

4.6 FREE AND FRANK EXPRESSIONS OF OPINION

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Corresponding provision in LGOIMA

Section 9(2)(g)(i) OIA = Section 7(2)(f)(i) LGOIMA

When does section 9(2)(g)(i)¹ apply?

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

- ❖ the withholding of the information requested is necessary to “*maintain the effective conduct of public affairs through... [t]he free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any Department or organisation in the course of their duty*”; and
- ❖ the need to withhold information to protect that interest is not “*outweighed by other considerations which render it desirable, in the public interest, to make that information available*”.

It is usually relevant where concerns about releasing the information relate to the ability of Ministers, officials or others to:

- (a) **generate** opinions in the future – such opinions are frequently the basis upon which advice is given; and
- (b) **express** such opinions in a free and frank manner in the future – the way in which information is expressed can be an important means of communicating the significance of issues.

In general terms, the purpose of this section is to avoid prejudice to the generation and expression of free and frank opinions which are necessary for good government. The ability of Ministers, officials and other advisers to Government to express their opinions on relevant issues in a free and frank manner is an essential ingredient of the climate necessary for the effective conduct of public affairs.

In the words of the Danks Committee:²

“Only if disclosure is likely to inhibit the free and frank expression of opinion and thereby adversely affect the conduct of public affairs may a reason for withholding [the information] under this head exist”.

The application of this section, however, is not limited to information produced within the government sector. If the elements of this section are established, it can apply where members of the public have conveyed their opinions to an organisation which is covered by the Act. This is because the section also applies to the expression of opinions “to” Ministers of the Crown, members of an organisation, or officers and employees of any Department or organisation in the course of their duty.

Is it necessary to withhold the information in order to “*maintain the effective conduct of public affairs through the free and frank expression of opinions*”?

In considering whether s.9(2)(g)(i) applies, it is not enough for the holders of the information to merely assert that disclosure would inhibit free and frank expression of opinions necessary for the effective conduct of public affairs. Three fundamental questions must be answered.

¹ Section 7(2)(f)(i) LGOIMA

² Supplementary Report, page 67

- (1) How would disclosure of the information at issue inhibit the free and frank expression of opinions in future?
- (2) How would the inhibition of such free and frank expression of opinions prejudice the effective conduct of public affairs?
- (3) Why is this predicted prejudice so likely to occur that it is necessary to withhold the information in the circumstances of the particular case?

Free and frank expression of opinions

Section 9(2)(g)(i) requires consideration to be given to the effect upon *future* generation of free and frank expressions of opinion if the information requested is released. It is therefore necessary to look to the effect of the release of the information at issue in order to determine whether that section applies.

Will release of the information:

- ❖ Inhibit future free and frank expressions of opinion?
- ❖ Mean that in the future opinions will be expressed in a different way, and will not be expressed in such a free and frank manner?
- ❖ Mean that similar free and frank expressions of opinion are not recorded adequately in the future?

If an organisation considers that release of the information will have any of these effects, it must be able to explain why that is so.

Some issues to consider:

- ❖ Consider the *overall process* of which the information forms part – for example, whether it is part of a considered consultative process of the early stage of developing policy options. If the information at issue forms part of an early stage of policy development, it can be expected that it is more of a free and frank nature.
- ❖ Consider the nature and content of the information.

What does it actually disclose?

Is there any factual information which could be made available?

Does the information contain free and frank expressions of opinion?

Can the withheld information be described as “*opinion*”, and is that “*opinion*” expressed in a free and frank manner?

Often information of a background or factual nature can be separated from that which contains expressions of opinion.

If the information at issue comprises free and frank expressions of opinion, then it is more likely that disclosure would inhibit such free and frank expression in future similar circumstances.

- ❖ Consult the person(s) who generated the information which is the subject of the request. Why would release of the information inhibit the expression of free and frank opinion by them in the future?

The seniority of the author is relevant to this issue. In general, if the free and frank opinions under consideration are those of senior managers, they would be expected by virtue of their position to continue to express their opinions freely and frankly in the future. However, junior employees might be more likely to be inhibited if their free and frank opinions were released. Professional policy advisers, that is, departmental officials, are expected to be more robust about their opinions than third parties from outside government who volunteer their opinion.

- ❖ If the information is contained in a memorandum or some other form of communication, consider the nature of the *relationship* between the author of the information at issue and the intended recipient of that information.

Is advice or opinion usually conveyed between these persons in a formal manner, or is it often expressed in an informal and frank fashion?

If advice is usually conveyed informally, will release of the information at issue damage such an informal and frank relationship in the future?

