

<sup>46</sup> <http://www.businesspost.ie/>

<sup>47</sup> <http://milc.lendac.ie>

<sup>48</sup> <http://www.betterregulation.com/ie>

<sup>49</sup> <https://www.lexisnexis.com/>

<sup>50</sup> <http://www.westlaw.ie/>

<sup>51</sup> From 1984 onwards

<sup>52</sup> <http://www.justis.com/>

<sup>53</sup> <http://bloomsburyprofessionalonline.com/>

## Biography

John Furlong is a solicitor and Director of Legal Resources at Matheson, one of Ireland's largest law firms. He is visiting lecturer in legal research and European legal research at the Law School of the Law Society of Ireland. He has written regularly on the topic of Irish legal resources over many years and presented at a number of conferences on the topic (IALL, AALL, CALL). He is a long time member and former Chair of the Technology Committee of the Law Society of Ireland and is currently an Irish delegate to the CCBE on legal technology matters. John was the first Irish Chair of BIALL and has been active on the Association's Conference Committee for many years.

*Legal Information Management*, 14 (2014), pp. 284–289

© The Author(s) 2014. Published by British and Irish Association of Law Librarians

doi:10.1017/S1472669614000644

# Impacts and Effects of Publishing Legal Information in a Small Jurisdiction: Privacy v Open Justice

**Abstract:** This paper, written by Sue du Feu and James Lambert, outlines the challenges faced by the Jersey Legal Information Board (JLIB) in providing free access to legal information. The power of modern internet search engines has implications for a small island jurisdiction wishing to make its case law available on-line (see: [www.jerseylaw.je](http://www.jerseylaw.je)). Having established protocols and policies to ensure a balance between open justice and privacy, several years later, JLIB is faced with concerns from individuals who feel that continuing public access to their earlier misdemeanours is an unfair burden. The paper will explain how the JLIB addressed the challenge of publishing court judgments online while safeguarding the interests of the individual.

**Keywords:** legal information; free legal information; legal sources; Jersey

## INTRODUCTION

Jersey is the largest of the Channel Islands, with a population of 100,000. The Island covers an area of 45 square miles, is 85 miles south of the English coast and 14 miles from France. Jersey is a British Crown Dependency, but

is neither a colony nor a dominion. It is not represented in the United Kingdom parliament and UK legislation applies to Jersey only if the Island expressly agrees that it should do so. The Island has its own legal system and courts of law.

The Jersey Legal Information Board (or JLIB) was established in 1999 under the chairmanship of the Island's Chief Justice. As a direct provider of legal information, JLIB is almost unique in being a government sponsored agency. JLIB's vision is for Jersey's legal system "to be, and be recognised as, the global best for a small jurisdiction".

Historically, JLIB has played a major role in ensuring that the Island's legal materials have been made available online to Jersey's legal profession and to prospective investors and regulators worldwide.

The Jersey Legal Information Board's strategy is based on the following elements:

- To support Jersey's position as a leading business centre.
- To make the law and legal processes more accessible.
- To promote the better co-ordination of Jersey's justice system.

This article is concerned with the first two of these strategic aims.

## **TO SUPPORT JERSEY'S POSITION AS A LEADING BUSINESS CENTRE**

To comprehend why supporting the Island as a leading business centre is so important and initially led to the creation of JLIB, it is necessary to understand a little of the economic history of Jersey.

### **Background**

Jersey had a long-standing favoured tax position, which both benefited goods produced in the Island and also made it a centre for manufacturing. This dates back to 1394 when Jersey was permitted to export goods to England free of tax. This privilege was extended to exports to the colonies in 1468 and can be seen as a necessary counterpart to Jersey's strategic importance to England as a result of its close proximity to the French mainland. A strong, well-fortified Jersey was essential to England during the long-running wars with the French, and tax-free status was deliberately designed to contribute to this. However, Jersey's status began to decline after 1815 and, at the end of the Franco-Prussian War of 1871, the Island ceased to have any strategic value to the UK and therefore no longer benefited from defence expenditure. The unique tax position was eroded between 1851 and 1911 but never abolished altogether.

During the second World War, the island that had once been so vital to England's security was abandoned by the British as being of no strategic importance and therefore not worth defending. Thus began 5 years of German occupation when most economic activity was limited to food production in order to keep from starvation. After the occupation, as elsewhere in the West, manufacturing started a slow decline and by the 1970's

Jersey's traditional industries of agriculture and tourism had also declined; together, they now provide only 5% of the Island's Gross Value Added (or GVA).

