

Request for report of interviews

Legislation	Official Information Act 1982, s 9(2)(ba)(i)
Agency	Minister of Justice
Ombudsman	Sir Brian Elwood
Case number(s)	W39272, W39579
Date	February 1999

Request for report of interviews—interviews conducted subject to obligation of confidence except to extent information provided might be used for prosecution purposes—report not admissible in evidence—public interest in contents met by details disclosed in public trial

Two requests were made to the Minister of Justice for the report by a Queen’s Counsel (QC) appointed to investigate the conduct of two District Court Judges. The requests were refused on a variety of grounds identified in the OIA, and the requesters sought reviews of those decisions.

The investigation and review focused on whether s 9(2)(ba)(i) of the OIA applied to the information at issue. It was clear that, before interviewing the two judges concerned, the QC had explained that anything they said would be reported to the Chief District Court Judge and might be used against them. The Chief District Court Judge had also told them that the QC’s report would be available to him and also to the Minister. Accordingly, the obligation of confidence attaching to the discussions was not comprehensive.

The QC explained that he had always regarded his investigation and report as being done in the strictest confidence. He believed the very nature of the subject matter of the investigation made this clear and that to disclose any information not already discussed in the relevant judgment of the Court would breach the assurances of confidentiality given.

The two interviewees were consulted about their expectations as to the confidentiality of the QC’s report. Both advised that they understood that their interview was part of an internal investigation. Apart from being provided to the Chief District Court Judge, they believed the only circumstances in which the report could be used would be if a prosecution were commenced. Otherwise, they both had an expectation of total confidentiality in respect of what was discussed and ultimately reported. They said they had been instructed not to discuss

the investigation with anyone else and they also referred to the fact that the report itself had been ruled inadmissible in the subsequent court proceedings.

It was clear from the comments provided by all the parties involved that there was in fact an expectation that the interviews were being conducted on a confidential basis, except to the extent that the information supplied might be used for the purpose of prosecution. In the circumstances, the view was formed that the information at issue was subject to an obligation of confidence and that consent to disclosure of the information to a limited class of persons and for a limited purpose could not be seen as total waiver of confidentiality.

It was then necessary to consider whether release of the information would be likely to prejudice the interests identified in section 9(2)(ba)(i). It was concluded that disclosure would be likely to prejudice the supply of similar information in the future and that it was in the public interest that such information should continue to be supplied. Factors taken into account in reaching this view were that it is in the public interest for the process of investigation on behalf of the executive arm of government into possible judicial misconduct to be conducted in as full and frank a manner as possible. The process is therefore always likely to require and should allow for information to be supplied on a confidential basis by judges, subject only to the limited circumstances of disclosure that applied in these cases. If investigations cannot be conducted on this basis, those being interviewed are likely to be reluctant interviewees, and the information available to the investigator is therefore likely to be less full and frank. This would not be in the public interest. It was therefore concluded that section 9(2)(ba)(i) did apply to the information at issue.

Consideration was then given to whether there were any countervailing public interest considerations which outweighed the interest in withholding the information. Clearly there is a strong public interest in the public having sufficient information to enable it to have confidence that justice is not only done but is seen to be done, particularly where members or former members of the judiciary are concerned. In this case, part of the information contained in the report in question had been discussed in considerable detail during a public trial. The legitimate public interest in aspects of the information contained in the report appeared to have been met by the publication of the substance of the report in the full and detailed judgment delivered during part of the proceedings and to which publicity had been given. Accordingly, the view was formed that the interest in withholding the report was not outweighed by the public interest considerations favouring disclosure. It was therefore concluded that section 9(2)(ba)(i) provided good reason for withholding the report.

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