

4.5 CONSTITUTIONAL CONVENTIONS

In this Guideline

- ❖ Section 9(2)(f) - Introduction
- ❖ The general approach to section 9(2)(f)¹
- ❖ When does section 9(2)(f)(i) apply?
- ❖ When does section 9(2)(f)(ii) apply?
- ❖ When does section 9(2)(f)(iii) apply?
- ❖ When does section 9(2)(f)(iv) apply?
- ❖ Summary sheet – section 9(2)(f)(i)
- ❖ Summary sheet – section 9(2)(f)(ii)
- ❖ Summary sheet – section 9(2)(f)(iii)
- ❖ Summary sheet – section 9(2)(f)(iv)

¹ There is no equivalent to this section in LGOIMA

Section 9(2)(f) – Introduction

Section 9(2)(f) of the OIA applies if, and only if, it is “*necessary*” to withhold the information requested in order to:

“Maintain the constitutional conventions for the time being which protect –

- (i) The confidentiality of communications by or between or with the Sovereign or her representative;*
- (ii) Collective and individual ministerial responsibility;*
- (iii) The political neutrality of officials;*
- (iv) The confidentiality of advice tendered by Ministers of the Crown and officials.”*

Each of the interests which are the subject of this protection are discussed separately on the following pages.

The general approach to section 9(2)(f)

At a general level, all of the paragraphs of section 9(2)(f) should be approached in the same way when consideration is being given to whether or not they apply to particular information.

Organisations should ask the following questions:

- (i) What is the relevant constitutional convention?
- (ii) What is the purpose of that constitutional convention?
- (iii) Is it necessary to withhold the information requested in order to “*maintain*” that convention? That is, will release of the information undermine the interests which the convention seeks to protect?

In the case of each of the subparagraphs (i) to (iv), there will also be technical requirements that must be met before it can be considered to apply in any particular case.

Even if one of the subparagraphs of section 9(2)(f) applies in a particular case, consideration must still be given to the issue of whether there are any countervailing considerations favouring release, in the public interest, which outweigh the need to withhold.

What is the relevant convention?

Dicey has described constitutional conventions as “*customs, practices, maxims or precepts which are not enforced or recognised by the courts*”, and commented that they comprise “*constitutional or political ethics*”.²

Section 9(2)(f) does not define the nature of the conventions which it protects – rather, it describes the interests which the various conventions are designed to protect. The conventions are not themselves defined as constitutional conventions evolve over time. This is recognised in the wording of section 9(2)(f), which refers to constitutional conventions “*for the time being*”.

Sir Ivor Jennings has coined a three-part test for determining the existence of a convention. He suggests that the following questions should be asked:³

- (a) Are there any precedents?
- (b) Did the actors in the precedents believe they were bound by a rule?
- (c) Is there any reason for the rule referable to the needs of constitutional government?

To the extent that there is ambiguity about the scope of the various conventions referred to in section 9(2)(f), Jennings’ test is a helpful means of identifying the convention being relied upon and the reasons why it might be necessary to withhold the information requested.

² Dicey *Introduction to the Law of the Constitution* (10th edition, Macmillan & Co Ltd, New York, 1962) 417

³ Sir Ivor Jennings *The Law and the Constitution* (5th ed, University of London Press, 1959) chapter III

What is the purpose of the convention? Is it necessary to withhold the information in order to maintain the convention?

The last part of Jennings' test looks to the purpose of the convention – Professor Philip Joseph has commented in his book *Constitutional and Administrative Law in New Zealand* that:⁴

“No convention could be asserted if the rule thought to be binding served no constitutional purpose or if it frustrated rather than served constitutional ends. Each of Jennings’ criteria must be satisfied.”

In order to determine whether it is necessary to withhold the information requested to “maintain” the convention identified, it is essential that an organisation:

- (a) identify the underlying purpose of the convention; and
- (b) ask whether it is necessary to withhold the requested information in order to maintain that convention.

Before an agency can conclude that withholding is necessary to maintain the convention, it must be able to identify how release of the requested information will undermine the convention.

