

## **PART E - COMMON MISCONCEPTIONS**

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## **1. INTRODUCTION**

By virtue of their experience as the statutory review body, the Ombudsmen are well placed to comment on certain common misconceptions about the operation of the OIA and LGOIMA which tend to recur and hinder timely and effective processing of requests for official information. Although these misconceptions are usually clarified in individual cases, there tends to be little obvious retention of institutional knowledge about the official information legislation in many public sector organisations. This is frustrating to requesters, to the Ombudsmen on review and ultimately to the agencies themselves. The smooth operation of the official information legislation depends, to a large degree, on the ability of public sector organisations to process simple requests quickly and effectively. The scheme and structure of the legislation is designed to assist this. However, if requesters and holders of information misunderstand or ignore the parameters of the legislation, the statutory mechanisms designed to promote timely processing of requests are unable to operate.

The purpose of this Part is to complement the preceding guidelines on how to apply the official information legislation properly with examples of misconceptions that usually result in unnecessary and avoidable expenditure of time and effort. For ease of reference, the misconceptions are grouped by topic.

## 2. SECTION 9(2) WITHHOLDING GROUNDS – GENERAL MISCONCEPTIONS

### **Misconception:**

**If the interest in favour of withholding information, as identified in the withholding grounds set out in sections 9(2)(a) to 9(k), and the considerations which render it desirable, in the public interest, for the information to be released are evenly balanced, the information should be released.**

### **Correct Position:**

If an agency considers that the interests in favour of withholding the information and any considerations which render it desirable, in the public interest, for the information to be released are equally balanced, then the information at issue should be withheld. Section 9(1)<sup>1</sup> of the OIA provides that good reason exists for withholding official information *unless* the need to withhold that information is *outweighed* by the public interest considerations favouring release.

### **Misconception:**

**Releasing the requested information will expose the agency to civil or criminal proceedings.**

### **Correct Position:**

Release of information in good faith under the OIA will not expose the agency to civil action. Section 48<sup>2</sup> of the OIA states:

*“Protection against certain civil actions:*

*Where any official information is made available in good faith – no proceedings, civil or criminal, shall lie against the Crown or any other person in respect of the making available of that information or for any consequences that follow...”*

So long as the agency has made reasonable efforts to identify the interests requiring protection and the considerations favouring disclosure of the information in the public interest and has considered those interests in good faith, release of the information under the OIA will not expose the agency to civil or criminal proceedings.

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<sup>1</sup> Section 7(1) LGOIMA

<sup>2</sup> Section 41 LGOIMA

### 3. PRIVACY<sup>3</sup>

**Misconception:**

**Any information that relates to an identifiable person needs to be withheld to protect that person's privacy.**

**Correct Position:**

Before any decision can be made about whether the OIA provides good reason to withhold personal information, an assessment must be made of the nature of the information and the circumstances of the case. An agency must be satisfied that the withholding of the information at issue is "*necessary*" to protect the privacy of an identifiable person.

In some cases, it is unlikely that withholding is necessary to protect such privacy interests. For example:

- ❖ An individual might consent to disclosure;
- ❖ The information may already be available publicly;
- ❖ The information may be about a person, but be of such a nature that no privacy interest requiring protection arises; or,
- ❖ The content of the particular information may not, in fact, relate to an identifiable natural person.

**Misconception:**

**Privacy interests lapse upon death or criminal activity.**

**Correct Position:**

Privacy interests do not lapse simply because a person is deceased. However, the strength of the privacy interest may diminish over time. This will depend on the circumstances of the particular case.

Privacy interests are not automatically forfeited by criminal activity.

**Misconception:**

**The person concerned does not consent to release, so the information must be withheld.**

**Correct Position:**

The fact that a person to whom the information relates does not consent to disclosure does not, in itself, mean that sections 9(2)(a) and 27(1)(b) automatically apply. The person to whom the information relates does not have a right to veto the release of information. However, his or her views about whether release of the information would infringe privacy are likely to be relevant. The agency must make an objective assessment of the facts and circumstances of each particular case (including the views of the person concerned) before deciding whether the sections apply.

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<sup>3</sup> Sections 9(2)(a) and 27(1)(b) OIA, sections 7(2)(a) and 26(1)(b) LGOIMA

**Misconception:  
Releasing personal information will breach the PA.**

**Correct Position:**

Release of information, in good faith, pursuant to the OIA will not breach any provisions of the PA.

