

## 5. COUNTERVAILING PUBLIC INTEREST IN RELEASE

### Introduction

Under section 9 of the OIA,<sup>1</sup> “good reason” to withhold information will exist if, and only if:

- (i) it is “*necessary*” to withhold the information at issue in order to protect one of the interests identified in section 9(2)(a) to (k); and
- (ii) in light of section 9(1)<sup>2</sup>, the interest in withholding the information is not “*outweighed by other considerations which render it desirable, in the public interest, to make the information available.*”

The reasons for refusal under section 9 operate on the premise that certain interests, identified in section 9(2)(a) to (k), require protection unless there is a countervailing public interest in the disclosure of the information at issue. Accordingly, in order to determine whether good reason exists to withhold information, an agency must identify and weigh the competing considerations raised by the particular circumstances of the case.

### **Assessing whether the interest in favour of withholding the information is outweighed by other considerations which render it desirable, in the public interest, to make that information available**

In order to answer this question, an agency will need to take the following steps:

- (i) Identify whether one of the withholding grounds set out in section 9(2)<sup>3</sup> applies to the information at issue.

If it is considered that a particular withholding ground applies, the interest protected by that withholding ground is the relevant interest to weigh against other considerations favouring release.

- (ii) Identify the considerations which render it desirable, in the public interest, for the information to be disclosed.

Depending on the circumstances, there can be many considerations which may favour the release of information in the public interest.

Section 4(a)<sup>4</sup> of the Act often provides a useful starting point. It provides that one of the purposes of the Act is:

*“To increase progressively the availability of official information to the people of New Zealand in order –*

- (i) to enable their **more effective participation** in the making and administration of laws and policies; and*

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<sup>1</sup> Section 7 LGOIMA

<sup>2</sup> Section 7(1) LGOIMA

<sup>3</sup> Section 7(2) LGOIMA

<sup>4</sup> Section 4(a) LGOIMA - in this regard, participation is in terms of the “*actions and decisions of local authorities*” and the accountability is that of “*local authority members and officials*”

(ii) To **promote the accountability** of Ministers of the Crown and officials,

and thereby to **enhance respect for the law** and to **promote the good government** of New Zealand.”

[Emphasis added]

Accordingly, when considering whether there are any considerations which render it desirable, in the public interest, to disclose information, one of the factors which an agency should consider is whether the release of information would promote the accountability of Ministers and officials or promote the ability of the public to effectively participate in the making and administration of laws and policies.

However, these are not the only matters which an agency should bear in mind when considering whether it is desirable to make information available in the public interest. Considerations which favour disclosure of the information in the public interest are not limited to promoting accountability or encouraging effective public participation in law making. Otherwise, the provision in section 9(1) would have been specifically limited to the purposes set out in section 4(a) of the Act.

The phrase “*public interest*” is not restricted in any way. Wider concepts, such as an individual’s right to fairness and natural justice in respect of the actions of public sector agencies, should also be considered when assessing whether the overall public interest favours disclosure of certain information. This may often reflect the purposes for which the information is initially generated or supplied, the use to which it has been put and other uses to which it may also legitimately be put.

The following factors can often assist an agency in identifying those considerations which favour the release of information:

❖ The **content** of the information requested

What does the information requested actually say? Is the content of the information such that its release would, in some way, promote the public interest?

For example, does the information relate to the expenditure of public money or will it reveal factors taken into account in a decision making process? If so, would the release of such information serve to promote the accountability of Ministers or officials?

❖ The **context** in which that information was generated

What is the background to the generation of the information at issue? For example, was the information generated as part of a decision making process? What stage has been reached in that decision making process? Releasing background information, or information which sets out the options under consideration, will often enable the public to participate in the decision making process.

❖ The **purpose** of the request

Although a requester is not required to explain his or her purpose in requesting information, knowing why the information is required by the requester is often helpful in identifying the considerations favouring disclosure of the information and assessing whether those considerations outweigh the interest in withholding the information.

For example, a requester may seek background information from an agency in order to challenge certain allegations which have been made against him or her that the agency is investigating. In such cases, an agency may need to weigh certain considerations, such as promoting that individual's right to fairness or natural justice, against the interests in favour of withholding the information.

- (iii) Assess the weight of these competing considerations and decide whether, in the particular circumstances of the case, the desirability of disclosing the information, in the public interest, outweighs the interest in withholding the information.

If an agency, after identifying and weighing these competing interests, finds them to be evenly balanced then the information at issue should be withheld. The test under section 9(1) is not whether there is a public interest in disclosure of the information, but rather, whether the considerations favouring the release of the information, in the public interest, outweigh the interest in withholding the information.

An agency will need to consider how the public interest is best served. Are the considerations favouring disclosure of the information such, that the public interest would be best served by disclosure of the actual information requested? While there may be a public interest in release of some information about a particular situation, this may not necessarily be met by release of the particular information requested.

There is no easy formula for deciding which interest will be stronger in any particular case. Rather, each case needs to be considered carefully on its own merits.