An important point to remember is that constitutional conventions can be breached without actually lapsing – their maintenance, therefore, does not depend upon absolute compliance in every case. Eagles, Taggart and Liddell have observed that:⁵

“The requirement that both the conventions and the effective conduct of public affairs be ‘maintained’ is not a legal license to withhold every time the former are breached, or the latter is made more difficult. This can, perhaps, be more clearly seen in relation to section 9(2)(f). ...[I]t is in the very nature of a constitutional convention that it can be departed from ‘without necessarily impairing its effectiveness’.”

⁴ (2nd ed, Brookers, Wellington, 2001) 276

⁵ *Freedom of Information in New Zealand* (Auckland, Oxford University Press, 1992) 335

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

Section 9(2)(f)(i) provides good reason for withholding the information if, and only if:

- ❖ the withholding of the information is necessary to “[m]aintain the constitutional conventions for the time being which protect ... [t]he confidentiality of communications by or with the Sovereign or her representative”, and
- ❖ the need to withhold is not “outweighed by other considerations which render it desirable, in the public interest, to make that information available”.⁶

Is it necessary to withhold the information to maintain the constitutional convention which protects “[t]he confidentiality of communications by or with the Sovereign or her representative”?

When answering this question, an agency should address the following issues:

- (i) What is the convention being relied upon?

Eagles, Taggart and Liddell have described the origins of the convention which protects the confidentiality of communications by or with the Sovereign or her representative in the following manner:⁷

“The notion that the ‘counsels of the Crown are secret’ long pre-dates the idea that the executive government should be responsible to representative institutions. In its original form it was a personal obligation imposed on the King’s servants and advisers, an obligation which found concrete expression in the oath of secrecy taken by privy councillors (an oath which in New Zealand has been given statutory expression). More latterly, instead of a personal and usually absolute obligation, the protection of royal and vice-regal confidences is justified by reference to the need to preserve the constitutional position of the Queen or Governor-General by limiting the visible involvement of either in matters of political controversy.”

The information encompassed by this convention is very broad in scope. The following points should be noted:

- ❖ the convention covers all “communications”, not merely advice; and
 - ❖ the communication need only be written by or directed to the Sovereign or her representative – it is not limited to communications between the Sovereign and Ministers or officials.
- (ii) What is the purpose of the convention? Is it necessary to withhold the information in order to maintain the convention?

As noted above, Eagles, Taggart and Liddell have observed that:⁸

⁶ Section 9(1) OIA

⁷ Above n5, 364

⁸ Above n5, 364

“... the protection of royal and vice-regal confidences is justified by reference to the need to preserve the constitutional position of the Queen or Governor-General by limiting the visible involvement of either in matters of political controversy”.

When considering whether it is “*necessary*” to withhold the information in order to “*maintain*” the convention, an organisation should consider:

- (a) the purpose of the convention; and
- (b) whether release of the information requested will undermine the convention.

Not every breach of a constitutional convention will impair its effectiveness. Section 9(2)(f)(i) will only apply if it is “*necessary*” to withhold the information in order to “*maintain*” this convention.

Assess whether the need to withhold is “*outweighed by other considerations which render it desirable, in the public interest, to make that information available*”

In order to make this assessment, 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 those considerations. While there may be a public interest in release of some information about the particular situation, this may not necessarily be met by release of the specific 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 under section 9(2)(f)(i).

The interest in maintaining the convention protected by section 9(2)(f)(i) needs to be weighed against the legitimate public interest considerations favouring release that have been identified. There is no predetermined formula for deciding which interest is stronger in a particular case. Rather, each case needs to be considered carefully on its own merits and taking into account the surrounding circumstances.

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

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

Section 9(2)(f)(ii) provides good reason to withhold information if, and only if:

- ❖ the withholding of the information is necessary to “[m]aintain the constitutional conventions for the time being which protect ... [c]ollective and individual ministerial responsibility”, and
- ❖ the need to withhold is not “outweighed by other considerations which render it desirable, in the public interest, to make that information available”.

In the experience of the Ombudsmen, this withholding ground has arisen very rarely. It arises more often in the context of collective than individual ministerial responsibility, which is reflected in the guidance set out below.

