

2C COMMERCIAL INFORMATION

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Corresponding provisions in LGOIMA

Section 9(2)(b)(i) OIA = section 7(2)(b)(i) LGOIMA

Section 9(2)(b)(ii) OIA = section 7(2)(b)(ii) LGOIMA

Section 9(2)(i) OIA = section 7(2)(h) LGOIMA

INTRODUCTION

In its general report *"Towards Open Government"*, the Danks Committee considered the issue of *"commercial confidences"*. The Committee accepted that there was a need for the protection, in appropriate circumstances, of information that could be considered commercially sensitive. The Committee commented:¹

"Much commercial information is gathered by government, some compulsorily and some voluntarily, for various purposes. As in other fields, confidentiality for such miscellaneous inputs of information will often be a necessary condition for their continuing and effective supply. No general rule about protection will fit; judgments will need to take account of the purposes for which the data is collected...."

"When government itself engages in business a first view might hold that the conventions of confidentiality which are accepted for private commerce should equally apply to publicly operated activities. Where the activity can be readily related to commercial practice, as in buying and selling, it seems reasonable that government should 'do and suffer', on behalf of its taxpayer-shareholders, no less confidentiality than does the private sector."

However, the Committee went on to note:²

"But the matter cannot end there. Not all government business activity has the profit-seeking, competitive colour of private enterprise.... Where commercial, social and economic objectives become conjoined... it is impossible to find a comprehensive rule which will apply, and again judgments on the merits of each case will be called for."

As was ultimately reflected in the legislation enacted in 1982, while in certain circumstances there will be a public interest in withholding commercial information, there is no blanket protection for commercial information as an exempt category or class. The issue of whether such information can properly be withheld must be considered in terms of the statutory reasons for refusal set out in the Act.

Withholding Grounds Relevant to Commercial Information

Section 9(2) of the OIA sets out certain specific grounds for withholding information that may be commercial in nature. The relevant sections state:³

"(2) Subject to sections 6, 7, ...10 and 18 of this Act, this section applies if, and only if, the withholding of information is necessary to -

(b) Protect information where the making available of the information:

*(i) Would **disclose a trade secret**; or*

¹ General Report (1980) 18-19, paragraphs 43 and 45

² Above n1, paragraph 46

³ Sections 7(2)(b), (c), (h) and (i), LGOIMA

- (ii) *Would be likely **unreasonably to prejudice the commercial position** of the person who supplied or who is the subject of the information;*
- (ba) *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;*
 - (ii) *Would be likely **otherwise to damage the public interest**; or....*
 - (i) *Enable a Minister of the Crown or any Department or organisation holding the information to **carry out, without prejudice or disadvantage, commercial activities**; or*
 - (j) *Enable a Minister of the Crown or any Department or organisation holding the information to **carry on, without prejudice or disadvantage, negotiations** (including commercial or industrial negotiations)..."*

(emphasis added)

However, these withholding grounds must be read subject to section 9(1) of the Act, which provides: ⁴

"Where this section applies, good reason for withholding official information exists, for the purposes of section 5 of this Act, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available."

It should also be noted that the grounds for withholding information under sections 9(2)(ba)⁵ and 9(2)(j)⁶ are not limited to the commercial context.

The reference to commercial and industrial negotiations in section 9(2)(j) is inclusive and does not limit the protection provided by that section solely to negotiations of that nature. Similarly, the protection provided by section 9(2)(ba) is not limited solely to information that is "*commercial in confidence*". It can potentially apply to any type of information, that is subject to an obligation of confidence, if the specific elements are made out.

Which Section Applies When?

Before considering whether there is good reason to withhold official information, an agency must first:

⁴ Section 7(1), LGOIMA

⁵ Section 7(2)(c) LGOIMA

⁶ Section 7(2)(i) LGOIMA

- (i) determine what precisely is the prejudice or harm which would be likely to result if the information was disclosed; and,
- (ii) identify the specific withholding ground that provides protection from that harm or prejudice.

In deciding which withholding ground may be appropriate in the circumstances, an agency should give consideration to the nature of the information at issue and how it came to be in the agency's possession. An agency may hold commercial information for a number of different reasons. For example,

- (i) the agency may be involved in a regulatory role and, as such, either:
 - ❖ generates information about private or public sector commercial enterprises; or
 - ❖ requires private or public sector commercial enterprises to supply it with certain information, either voluntarily or under compulsion.
- (ii) the agency may itself be involved in some form of commercial enterprise.