In the years since 1970, the boom has come in the financial services market which provides 40% of GVA and employs over 22% of the Island's workforce. It is self-evident that the government would consider it important to put laws in place to support its claim to being a well regulated jurisdiction. It is imperative for the economy that the outside world perceives Jersey as a desirable place to do business, and that means having laws and processes that are both easily understood and seen to be working well. Judgments from all cases, but particularly civil law cases pursued under the Companies or Trusts Laws, could be used to demonstrate the fairness, efficiency and transparency of Jersey's courts when doing business offshore.

Partly to support the rise of financial services, JLIB was established 15 years ago and, shortly after it was founded, started placing legal materials online on its website. In relation to the website, the aim was to provide online access to all of the Island's legislation, all judgments of the courts and other legal materials. Since then, an annual Revised Edition of the legislation has been added, and a separate Revised Edition with case law annotations is published on an ongoing basis. As some laws are still in French, (the language of the court until relatively recently), a project is underway to provide 'unofficial' translations to assist the public in their understanding of the law. In addition, the website has an online digital library with books on Norman and other customary law dating back to 1535.

### **Jersey Legal Information Board and the Business Community**

Jersey has established itself as an international finance centre with approximately 50 international banks, and a plethora of sophisticated financial service companies all utilising a highly skilled work force. This industry has been attracted to Jersey by its geographical closeness to the UK and continental Europe and, of course, its favourable tax regime. As an English Crown Dependency, the Island offers political and economic stability, a flexible, independently endorsed regulatory framework, a tax neutral environment, and a mature and respected legal system.

Given Jersey's size, UK time zone and location, it has the potential to compete fiercely even with larger jurisdictions for a substantial chunk of offshore finance business. In addition, it has a relatively compact body of statute and case law which it has been comparatively easy to make available online. Being small, it can respond more easily to changing markets and conditions by bringing in new or amending existing laws, whereas larger jurisdictions with a more complex body of legislation may suffer from what Susskind (2000) calls the "supertanker syndrome"<sup>1</sup>.

Business looks to government to provide a supporting and legitimising climate. What international business

looks for in a potential jurisdiction is democratic open government with laws operating successfully, and effective and efficient dispute resolution. This gives confidence that the jurisdiction is well regulated and complies with international bodies such as the IMF and OECD. The government has to ensure that potential companies know that Jersey is pro-business with accessible and responsive politicians, minimum state interference and a modern e-business infrastructure.

The structure of JLIB provides for an elected member of the government to be appointed as a Board member. By default, this has always been the Minister for Economic Development (who has responsibility for inward investment and development of international trade). Other members include the Attorney General, the Judicial Greffier (head of administration of the courts), the Greffier of the States (head of administration of the States Assembly) and the Law Draftsman, all presided over by the Bailiff (or Chief Justice), as well as other co-opted members from the local legal community and the States of Jersey Information Services Department. The full Board meets annually to approve the accounts, with a strategy workshop towards the end of each year to determine the direction for JLIB for the next three years. The Executive Group of the board meets alternate months to monitor progress of the business plan.

## TO MAKE THE LAW AND LEGAL PROCESSES MORE ACCESSIBLE

Although JLIB was originally set up to service the emerging financial services sector, it had from the start a second strategic aim, that of making the law and legal processes more accessible to the population, and to that end in 2008, joined the Free Access to Law Movement<sup>2</sup> (or FALM). In that aim it has been very successful, almost too successful, because like other small island jurisdictions, Jersey now wrestles with the problem of balancing public interest and open justice with the privacy of the individual. As Spigelman (2005) asserted:

In a free society public access to the conduct of the courts and the results of deliberations in the courts is a human right, as well as a mechanism for ensuring the integrity and efficacy of the institutions of the administration of justice. The publication of findings of guilt are of value in and of themselves.<sup>3</sup>

Although the concept of open justice can be traced back in most European jurisdictions to the 19<sup>th</sup> century, it has been tempered and balanced thus by Winn (2004):

The pragmatic reasons supporting the need for public access ... are typically balanced against the pragmatic reasons supporting the need to restrict

public access (for example ... protecting the rights of individuals to privacy).<sup>4</sup>