Section 48<sup>4</sup> of the OIA provides as follows:

*“Protection against certain civil actions:*

*Where any official information is made available in good faith – no proceedings, civil or criminal, shall lie against the Crown or any other person in respect of the making available of that information or for any consequences that follow...”*

So long as the agency:

- ❖ has made reasonable efforts to identify the interests requiring protection and the countervailing public interest considerations; and,
- ❖ has considered those interests in good faith,

release of the information under the OIA will not breach any provisions of the PA nor subject an agency to civil or criminal proceedings.

However, if a requester breaches any conditions the agency may have placed on the information at the time of release (for example, limiting the disclosure or use of information), the person to whom the information relates may have recourse under the PA

**Misconception:  
If release of the information would prejudice the privacy of a person, the information must be withheld.**

**Correct Position:**

Section 9(2)(a) provides good reason for withholding information about natural persons if, and only if:

- ❖ The withholding of the information is necessary to “[p]rotect the privacy of natural persons including that of deceased natural persons”; and
- ❖ This interest is not “outweighed by other considerations which render it desirable, in the public interest, to make that information available”.

Both elements of this test must be satisfied before information can be withheld under section 9(2)(a). In other words, release of some, or all, of the information may be justified, in the public interest, even though that would necessarily affect the privacy of the person to whom the information relates.

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<sup>4</sup> Section 41 LGOIMA

**Misconception:**

**When an agency releases information voluntarily (i.e. not in response to a request), the OIA applies.**

**Correct Position:**

The OIA only applies in situations where a person who meets the requirements of section 12<sup>5</sup> of the Act has requested information. If information relating to an identifiable person is released voluntarily by an agency then the provisions of the PA apply.

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<sup>5</sup> Section 10 LGOIMA

#### 4. TRADE SECRETS<sup>6</sup> AND COMMERCIAL POSITION<sup>7</sup>

**Misconception:**

**Before section 9(2)(b)(i) can apply, a prejudice or harm must be shown.**

**Correct Position:**

Section 9(2)(b)(i) applies if, and only if, it is necessary to protect information that, if released, would disclose a trade secret. There is no need to prove that it would be unreasonable to disclose the trade secret at issue or describe any harm to the business interests of those who supplied, or who are the subject of, the information at issue. Rather, it is assumed that any disclosure of trade secrets is damaging.

**Misconception:**

**If the requested information relates to a commercial position then it can be withheld under section 9(2)(b)(ii).**

**Correct Position:**

Section 9(2)(b)(ii) does not provide good reason to withhold *all* information relating to a particular commercial position. It only protects information, the disclosure of which would be so likely to unreasonably prejudice the commercial position of either:

- ❖ the person who supplied the information; or
- ❖ the person who is the subject of the information;

that it is necessary to withhold that information. The onus is on the agency holding the information to make a decision in this regard bearing in mind all the circumstances of the particular case.

**Misconception:**

**If release of the requested information would prejudice a commercial position then it can be withheld.**

**Correct Position:**

Before section 9(2)(b)(ii) can apply, the effect of making the information available must not simply be “*to prejudice*” but “*unreasonably to prejudice*” the commercial position of the affected party.

**Misconception:**

**Section 9(2)(b)(ii) does not apply to the commercial position of agencies.**

**Correct Position:**

There is nothing in the wording of section 9(2)(b)(ii) to preclude its application to the commercial position of agencies. “*Person*” is defined in section 2 of the OIA as including “*a body of persons whether corporate or unincorporate*”. Accordingly, departments, Ministries and organisations are included in this definition for the purposes of section 9(2)(b)(ii).

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<sup>6</sup> Section 9(2)(b)(i) OIA, section 7(2)(b)(i) LGOIMA

<sup>7</sup> Section 9(2)(b)(ii) OIA, section 7(2)(b)(ii) LGOIMA

**Misconception:**

**If the requested information is commercially sensitive or misleading it can be withheld.**

**Correct Position:**

A general belief that certain information is commercially sensitive or misleading is not, by itself, sufficient reason for withholding information under the Act.

For example, information may be sensitive to a person's "*commercial reputation*" on the basis that the information, if released on its own, might be misleading. However, this alone does not meet the test in section 9(2)(b)(ii) - namely, would the release of the information be so likely to unreasonably prejudice a person's commercial position that it is necessary to withhold it. In such cases, a realistic assessment needs to be made of the likely consequences of disclosure of the information and consideration should be given to whether the inclusion of a contextual statement might alleviate the concerns held.