If an agency holds commercial information about a **third party** and the agency is concerned that the release of that information would be likely to prejudice the commercial position of that third party, the agency will need to consider whether section 9(2)(b)(ii) applies. However, if the agency's primary concern is that the information was supplied under compulsion or subject to an obligation of confidence, and that the release of the information would be likely to prejudice the supply of similar information in the future, the agency will need to consider whether section 9(2)(ba) applies.

If an agency's primary concern is that the release of the information would prejudice its ability to carry out **its own commercial activities** or to carry on its own negotiations, the agency should consider whether sections 9(2)(i) or 9(2)(j) apply.

The application of sections 9(2)(b) and 9(2)(i) are discussed in this chapter. The application of sections 9(2)(ba) and 9(2)(j) are discussed in the following chapters.

TRADE SECRETS AND THE COMMERCIAL POSITION OF THIRD PARTIES

Section 9(2)(b)⁷ applies if, and only if, the withholding of information is necessary to:

- "(b) Protect information where the making available of the information-*
- (i) Would disclose a trade secret; or*
 - (ii) Would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information...."*

Generally speaking, sections 9(2)(b)(i) and (ii) are primarily aimed at information, held by an agency, that relates to the commercial interests of third parties.

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

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

- (i) The withholding of the information is "*necessary*" to prevent the disclosure of a trade secret; and,
- (ii) the interest in favour of withholding the information is not "*outweighed by other considerations which render it desirable in the public interest to make the information available*".⁸

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

Is it "*necessary*" to withhold the information at issue to prevent the disclosure of a trade secret?

In order to answer this question, an agency will need to consider whether the information at issue amounts to a "*trade secret*" and whether it is "*necessary*" to withhold the information to prevent the disclosure of that trade secret.

In this regard, it may be helpful to consider certain criteria laid down by the Australian courts for determining whether information amounts to a trade secret.

"An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are:

- (1) the extent to which the information is known outside of his business;*
- (2) the extent to which it is known by employees and others involved in his business;*
- (3) the extent of measures taken by him to guard the secrecy of the information;*

⁷ Section 7(b)(i) and (ii), LGOIMA

⁸ Section 9(1) OIA, section 7(1) LGOIMA

- (4) *the value of the information to him and to his contemporaries;*
- (5) *the amount of effort or money expended by him in developing the information;*
- (6) *the ease or difficulty with which the information could be properly acquired or duplicated by others.*⁹

It should also be noted that an agency does not need to describe or prove the particular harm to the business interests of the person who supplied or who is the subject of the information at issue. Rather it is assumed that any disclosure of trade secrets is, in itself, damaging.

If the agency is satisfied that it is necessary to withhold the information at issue to prevent the disclosure of a trade secret, section 9(2)(b)(i) is likely to apply.

Before section 9(2)(b)(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.

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 the 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.
- (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 in order to protect the trade secret.

Issues to consider when identifying and assessing the strength of public interest considerations are discussed further in Part 2D.

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

Section 9(2)(b)(ii) provides good reason for withholding official information if, and only if:

- ❖ The withholding is necessary to protect information where the making available of that information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; and,
- ❖ This interest in favour of withholding information is not "*outweighed by other considerations which render it desirable, in the public interest, to make that information available.*"

⁹ *Ansell Rubber Co. Pty Ltd v Allied Rubber Industries Pty Ltd* (1967) VR 37, 50

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

Is withholding "necessary" to protect information where the making available of that information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information?

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

(i) Consider whether the information at issue relates to the "*commercial position*" of the person who is the subject of the information or who supplied the information.

(a) The first issue to consider is the meaning of "*commercial*". The Ombudsmen are of the view that, in order to be "*commercial*", activities must be undertaken for the purpose of making a profit. This interpretation is based on:

- ❖ Dictionary definitions of the word "*commercial*", which refer to the conduct of commerce and trade for the purposes of profit and loss; and
- ❖ Case law which has established that a profit motive is implied by the term "*commercial*" activities. For example, in *Calgary (City) v Alberta (Assessment Appeal Board)*, the Court, citing other Canadian case law, stated that:¹⁰

"...whatever other attributes an activity may have it is not a commercial activity unless in addition it has as its predominant purpose the making of a profit."

