

2C NEGOTIATIONS

In this Guideline

- ❖ When does Section 9(2)(j) Apply
- ❖ Section 9(2)(j) Summary Sheet

Corresponding provision in LGOIMA

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

When Does Section 9(2)(j) Apply?

Section 9(2)(j) provides good reason for withhold information if, and only, if:

- ❖ The withholding of the information is necessary to “*enable a Minister of the Crown or any Department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations)*”¹; and,
- ❖ 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)(j) provides good reason for refusing a request.

Is it necessary to withhold information to enable the agency holding the information to carry on, without prejudice or disadvantage, negotiations?

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

- (i) Identify the specific negotiations which are likely to be prejudiced by release of the information at issue.

The negotiations must either be current or reasonably contemplated by the agency. This will usually be a matter of fact to be established in each case.

The negotiations do not necessarily need to be commercial or industrial negotiations. The reference to commercial and industrial negotiations in section 9(2)(j) is inclusive and does not limit the protection accorded by the section solely to negotiations of that nature.

- (ii) Identify the prejudice or disadvantage that might result to those negotiations if the information were disclosed.

Section 9(2)(j) does not provide good reason to withhold all information relating to particular negotiations. It only protects information, disclosure of which would be so likely to prejudice or disadvantage the agency in their negotiations, that it is necessary to withhold that information. Whether such prejudice or disadvantage will occur will very much depend on:

- ❖ the precise nature of the information at issue; and,
- ❖ the relevance of that information to the actual issues under negotiation.

The agency must be able to explain precisely how the prejudice will occur.

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

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 prejudice or harm from arising. A mere possibility that prejudice *could* occur is not

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

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

sufficient to meet the requirement under section 9 that the withholding of the information is *necessary*.

If the agency is satisfied that it is necessary to withhold information to enable it to carry on negotiations, without prejudice or disadvantage, then section 9(2)(j) may apply.

Before section 9(2)(j) 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, 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 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 requested to enable the agency to carry on negotiations without prejudice or disadvantage.

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 Part 2D.

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

Negotiations

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

1. Identify the particular negotiations at issue.
2. Identify the prejudice or disadvantage that the agency believes would result to those negotiations if the information were disclosed and explain how it would occur.
3. Assess how likely it is that the disclosure of the requested information could 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)(j) 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 no, advise the requester of the decision to withhold the information.