**Misconception:**

**If the person who supplied the information, or who is the subject of the information, does not consent to disclosure then it can be withheld.**

**Correct Position:**

While it may be necessary to consult a third party in order to determine how its commercial position would be prejudiced by the release of information, the third party cannot veto the release of that information.

**Misconception:**

**If releasing the requested information will expose the third party to litigation, this is an unreasonable prejudice in terms of section 9(2)(b)(ii).**

**Correct Position:**

Although release of information might place the person in a position of having to defend litigation, that alone is not enough to conclude that such an outcome is an "*unreasonable prejudice*" to the person's commercial position in terms of 9(2)(b)(ii). If the person is in a business which might arguably be in violation of some law, the risk of possibly being exposed to litigation costs if the information were to be released could not likely be said to prejudice "unreasonably" that person's commercial position. Further, if release of the requested information was the only means for members of the public to pursue a legal remedy, there is likely to be a strong public interest favouring release. Each case must, therefore, be considered on its own merits.

## 5. CONFIDENTIALITY<sup>8</sup>

### **Misconception:**

**A simple declaration that information is confidential is enough to establish that section 9(2)(ba) applies.**

### **Correct Position:**

Declaring information to be confidential is not sufficient to establish that an obligation of confidence exists. Similarly, simply stamping a document “*confidential*” is not, necessarily, sufficient to establish that an obligation of confidence exists in respect of that information. Rather, what is required is an understanding between the parties that the information is subject to an obligation of confidence. Stamping a document “*confidential*” may be evidence of such an understanding between the respective parties but is not, in itself, conclusive.

### **Misconception:**

**Obligations of confidence must be express.**

### **Correct Position:**

Obligations of confidence need not be express. They can be implied from the circumstances of the particular case. What is required is a meeting of minds between the supplier and the agency that the information is to be kept confidential. In making an assessment as to whether the requested information is subject to an obligation of confidence regard must be had to both the nature of the information requested and the full circumstances of its supply.

For example, Ministers often receive unsolicited personal correspondence from New Zealanders. The general approach taken by Ombudsmen to requests, under the OIA, for such information is that, in the normal course of events, the correspondence can reasonably be expected to be subject to an obligation of confidence (unless there are factors or circumstances suggesting otherwise). Furthermore, the Ombudsmen have generally accepted that it is in the public interest that Ministers be able to correspond directly with individual citizens. It would be detrimental to this public interest consideration if indiscriminate disclosure of such correspondence were to inhibit individual citizens from raising matters of concern directly with relevant Minister.

### **Misconception:**

**Consent given to disclose information to a limited class of persons for a limited purpose amounts to a total waiver of confidentiality.**

### **Correct Position:**

Where an assurance of confidentiality is given it may not necessarily be comprehensive. For example, suppliers may provide information in the knowledge that it will form part of a final report which would go to a certain number of people or, in the case of an investigation, may form the basis of a prosecution. In any event, the collation of information, or the investigation, may otherwise be conducted in strictest confidence. In such circumstances there will likely be an expectation of total confidentiality in respect of what was discussed and ultimately reported within those limitations.

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<sup>8</sup> Section 9(2)(ba) OIA, section 7(2)(c) LGOIMA

An agency should, therefore, consider the full circumstances of the particular case when assessing whether the information is subject to an obligation of confidence and how comprehensive that obligation is.

**Misconception:**

**Contracts that include confidentiality clauses can be withheld under the OIA.**

**Correct Position:**

Agreements as to confidentiality do not, in themselves, permit information to be withheld under the OIA. The use of a confidentiality clause does not have the effect of authorising the parties involved to contract out of the provisions of the official information legislation. Rather, parties can only agree that the terms of their particular agreement will be confidential to the fullest extent practicable in light of the legislation. This principle has been recognised by the courts, in the context of the Local Government and Official Information and Meetings Act, where Justice Jeffries said:<sup>9</sup>

*“There cannot be allowed to develop in this country a kind of commercial Alsatia beyond the reach of a statute. Confidentiality is not an absolute concept admitting of no exceptions...It is an implied term of any contract between individuals that the promises of their contract will be subject to statutory obligations. At all times the applicant would or should have been aware of the provisions of the Act and on particular s7, which effectively excludes contracts on confidentiality preventing release of information.”*

However, the existence of a confidentiality clause provides strong evidence of an understanding between the parties concerned that the information covered by that clause is “*subject to an obligation of confidence*” for the purposes of section 9(2)(ba).