Is it necessary to withhold the information to maintain the constitutional convention which protects “[c]ollective and individual ministerial responsibility”?

When making this assessment, an agency should consider the following issues:

- (i) What is the convention being relied upon?
 - (a) “*Collective ministerial responsibility*” is the constitutional convention which protects the ability of Cabinet to present a united front once a Cabinet decision has been made, regardless of the personal views of individual Ministers. This convention allows Ministers to debate issues freely and frankly within Cabinet without fear that their differences will be aired in public.

The *Cabinet Manual 2001* describes collective responsibility in the following manner:⁹

*“Acceptance of ministerial office requires acceptance of collective responsibility. Issues are often debated vigorously and within the confidential setting of Cabinet meetings, although consensus is usually reached and votes are rarely taken. **Once Cabinet makes a decision, then** (except as provided in paragraph 3.23) **Ministers must support it**, regardless of their personal views and whether or not they were at the meeting concerned.”* [Emphasis added]

Paragraph 3.23 provides for an “*agreement to disagree*” process within a Coalition Government, which may allow a different party position to be maintained by Ministers, regardless of their position during the decision-making process. This is effectively an exception to the convention of collective responsibility, which has arisen as a result of MMP Government.

Joseph has commented upon the adaptation of the convention of collective responsibility under MMP:¹⁰

“Under MMP, collective ministerial responsibility has narrowed to collective Cabinet responsibility. Until a policy has been placed

⁹ Paragraph 3.21

¹⁰ [2000] NZ Law Review 305

on the Cabinet agenda and adopted by Cabinet, Cabinet Ministers are free to engage in ‘branding’ exercises. Alliance Ministers Matt Robson and Laila Harré continued to advocate employer-paid parental leave and an increase in the youth minimum wage, despite their coalition partner’s concern for flagging business confidence. Helen Clark publicly ruled out her government adopting the Alliance proposals without reverberation of collective responsibility. Neither issue had been before Cabinet and there was no need to resort to the party distinction clause.”

- (b) The convention of “*individual ministerial responsibility*” holds Ministers accountable to Parliament for their personal actions and for the acts or omissions of their Departments. It requires them to explain how such acts or omissions occurred, and advise both Parliament and the public how they will be corrected and any damage minimised.¹¹ In very limited circumstances, a Minister may be required to accept personal responsibility and resign; this will usually only occur where the Minister’s own conduct is at issue.
- (ii) What is the purpose of the convention?
- (a) “*Collective ministerial responsibility*” serves two closely related purposes.
- It:
- ❖ allows Cabinet to present a united front once a decision has been made, even if the merits of the decision were debated within Cabinet; and
 - ❖ allows issues to be debated freely and frankly within Cabinet without fear that individual opinions will be disclosed.
- (b) The purpose of “*individual ministerial responsibility*” is to ensure that Ministers are politically accountable to Parliament, and ultimately the public.
- (iii) Is it necessary to withhold the requested information in order to maintain the conventions?
- (a) When considering whether it is necessary to withhold the requested information in order to maintain the convention which protects “*collective ministerial responsibility*”, an agency should consider the following factors:
- ❖ Has a decision been made by Cabinet?
- If not, then there is no decision in respect of which Cabinet must present a united front. As noted above, the *Cabinet Office Manual* describes the convention as applying once Cabinet makes a decision.
- Joseph has also argued that since the advent of MMP, Ministers are free to air their individual or party views publicly, prior to an issue

¹¹ Joseph, above n 4, 287

being placed upon Cabinet's agenda and a Cabinet decision being made. The convention of collective responsibility does not constrain the publication of such views.

- ❖ If a decision has been made by Cabinet, would disclosure of the requested information reveal diverging views of individual Ministers?

In order for release of the information to breach collective responsibility, the information must reveal the personal views of individual Ministers, which diverge from the Cabinet decision.

The disclosure of views expressed by agencies in the course of providing advice to the relevant Ministers is not a breach of collective responsibility.

