

4.3 CONFIDENTIALITY

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Corresponding provision in LGOIMA

Section 9(2)(ba) OIA = section 7(2)(c) LGOIMA

Section 9(2)(ba)

Section 9(2)(ba)¹ applies if, and only if, the withholding of information is necessary to:

“Protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information-

- (i) Would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or*
- (ii) Would be likely otherwise to damage the public interest...”*

Generally speaking, this section may apply where a third party has provided the information at issue to an agency and that information has either been supplied under compulsion or on a voluntary basis, subject to an obligation of confidence.

Is section 9(2)(ba) applicable?

The first step in deciding whether sections 9(2)(ba)(i) or (ii) provide good reason to withhold official information is to assess the nature of the information at issue and determine whether that information falls within the scope of section 9(2)(ba), namely:

“...information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment...”

(i) Information that is subject to an obligation of confidence

In determining whether information is *“subject to an obligation of confidence”*, regard must be had to:

- ❖ The nature of the information that has been requested - why is the information believed to be confidential? Does the information have the necessary quality of confidence about it?
- ❖ The full circumstances of its supply - what are the circumstances which are claimed to create the obligation of confidence? Do those circumstances import an obligation of confidence?

In order to establish that information is subject to an obligation of confidence, there must generally be a mutual understanding between the supplier of the information and the agency receiving the information that it is subject to an obligation of confidence. In other words, the supplier must regard the information as confidential and there must be knowledge on the part of the agency that the information was imparted in confidence. This mutual understanding may be express (for example, where there is a specific agreement that the information will be kept confidential) or implied from the circumstances of the particular case.

¹ Section 7(2)(c), LGOIMA

A simple declaration that information is confidential is insufficient to establish that such an obligation exists, without providing the basis for the understanding.

Further, it is not sufficient for the supplier of information to ask that information be kept confidential if the recipient makes it clear that the information is not being received on that basis. Similarly, an obligation of confidence will not exist simply because an agency unilaterally imposes an obligation of confidence upon itself and promises confidentiality to a supplier of information. Either the supplier must have required or, at the very least, implicitly relied on such a promise in consideration when providing the information in question, to the extent that the information would either have not been given or would have been given in a different format had no such undertaking been given.

The fact that information is disclosed to certain third parties for a limited purpose does not waive confidentiality in respect of other third parties. The agency will, therefore, be bound by an obligation not to use or disclose the information for any other purpose, or to any other person, beyond that for which the information was imparted.

No obligation of confidence will arise where the information is generally known or is readily available to the public, for example where it can be obtained in a public register or other document open to inspection by the public.

Confidentiality can be destroyed where there has been sufficient prior publication. This is a question of degree in the circumstances of each particular case. In this regard, the passage of time may be a relevant factor in establishing the degree of confidentiality that may apply to the information at issue:²

“...though facts may be widely known, they are not ever-present in the minds of the public. To extend the knowledge or revive the recollection of matters which may be detrimental or prejudicial to the interests of some person or organisation is not to be condoned because the facts are already known to some and linger in the memories or others...It is not the law that where confidence exists it is terminated or eroded by adventitious publicity.”

Each case must, therefore, be considered on its own merits.

(ii) Information which “any person has been or could be compelled to provide under statutory authority”

An agency must be able to identify the specific statutory authority in question.

Once an agency is satisfied that the information at issue falls within the scope of section 9(2)(ba), it should then go on to consider whether the prejudice which would be likely to result if the information were disclosed, falls within the tests set out in section 9(2)(ba)(i) and 9(2)(ba)(ii).

² *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 All ER 321, 338 – 339 (per Shaw LJ)

When does section 9(2)(ba)(i) apply?

If an agency considers that disclosure of the information would be likely to prejudice the supply of similar information or information from the same source, the agency may wish to consider whether section 9(2)(ba)(i)³ applies.

In order to establish whether section 9(2)(ba)(i) applies, an agency will need to take the following steps:

- (i) Determine whether the information at issue falls within the scope of section 9(2)(ba), as discussed above.
- (ii) Assess whether the release of the information would be likely to prejudice the supply of similar information or information from the same source.

A useful starting point is to consult the suppliers of information regarding their views about release. While the suppliers are not entitled to veto the release of information, their views are likely to be relevant in assessing whether the future supply of information is at risk.

As a result of consultation with the supplier of the information, one of the following situations may arise:

- ❖ The supplier advises the agency that it does not consent to the disclosure of information that it has supplied to the agency.