Further, if a breach of confidentiality would prejudice the ability of the relevant agency to maintain promises of confidentiality and thereby hinder future agreements Ombudsmen have held, in appropriate cases, that disclosure “*would be likely to otherwise damage the public interest.*”

**Misconception:**

**The fact that an agency can compel a supplier to provide information in the future means that future supply can not be prejudiced.**

**Correct Position:**

The fact that information may be obtained pursuant to statutory powers does not mean that the future supply of similar information will not be prejudiced by reason of disclosure of current information. If statutory powers were deemed to be fully adequate to ensure the future supply of information, then one may presume that section 9(2)(ba) would have been drafted differently.

Under the OIA Ombudsmen have had regularly to consider information obtained pursuant to statutory powers. Despite the existence of penalties for non-compliance, in reality the agency seeking information is often reliant upon the honesty and co-operation of the suppliers. In this regard, there are various levels of co-operation in providing information. For example, suppliers may provide information willingly or reluctantly, with frankness or with reticence, thoroughly or cursorily, comprehensively or with minimum

<sup>9</sup> *Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180, 191

detail, in the spirit of the statutory requirement or to the letter of it, in writing to orally, well in advance or at the last minute. In other words, the effective and efficient administration of relevant statutory duties may be considerably hindered in the absence of genuine co-operation. Each case must therefore be considered on its merits.

**Misconception:**

**If the supplier does not consent to disclosure of the information, it can be withheld.**

**Correct Position:**

The supplier of the information cannot veto release. Whilst suppliers can reasonably expect their concerns to be taken into account, they cannot require that the information be withheld. If a supplier genuinely believes that disclosure of certain information would harm it in some way, it needs to explain to the agency what exactly that harm would be and how it would arise. However, it is for the agency to assess whether there is good reason for withholding in terms of the Act.

If the agency believes, in good faith that there is no good reason for refusal under the OIA, then it is not open to the agency to refuse the request simply because the supplier does not consent to disclosure. Lack of consent is not, in itself, a reason for refusal.

However, should the agency make the information available, it may be open to the supplier which it believes has been adversely affected by such disclosure to ask an Ombudsman to investigate and review under the Ombudsman Act whether, in all the circumstances, the decision to release was reasonable.

**Misconception:**

**Release of the requested information will create a precedent for future requests.**

**Correct Position:**

Each request must be considered on a case by case basis with the only considerations being the circumstances of that particular case. For example, a supplier may have no objection to the release of certain specific information but may be concerned that release could create a precedent which would allow future, possibly more sensitive, information to be disclosed. That concern can be alleviated by assuring the supplier that each request under the OIA must be considered on its own merits.

## 6. CONSTITUTIONAL CONVENTIONS<sup>10</sup>

### **Misconception:**

**Ministers and Cabinet have a right to “*undisturbed consideration*” of advice.**

### Correct Position:

While in an individual case it may be necessary to withhold information in order to enable it to be properly considered by Ministers and/or Cabinet, there is no general “*right*” to “*undisturbed consideration*” of such advice.

The issue of whether it is necessary to withhold information must be considered in each individual case. In some cases the release of advice may mean that ministers are unable to make effective decisions – if this is the case, however, an agency must be able to explain why it believes that disclosure will have this effect. In other cases, releasing such advice will promote public participation in the policy-making process – and it is therefore not “necessary” to withhold it.

### **Misconception:**

**Advice may be withheld until a decision is made by Ministers or Cabinet.**

### Correct Position:

There is no statutory presumption that advice may be withheld until a decision is made by Ministers or Cabinet. As noted above, there must be a specific reason as to why it is necessary to withhold such advice in each particular case. In some cases, release of advice before decisions have been made will promote the public interest in enabling public participation in the policy-making process.

### **Misconception:**

**Advice can be withheld because it is misleading – it does not represent Government policy or the Government’s view.**

### Correct Position:

In some instances, Ministers and Government may not agree with the advice that has been tendered to them. There is sometimes concern that if such advice is released, the public will form the wrong impression that such advice represents official government policy.

The fact that there is potential for the advice to be misunderstood by the public, however, is not good reason to withhold it in terms of section 9(2)(f)(iv). It is always open for the agency releasing such information to issue a contextual statement explaining the current status of the advice in terms of Government policy.