- ❖ Even if a decision has been made and the information reveals the diverging views of Ministers, is it necessary to withhold the information in order to maintain the convention? It is important to remember that a convention can be breached without actually lapsing.

- (b) In order for it to be considered necessary to withhold the requested information in order to maintain the constitutional convention which protects "*individual ministerial responsibility*", an agency must have reason to believe that releasing the information will undermine the accountability of the relevant Minister to Parliament.

Assess whether the need to withhold is "*outweighed by other considerations which render it desirable, in the public interest, to make that information available*"

In order to make this assessment, 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 those considerations. While there may be a public interest in release of some information about the particular situation, this may not necessarily be met by release of the specific 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 under section 9(2)(f)(ii).

The interest in maintaining the conventions protected by section 9(2)(f)(ii) needs to be weighed against the legitimate public interest considerations favouring release that have been identified. There is no predetermined formula for deciding which interest is stronger in a particular case. Rather, each case needs to be considered carefully on its own merits and taking into account the surrounding circumstances.

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

When does section 9(2)(f)(iii) apply?

Section 9(2)(f)(iii) provides good reason for withholding information if, and only if:

- ❖ the withholding of the information is necessary to “[m]aintain the constitutional conventions for the time being which protect ... [t]he political neutrality of officials”, and
- ❖ the need to withhold is not “outweighed by other considerations which render it desirable, in the public interest, to make that information available.”¹²

Is it necessary to withhold the information to maintain the constitutional convention which protects “[t]he political neutrality of officials”?

When making this assessment, an agency should consider the following issues:

- (i) What is the convention being relied upon?

The “*Public Service Code of Conduct*”, published by the State Services Commission, describes the convention of political neutrality in the following manner:

“Public servants are required to serve the Government of the day. They must act to ensure not only that their department maintains the confidence of its Ministers, but also to ensure that it is able to establish the same professional and impartial relationship with future Ministers. This convention of political neutrality is designed to ensure the Public Service can provide strong support for the good government of New Zealand over the long term.”

Public servants have a long-established role in assisting with development as well as implementation of policy. This role may be performed in different ways and at different levels from department to department. Public servants are responsible for providing honest, impartial, and comprehensive advice to Ministers, and for alerting Ministers to the possible consequences of following particular policies, whether or not such advice accords with Ministers’ views.”

- (ii) What is the purpose of the convention?

The purpose of the convention of political neutrality is to ensure that public servants serve the Government of the day in an impartial and loyal manner in order to “*provide strong support for the good government of New Zealand over the long term*”.

- (iii) Is it necessary to withhold the information at issue in order to maintain that convention?

In making this assessment, an agency should consider whether releasing the requested information would undermine the convention protecting the political neutrality of officials. In this regard, it should note that:

¹² Section 9(1) OIA

- ❖ the fact that Ministers and their officials have taken a different view of a particular issue does not mean that publication of those views will mean that the officials will no longer be politically neutral;¹³ and
- ❖ depending upon the nature of the information requested, disclosure of the information may actually enhance or protect the convention of political neutrality.

Assess whether the need to withhold is “outweighed by other considerations which render it desirable, in the public interest, to make that information available”

In order to make this assessment, 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 those considerations. While there may be a public interest in release of some information about the particular situation, this may not necessarily be met by release of the specific 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 under section 9(2)(f)(iii).

The interest in maintaining the convention protected by section 9(2)(f)(iii) needs to be weighed against the legitimate public interest considerations favouring release that have been identified. There is no predetermined formula for deciding which interest is stronger in a particular case. Rather, each case needs to be considered carefully on its own merits and taking into account the surrounding circumstances.

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

¹³ Case Numbers 13 and 69, 5th Compendium of Case Notes of the Ombudsmen (Official Information Act 1982) 34, 38

When does section 9(2)(f)(iv) apply?