## Privacy Issues

In the past, when judgments of the Jersey courts remained in “practical obscurity”, that is published in hard copy and available in a limited way but relatively unknown to the majority of the public, there were few privacy issues (the effort required to extract them exceeded the desire to view them). Judgments were distributed to lawyers in hard copy form; they were not filed in the public library but were available to the public on request. However, once they were published openly on the JLIB website, Googling a name became a pastime for the idle or inquisitive. JLIB has received complaints from people who committed serious offences as young adults and were sent to prison, but now 10 or 12 years later are trying to get their lives back on track. They feel haunted by the publication of judgments which can be read by prospective employers, people who would like to settle old scores, or people they meet in the street. This is especially significant to a small island population.

Neither the Data Protection Law nor the Rehabilitation of Offenders Law in Jersey restricts the publication (in full) of judgments on the JLIB website. However, it would not be unreasonable to apply a process of redaction (or “pseudonymisation”) to protect the identity of victims and witnesses involved in criminal cases.

JLIB has addressed these and other issues associated with being a small community, by working with the courts, the Children’s Service and the Data Protection Commissioner to agree a protocol for when a judgment should be redacted or indeed retained in a restricted area of the website to which access is limited to the legal profession. These include:

- Criminal cases involving under-18s – redacted.
- Criminal case victims and witnesses – redacted.
- Trust cases involving minors – redacted.
- Sexual assault case victims – redacted and restricted access.
- Public Law Children cases – redacted and restricted access.
- Adoption cases – redacted and restricted access.

Statute law already prevents the identification of victims of sexual assault, under-18s in criminal or public law children proceedings, and adopted children. This protocol therefore reflects and exceeds existing statutory requirements.

The courts in Jersey have made it clear that, wherever possible, adult defendants in criminal cases should be named in the judgment. However, there are rare occasions where a judgment, on the direction of the judge, is not published even within the restricted area of the

website, due to the fact that it is too sensitive to be placed on the website without redaction, but if redacted would lose its meaning (for example, where a sexual assault is committed by a parent or relative on a member of his or her family). In this case the judgment would not be published at all, and anyone beyond the parties concerned who wanted a copy would have to apply to the court with a reason.

Some recent examples reveal other dimensions of the privacy issue. A murder took place. The murder victim had allegedly been responsible for the sale of drugs to a teenager who had subsequently died of an overdose. There was a strong suspicion that the murder had been motivated by revenge, and therefore generated a high level of public interest. The suspected murderer was arrested and, once charges had been laid, his name was released to the media. The suspect had previously committed serious offences and immediately after his name became public there was a spike in website activity: the weekly figure for page views leapt from an average of 27,000 to 53,000 and there were 11,000 attempts to access the judgment concerning the suspect's previous offence in the space of 48 hours. In order to protect the suspect's right to a fair trial, the judgment was moved from the open area of the website to the restricted area, and a protocol will be put in place to ensure that, in the interests of justice, JLIB will be informed if similar circumstances arise in future.

The right of erasure or the right to be forgotten is a legal concept that is becoming increasingly commonplace, albeit that it relates more to matters in the civil justice arena as opposed to criminal justice. A judgment of the European Court of Justice on 13 May ruled that Google is liable for information about an individual that appears on a third party's website. The case concerned a Spanish individual whose name, when entered into Google, threw up results concerning historical proceedings for recovery of debt which had been resolved many years previously; the Spanish data protection agency upheld his complaint against Google, who then initiated court proceedings to defend their right to publish such information. The European Court found that Google was effectively collecting data and acting as data controller within the meaning of the 1995 EU data protection directive, and concluded that the data (even if initially processed lawfully) could eventually become incompatible with the directive if it was no longer relevant after a period of time. The Court ruled that Google should remove links to web pages that are published by third parties relating to a person's name. The case is likely to have serious implications for operators of internet search engines and we will return to this development later.

### **Dealing with Online Publication of Historical Cases**

In Jersey, the reasoned judgments of the courts as handed down are referred to as unreported judgments.

Since 1985, the formal, reported case law has been published in the Jersey Law Reports; these are the edited and indexed series of selected judgments (produced by a commercial publisher) concerning matters of lasting legal importance, and produced mainly for the use of practitioners. Prior to 1985, the formal law reports appeared in a series known as the Jersey Judgments.

