

Request for the Callinan report on David Bain's compensation claim

Legislation	Official Information Act, s 9(2)(h), 9(1)
Agency	Minister of Justice
Ombudsman	Chief Ombudsman Judge Peter Boshier
Case number(s)	423555
Date	July 2016

Summary

A requester asked the Minister of Justice, Hon Amy Adams, for a copy of the report by Hon Ian Callinan QC concerning David Bain's claim for compensation for wrongful conviction and imprisonment (the Callinan report). The Minister refused the request under section 9(2)(h) of the Official Information Act (OIA) in order to maintain legal professional privilege.

The Chief Ombudsman formed the opinion that the Callinan report was legally privileged; that privilege had not been waived; and that withholding was therefore necessary in order to maintain privilege. Furthermore, the need to withhold was not outweighed by the public interest in disclosure (section 9(1) OIA refers). The Minister was therefore entitled to refuse the request under section 9(2)(h) of the OIA.

Background

1. On 5 June 2009, David Bain was found not guilty on five counts of murder, of which he had been convicted at his first trial in 1995. Mr Bain had spent 13 years in prison.
2. In March 2010, Mr Bain wrote to the Hon Simon Power, then Minister of Justice, seeking compensation on grounds of wrongful conviction and imprisonment (the claim).

3. Eligibility for such claims is generally assessed by Cabinet, but Mr Bain's case fell outside Cabinet's rules on compensation. However, compensation could be payable if Mr Bain was able to establish his innocence '*on the balance of probabilities*', and if he was considered a '*victim of exceptional circumstances*'.
4. In 2011, given the high-profile and contentious nature of the case, Mr Power tasked an overseas judge, retired Justice of the Supreme Court of Canada Ian Binnie, with preparing a report on the claim. This was delivered in August 2012 to the Hon Judith Collins who had succeeded Mr Power by that date. Justice Binnie concluded that Mr Bain was, '*on the balance of probabilities*', innocent of the murders of his family and should be compensated.
5. Ms Collins sought feedback on the report from the Police and the Solicitor-General and, in addition, commissioned a peer review of Justice Binnie's report by former High Court Judge Robert Fisher. Justice Fisher's critique of the earlier report concluded that Justice Binnie had gone beyond his mandate and that a new report would be required.
6. Mr Bain filed for judicial review of Ms Collins' actions in questioning the original report, alleging breach of natural justice, and of Mr Bain's rights under the New Zealand Bill of Rights Act 1990. This claim was discontinued and, in early 2015, the new (and present) Minister of Justice, the Hon Amy Adams (the Minister), with the support of Cabinet, announced that both reports would be put aside, with a new report to be commissioned. Ms Adams advised that Justice Callinan, a retired Australian Judge, would provide a report to assist her in providing advice to Cabinet on the merits of the claim.
7. Justice Callinan delivered his report to the Minister in January 2016 and, in February 2016, the requester sought a copy of the report. That same month, a newspaper reported the alleged conclusion of the Callinan report, which it said had been leaked.
8. The Minister refused the request for the Callinan report in reliance on section 9(2)(h) of the OIA, because withholding was necessary to '*maintain legal professional privilege*'.

Investigation

9. The Chief Ombudsman notified the Minister of the complaint and sought a copy of the Callinan report and an explanation of the reasons for withholding it.
10. Section 9(2)(h) of the OIA provides good reason to withhold official information if, and only if:
 - a. it is '*necessary*' to '*maintain legal professional privilege*'; and
 - b. this interest is not outweighed by other considerations which render it desirable, in the public interest, to make the information available (section 9(1) of the OIA).
11. Generally, the withholding of legally privileged information will be necessary to maintain the privilege, unless it has been waived.

12. Accordingly, the Chief Ombudsman considered three issues:
 - a. Was the Callinan report legally privileged?
 - b. Had privilege been waived?
 - c. Was the need to withhold the report in order to maintain legal privilege outweighed by the public interest in release?

Legal privilege

13. Legal professional privilege is a public policy privilege designed to protect confidential communications between solicitor and client. It is based on the impossibility of conducting legal business without professional assistance and the need for full and unreserved confidence between adviser and client in order to receive that assistance effectively.
14. There are two types of legal privilege: solicitor-client privilege and litigation privilege. Litigation privilege was not relevant here. Solicitor-client privilege applies to confidential communications between legal advisor and client, where the legal advisor is acting in a legal capacity, and the communications are for the purposes of obtaining or giving legal advice.
15. Having considered the content of the information at issue, the Chief Ombudsman formed the opinion that the Minister's clear purpose in commissioning the Callinan report was to seek legal advice that would, in turn, enable her to advise Cabinet on the claim. The questions addressed in the Callinan report were inherently legal questions, and the conclusions therefore legal advice. The fact that it was Cabinet that would make a final decision on Mr Bain's claim did not affect the nature of the advice to the Minister.