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<sup>10</sup> Section 9(2)(f) OIA. There is no equivalent to this withholding ground in LGOIMA

## 7. "FREE AND FRANK EXPRESSION OF OPINION"<sup>11</sup>

### **Misconception:**

**The comments are “free and frank”, therefore they can be withheld.**

### Correct Position:

It is not sufficient to simply assert that the information requested is free and frank, and that it should therefore be withheld. Before information can be withheld under this section, there must also be sufficient basis to consider that:

- (a) disclosure of the information requested would be likely to inhibit the future free and frank expression of opinions;
- (b) such free and frank expressions of opinion are necessary in the future to maintain the effective conduct of public affairs; and
- (c) there are no countervailing public interest considerations favouring release of the information which outweigh the need to withhold.

### **Misconception:**

**If the information requested is a draft, it can be withheld.**

### Correct Position:

The Act does not protect draft documents as a special exempt “class” or “category” of information. Each request for information must be examined on its merits. However, there is often good reason under the Act to refuse requests for draft documents. In terms of the protection conferred by section 9(2)(g)(i) of the Act, this may arise where the information is an early draft prepared for the author’s own use as part of the process of jotting down and working through initial ideas. Before section 9(2)(g)(i) applies, however, all of the elements discussed above must be satisfied.

### **Misconception:**

**The comments will embarrass the government, therefore they should be withheld.**

### Correct Position:

The fact that information or comments may embarrass the government, or may be contrary to the position taken by the government, is not in itself good reason to withhold information. Each element of section 9(2)(g)(i), as discussed above, must be made out before it can be relied upon to withhold information. The Danks Committee emphasised that:<sup>12</sup>

*“The fact that the release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public.”*

<sup>11</sup> Section 9(2)(g)(i) OIA, section 7(2)(f)(i) LGOIMA

<sup>12</sup> General Report, 1980, 19, para 47

## 8. LEGAL PROFESSIONAL PRIVILEGE<sup>13</sup>

### **Misconception:**

**Any document signed by a solicitor is covered by legal professional privilege and can be withheld.**

### **Correct Position:**

A document does not become the subject of legal professional privilege merely because it is signed by a legal adviser or includes a claim to being privileged. Consideration must always be given to the content and substance of the specific information at issue and the purpose for which it was provided. In particular, the information at issue must be a communication from a professional legal adviser, retained in that capacity, for the purpose of providing confidential legal advice to a client.

### **Misconception:**

**Legal Professional Privilege only relates to communications from a solicitor to the agency not from the agency to the solicitor.**

### **Correct Position:**

Legal Professional Privilege extends to all communications between a solicitor (acting in that capacity) and the client for the purposes of seeking or giving legal advice or assistance, irrespective of whether legal proceedings are ongoing. Accordingly, legal professional privilege covers communications from the client to the solicitor for the purpose of seeking legal assistance. Legal professional privilege also extends to communications with third parties where that communication has, as its dominant purpose, the object of enabling a legal adviser to advise a client on the conduct of litigation.

### **Misconception:**

**If a document is privileged, then section 9(2)(h) automatically provides good reason to withhold that document.**

### **Correct Position:**

Under section 9(2)(h), an agency must decide whether it is "*necessary*" to withhold the information at issue in order to "*maintain*" legal professional privilege. In some cases, even though information is covered by legal professional privilege, it may not be necessary to withhold that information in order to maintain the privilege. For example, where the privilege has been previously waived, either expressly or impliedly, it cannot be necessary to withhold the information in order to maintain the privilege.

Furthermore, even if it is established that section 9(2)(h) does apply to the information at issue, the agency must also go on to consider the application of section 9(1). The agency will, accordingly, need to assess whether the interest in withholding the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available. However, legal professional privilege has long been regarded as a "*fundamental element in the administration of justice.*"<sup>14</sup> As such, the public interest in ensuring the maintenance of the privilege is high.

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<sup>13</sup> Section 9(2)(h) OIA, section 7(2)(g) LGOIMA

<sup>14</sup> *Beecroft v Auckland District Court* [1999] 3NZLR 672, 677

## 9. COMMERCIAL ACTIVITIES<sup>15</sup>

### **Misconception:**

**All the activities of a commercial organisation are, by definition, commercial activities.**

### Correct Position:

A distinction must be made between commercial organisations and commercial activities. Not every activity of a commercial organisation will, necessarily, be a commercial activity and conversely not every activity of a non-commercial organisation will, necessarily, be non-commercial. For example, charities, which are a non-profit organisation, may carry out commercial activities, whether in the form of renting property, selling goods or otherwise to generate income to enable them to undertake their charitable work.