Once an unreported judgment is redacted, any corresponding Jersey Law Report or Jersey Judgment will also be redacted. The old Jersey Judgments are progressively being converted from hard copy and placed online, current coverage running from 1966 to 1984. The unreported judgments from that period were distributed to the legal profession in hard copy only, without any redaction. The Criminal Justice (Anonymity in Sexual Offences) (Jersey) Law 2002 only made it an offence to name the victims of sexual assault in judgments from 2002 onwards. Consequently, the further back the Jersey Judgments and unreported judgments go, the greater the problems of privacy and the greater the need for redaction before online publication.

Going back to that era, it is possible to find names, addresses, ages, schools, and many other personal details which would identify victims and witnesses. In civil matters, particularly divorce and ensuing maintenance disputes, the judgments could be quite specific in relation to some of the more lurid details. The children referred to in those cases (now adults and many still in Jersey) are entitled to privacy, and some of the most colourful cases, where there is no longer a point of law to be gleaned, will not appear online at all.

### **Balancing of Interests**

Balancing of interests involves an examination on a case by case basis, and balancing the need for judicial accountability with the need for the privacy of the individual. However, the over-riding principal is that justice must be seen to be done. Public trust and confidence in the justice system would be jeopardised if judicial hearings were routinely held in private. Justice being seen to be done is perceived by the public as a need for criminals to be punished for their acts, otherwise retribution and vigilantism by the public will prevail. As Jeremy Bentham asserted, "Publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial."<sup>5</sup>

The alternative point of view is that the combination of permanency, longevity and immediacy of online records can have a detrimental effect, and cause lasting damage to reputation. One example in Jersey is the Employment Tribunal judgments, which have recently been published on the JLIB website. Previously they were on the Tribunal's own website which was difficult to navigate and thus, to all intents and purposes, suffered from "practical obscurity". Not only is it upsetting for witnesses who are mentioned in the judgment to realise that they can be Googled, it has also been suggested that

employers could now easily check judgments before making offers of employment, and therefore that someone who had previously been involved in a civil action could be put at a serious disadvantage.

With regard to criminal offences, the Rehabilitation of Offenders (Jersey) Law 2001 deals with the rights of the individual under certain circumstances for convictions to be regarded as “spent” after a certain period of time, and therefore never alluded to or disclosed to anyone. The Law states that any person, who in the course of official duties, has custody of or access to any official record, or the information contained in it, shall be guilty of an offence if they disclose details of a spent conviction to another person. Later, it deals with defamation actions where publication takes place after the conviction is spent. However, it permits publication of judicial proceedings in any *bona fide* series of law reports or *bona fide* publication of judicial proceedings given for educational, scientific or professional purposes. Thus the Law enables current and retrospective judgments to be published indefinitely on the JLIB website without fear of defamation action.

Notwithstanding the legality of continuing to publish judgments online after a conviction is spent, jurisdictions are now asking themselves if there is a moral issue. Does an individual have the right to be forgotten once the conviction is spent? Should publishers be obligated to remove timed-out judgments from public websites, rendering them solely for use by the legal profession? While this might seem a simple option, it has not in the past dealt with the wider problem of commercial search engines trawling the internet and pulling data from websites. There has been no way of bringing them to heel with regard to removing old data. However, returning to the recent ruling from the European Court of Justice on Google, the lot of many people who feel aggrieved that old and potentially damaging information about them is out there for all to access (and there have been thousands of requests for removal already) could be improved. Google has agreed to comply in certain circumstances with requests from individuals to “de-link” search results where their privacy interests are implicated. There are no responses from other search engines as this article is written, but most commentators, while welcoming the ruling, doubt that it is enforceable. There are others who think it opens up the road to censorship.

However, since the European Court of Justice ruling, a person against whom a judgment was taken in the Jersey courts has applied and been successful in having the judgment taken off Google. The judgment in question was a civil matter and resulted in an appeal being upheld. However, the presiding judge, while finding that the appellant was not proved to be dishonest or without integrity, thought it was more that he was incompetent. The appellant subsequently requested that the judgment be removed and Google agreed to do so. Matters are moving rapidly and Google, far from resisting the decision of the European Court of Justice, and in what to a cynical

mind may simply look like a smart PR move, has decided to remove innocuous material in order to create a dissatisfied rumble around the whole situation.

