

4.9 IMPROPER GAIN OR ADVANTAGE

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Corresponding provision in LGOIMA

Section 9(2)(k) OIA = section 7(2)(j) LGOIMA

When does section 9(2)(k) apply?

Section 9(2)(k)¹ provides good reason to withhold official information if, and only if,

- (i) the withholding of the information is necessary to “*prevent the disclosure or use of official information for improper gain or improper advantage*”, and
- (ii) This interest is not “*outweighed by other considerations which render it desirable, in the public interest to make that information available.*”²

Both of these elements must be satisfied before section 9(2)(k) provides good reason to withhold official information.

Is it necessary to withhold information in order to prevent the disclosure or use of official information for improper gain or improper advantage?

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

- (i) Decide whether disclosure or use of the requested information would result in an improper gain or advantage. In particular, an agency must be able to demonstrate that:
 - ❖ the information will confer an advantage or gain if released; and,
 - ❖ that advantage or gain would be improper.

Assessing whether a gain or advantage is “*improper*” is not easy because section 9(2)(k) is directly concerned with the use of information once it has been disclosed and requesters do not have to specify or justify the purpose for which the information is sought.

In commenting on this provision, the Danks Committee said:³

“... Not all disclosure or use of official information for advantage or gain is objectionable; much information of this character is designed to assist individuals and businesses to their advantage. It seems impossible in a succinct statement to spell out precisely the circumstances in which the exception should apply: the word ‘improper’ in general appears adequate.”

In this regard, the word “*improper*” is defined in the Concise Oxford Dictionary as meaning, “*...not in accordance with accepted rules of behaviour, inaccurate, wrong....*” The word “*improper*” has also been held by the courts to import an element of illegality or moral turpitude.⁴ To support such an inference a close examination of the facts will usually be called for.

An agency wishing to rely upon section 9(2)(k) will have to demonstrate that any advantage to be gained by the requester through the release of information is “*improper*” in the sense indicated above. In other words, it is not sufficient for the

¹ Section 7(2)(j) LGOIMA

² Section 9(1) OIA, section 7(1) LGOIMA

³ Supplementary Report, page 68

⁴ *Waitemata County v Expans Holdings Ltd* [1975] 1 NZLR 34, 46

purposes of the section to argue that requested information is not relevant to the concerns of a requester or simply that the information might be used to the advantage of the requester.

For example, in a case involving the release of statistical information, the Ombudsman stated:⁵

“I had very great difficulty in following the argument that use of statistical information could be improper. It might lend itself to a variety of interpretations and each interpretation might lead to other consequences. However, while the interpretation of the data in a particular way might be unacceptable to the Minister, the department or interested groups, I could not see that it constituted impropriety.”

In a case involving a request for a copy of the Seventh Form Calculus notes used by a Correspondence School, the Ombudsman concluded that disclosure of the calculus notes would constitute an improper gain or advantage for the requester.⁶ This was on the grounds that the material had been compiled using the skill and judgment of the school staff and as the requester was not enrolled at the school, provision of the information would have given the requester an advantage or gain to which he was not entitled.

In a case where disclosure of the information at issue would have enabled beneficiaries and recipients of the Rest Home Subsidy to obtain a benefit to which they were not legally entitled, the Ombudsman formed the view that if something was illegal, it was also improper.

- (ii) Assess how likely it is that the disclosure of the requested information would cause the predicted prejudice or harm to occur.

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

Section 16⁷ of the OIA recognises that there are situations where disclosure of documents will prejudice the interests protected by the Act while at the same time allowing a requester to inspect a document will not. This is clear from section 16(2) which provides that an agency shall make information available in the way preferred by the requester unless to do so would “*prejudice the interests protected by ... section 9 of this Act.*” In turn section 16(1)(a) provides that one of the ways in which information may be made available is “[b]y giving the person a reasonable opportunity to inspect the document.”

In other words, before relying upon section 9(2)(k) to withhold information an agency should also consider whether it is able to make the information available to the requester in another way which would avoid the prejudice or harm protected by that section.

⁵ 6th Compendium of Case Notes of the Ombudsmen (1985) 106

⁶ 11th Compendium of Case Notes of the Ombudsmen (1998) 134

⁷ Section 15 LGOIMA

Assess whether the interest identified 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 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 of the 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.

The interest in favour of withholding the information needs 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)(k) OIA and Section 7(2)(j) LGOIMA

Improper Gain or Advantage

Always begin with the principle that the information requested *“shall be made available unless there is good reason for withholding it”*

1. Decide whether the information, if released, could be used to obtain a gain or advantage.
2. Decide whether that gain or advantage would be improper.
3. Assess how likely it is that the disclosure of the requested information would result in an improper gain or advantage.

If it is so likely that the information at issue could be used or disclosed for improper gain or advantage, that it is necessary to withhold that information, then section 9(2)(k) 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 the information.

4. Identify any considerations favouring disclosure of the information.
5. In light of such considerations, is there a public interest in disclosure of the specific 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.

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

If no, advise the requester of the decision to withhold the information.