### **Misconception:**

**If the requested information relates to commercial activities then it can be withheld.**

### Correct Position:

Section 9(2)(i) does not provide good reason to withhold all information relating to particular commercial activities. It only protects information, disclosure of which would be so likely to prejudice or disadvantage the agency in the performance of their commercial activities that it is necessary to withhold that information. Whether such prejudice or disadvantage will occur will depend very much on:

- ❖ the precise nature of the information; and
- ❖ the relevance of that information to the commercial activities.

Furthermore, only the agency that is carrying out the commercial activities in question can withhold the information under section 9(2)(i). This may be relevant where the information at issue is held by a number of different agencies. In such cases, consideration may be given to whether it is appropriate to transfer the request, under section 14(b)(ii) of the Act, to the agency carrying out the commercial activities.

### **Misconception:**

**If the agency thinks the information might be relevant to future commercial activities, then it can be withheld.**

### Correct Position:

While nothing in 9(2)(i) requires that the commercial activities must actually be underway at the time of the request, they must be either current or reasonably contemplated before the information can be withheld under section 9(2)(i). This will usually be a matter of fact to be established in the particular case.

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<sup>15</sup> Section 9(2)(i) OIA, section 7(2)(h) LGOIMA

**Misconception:**

**If the requested information is out of date, misleading or capable of misinterpretation it can be withheld.**

**Correct Position:**

In previous Ombudsmen investigations, the view has been taken that information does not, necessarily, need to be withheld simply because the holder considers it to be irrelevant, inaccurate or misleading and capable of misinterpretation. In such cases the provision of an appropriate explanation has been found to be an effective means of countering any “unhelpful” effect.

However, if release of the requested information means that the agency will need to divert scarce resources to deal with public comments or to explain its position and to do this would disadvantage the agency in conducting its commercial activities, then section 9(2)(i) may apply.

## 10. CONDUCT OF NEGOTIATIONS<sup>16</sup>

### **Misconception:**

**If the requested information relates to negotiations then it can be withheld.**

### Correct Position:

Section 9(2)(j) does not provide good reason to withhold all information relating to particular negotiations. It only protects information, disclosure of which would be so likely to prejudice or disadvantage the agency in the negotiations that it is necessary to withhold that information. Whether such prejudice or disadvantage will occur will depend very much on:

- ❖ the precise nature of the information; and
- ❖ the relevance of that information to the actual issues under negotiation or contemplated negotiation.

### **Misconception:**

**If the agency thinks there might be negotiations in the future which the requested information might relate to, then it can be withheld.**

### Correct Position:

Negotiations must be either current or reasonably contemplated before the information can be withheld under section 9(2)(j). This will usually be a matter of fact to be established in the particular case.

### **Misconception:**

**If release of the requested information will inhibit an agency's consultations then it can be withheld.**

### Correct Position:

Section 9(2)(j) specifically refers to "*negotiations*". Consultations are not negotiations, therefore, this section cannot be relied upon in such circumstances.

### **Misconception:**

**Section 9(2)(j) only applies to commercial and industrial negotiations.**

### Correct Position:

Section 9(2)(j) applies to all negotiations that an agency is carrying on, regardless of the subject or outcome. The reference to commercial and industrial negotiations in this section of the OIA is inclusive only.

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<sup>16</sup> Section 9(2)(j) OIA, section 7(2)(i) LGOIMA

**Misconception:**

**If the requested information is out of date, misleading or capable of misinterpretation it can be withheld.**

**Correct Position:**

In previous Ombudsmen investigations, the view has been taken that information does not necessarily need to be withheld simply because the holder considers it to be irrelevant, inaccurate or misleading and capable of misinterpretation. In such cases the provision of an appropriate explanation has been found to be an effective means of countering any “*unhelpful*” effect.

However, if release of the requested report would cause the agency to divert scarce resources to deal with public comments or to explain its position, and to do this would disadvantage the agency in conducting the negotiations, then section 9(2)(j) may apply.

**Misconception:**

**If the current negotiations have come to an end then the information must be released.**

**Correct Position:**

This may not necessarily be the case. Usually once negotiations have been either successfully concluded or abandoned an agency can no longer assert that a prejudice or disadvantage will occur if the requested information is released.