- ❖ Is it the content of the information which causes concern or the way in which it has been expressed? Sometimes opinions are expressed in a particularly informal or blunt fashion in order to emphasise an important point. If this is the case, would release of this information cause the author to reconsider the way that such opinions are expressed in the future?

If it is the manner in which the information is expressed that requires protection, rather than the information itself, a summary of the content of the information can often be released without harm.

If the information-holder considers that release of the information will inhibit the future expression of free and frank opinions, and can explain why, section 9(2)(g)(i) may be relevant.

Effective conduct of Public Affairs

Ultimately, this particular section is designed to protect the effective conduct of public affairs. In order for it to apply, there must be sufficient basis to consider that the free and frank expressions of opinion which would be inhibited by the release of information are themselves necessary for the effective conduct of public affairs.

If the generation of such opinions is not necessary, there will be no reason to withhold them under this section.

Some issues to consider:

- ❖ Will decisions be taken without the advantage of having received such free and frank expressions of opinion?

Are such opinions necessary in order to produce robust and good quality advice?

- ❖ Alternatively, will there be a failure to record adequately the reasoning behind decisions?

In this regard, the Danks Committee observed that:³

“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 the decisions will suffer, as will the quality of the record. The processes of Government could become less open and, perhaps, more arbitrary.”

- ❖ In circumstances where it is argued that disclosure will result in opinions being expressed orally rather than being documented in writing, the issue is whether the opinions need to be documented in writing for the effective conduct of public affairs. In some contexts the usefulness of free and frank expression of opinions may well be undermined if they are not recorded in writing. However, in other contexts it may not matter for the effective conduct of public affairs whether the opinions are expressed orally or in writing. Each case will need to be considered on its merits.

Why is the predicted prejudice so likely to occur that it is necessary to withhold the information?

The agency must demonstrate that the predicted prejudice or harm is so likely to occur that it is necessary to withhold the information in order to prevent that harm or prejudice arising. A mere possibility that prejudice could occur is not sufficient to meet the requirement under section 9 that the withholding of the information is *necessary*.

If the agency considers that:

- (a) releasing the information requested will inhibit the generation or expression of free and frank opinions in the future; and
- (b) such free and frank expressions of opinion are necessary to maintain the effective conduct of public affairs;

then section 9(2)(g)(i) may apply to the information.

However, before section 9(2)(g)(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.

If s.9(2)(g)(i) applies, then the agency must assess whether the need to withhold the information 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.

³ General Report, page 19

In the context of section 9(2)(g)(i), the following questions may help to identify such considerations:

- ❖ Is the content of the information such that its release will promote the accountability of ministers or officials?

For example, does it relate to the expenditure of public money or 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.⁴ 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.

The need to withhold information in order to protect the interests set out in section 9(2)(g)(i) needs to be weighed against legitimate public interest considerations favouring disclosure. There is no predetermined formula for deciding which interest will be stronger in a particular case. Rather, each case needs to be considered carefully on its own merits, taking into account the specific context.

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

⁴ 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)(g)(i) OIA and Section 7(2)(f)(i) LGOIMA

Free and Frank Expressions of Opinion

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

1. Does the information contain free and frank expression of opinion?
2. What will be the effect of release of the information? Will it:
 - ❖ Inhibit future free and frank expressions of opinion? Or
 - ❖ Mean that such free and frank expressions of opinion are not recorded adequately in the future?

Why? What is it about this particular information or the circumstances in which it has been generated that makes you think that its release will have this effect?
3. Will these consequences prejudice the effective conduct of public affairs? Why? Will such consequences:
 - ❖ Mean that decisions are taken without the advantage of having received such opinion?
 - ❖ Lead to a failure to record adequately the reasoning behind policy decisions?
4. Is the predicted prejudice so likely to occur that it is *“necessary”* to withhold the information at issue? Why?

If you cannot answer “yes” to questions 1, 2, 3 and 4 above, the section does not apply.

If you have answered “yes” to questions 1, 2, 3 and 4, and can explain why, you should consider whether there are any public interest considerations favouring release which outweigh the need to withhold.

5. Identify any considerations favouring disclosure of the information. The following considerations are often relevant in the context of information withheld under section 9(2)(g)(i):
 - ❖ Is the content of the information such that its release will promote the accountability of ministers or officials? For example, does it relate to the expenditure of public money or does it reveal the factors taken (or not taken) into account in a decision-making process?
 - ❖ Would the release of this information promote the ability of the public to effectively participate in the making and administration of laws and policies?

6. In light of such considerations, is there a public interest in disclosure of the specific information requested?
7. 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.

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

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