

David Bain's contribution to legal aid grants - release of some information required in the public interest

Legislation	Official Information Act 1982, sections 9(2)(a) and 9(2)(ba)(i)
Agency	Ministry of Justice (Legal Services Commissioner)
Ombudsman	Chief Ombudsman Judge Peter Boshier
Case number	399726
Date	June 2016

Summary

A journalist made a request under the Official Information Act (OIA) to the Legal Services Commissioner seeking information relating to Mr David Bain's contributions to his legal aid. The Commissioner is an employee of the Ministry of Justice. The request was refused on grounds of privacy (s 9(2)(a) OIA) and confidentiality (s 9(2)(ba)(i) OIA). The Ministry stated it had previously released a significant amount of information about the grants of legal aid, which amounted to \$3.33 million.

Chief Ombudsman Judge Peter Boshier formed the opinion that good reason did not exist to withhold all of the information under the OIA and recommended release of information relating to:

- the criteria under which Mr Bain's grants of legal aid were made;
- whether Mr Bain was required to make any contributions (but not the amount of those contributions);
- the steps the Legal Services Commissioner and its predecessors took to recover contributions (if any);
- and, if relevant, the statutory provisions under which the Legal Services Commissioner and its predecessors exercised their discretion not to enforce recovery of the contributions; and
- the reasons for exercising their discretion under those provisions.

The Ministry released this information to the requester.

Background

1. In February 2015, the Legal Services Commissioner received a request for information relating to grants of legal aid to Mr David Bain, as follows:

Can you tell me please if any of the \$3.33 million legal aid has been repaid by David Cullen Bain or Joe Karam and if so, how much?

What approaches or discussions have there been with Mr Bain, Mr Karam or anyone representing them about repaying legal aid???

Can you please send me copies of any correspondence or notes in relation to this matter with any parties???

If legal aid is not being repaid, what steps are to be taken to see if any can be repaid???

If the government decides to award Mr Bain any compensation, would you expect legal aid to be deducted from any such amount before any payment is made to Mr Bain???

The MoJ website says interest of 8% is charged six months after a case is finalised. Is interest being charged in Mr Bain's case and if not, why not???

2. In March 2015, the Legal Services Commissioner refused the request in reliance on section 9(2)(a) of the OIA to protect Mr Bain's privacy. The requester complained to the Chief Ombudsman about this decision.
3. During the investigation, the Ministry advised that it also considered section 9(2)(ba)(i) of the OIA applied to the information at issue, on the basis that the information was said to be subject to an obligation of confidence.

Application of section 9(2)(a) - privacy

4. Section 9(2)(a) applies if it is 'necessary' to withhold information to protect the privacy of natural persons. An early High Court decision¹ interpreted 'necessary' to mean **reasonably**, rather than **strictly** necessary. More recently, however, the High Court² (without reference to the earlier decision) interpreted 'necessary' to mean **essential**.
5. The Chief Ombudsman preferred the earlier interpretation, namely, that for section 9(2)(a) (or any withholding ground set out in section 9(2) of the OIA) to apply, it must be

¹ *Television New Zealand Ltd v the Ombudsman* [1992] 1NZLR 106, 118 (Heron J).

² *Kelsey and Others v the Minister of Trade* [2015] NZHC 2497, para 141 (Collins J).

reasonably necessary to withhold the information in order to protect the identified privacy interest.

6. The Ministry commented that *'high level information about the total amount of aid paid under Mr Bain's grants'* had previously been released in order to address the public interest. However, in respect of the particular information requested in this instance, the Ministry considered the privacy interest was higher:

... the information requested [here] is more personal, focused as it is on information about Mr Bain's financial circumstances... Legal Aid Services has never released information of this type about anyone granted legal aid. Indeed such information is obtained under an obligation of confidence ... which strengthens the privacy interest in the information.

7. Mr Bain's representative also commented:

... the mere fact of 'quantum', that it is the largest claim of its type, should not have an impact on the principles espoused by the Ministry in support of not releasing such information. ...

It goes without saying that the sole reason for the amount of legal aid required by Mr Bain was to clear his name following the 'substantial miscarriage of justice' (Privy Council decision 10 May 2007) inflicted on him in the High Court trial in 1995. ...

[Mr Bain] should not now suffer further humiliation or adversity, or be treated any differently to any other recipient.

8. For his part, the requester stated:

Seeking this information [was] not ... an invasion of Mr Bain's financial circumstances. Reference to Mr Bain's unspecified personal circumstances and his 'privacy' are all – too – convenient red herrings.

It makes sense that Mr Bain – and anyone else – should be publicly accountable for benefiting from public generosity.

Legal aid is granted on the basis that a recipient should make an effort to pay at least some of it back – and that is fair.

Reference is usually made in annual reports on legal aid repayments, but only in general terms.