However, there may be occasions where current negotiations have come to an end but it is apparent that further rounds of negotiations will occur in the future and that the release of the information would prejudice or disadvantage the agency in those negotiations. In such a case the undertaking of such negotiations must be in reasonable contemplation as opposed to being speculative. Section 9(2)(j) will usually apply in cases where disclosure would reveal the agency’s approach in the current negotiations and this would impact adversely upon the agency’s ability to negotiate in later years. One such example may be where industrial negotiations take place on an annual or bi-annual basis.

**Misconception:**

**Disclosure of the requested information will set a precedent for future negotiations and therefore should be withheld.**

**Correct Position:**

Each case must be considered on its own merits. Section 9(2)(j) recognises that it is in the public interest for central and local government to be able to carry on negotiations without prejudice or disadvantage. Where there is a concern that disclosure of the information would set a benchmark, that concern may be alleviated by release of a contextual statement advising that the requested information was particular to the negotiations in that case. However if a contextual statement will not alleviate the agency’s concern and it can explain why release would prejudice or disadvantage its ability to negotiate the best terms in the future, then section 9(2)(j) may apply.

## 11. IMPROPER GAIN OR ADVANTAGE<sup>17</sup>

### **Misconception:**

**To be “improper”, the gain or advantage must be illegal.**

### **Correct Position:**

There is no requirement in the OIA that before a gain or advantage can be said to be “*improper*” in terms of section 9(2)(k) it must involve some breach of the law. However, if release of the information would result in an illegal gain or advantage then it is likely that section 9(2)(k) would apply.

### **Misconception:**

**To be “improper” there must be a contractual obligation between the agency and the requester.**

### **Correct Position:**

There is no requirement in the OIA that before a gain or advantage can be said to be “*improper*” in terms of section 9(2)(k) it must involve a breach of a contractual obligation. However, if release of the information would involve breaching a contractual obligation and this would, in turn, result in a gain or advantage occurring then this is a relevant factor for the agency to consider when assessing whether such a gain or advantage would be “*improper*”.

### **Misconception:**

**To be “improper” the advantage must be commercial or financial.**

### **Correct Position:**

There is no requirement in the OIA that in order for a gain or advantage to be “*improper*” it must be commercial or financial in nature.

### **Misconception:**

**If the requester is going to use the information to advance views or pursue a cause which the agency does not agree with, then that would be “improper”**

### **Correct Position:**

The fact that an agency does not agree with the views of the requester does not provide it with good reason to withhold the information under section 9(2)(k). Similarly, an agency cannot withhold the information simply because it believes the requester will use it to pursue administrative or legal proceedings unless it can be established that this would be an abuse of process or vexatious for the requester to do so.

### **Misconception:**

**It would be an “improper gain or advantage” if the requester received the information first just because he or she requested it first.**

### **Correct Position:**

Section 9(2)(k) does not apply simply because one person requests information before everyone else, even if the requester gains an advantage in receiving it first, unless to do

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<sup>17</sup> Section 9(2)(k) OIA, section 7(2)(j) LGOIMA

so would be "*improper*". The agency has available the option of voluntarily releasing the information to the general public as well and doing so may alleviate this concern.

## 12. SECTION 23 - REASONS FOR DECISIONS<sup>18</sup>

### **Misconception:**

**If an agency does not hold written documentation about the decision or recommendation it cannot provide a written statement.**

### **Correct Position:**

In requiring an agency to prepare a written statement upon request, section 23 implicitly recognises that the recommendation or decision will often not be fully recorded prior to a section 23 request being received. If an agency has difficulty recalling immediately why a decision or recommendation was made, by looking at relevant information it does hold, it ought to be possible to at least summarise the reasons for the decision or recommendation.

However, given the requirements of section 23, agencies should implement procedures which ensure that decisions and recommendations, which affect a person in his, her or their personal capacity, are recorded at the time they are made in sufficient detail to facilitate the provision of an accurate statement of reasons.

### **Misconception:**

**A section 23 written statement will provide a requester with all the information an agency holds about him.**

### **Correct Position:**

Section 23 does not provide a general right of access to all information which may be held about the requester in respect of the particular decision or recommendation. If a requester wants to know what information is held about him, her or it in respect of the decision or recommendation:

- (a) in the case of a natural person, he or she should pursue the information by making request under Part V of the PA for all personal information held about him or her by the agency in respect of the particular decision or recommendation.
- (b) in the case of a legal person, the request should be made in terms of section 24 of the OIA.