Section 9(2)(f)(iv) provides good reason to withhold information if, and only if:

- ❖ withholding the information is necessary to “[m]aintain the constitutional conventions for the time being which protect ... [t]he confidentiality of advice tendered by Ministers of the Crown and officials”, and
- ❖ the need to withhold is not “outweighed by other considerations which render it desirable, in the public interest, to make that information available”.¹⁴

In general terms, this section is often relevant where there is concern that release will prejudice the ability of decision-makers to **consider** advice. It will often arise where a decision-maker has an expectation that advice which has been tendered for consideration will remain confidential for a certain period of time. For this reason, if a request for such advice is received by an agency other than the decision-maker, consideration should be given to:

- (a) consulting the decision-maker in order to ascertain the precise nature of any concerns regarding release of the advice; or
- (b) transferring the request to the decision-maker.

Is it necessary to withhold the information to maintain the constitutional convention which protects “[t]he confidentiality of advice tendered by Ministers of the Crown and officials”?

When making this assessment, an agency should consider the following issues:

- (i) Is the information “*advice*” and has it been “*tendered*”?

Section 9(2)(f)(iv) will usually only be relevant if the information requested is of an advisory nature and has been tendered. Once these elements of the subsection have been satisfied, then the agency may move on to consider whether it is “*necessary*” to withhold the information in terms of the Act.

In certain limited circumstances this section may still be relevant even if information has not been “*tendered*” at the time of the request. This situation may occur where internal discussion papers are circulated within an agency or between agencies prior to the tendering of formal advice to a Minister. In these circumstances, the best way to assess the most appropriate withholding ground is to define as precisely as possible the reasons why the agency does not consider the information should be released:

- ❖ If the agency is concerned that release of internal discussion papers will inhibit the future production, circulation or retention of opinions, or have an impact upon the way it is expressed in the future, it should consider whether the interests protected by section 9(2)(g)(i) of the Act more accurately reflect its concerns.
- ❖ If, however, an agency is concerned that release of internal discussion papers will undermine the ability of Ministers to consider the advice that will

¹⁴ Section 9(1) OIA

be tendered in an effective and orderly manner, section 9(2)(f)(iv) of the Act may be an appropriate withholding ground.

Such concerns might arise if release of the information means that a Minister is asked to publicly comment upon issues regarding which he or she has not been fully briefed. Section 9(2)(f)(iv) can only be relied upon in these circumstances if a direct connection can be established between the internal discussion papers and the advice to be tendered to Ministers, and the remaining elements of the section are made out.

(ii) What is the convention being relied upon?

The wording of section 9(2)(f)(iv) suggests that in certain circumstances the convention allows advice tendered to Ministers to be kept confidential. It is generally considered that such protection may be “*necessary*” in order to enable the process of government to operate in an effective and orderly manner.

The Danks Committee has provided some guidance in this respect, explaining that:¹⁵

“To run the country effectively the government of the day needs nevertheless to be able to take advice and to deliberate on it, in private, and without fear of premature disclosure. If the attempt to open processes of government inhibits the offering of blunt advice or effective consultation and arguments, the net result will be that the quality of decisions will suffer, as will the quality of the record. The processes of government could become less open and, perhaps, more arbitrary.”

(iii) What is the purpose of the convention?

In general terms, the Danks Committee explained that the underlying purpose of the convention is to protect the ability of government to receive and deliberate upon advice in an effective and orderly manner – its ability to run the country effectively will sometimes depend upon confidentiality. That general purpose, however, may have a number of different practical manifestations. The Ombudsmen have recognised that various purposes of the convention include protecting the ability:

- ❖ of Ministers and Cabinet to consider advice, where release of the advice will prejudice the ability to decide what course of action to take;
- ❖ of Coalition partners to conduct negotiations regarding policy issues, where release of the advice may prejudice such negotiations;
- ❖ of a Minister to consider draft answers to Parliamentary questions, in order that he or she may decide precisely how to respond and take individual responsibility for the answer actually given.

These examples are not exhaustive – the convention may arise in other circumstances as well.

¹⁵ General Report para 47

- (iv) Is it necessary to withhold the requested information in order to maintain the convention?

In order to establish that it is “*necessary*” to withhold the information requested in order to “*maintain*” the convention protected by section 9(2)(f)(iv), there must be reason to believe that the release of this information would undermine that convention. An agency should consider the purposes of the convention, and identify whether the release would undermine those purposes. It is important to remember that not every breach of a convention will cause it to lapse.