Other recipients of public money are required to account for it in much greater detail than is sought by my request.

The public has a vested interest in this aspect of the public justice system but the system is being short-changed by lack of transparency.

9. Section 29B of the OIA requires an Ombudsman, before forming a final opinion in relation to a decision to refuse a request on grounds of privacy, to consult with the

Privacy Commissioner on the merits of refusing the request on these grounds. On consultation, the Privacy Commissioner expressed the view that the privacy interests in the information at issue were strong.

10. Judge Boshier accepted that release of the requested information would infringe Mr Bain's privacy. The provision of information relating to the amounts of any assessed contributions would enable the requester (and others) to make a reasonable guess as to Mr Bain's financial position, as the criteria under which contributions are assessed are public information.

Application of section 9(2)(ba)(i) - obligation of confidence

11. Section 9(2)(ba)(i) provides for withholding information where this is necessary to:

(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

12. The Chief Ombudsman was satisfied that Mr Bain had provided the information at issue in confidence to the Ministry.
13. In reaching this conclusion, the Chief Ombudsman took into account the clause in the current legal aid application form stating that the application is confidential, and the Ministry's long-standing practice of keeping applicants' financial information confidential.
14. The Chief Ombudsman was of the opinion that if the Ministry were to release similar information as a matter of course when requested, there would be a substantial risk of prejudice to the supply of information in the future by legal aid applicants and other information the Ministry requires in support of applications. However, in all the circumstances, Mr Bain's case was not an ordinary one.

Section 9(1) - public interest

15. Having accepted that sections 9(2)(a) and 9(2)(ba)(i) were both engaged in respect of the requested information, the remaining issue to be considered was whether these protected interests were outweighed by factors favouring release of the information in the public interest (see section 9(1) of the OIA).
16. The Chief Ombudsman considered that the factors to be taken into account were:

- the transparency of the administration of the legal aid system relating to Mr Bain's grants; and
 - the accountability of those officials who administer it, including the Legal Services Commissioner.
17. The Chief Ombudsman was of the opinion that the fact that the total amount of Mr Bain's grants was the highest for one person in New Zealand's legal history was relevant and resulted in a high public interest in the information. Undeniably, Mr Bain's legal case attracted significant media attention, and the public has a general interest in the issues raised by his case.
 18. The Chief Ombudsman noted, however, that those matters do not, on their own, determine the public interest under section 9(1). In obtaining the grants of legal aid, Mr Bain was exercising his statutory right to obtain financial assistance to assist him with his defence of the charges brought against him. As the Ministry and Mr Bain's representative commented, the quantum of the grants is indicative of the complexity of the trials and appeals which came before the courts.
 19. Usually, legal aid recipients are entitled to keep their financial affairs as private as possible. However, the Chief Ombudsman observed that there is already a substantial amount of information in the public domain about Mr Bain's financial position, such as:
 - a. at the time of his original arrest, he was a university student, with part time employment delivering newspapers;
 - b. he has spent 13 years in prison; and
 - c. he was ineligible to inherit from his immediate family due to his convictions for murder at his first trial.
 20. In the Chief Ombudsman's opinion, what was important in the interests of transparency and accountability was whether the Legal Services Commissioner (or the Commissioner's predecessors) had assessed Mr Bain's liability to make contributions to his grants in the same way as it assessed other applicants, and in accordance with the same criteria.
 21. Given the significant expenditure of public money in Mr Bain's case, the Chief Ombudsman considered there was a high public interest in the transparency of the administration of his grants of legal aid, assessment, the collection of any contributions and the accountability of officials administering those grants.
 22. In many respects, this was an exceptional case. Generally, legal aid recipients can expect that the Legal Services Commissioner and the Ministry will not release this type of information, particularly in cases such as those coming before the Family Court dealing with private and confidential issues. However, each request must be considered on its merits, having regard to the principle of availability set out in section 5 of the OIA, the protections from disclosure under the OIA, and, if applicable, the countervailing public interest under section 9(1).

23. The Chief Ombudsman formed the opinion that the public interest favoured release of some of the requested information and that this outweighed the interests to be protected by withholding it.

Outcome

For the reasons outlined above, the Chief Ombudsman concluded that good reason did not exist under the OIA to withhold all of the information at issue and the public interest in release of some of the material outweighing the interests of privacy and confidentiality.

The Chief Ombudsman recommended the Ministry release the following information:

- the criteria under which Mr Bain's grants of legal aid were made;
- whether Mr Bain was required to make any contributions (but not the amount of those contributions);
- the steps the Legal Services Commissioner and its predecessors took to recover contributions (if any);
- and, if relevant, the statutory provisions under which the Legal Services Commissioner and its predecessors exercised their discretion not to enforce recovery of the contributions; and
- the reasons for exercising their discretion under those provisions.

The Ministry agreed to release this information to the requester.