It is therefore considered that a profit motive is a pre-requisite for the conduct of "*commercial*" activities.

A distinction is recognised at law between financial motives and "*commercial*" motives. Prudent management of the financial position of an organisation does not establish that there is a "*commercial*" motivation.

The status of an organisation is not always relevant – for example, a charitable organisation may conduct activities in order to earn a profit, even though those profits are then applied for charitable purposes.

(b) Once it is established that the purpose is "*commercial*", the agency must consider whether the person who supplied or is the subject of the information has a "*commercial position*".

In this regard, the person's activities are relevant. An involvement in commercial activities is a logical pre-requisite to the existence of a

¹⁰ (1987) 77 AR 23 (QB); See also *Mayor of Timaru v South Canterbury Electric Power Board* [1928] NZLR 174; *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405; *Commissioner of Inland Revenue v Carey's (Petone and Miramar) Limited* [1963] NZLR 450; *Commissioner of Inland Revenue v United Dominions Trust Ltd* [1973] 2 NZLR 555 (CA); *Bevan Investments Ltd v Blackhall and Struthers (No 2)* [1978] 2 NZLR 97 (CA); *Lowe v Commissioner of Inland Revenue* [1981] 1 NZLR 326 (CA); *New Zealand Rail Ltd v Port Marlborough New Zealand Ltd* [1993] 2 NZLR 641 (CA) ; *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278 (CA).

commercial position. However, this does not mean that it is necessary for there to be prejudice to a person's commercial activities before it can be said that the commercial position has been prejudiced. Nor does it mean that the information at issue must relate to the commercial activities of the person before it can be said that release of the information would be likely to prejudice the person's commercial position.

For example, a tertiary institution may conduct commercial activities by tendering for research contracts on the global market. If the release of information diminished the reputation and global standing of the university, its commercial position in respect of those activities may be prejudiced, whatever the subject of the information at issue.

- (ii) Identify the prejudice that would likely result to that commercial position if the requested information were to be made available.

The agency must be able to explain precisely how the predicted harm or damage would be likely to result if the requested information was released. This includes the possibility of future harm, which, at the present time, might not be quantifiable.

The likelihood and nature of prejudice to a third party's commercial position cannot be established by a simple assertion made by the holder of the information that such prejudice would be likely to arise. Direct consultation with the third party or parties may be necessary in order to establish the basis for this concern. However, although the views of the third party may be relevant to any consideration of the prejudice which would be likely to result if the information were released, it is not open to an agency to refuse a request simply because the third party does not consent to disclosure.

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

A simple assertion that the release of the information would be likely to prejudice the commercial position of the person to whom the information relates 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.*"¹¹ Accordingly, it is necessary for an agency to identify exactly how the prejudice would be likely to occur.

- (iv) Explain why that prejudice would be unreasonable.

An agency should not focus solely on the quantum of harm that is likely to result if the information were released but also turn its mind to whether, in the circumstances of the case, the likely prejudice would be unreasonable.

Factors to consider at this stage include the nature of the information, the circumstances in which it was obtained, the current relevance of the information and the likelihood that the information is of a type which the person would not want to have disclosed without their consent.

¹¹ *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 391

- (v) Explain why disclosure of the requested 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 the information in order to prevent that prejudice or harm from arising. A mere possibility that the prejudice *could* occur is not sufficient to meet the requirement under section 9 that the withholding of the information is *necessary*.

If the agency is satisfied that:

- ❖ the information relates to the commercial position of the person who supplied, or who is the subject of, the information; and
- ❖ that it is necessary to withhold the information because, if released, it would be likely unreasonably to prejudice the commercial position of the person who supplied, or who is the subject of, the information,

section 9(2)(b)(ii) is likely to apply.

Before section 9(2)(b)(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.

Assess 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 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.

The interests in favour of withholding the information need to be weighed against the legitimate considerations favouring disclosure, in the public interest, 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 Part 2D.