In this case, an agency may be concerned that disclosing the information would jeopardise their relationship with the supplier because the supplier may no longer trust the agency to hold its information in confidence. This may result in prejudice to the future supply of similar information or information from that source. If there is a real risk that the future supply of information will be jeopardised and it is in the public interest that such information should continue to be supplied (see discussion at (iii) below), it is likely that section 9(2)(ba)(i) will apply.

- ❖ The supplier advises the agency that, even if the information requested were disclosed, they would still provide the public sector agency with similar information in the future.

In such cases, it is unlikely that section 9(2)(ba)(i) can be relied upon. However, even though the supplier of information has consented to its disclosure, an agency may be concerned that release of the information at issue would prejudice the future supply of similar information from other sources. In such cases, an agency should consider whether releasing the information along with a contextual statement, confirming that the information was disclosed with consent, would alleviate any concerns regarding future supply.

Where there is a statutory power to compel the supply of information, it is usually likely that future supply can be assured. However, there are circumstances where, notwithstanding the power to compel the supply of information, an agency has to rely on the supplier to provide information of a certain quality to enable it to

³ Section 7(2)(c)(i) LGOIMA

discharge its functions effectively. In some cases, a public sector agency may only be able to ensure the future supply of information of this quality if the information is supplied on the basis that it will be held in confidence. In these circumstances, an agency should consider the following factors when assessing whether section 9(2)(ba)(i) applies:

- ❖ To what extent can the agency verify the accuracy of the information supplied?
- ❖ If the supplier were to provide inaccurate or incomplete information, would the agency be able to identify that this has occurred?
- ❖ Is the agency reliant on the supplier providing information in addition to that which can be compelled under statute?

A simple assertion that release of the information at issue would be likely to prejudice the supply of similar information or information from the same source is not sufficient. The Court of Appeal has interpreted the phrase “*would be likely*” to mean “*a serious or real and substantial risk to a protected interest, a risk that might well eventuate.*”⁴ The agency, in assessing whether release of the requested information “*would be likely*” to prejudice the supply of information, must ask itself whether that risk is real or substantial and one which might well eventuate.

- (iii) Assess whether it “*is in the public interest that such information should continue to be supplied.*”

An agency must be able to establish that there is a *public interest* in the continued supply of similar information or information from the same source. The agency should identify what the public interest is and explain why the continual supply of information promotes that interest.

In order to establish that the future supply of information is in the public interest, the agency must be able to establish that the information plausibly assists, to some significant degree, the agency to carry out its statutory function or some other lawful purpose. When considering the public interest in the supply of future information, an agency should also bear in mind its role in receiving the information. In this regard some useful questions to consider may include:

- ❖ What is the agency trying to do?
- ❖ What does the agency need the information for?
- ❖ How much, and what calibre of, information does the agency need in order to undertake its role successfully?
- ❖ Why is that in the public interest?

There is likely to be little public interest in protecting the continuing supply of future information, in the public interest, if that information is already available to an agency, either through internal resources or from external but non-confidential sources.

⁴ *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 391

- (iv) Explain why disclosure of the information would be so likely to cause the predicted prejudice that it is necessary to withhold it.

The agency must demonstrate that the prejudice or harm is so likely to occur that it is necessary to withhold it. Mere possibility that the prejudice “*could*” occur is not sufficient to meet the requirement under section 9 that the withholding is “*necessary*.”

If the agency is satisfied that:

- (i) the requested information is either subject to an obligation of confidence; or, is information which any person has been or could be compelled to provide under the authority of any enactment; and
- (ii) the release of the information would be likely to prejudice the supply of similar information or information from the same source; and
- (iii) it is in the public interest that such information should continue to be supplied,

section 9(2)(ba)(i) may apply.

Before section 9(2)(ba)(i) provides “*good reason*” for withholding information, the agency must go on to consider 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.

When does section 9(2)(ba)(ii) apply?

If an agency considers that disclosure of the information would be likely to result in a different harm or prejudice from that outlined above, the agency may wish to consider whether section 9(2)(ba)(ii)⁵ applies.

In order to establish whether section 9(2)(ba)(ii) applies, an agency will need to take the following steps:

- (i) Determine whether the information at issue falls within the scope of section 9(2)(ba), as discussed above.
- (ii) Identify precisely how release of the information would damage the public interest.

It may be useful for an agency to consider why it originally received the information and why the supply of the information was in the public interest.

