

PART 2C PRIVACY

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Corresponding provisions in LGOIMA

Section 9(2)(a) OIA = section 7(2)(a) LGOIMA

Section 27(1)(b) OIA = section 26(1)(b) LGOIMA

Appendix

Consultation procedures between the Ombudsmen and the Privacy Commissioner

What is Personal Information?

The first issue when considering whether release of certain information might infringe personal privacy is to assess whether the information requested is (or contains) personal information about a natural person.

Both the OIA and the Privacy Act (PA) define what is meant by "*personal information*". The OIA sets out the following definitions:

- ❖ Personal information - "*any official information held about an identifiable person*".
- ❖ Person - includes "*a corporation sole, and also a body of persons, whether corporate or unincorporate*".
- ❖ Official information - subject to certain exclusions specified in section 2 means "*any information held by*" an agency.

The PA provides the following definitions:

- ❖ Personal information - "*information about an identifiable individual; and includes information contained in any register of deaths kept under the Births and Deaths Registration Act 1951*".
- ❖ Individual - "*a natural person, other than a deceased natural person*".

How to determine which Act applies to a particular request

As a general rule:

- ❖ requests for personal information about persons *other than the requester*, and which is held by an agency subject to the official information legislation, must be considered under the *Official Information Act or the Local Government Official Information and Meetings Act*,
- ❖ requests by, or on behalf of, *natural persons* who are New Zealand citizens, permanent residents of New Zealand, or in New Zealand, for personal information *about themselves*, must be considered under the *Privacy Act*, and
- ❖ requests by, or on behalf of, *bodies corporate* for personal information *about themselves*, must be considered under the *Official Information Act or the Local Government Official Information and Meetings Act*.

Deciding whether personal information is covered by the PA or the OIA can sometimes be difficult. This is primarily because the same document can contain information about more than one person. For example, a CYFS file will often contain information about parents, caregivers and children.

Whether the official information legislation or PA applies will depend upon who is asking for what information. An example is where a request is made for the name of an informant who provided information to an agency about the requester. Such a request can reasonably be paraphrased as "*who said that about me?*" and is, therefore, a request for personal information about the requester to be considered under the PA.

Another example is where a parent makes a request for a file that contains information about the requester and their children. Generally:

- ❖ Information solely about the parent requester should be considered under the PA;
- ❖ Information solely about the children should be considered under the official information legislation;

Where a parent is requesting information about their child on behalf of that child and with that child's informed consent, the parent is acting as the child's agent and the request should be considered under the PA. Agency relationships may also arise in other contexts.

Having determined which Act applies, the decision on the request must be made in accordance with the requirements of that Act. These guidelines deal only with privacy issues raised under the official information legislation.

Principle of availability

The starting point when considering any request for official information is the principle that information shall be made available unless there is good reason for withholding it.¹

Withholding provisions relating to privacy concerns

There are two provisions in the official information legislation that allow information to be withheld to protect privacy. These are sections 9(2)(a)² and 27(1)(b).³ Each of these sections is discussed separately below.

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

Section 9(2)(a)⁴ provides good reason for withholding information about natural persons if, and only if:

- ❖ the withholding of the information is necessary to "*[p]rotect the privacy of natural persons, including that of deceased natural persons*"; and
- ❖ this interest is not "*outweighed by other considerations which render it desirable, in the public interest, to make that information available*".⁵

Both of these elements must be satisfied before section 9(2)(a) provides good reason for refusing a request.

¹ Section 5 OIA, LGOIMA

² Section 7(2)(a) LGOIMA

³ Section 26(1)(b) LGOIMA

⁴ Section 7(2)(a) LGOIMA

⁵ Section 9(1) OIA, Section 7(1) LGOIMA

Is it necessary to withhold the information "to protect the privacy of natural persons, including that of deceased natural persons"?

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

- (i) Begin with the principle that information "*shall be made available unless there is good reason for withholding it*".
- (ii) Identify whether there is any privacy interest in the information.
- (iii) Assess the strength of the privacy interest and ask whether it is "*necessary*" to withhold the information to protect the privacy of the person to whom it relates. Consider:

- ❖ The nature of the information and what it would reveal about the person(s) to whom it relates.

Section 9(2)(a) is only relevant if the information identifies a particular person or can easily be connected with a particular person.