When considering the matter of individual privacy versus open access to justice, and the difficulties Jersey faces with regard to whether or not to remove a judgment from the open area of its website, the new European Court of Justice ruling may inadvertently assist JLIB. It could be a partial remedy for those who feel aggrieved by having a spent conviction in the open area of the website. An individual who complains to JLIB in future that the continued publication of a spent conviction is blighting their life could be advised to apply to Google to have it removed. Once removed, no links would appear on Google and the trail would end; most people would not be aware of the existence of the JLIB website and would therefore not know where else to look.

There is a further erosion of rights when we look at a new breed of website suddenly on the scene, of which Globe24 h is an example.<sup>6</sup> It is a Romanian website that acquires content and republishes personal details from court cases, tribunals, clinic trials and many other sources. Its home page is just a site map of all the sources. Its mission, it claims, is that of open access and free legal information, but the real purpose of the site appears to be to extract payment from people anxious to have content redacted (19 euros being the standard charge). The site operator purports to comply with Romanian and EU privacy directives and is willing to redact personally identifying information for free. All you need to do is send a letter (by post only, no email) and wait up to 12 months.

The only reason that this (otherwise obscure) site can operate in this way is because it is linked to Google. It has no presence of its own, but when the Canadian Legal Information Institute (or CanLII) discovered that Globe24 h had reposted content from the CanLII website and was demanding payment from individuals seeking to protect their privacy interests, one of the steps CanLII took was to ask Google to “de-link” the Globe24 h search results. Google declined their request.<sup>7</sup>

The internet, still in relative infancy, remains internationally ungovernable at present and, as we have seen, internet companies do not respond necessarily favourably to requests to remove data from their websites. If JLIB removes timed-out judgments from its website in isolation, they will still be available to savvy internet users, unless requests are made to have them removed from the large search engines in parallel.

That should not prevent jurisdictions from seeking a permanent solution to the problem. It may be that a trans-national approach will be needed, and the European Court of Justice ruling is a step along the way, but it should not stop individual jurisdictions finding a rapprochement with any aggrieved citizen who committed a misdemeanour, paid for it and now wants to be forgotten.

## Footnotes

<sup>1</sup> Susskind, Richard. (2000) *Transforming the Law*. Oxford University Press.

<sup>2</sup> See [http://www.worldlii.org/worldlii/declaration/montreal\\_en.html](http://www.worldlii.org/worldlii/declaration/montreal_en.html).

<sup>3</sup> Spigelman, James. (2005) *The Principle of Open Justice: A Comparative Perspective*. Downloaded (27 August 2014) from: [http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman\\_speeches\\_2005.pdf](http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman_speeches_2005.pdf).

<sup>4</sup> Winn, Peter. (2004) Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information. *Washington Law Review*, vol. 79, 307–330.

<sup>5</sup> Bowring, John (ed). (1843) *The Works of Jeremy Bentham*, vol. 4, 316–317.

<sup>6</sup> Lachance, Colin. (2014) *Google, González and Globe24 h*. Downloaded (27 August 2014) from: <http://www.slaw.ca/2014/05/26/google-gonzalez-and-globe24h/>.

<sup>7</sup> Dobby, Christine. (2014) *How cyber shame scams are playing on our privacy fears and scaling up*. Downloaded (27 August 2014) from: [http://business.financialpost.com/2014/03/29/how-cyber-shame-scams-are-playing-on-our-privacy-fears-and-scaling-up/?\\_\\_lsa=8cfb-af2f](http://business.financialpost.com/2014/03/29/how-cyber-shame-scams-are-playing-on-our-privacy-fears-and-scaling-up/?__lsa=8cfb-af2f).

## Biographies:

Sue du Feu is the Programme Director at the JLIB. Sue du Feu has been a project and programme manager for over 25 years and was appointed to the Jersey Legal Information Board early in 2010. Since then she has overseen the expansion of the website to include annotated laws, translated laws, the adoption of a new search engine and, at the end of this year migration of the website to Sharepoint. She is currently involved in several other projects as part of the remit to increase access to the law and legal materials to the public. Sue has an MA in West European Politics (Reading 1984), is a qualified librarian and Prince2 practitioner.

James Lambert is the Director of Services, States of Jersey. James Lambert has a BSc in engineering and an MBA from Sheffield Hallam University. His career in the public sector spans 33 years, covering a variety of roles, but most recently as Director of Services in the Jersey Court Service. He is a founder member of the Jersey Legal Information Board (JLIB).