- (iii) Explain why disclosure of the information “*would be likely*” to damage that public interest.

A simple assertion that release of the information at issue would be likely to damage the public interest is not sufficient. The Court of Appeal has interpreted the phrase “*would be likely*” to mean “*a serious or real and substantial risk to a protected interest, a risk that might well eventuate.*”⁶ The agency, in assessing whether release of the requested information “*would be likely*” to prejudice the

⁵ Section 7(2)(c)(ii) LGOIMA

⁶ Above n 4

supply of information, must ask itself whether that risk is real or substantial and one which might well eventuate.

Section 9(2)(ba)(ii) is commonly used by agencies to withhold the details of settlement agreements. A common feature of such agreements is that the terms remain confidential to the parties. In previous cases, Ombudsmen have accepted that:

- ❖ it is in the public interest for agencies to be able to reach settlement in appropriate cases;
 - ❖ if it is necessary to agree to keep certain information confidential in order to achieve settlement, then there is a public interest in an agency being able to honour its promise of confidentiality; and,
 - ❖ if disclosure of information would prejudice the ability of an agency to uphold a promise of confidentiality and, thereby, reach settlement in appropriate cases then disclosure “*would be likely to otherwise damage the public interest*” for the purposes of s9(2)(ba)(ii).
- (iv) Explain why disclosure of the information would be so likely to cause the predicted prejudice that it is necessary to withhold it.

The agency must demonstrate that the prejudice or harm is so likely to occur that it is “*necessary*” to withhold it. Mere possibility that the prejudice “*could*” occur is not sufficient to meet the requirement under section 9 that the withholding is “*necessary*.”

If the agency is satisfied that:

- (i) the requested information is either subject to an obligation of confidence; or, is information which any person has been or could be compelled to provide under the authority of any enactment; and,
- (ii) the release of that information would be likely otherwise to damage the public interest,

section 9(2)(ba)(ii) may apply.

Before section 9(2)(ba)(ii) provides “*good reason*” for withholding information, the agency must go on to consider 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.

Section 9(1)

Assessing whether the interests identified in favour of withholding the information are “*outweighed by other considerations which render it desirable, in the public interest, to make that information available*”.

In order to address this issue, an agency will need to take the following steps.

- (i) Identify any considerations that may favour disclosure of the information in the public interest.
- (ii) Consider whether disclosure of the actual information requested would, in fact, promote these considerations. While there may be a public interest in the release of some information about the particular situation, this may not necessarily be met by release of the particular information requested.
- (iii) Finally, consider whether, in the circumstances of the particular case, the considerations favouring disclosure outweigh, in the public interest, the need to withhold the information requested.

The interests in favour of withholding the information need to be weighed against the legitimate public interest considerations favouring disclosure that have been identified. However, there is no predetermined formula for deciding which will be stronger in a particular case. Rather, each case needs to be considered carefully on its own merits and in its own circumstances.

Issues to consider when identifying and assessing the strength of public interest considerations are discussed further in Chapter B5.

Summary Sheet
Section 9(2)(ba) OIA & Section 7(2)(c) LGOIMA

Confidentiality

Always proceed on the basis that the information requested “*shall be made available unless there is good reason for withholding it.*”

1. Identify the information which falls within the scope of the request and determine whether:
 - (i) the information is subject to an obligation of confidence, or,
 - (ii) the information is such that any person has been or could be compelled to provide it under statutory authority.

2. If the requested information does fall within either category, then go on to:

- (i) Assess whether disclosure of the information *would be likely* to prejudice the supply of similar information or information from the same source.

If yes, decide whether it is in the public interest that such information should continue to be supplied.

Or

- (ii) Assess whether disclosure of the information at issue *would be likely* to otherwise damage the public interest.

If you have answered in the affirmative to both limbs of 2(i) above, then section 9(2)(ba)(i) is likely to apply. If you have answered in the affirmative to 2(ii) above, then section 9(2)(ba)(ii) is likely to apply. You should then move on to consider whether there are any public interest considerations, in terms of section 9(1), favouring release which outweigh the need to withhold the information.

3. Identify any considerations favouring disclosure of the information. In light of such considerations, is there a public interest in disclosure of the specific information requested?
4. Consider whether the public interest in disclosure of the information, in whole or in part, outweighs the need to withhold the information.

If yes, release sufficient information to meet the public interest in disclosure. If no, advise the requester of the decision to withhold the information.