In the context of section 9(2)(f)(iv), factors such as:

- ❖ the content of the advice;
- ❖ the context in which it was generated; and
- ❖ the stage reached in the policy-making process to which it relates;

are all relevant to this assessment. By identifying these factors, the information at issue can be placed in its proper context and the harm (if any) that will be caused by release can more easily be identified. The following bullet points provide examples of how these factors are relevant to an assessment of whether it is necessary to withhold particular information:

- ❖ Advice that is purely factual in nature or comprises bare options, as opposed to opinions offered or recommendations made as to future action, can often be disclosed without pre-empting the ability of Ministers or Cabinet to deliberate on the advice received and decide how to proceed. In other words, not all advice may need to be withheld, even though it is still under consideration. [*Content of the advice*]
- ❖ The advent of an MMP electoral system, with its tendency to cause the formation of coalition and/or minority governments, has created a new context in which section 9(2)(f)(iv) must operate. Premature release of information before full consultation has between coalition partners occurred may prejudice the ability of those partners to reach agreement, thus undermining the convention that section 9(2)(f)(iv) seeks to protect. [*Context in which advice generated, stage reached in policy-making process*]
- ❖ Alternatively, coalition partners may have publicly debated their opposing views regarding a particular policy. In such cases it may be difficult to see how release of policy advice will prejudice the ability to reach an agreed government position. [*Context in which advice generated, stage reached in policy-making process*]
- ❖ Once a decision has been made, there may be no need for ongoing protection of the advice on which that decision was based. In some circumstances, release of relevant information can have the positive effect of explaining to the public the reasons why certain policies have been developed or modified or other actions taken. Such an approach is

consistent with one of the purposes of the Act.¹⁶ [*Stage reached in policy-making process*]

Assess whether the need to withhold is “outweighed by other considerations which render it desirable, in the public interest, to make that information available”

In order to make this assessment, an agency will need to take the following steps:

- (i) Identify any considerations that may favour disclosure of the information in the public interest. The following considerations often arise in the context of section 9(2)(f)(iv):
 - ❖ Is the content of the information such that its release will promote the accountability of ministers or officials?

For example, will it reveal the factors taken (or not taken) into account in a decision-making process?
 - ❖ Would release of this information promote the ability of the public to effectively participate in the making and administration of laws and policies?

Enabling the public to effectively participate in the making and administration of laws and policies is one of the purposes of the OIA.¹⁷

Releasing background information, or information which sets out options under consideration, will often enable the public to participate in the policy-making process.
- (ii) Consider whether disclosure of the actual information requested would in fact promote those considerations. While there may be a public interest in release of some information about the particular situation, this may not necessarily be met by release of the specific 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 under section 9(2)(f)(iv).

The interest in maintaining the convention protected by section 9(2)(f)(iv) needs to be weighed against the legitimate public interest considerations favouring release that have been identified. There is no predetermined formula for deciding which interest is stronger in a particular case. Rather, each case needs to be considered carefully on its own merits and taking into account the surrounding circumstances.

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

¹⁶ Section 4(a)(ii) OIA

¹⁷ Section 4(a)(i) of the OIA. Similarly, section 4(a)(i) of LGOIMA provides that one of the purposes of that Act is to enable more effective participation by the public in the actions and decisions of local authorities

Summary sheet – Section 9(2)(f)(i)

Maintaining the convention which protects the confidentiality of communications by or with the Sovereign or her representative

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

1. Identify the convention being relied upon.
2. Identify the purpose of that convention and assess whether, in light of that purpose, it is necessary to withhold the requested information in order to maintain the convention.

If you have identified the convention and its purpose, and consider that releasing the information will undermine that convention and can explain why, then section 9(2)(f)(i) may 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.

3. Identify any considerations favouring disclosure of the information.
4. In light of such considerations, is there a public interest in disclosure of the information requested?
5. Consider whether, in the circumstances of the particular case, the public interest in disclosure of the information (in whole or in part), outweighs the need to withhold the information to maintain the convention.