Waiver

16. In certain circumstances, release of information in respect of which legal professional privilege may have been claimed, can amount to 'waiver' of that privilege. Such waiver can be either express or implied.
17. In his complaint, the requester stated:

The government has already had one report from retired Judge Ian Binnie and released the detail of that. They have therefore already set aside privilege on legal advice being sought in relation to the David Bain compensation matter...

The key finding of the report has been leaked and the government has stated that the release of this will not affect the outcome of their decision. As this is the case then the details of the report that lead to the conclusion, which has been leaked, should also be made available to me.
18. The Chief Ombudsman rejected the argument that the earlier release of Justice Binnie's report could determine whether privilege in the Callinan report was waived.

19. In addition, involuntary disclosure, such as leaking of an otherwise legally privileged document, does not as such amount to waiver of the privilege or mean the privilege is lost.
20. The Minister advised she held no information indicating that a leak had occurred, and to the best of her knowledge, the information was not in the public domain. No information was given indicating a leak occurred or the circumstances of a leak (if it occurred).
21. The strength of legal professional privilege has often been recognised by the Courts and its principles are well settled. The requester provided no evidence indicating the Minister (or anyone on her behalf) waived the Crown's privilege in the Callinan report, and the Minister assured the Chief Ombudsman she had not done so. Whether waiver has occurred, as the Court of Appeal stated in *Ophthalmological Society of New Zealand Inc v Commerce Commission Inc*,¹ involves an assessment of whether a party's use of privileged material destroyed its confidentiality or unfairly abused the privilege. There was no evidence that the Minister acted in that way.
22. The Chief Ombudsman accepted the Minister's assurance that the requested information was kept confidential, and remained confidential, except in the respect that it was disclosed to affected parties. That disclosure is protected from further disclosure by a subset of professional legal privilege: '*common interest privilege*'.²
23. Accordingly, the Chief Ombudsman concluded that the Minister had not waived the Crown's privilege to the requested information, and it was not in the public domain.

Public interest

24. The Chief Ombudsman then considered whether the need to withhold the Callinan report in order to maintain legal professional privilege was outweighed by the public interest in release (section 9(1) of the OIA).
25. The requester submitted:

The issue of David Bain's conviction, acquittal and subsequent claim to the government for compensation are matters of considerable public interest.

...

The information being requested is the very type of information that we should have access to under the OIA. Information that underpins government decision making and the spending or potential spending of taxpayer funds.

¹ [2003] 2 NZLR 145.

² See the discussion of '*common interest privilege*' in *Fresh Direct Limited v JM Batten and Associates CIV- 2008-404-004757* (High Court) and *Water Guard NZ Ltd v Cynortic Water Systems Ltd* [2015] NZHC 1021.

26. The Chief Ombudsman stated that:
 - a. while the requester and the general public may well be interested in the nature and content of the Callinan report, that is not the test in the terms of section 9(1) of the OIA; and
 - b. the Minister is entitled to seek legal advice to assist her thinking as to how she should address the question of compensation and formulate her advice to her Cabinet colleagues.
27. The requester's submission about accountability for information underpinning Government decision making on expenditure of taxpayer funds was premature in the light of fact that Cabinet had not at the time made a decision on Mr Bain's claim for compensation.
28. The Chief Ombudsman was not persuaded that the need to maintain legal professional privilege to assist the Minister in providing advice to Cabinet was outweighed by other considerations favouring disclosure of the Callinan report in the public interest.

Outcome

29. For the reasons outlined above, the Chief Ombudsman concluded that the Minister was entitled to refuse the request under section 9(2)(h) of the OIA.
30. The Chief Ombudsman noted that while the countervailing public interest under section 9(1) of the OIA did not outweigh the need to withhold in order to maintain legal professional privilege, once Cabinet had made a decision on the claim, it was possible that other factors would need consideration, should a request for the report be refused at that time.
31. The Government subsequently announced its decision on Mr Bain's compensation claim and released the Callinan report.³

³ See <https://national.org.nz/news/2016-08-02-conclusion-reached-in-bain-compensation-case>.