

Request for ballistic evidence report provided by Victoria Forensic Science Centre for David Bain trial

Legislation:	Official Information Act 1982, s 9(2)(ba)(ii) (see appendix 1 for full text)
Agency:	New Zealand Police
Complaint about:	Request for ballistic evidence report provided by Victoria Forensic Science Centre for David Bain trial
Ombudsman:	Professor Ron Paterson
Reference number:	389625
Date:	July 2015

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Summary

The complainant made a request to the New Zealand Police (the Police) for a copy of a ballistic evidence report (the report) prepared by Mr Henry Glaser of the Victoria Forensic Science Centre (the VFSC) in 1997 in relation to a homicide investigation into the deaths of five members of the Bain family on 20 June 1995. Mr Joe Karam, Mr David Bain's representative, commissioned the report.

The Police initially refused the request on the basis that it was *"not their document to provide under the provisions of the Official Information Act"*. During my investigation, the Police relied on section 9(2)(ba)(ii) of the Official Information Act 1982 (OIA) to withhold the report, on the basis that it was provided to the Police in confidence, and its release would be likely to damage the public interest in maintaining confidence in the Police as an organisation to be trusted to keep such information confidential.

I formed the opinion that the Police had good reason to withhold the report under section 9(2)(ba)(ii).

Request and refusal

1. In September 2014, the complainant asked the Police to provide a copy of a report *"commissioned [by] an armourer in Melbourne Australia to investigate evidence in the Bain murders"*. In September 2014, the Police advised the complainant that they had a copy of the report, but it was not willing to release it,

"... as although the Police hold a copy it is not their document to provide under the provisions of the Official Information Act."
2. The Police advised the complainant that the author of the report was Mr Henry Glaser, and that it had been commissioned by Mr Joe Karam, Mr Bain's representative. Mr Glaser was at the time a senior constable with the VFSC.
3. During my investigation, the Police advised that they relied on section 9(2)(ba)(ii) of the OIA to withhold the report.

Complaint and investigation

4. In September 2014, the complainant complained to the Ombudsman about the Police refusal of the request.
5. In April 2015, the Ombudsman's investigation of the complaint was notified to the Police.
6. In June 2015, I provided copies of my provisional opinion to the complainant and the Police.
7. Both the complainant and the Police advised that they had no comment to make on my provisional opinion.

Analysis and findings

8. Subject to certain exceptions not relevant to this case, section 9(2)(ba) provides good reason to withhold information–

“ ... if, and only if, the withholding of the information is necessary to–

...

protect information which is subject to an obligation of confidence ... 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; or*
 - ii. would be likely otherwise to damage the public interest;”*
9. As part of the Police homicide investigation into the deaths of five persons on 20 June 1994, the Police sent certain evidence to the VFSC for forensic analysis. In 1997, Mr Bain’s defence counsel engaged the same organisation to conduct ballistic and other tests referred to in the report. It is clear that the report was prepared for Mr Bain’s defence counsel.
10. In 2007, Police obtained the report, along with other documents, directly from the VFSC. At Mr Bain’s retrial in 2009, the Police sought to rely on the work undertaken by the VFSC for Mr Bain’s defence counsel, including matters referred to in the report.
11. The High Court concluded that most of the material obtained by the Police relating to work carried out by VFSC for Mr Bain’s defence counsel (including the report) was the subject of litigation privilege.¹ The Crown was thus not able to adduce this evidence at the trial.
12. The focus of the High Court judgment was on the question of privilege, in particular litigation privilege. However, it also considered whether the VFSC had assumed an obligation of confidence in relation to the work carried out for Mr Bain’s defence counsel.
13. Mr Karam signed a formal ‘Request for Services’ provided by the VFSC under which *“the VFSC agreed to examine, analyse and report on all exhibits provided to it”* and *“Mr Karam agreed to pay the VFSC’s costs for undertaking the work and later did so at a cost of approximately AU\$12,600”*.²

¹ HC Christchurch, CRI 1994-012-217294, 2 March 2009.

² Ibid at [167].