If so, release sufficient information to satisfy the public interest in disclosure.

If not, advise the requester of the decision to withhold.

Summary Sheet – Section 9(2)(f)(ii)

Maintaining the Conventions which protect Collective and Individual Ministerial Responsibility

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

1. Identify the convention being relied upon.
2. Identify the purpose of that convention and assess whether, in light of that purpose, it is necessary to withhold the requested information in order to maintain the convention.
3. With regard to collective ministerial responsibility, consider whether:
 - ❖ a decision has been made by Cabinet; and
 - ❖ whether disclosure of the requested information would reveal diverging views of individual Ministers.

With regard to individual ministerial responsibility, consider whether releasing the information will undermine the accountability of a particular Minister to Parliament.

If you have identified the convention and its purpose, and consider that releasing the information will undermine that convention and can explain why, then section 9(2)(f)(ii) may 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.

3. Identify any considerations favouring disclosure of the information.
4. In light of such considerations, is there a public interest in disclosure of the information requested?
5. Consider whether, in the circumstances of the particular case, the public interest in disclosure of the information (in whole or in part), outweighs the need to withhold the information to maintain the convention.

If so, release sufficient information to satisfy the public interest in disclosure.

If not, advise the requester of the decision to withhold.

Summary sheet – Section 9(2)(f)(iii)

Maintaining the Convention which protects the Political Neutrality of Officials

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

1. Identify the convention being relied upon.
2. Identify the purpose of that convention and assess whether, in light of that purpose, it is necessary to withhold the requested information in order to maintain the convention. Would disclosure of the information undermine the convention protecting the political neutrality of officials?

If you have identified the convention and its purpose, and consider that releasing the information will undermine that convention and can explain why, then section 9(2)(f)(i) may apply. You should then consider whether there are any public interest considerations, in terms of section 9(1), favouring release which outweigh the need to withhold.

3. Identify any considerations favouring disclosure of the information.
4. In light of such considerations, is there a public interest in disclosure of the information requested?
5. Consider whether, in the circumstances of the particular case, the public interest in disclosure of the information (in whole or in part), outweighs the need to withhold the information to maintain the convention.

If so, release sufficient information to satisfy the public interest in disclosure.

If not, advise the requester of the decision to withhold.

Summary sheet – Section 9(2)(f)(iv)

Maintaining the Convention which protects the Confidentiality of Advice tendered by or between or to Ministers or Officials

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

1. Identify the convention being relied upon.
2. Identify the purpose of that convention. Is its purpose to:
 - ❖ enable Ministers and Cabinet to consider advice, where release would prejudice the ability to decide what course of action to take?
 - ❖ enable Coalition partners to conduct negotiations which would be prejudiced by the disclosure of the information requested?
 - ❖ enable a Minister to consider draft answers to Parliamentary questions, in order to take individual responsibility for the answer actually given?
3. Assess whether, in light of that purpose, it is necessary to withhold the requested information in order to maintain the convention. Consider here:
 - ❖ the nature and content of the advice – is it factual in nature or does it comprise bare options, as opposed to opinions offered or recommendations made?
 - ❖ whether, in the context of coalition government, release would undermine negotiations, or whether the coalition partners have already openly debated the policy issues; or
 - ❖ whether a decision has been made – is there any need for ongoing protection?

If you have identified the convention and its purpose, and consider that releasing the information will undermine that convention and can explain why, then section 9(2)(f)(i) may apply. You should then consider whether there are any public interest considerations, in terms of section 9(1), favouring release which outweigh the need to withhold.

4. Identify any considerations favouring disclosure of the information. For example:
 - ❖ public participation in the policy and law-making process; or
 - ❖ accountability of Ministers and Cabinet for decisions made.
5. In light of such considerations, is there a public interest in disclosure of the information requested?
6. Consider whether, in the circumstances of the particular case, the public interest in disclosure of the information (in whole or in part), outweighs the need to withhold the information to maintain the convention.

If so, release sufficient information to satisfy the public interest in disclosure.

If not, advise the requester of the decision to withhold.