Certain information may be of a kind that most people would not usually wish to have disclosed (e.g. information about medical or financial affairs). However, consideration must still be given in every case to what that information would reveal about the person concerned - an employment contract, for example, will usually include a mixture of generic terms which may not require protection and more specific terms in which there is a greater privacy interest.

- ❖ The circumstances in which the information came to be held by the agency.

How the information came to be supplied or generated, by whom and for what purpose, are all factors likely to be relevant in assessing whether, and to what extent, disclosure of certain information would infringe a person's privacy.

- ❖ Whether the person to whom the information relates would consent to its disclosure.

While the person concerned does not have a right to veto the release of personal information, his or her views about whether its release would infringe privacy are likely to be relevant. In this regard:

- ♦ if the agency cannot consult the person concerned, it should not be assumed that consent for the release of the information would be forthcoming;
- ♦ if the person consents to release, or expresses the view that he or she does not care whether the information is disclosed, then it is difficult to justify withholding information on the basis that it is "*necessary*" to protect that person's privacy;
- ♦ in the case of children, the agency may itself consult the child or decide that it would be more appropriate, given the age, understanding and/or family circumstances of the child, for a parent or guardian to be consulted;

- if the privacy interests at issue relate to a deceased person, the next of kin may be consulted. In such a case, it may also be necessary to consult the next of kin in their own right as they may have separate privacy concerns as surviving family members.

The fact that a person to whom the information relates does not consent to disclosure does not, in itself, mean that this section applies. The agency must make an objective assessment of the facts and circumstances of the particular case (including the views of the person concerned), before deciding whether this section applies.

- ❖ The extent to which the information is already in the public domain.

If the information requested has already been released or is a matter of public record, then it is difficult to justify withholding it in order to protect the privacy of the individual to whom it relates. However, consideration must be given to the scope or timing of any prior disclosure. If prior disclosure was limited, or significant time has elapsed since that disclosure, then the information may have moved out of the public domain.

If the agency considers that there is a privacy interest in the information requested and that the privacy interest is sufficiently strong that it is necessary to withhold the information to protect the privacy of the person concerned, section 9(2)(a) is likely to apply.

Before section 9(2)(a) provides "*good reason for withholding information*", the agency must go on to assess whether the privacy interest is outweighed by other considerations which render it desirable in the public interest, to make that information available.

Assess whether the privacy interest identified 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 these 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 particular information requested.
- (iii) Finally, consider whether, in the circumstances of the particular case, the considerations favouring disclosure, in the public interest, outweigh the need to withhold the information requested to protect personal privacy.

The interest in protecting personal privacy needs to be weighed against the legitimate considerations favouring disclosure, in the public interest, which 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 Part 2D.

When does section 27(1)(b) apply?

Where companies (or other "legal" persons) request personal information about themselves, Part IV of the OIA applies.⁶ This provides that every body corporate which is either incorporated in New Zealand or has a place of business in New Zealand "has a right and shall, on request, be given ... access to any personal information" which is held about it and can readily be retrieved.⁷ The PA only applies to requests by "natural" persons for personal information about themselves.

Section 27(1)(b)⁸ provides that personal information about *the body corporate* making the request may be withheld if, and only if;

"(b) the disclosure of the information would involve the unwarranted disclosure of the affairs of another person or of a deceased person".

Generally speaking, this section may be relevant when considering requests *by bodies corporate* for personal information *about themselves* which also comprises information about other persons.

In order to decide whether section 27(1)(b) applies, an agency will need to take the following steps:

- (i) Begin with the assumption that information should be made available, taking into account the principle of availability⁹ and the statutory right of access to such information.¹⁰
- (ii) Identify whether releasing the information would involve the disclosure of the "affairs" of another person.
- (iii) Consider whether, notwithstanding the requester's legal right of access, disclosure of such "affairs" would be "unwarranted". Take into account:
 - ❖ The nature of the personal information:
 - ♦ Is the information factual in nature, or already in the public domain? If so, disclosure of this information is unlikely to be unwarranted.
 - ♦ Does the information contain allegations about the requester (serious or trivial), which may have the potential to adversely affect the requester's standing in the community? In this regard, the requester may require the information in order to ascertain how prejudicial the allegations may be and, if necessary, enable the requester to rebut adverse comments. The requester's right to correct such information¹¹ might also be relevant in such circumstances.