### **Misconception:**

**A section 23 statement will detail information that was not considered by the agency when making the decision or recommendation.**

### **Correct Position:**

Section 23 does not always provide a complete answer for individuals wanting to find out why a particular decision or recommendation was made about them. A requester may believe that relevant information about him, her or it, which should have been taken into account, was ignored or overlooked. However a section 23 statement will not reflect information which was **not** taken into account in making the decision or recommendation. While section 23 statements will reflect evaluative material which agencies have adopted as findings on material issues of fact, they will not identify evaluative material held by the decision-maker which was not adopted or otherwise taken into account.

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<sup>18</sup> Section 22 LGOIMA

**Misconception:**

**Because the written statement contains information about an individual, it is governed by the PA.**

**Correct Position:**

The right of access by individuals to personal information about themselves is governed by the PA. However, the right of access by individuals to statements of reasons, which essentially addresses the accountability of the decision-maker, remains governed by section 23 of the OIA.

Further section 23 statements are not subject to section 9(2)(a) or section 27(1)(b) in any way. Therefore, Parliament has not placed any obstacle in the way of requesters being given findings or reasons about themselves which also relate to other persons.

**Misconception:**

**Section 23 statements only apply to the final decisions in a particular process.**

**Correct Position:**

A written statement can be requested for any decision or recommendation affecting the requester regardless of the stage reached in a particular process. Some processes may involve a series of stages where a number of preliminary decisions or recommendations are made. For example, in the recruitment process, an agency may decide to shortlist applicants for a position. An unsuccessful applicant may request a written statement of the reasons why he or she did not make the shortlist (as opposed to why he or she didn't get the job). This decision is distinct from the final decision as to whom to appoint.

Agencies should, therefore, be sure the particular decision at issue has been identified before preparing the written statement.

**Misconception:**

**Requesting a section 23 statement is a means of obtaining a review of the reasonableness or otherwise of the particular decision-making process.**

**Correct Position:**

Where a requester's concern is directed at what he or she perceives to be the unfairness or unreasonableness of the decision-making process, rather than at the reasons for the decision or simply accessing information, a request for a section 23 statement will not provide a review of that process.

Rather, an investigation by an Ombudsman under the OA may address the relevant issues and the Ombudsman could form an opinion on the reasonableness or otherwise of the process.

**Misconception:**

**A section 23 statement will detail the general criteria an agency considered relevant to the decision or recommendation at issue.**

**Correct Position:**

A section 23 statement will not identify any general criteria which the decision-maker identified as being relevant to the decision or recommendation at issue. Such general

criteria cannot be characterised as personal information about a particular person because they relate to the process by which all decisions or recommendations on the particular issue are made. If this information is being sought, then a request under either section 12 or section 22 of the OIA may be the appropriate means of pursuing the matter.

**Misconception:**

**The exception in section 23(2A)(a) enables a decision-maker to promise that all information about the reasons for the decision will be kept confidential**

**Correct Position:**

Section 23(1)(b) ensures that reference to evaluative material (on which the findings on material issues of fact are based) can be deleted, where such reference would itself breach the relevant promise of confidentiality to which section 23(2A)(a) refers. However, it does not enable the decision-maker to promise that all information about the reasons for his, her or its decision will be kept confidential. Sections 23(1)(a) and (c) would be rendered virtually nugatory if a decision-maker could withhold his or her **own** findings and reasons from a requester simply because some, or even all, of the evaluative material on which the decision was based may be protected by section 23(2A)(a).

**Misconception:**

**The decision-maker's opinion of the evaluative material provided by a third party should be included in the statement.**

**Correct Position:**

The fact that the decision-maker may have formed the same or a different view to that of the supplier/s of evaluative material is irrelevant for the purposes of section 23 and need not be disclosed.

**Misconception:**

**An agency cannot charge for providing a written statement**

**Correct Position:**

Section 23(3)<sup>19</sup> says that the provision relating to charging for info supplied under the Act<sup>20</sup> shall apply to requests for written statements. However, as usual any charge must be reasonable in the circumstances of the particular case. In this regard, a critical factor to be considered when setting a charge will be the fact that section 23 provides the requester with a "*right of access*" to the reasons for the decision or recommendation at issue. If a charge proves to be prohibitive, so that it effectively denies a person the ability to obtain a statement of reasons, the reasonableness of such a charge would need to be carefully considered.

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<sup>19</sup> Section 22(2) LGOIMA

<sup>20</sup> Section 15 OIA, section 13 LGOIMA