Section 9(2)(b)(ii) in practice - Requests for tender information

When an agency receives a request for tender information, a useful starting point is to establish the:

- ❖ particular market activity to which the information relates;
- ❖ characteristics of that market activity, e.g. the number of competitors and degree of competition;
- ❖ criteria on which the tender contracts are awarded and how the information at issue relates to those criteria; and
- ❖ degree to which the information reveals a tenderer's pricing strategy which, if released, would allow a competitor to obtain a competitive advantage.

The answers to these questions will assist in the assessment of the:

- ❖ precise nature of the prejudice which the public sector agency predicts would result from disclosure;
- ❖ likelihood of such a prejudice occurring; and
- ❖ reasonableness of that prejudice.

The Ombudsmen have generally accepted that, where disclosure of tender information would be likely to reveal a tenderer's pricing/market strategy in a competitive market, such information is protected by section 9(2)(b)(ii). However, in respect of requests for total tender prices (as opposed to details of how the total price is made up) and the identities of successful and unsuccessful tenderers, the Ombudsman would have to be persuaded in each particular case that such information requires protection under the official information legislation.

The public interest consideration identified as favouring disclosure of information in such cases is the interest in public sector tendering procedures being seen to be beyond reproach. Integrity and transparency in the tendering process is important. Release of adequate information about the successful and unsuccessful bids assists in achieving these objectives.

COMMERCIAL ACTIVITIES

Section 9(2)(i)¹² applies, if and only if, the withholding of information is necessary to:

- "(i) *Enable a Minister of the Crown or Department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities...*"

Generally speaking, this section recognises that it is in the public interest for those subject to the Act to be able to carry out commercial activities without prejudice or disadvantage.

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

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

- (i) the withholding of the information is necessary to "[e]nable a Minister of the Crown or any Department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities...."; and
- (ii) this interest is not "outweighed by other considerations which render it desirable, in the public interest, to make that information available".

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

Is it necessary to withhold the information to enable the agency holding the information to carry out, without prejudice or disadvantage, commercial activities?

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

- (i) Consider whether the information at issue relates to the "commercial activities" of the person who is the subject of the information or who supplied the information.
 - (a) The first issue to consider is the meaning of "commercial". The Ombudsmen are of the view that in order to be "commercial", activities must be undertaken for the purpose of making a profit. This interpretation is based on:
 - ❖ Dictionary definitions of the word "commercial", which refer to the conduct of commerce and trade for the purposes of profit and loss; and,
 - ❖ Case law, which has established that a profit motive is implied by the term "commercial" activities. For example, in *Calgary (City) v Alberta (Assessment Appeal Board)*, the Court, citing other Canadian case law, stated that:¹³

¹² Section 7(2)(h) LGOIMA

¹³ (1987) 77 AR 23 (QB); See also *Mayor of Timaru v South Canterbury Electric Power Board* [1928] NZLR 174; *M K Hunt Foundation Ltd v Commissioner of Inland Revenue* [1961] NZLR 405; *Commissioner of Inland Revenue v Carey's (Petone and Miramar) Limited* [1963] NZLR 450; *Commissioner of Inland Revenue v United Dominions Trust Ltd* [1973] 2 NZLR 555 (CA); *Bevan Investments Ltd v Blackhall and Struthers (No 2)* [1978] 2 NZLR 97 (CA); *Lowe v Commissioner of Inland Revenue* [1981] 1 NZLR 326 (CA); *New Zealand Rail Ltd v Port*

“...whatever other attributes an activity may have it is not a commercial activity unless in addition it has as its predominant purpose the making of a profit.”

It is therefore considered that a profit motive is a pre-requisite for the conduct of “*commercial*” activities.

A distinction is recognised at law between financial motives and “*commercial*” motives. Prudent management of the financial position of an organisation does not establish that there is a “*commercial*” motivation.

The status of an organisation is not always relevant – for example, a charitable organisation may conduct activities in order to earn a profit, even though those profits are then applied for charitable purposes.

- (b) Once it is established that the purpose is “*commercial*”, the agency must identify the relevant “*commercial activities*.”
- (ii) Identify the prejudice or disadvantage that might result to those commercial activities if the information were to be made available.

The agency must identify the harm or damage that would result if the information at issue was released. This includes the possibility of future harm, which, at the present time, is not quantifiable.

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

A simple assertion that release of the information would prejudice the commercial activities of the agency that holds the information is not sufficient. The agency will need to explain exactly how the prejudice would occur.