⁶ Part IV LGOIMA

⁷ Section 24 OIA, section 23 LGOIMA

⁸ Section 26(1)(b) LGOIMA

⁹ Section 5 OIA, LGOIMA

¹⁰ Section 24 OIA, section 23 LGOIMA

¹¹ Section 26 OIA, section 25 LGOIMA

- ❖ The circumstances in which the information came to be held by the agency:

Consider how the information came to be recorded - was it volunteered, provided in confidence or under compulsion? Consider whether any other person had control over what was provided or recorded.
 - ❖ The purpose for which it was provided:

Is the information in the form of a complaint about the requester, which the informant would have expected the agency to act upon with the possibility that the information would need to be disclosed to the requester for comment?
 - ❖ How the agency used the information:

Was the information simply used for statistical purposes, or was it used to identify or resolve any issues involving the requester?
- (iv) The fact that disclosure of the information requested would be unwarranted does not necessarily mean that the information should be withheld.

Section 27 states that an agency "*may*" refuse to disclose personal information. This implies that an agency has discretion as to whether it refuses a request even where the grounds for withholding under section 27(1)(b) have been satisfied.

Consideration must therefore be given to whether it is reasonable, in the particular case, for the agency to rely on section 27(1)(b). To do this the agency will need to balance the factors in favour of disclosure and those against. Where there are considerations favouring disclosure and withholding, partial disclosure or disclosure in an alternative form (e.g. summary) may be appropriate.

Because section 27(1)(b) applies to personal information about the requester and the Act provides a legal right of access to such information, an agency should have strong reasons for refusing a request under section 27(1)(b).

Summary Sheet
Section 9(2)(a) OIA & Section 7(2)(a) LGOIMA

Protecting the Privacy of Natural Persons

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

1. Is there a privacy interest in the information requested?
2. Is that privacy interest such that it is necessary to withhold the information to protect the privacy of the person to whom it relates? Consider:
 - ❖ the nature of the information and what it would reveal about the person to whom it relates;
 - ❖ the circumstances in which the information came to be held by the agency;
 - ❖ whether the person to whom the information relates would consent to its disclosure; and
 - ❖ the extent to which the information is already in the public domain.

If you have answered "yes" to questions 1 and 2 above, and can explain why, section 9(2)(a) 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 specific 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 protect personal privacy.

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

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

Summary Sheet
Section 27(1)(b) OIA & Section 26(1)(b) LGOIMA

**Privacy Interest when Requester is a Body Corporate
seeking Information about Itself**

Always proceed on the basis that the requester has a right to be given access to the personal information the agency holds and can readily retrieve.

1. Would release of the information involve the disclosure of the "*affairs*" of another person?

2. Would the disclosure of such "*affairs*" be "*unwarranted*"?

If not, the information should be released.

3. The fact that disclosure of such affairs would be unwarranted does not mean that the information should be withheld. This section states that information "*may*" be withheld - balance the factors favouring disclosure against those favouring withholding, and consider whether it is reasonable in all the circumstances to exercise the discretion to withhold the information.

If it is not reasonable, in all the circumstances, to exercise the discretion to withhold the information, then consider how much information it is reasonable to release to the requester and proceed accordingly.

If it is reasonable to exercise the discretion to refuse the request, advise the requester accordingly.

Consultation procedures between the Ombudsmen and the Privacy Commissioner

The need for the Ombudsmen to consult with the Privacy Commissioner generally arises in two situations.

The first is where a refusal relates to certain information covered by the OIA and other information covered by the PA. The Ombudsmen and the Privacy Commissioner have implemented procedures for consultation between them and their respective staff to ensure that the complaint is processed by the relevant office.

The second situation is where a request has been refused under section 9(2)(a)¹² and an Ombudsman is investigating and reviewing a complaint about the refusal. Section 29B requires an Ombudsman to consult with the Privacy Commissioner under the PA 1993 *“before forming a final opinion under s.30 of [the Official Information Act]”* on the merits of refusing a request under section (2)(a).

Section 29B¹³ is designed to ensure that, where an Ombudsman is inclined to the view that:

- (i) section 9(2)(a) does not apply, or
- (ii) section 9(2)(a) applies but, in the circumstances of the case, the countervailing considerations favouring disclosure outweigh, in the public interest, the need to withhold,

he or she considers the Privacy Commissioner's views on the matter before forming any final views.

¹² Section 7(2)(a) LGOIMA

¹³ Section 26(1)(a) LGOIMA