14. Mr DN Gidley, the VFSC Director, circulated to relevant personnel within the VFSC, a memorandum dated 13 August 1997. With reference to this memorandum, the High Court stated:³

“The memorandum makes it clear that, with the approval of the New Zealand Police, the VFSC would be undertaking work for Mr Karam as a private New Zealand citizen and at his cost. The memorandum refers to the high public interest about the case in New Zealand and states that:

... we will proceed as per normal case work with nothing divulged unless to the client who in this case is MR KARAM.” (original emphasis)

15. Mr Glaser undertook (for Mr Karam) an examination of rifle shell cases, lead fragments and the like, certain details of which appeared in a police brief of Mr Glaser’s evidence. The High Court stated:⁴

“[Mr Glaser’s] evidence has never featured in any form in any statement or affidavit lodged to date on behalf of the defence or otherwise. There [was] no basis on which it can be said that there has been any express or implied waiver of privilege in his case.”

16. The High Court observed:⁵

“Given our conclusions in relation to the issue of privilege, it is not strictly necessary for us to determine whether the VFSC assumed an obligation of confidence in relation to the work carried out for the defence in 1997. If it were necessary for us to determine this issue, we would have found that the Request for Services signed by Mr Karam on 31 July 1997 and the terms of Mr Gidley’s internal memorandum of 13 August 1997 were such as to give rise to an obligation of confidence in relation to the results of the work undertaken. The VFSC acknowledged that nothing would be divulged unless to their client (Mr Karam).”

17. The High Court’s conclusion is unequivocal — the results of the work undertaken by the VFSC for Mr Karam were subject to an obligation of confidence.

18. In this case, I must determine whether section 9(2)(ba)(ii) applies to the report.

19. In *Hunt v A*,⁶ the Court of Appeal considered the different circumstances in which third party liability for a breach of confidence may arise. While acknowledging that this was not an easy area of law, it concluded:⁷

³ Ibid at [170].

⁴ Ibid at [237]-[238].

⁵ Ibid at [246].

⁶ [2008] 1 NZLR 368.

⁷ See note 6 above at [92].

“In the current state of the law in New Zealand, it appears to us that the most satisfactory principle to proceed on is to determine whether a third party recipient of confidential information has acted unconscionably in relation to the acquisition of the information or in the way it has been employed.”

*and*⁸

“Clearly the most critical factor in the vast majority of cases will be the state of the defendant’s knowledge. A third party recipient with actual knowledge of the confidence likely faces almost insuperable difficulties; as does somebody acting in ‘wilful blindness’ (as Lord Goff noted in Spycatcher).”

20. In the ‘*Spycatcher*’ case, a House of Lords decision, Lord Goff stated:⁹

“[A] duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all circumstances that he should be precluded from disclosing that information to others.”

21. In my opinion, the fact that the VFSC appears not to have observed its undertaking of confidentiality in respect of its investigations carried out on behalf of Mr Bain’s defence counsel and the report, does not mean that the Police are now free to disclose the information they should not have been given. The report remains confidential on the basis of the principles expressed in *Hunt v A*.
22. In *Commissioner of Police v Ombudsman*,¹⁰ the Court of Appeal interpreted the phrase “*would be likely*” found in section 9 to mean a “*serious or real and substantial risk to a protected interest, a risk that might well eventuate*”.
23. In my opinion, there is a real risk, in terms of section 9(2)(ba)(ii), that the release of the report would be likely to undermine the public interest in maintaining confidence in the Police as an organisation to be trusted to keep such information confidential.
24. Accordingly, I consider that section 9(2)(ba)(ii) applies to the report.

Public interest

25. Having accepted that section 9(2)(ba)(ii) applies to the report, I must consider whether, in terms of section 9(1), the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

⁸ See note 6 above at [94].

⁹ *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281.

¹⁰ [1988] 1 NZLR 385, 391.

26. The issue under section 9(1) is not simply whether there is a “*public interest*” in making the information available, but rather whether any considerations favouring disclosure outweigh the interest that would be protected by withholding the information requested.
27. Section 5 of the OIA recognises the principle that information “*shall be made available unless there is good reason for withholding it*”. In the present case, I am not satisfied that there are any considerations favouring disclosure of the report outweighing the strong interest in maintaining public confidence in the Police as an organisation that can be trusted to keep such information confidential.

Ombudsman’s opinion

28. For the reasons set out above, I have concluded that the Police had good reason to withhold the report under section 9(2)(ba)(ii) of the OIA.

Professor Ron Paterson
Ombudsman

Appendix : Relevant statutory provisions

5. Principle of availability

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

9. Other reasons for withholding official information

- (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, 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.
- (2) Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—
 - (a) protect the privacy of natural persons, including that of deceased natural persons; or
 - (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; or
 - (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; or
 - (ii) would be likely otherwise to damage the public interest; ...