- (iv) Explain why disclosure of the requested information would be so likely to cause the predicted prejudice or disadvantage 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 the information in order to prevent that prejudice or harm from arising. A mere possibility that the prejudice *could* occur is not sufficient to meet the requirement under section 9 that the withholding of the information is *necessary*.

If the agency is satisfied that the information requested relates to its commercial activities and that it is necessary to withhold the information to enable it to carry out those activities, without prejudice or disadvantage, section 9(2)(i) is likely to apply.

Before section 9(2)(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.

Assess whether the interest 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, the 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, satisfy those considerations favouring disclosure. 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.

The interests in favour of withholding the information need to be weighed against the legitimate considerations favouring disclosure, in the public interest, that have been identified. However, there is no formula for deciding which will be stronger in the particular case. 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.

Section 9(2)(i) in practice - requests for information held by state-owned enterprises (SOEs)

It has been argued in the past that SOEs should not have to reveal the commercial information that they hold because other organisations undertaking similar activities in the private sector would not reveal such information. In other words, the argument is that SOEs should not be disadvantaged, in the market place, by the application of the OIA.

However, SOEs cannot escape the fact that they are subject to the OIA. They are publicly owned assets. In this regard the Privy Council in *Mercury Energy Limited v Electricity Corporation of New Zealand* recognised that a State-Owned Enterprise is a “public body” and “carries on its business in the interests of the public.”¹⁴

Furthermore:

- ❖ Part III of the State-Owned Enterprises Act requires SOEs to be accountable to Parliament;
- ❖ That Act also confirms that SOEs be subject to the OIA; and
- ❖ The Report of the State-Owned Enterprises (OA and OIA) Committee, reviewing the effect of the OA and the OIA on the operation of SOEs, noted that these Acts “provide a measure of accountability for the public that other accountability processes do not”. The Committee recommended that SOEs continue to be subject to those Acts.

¹⁴ [1994] 2 NZLR 385, 388

In summary, SOEs have certain obligations which private sector businesses do not, including the adherence to the principle of availability of information set out in the OIA. This necessarily requires that each request for official information be considered on its merits and does not allow the withholding of information on a "*blanket basis*".

Section 9(2)(i) of the Act does not permit the withholding of information, as a category or class, solely on the basis of any relative disadvantage between State-Owned Enterprises and the private sector stemming from the application of the Act.

The section would only be applicable if, in the particular circumstances of the case, a specific prejudice or disadvantage to the performance of the State-Owned Enterprises commercial activities would flow from releasing the particular information at issue.

These considerations will also be relevant in the context of Local Authority Trading Enterprises, which have been subject to the official information legislation since December 2001.

Summary Sheet
Section 9(2)(b)(i) OIA & Section 7(2)(b)(i) LGOIMA

Trade Secrets

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 at issue amount to a *"trade secret"*?
2. Decide whether it is necessary to withhold that information to prevent the disclosure of a trade secret.

If you have answered "yes" to questions 1 and 2 above, and can explain why, section 9(2)(b)(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 the information.

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.

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

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

Summary Sheet
Section 9(2)(b)(ii) OIA & Section 7(2)(b)(ii) LGOIMA

The Commercial Position of Third Parties

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 at issue relate to the commercial position of the person who is the subject of the information or who supplied the information.
2. Identify the prejudice that would likely result to that commercial position if the requested information were to be made available.
3. Assess how likely it is that disclosure of the information at issue would cause the predicted prejudice to occur.
4. Consider whether that prejudice would be unreasonable.

If the predicted prejudice is unreasonable and is so likely to occur that it is necessary to withhold the information, then section 9(2)(b)(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 the information.

5. Identify any considerations favouring disclosure of the information.
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 yes, release sufficient information to meet the public interest in disclosure

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

Summary Sheet
Section 9(2)(i) OIA & Section 7(2)(h) LGOIMA

Commercial Activities

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

1. Identify the commercial activities carried out by the agency holding the information at issue.
2. Identify the prejudice or disadvantage that might result to those commercial activities if the information were to be made available.
3. Assess how likely it is that the disclosure of the requested information would cause the predicted prejudice or disadvantage to occur.

If the predicted prejudice or disadvantage is so likely to occur that it is necessary to withhold the information, then section 9(2)(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 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 not, advise the requester of the decision to withhold the information.