

19 November 2014

Mr K Rees
fyi-request-2126-5471537c@requests.fyi.org.nz

Dear Mr Rees

Request for information relating to Mr Ian Binnie QC

Thank you for your email of 23 October 2013 requesting information about the appointment of Mr Ian Binnie to advise on David Bain's compensation claim.

Your request was:

"I am requesting information about Simon Power's appointment of J. Ian Binnie's employment/selection to review the Bain compensation case.

I would like to know who first put Binnie's name forward to Power, leading to his engagement.

How was Binnie *in particular* selected?

The letter from Power to Binnie setting out the terms of his engagement is already in the public domain.

I am requesting the correspondence between Power and Binnie, that immediately preceded that letter, and/or also any correspondence or minutes of meetings between Bain's representatives and Power that preceded Binnie's appointment."

I address each aspect of your request in turn.

Who first put Mr Binnie's name forward to Minister of Justice Simon Power? How was he selected?

As you are aware, the then Minister, Hon Simon Power, appointed Mr Binnie in November 2011.

Information about who put Mr Binnie's name forward and the selection process is contained in briefings to the Minister of Justice in September and November 2011. Those briefings are subject to legal professional privilege and are, therefore, withheld under section 9(2)(h) of the Official Information Act 1982. Details are listed in the appended table.

Correspondence between Minister Power and Mr Binnie that immediately preceded the Minister's instructions to Mr Binnie

There was no correspondence between the Minister and Mr Binnie prior to the Minister instructing Mr Binnie on the compensation claim.

Correspondence or minutes of meetings between Mr Bain's representatives and Minister Power that preceded Mr Binnie's appointment

There was no meeting between the Minister and Mr Bain's representatives.

There were three items of correspondence, comprising letters from Mr Bain's lawyers on 25 March and 9 April 2010 and the Minister's response to those letters, on 20 April 2010.

The 25 March 2010 letter and supporting affidavit by David Bain have since been published, with deletions, as an Appendix to Mr Binnie's report – http://www.justice.govt.nz/media/in-focus/topic-library/David-Bain-reports/justice-binnie/05Appendices_Tab-A-to-Tab E.pdf/view - see Tab C. The deletions related to paragraph 4 of the letter and a related attachment.

To the extent that the 25 March letter is publicly available, the request is refused under section 18(d) of the Act. The deleted material is withheld under section 6(c) of the Act.

Details of the correspondence are listed in the appended table.

Conclusion

Where information has been withheld in reliance on grounds under section 9 of the Act, I am satisfied that there are no other public interest considerations that render it desirable to make the withheld information available.

You have the right under section 28(3) of the Act to complain to the Ombudsman about the decision to withhold information.

Yours sincerely



Jeff Orr

Chief Legal Counsel

APPENDIX: DOCUMENTS COVERED BY REQUEST

	Document	Deletions/withheld
1	Briefing from Chief Legal Counsel, Ministry of Justice, to Minister of Justice, dated 1 September 2011	Withheld under section 9(2)(h) to maintain legal professional privilege
2	Briefing from Chief Legal Counsel, Ministry of Justice, to Minister of Justice, dated 13 September 2011	Withheld under section 9(2)(h) to maintain legal professional privilege
3	Briefing from Chief Legal Counsel, Ministry of Justice, to Minister of Justice, dated 2 November 2011	Withheld under section 9(2)(h) to maintain legal professional privilege
4	Letter and attachments from Duncan Cotterill, Lawyers, to Minister of Justice, dated 25 March 2010	Refused under section 18(d) to the extent that the letter and attachments are publicly available on the Ministry of Justice website www.justice.govt.nz Paragraph 4 of letter and related attachment withheld under section 6(c) – release likely to prejudice the maintenance of the law
5	Letter from Duncan Cotterill, Lawyers, to Minister of Justice, dated 9 April 2010	Released in full
6	Letter from Minister of Justice to Duncan Cotterill, Lawyers, dated 20 April 2010	Released in full



9 April 2010

The Honourable Simon Power
Minister of Justice
Parliament Office
Private Bag 18888
Parliament Buildings
WELLINGTON 6160

Auckland

Level 1, CPO Building
Queen Elizabeth Square
12 Queen Street
Auckland City 1010

PO Box 5326

Telephone +64 9 309 1948
Facsimile +64 9 309 8275

New Zealand

www.DuncanCotterill.com

Dear Sir

Compensation Claim - David Cullen Bain

1. We write further to our letter of 25 March 2010.
2. You will have observed the immediate media reaction to your announcement that a claim for compensation had been lodged by Mr Bain. It is apparent from the raft of opinions generated by that media coverage from a variety of commentators (including senior members of the legal profession, some of whom were unnamed and remain unknown) that people from all walks have a pre-determined view of Mr Bain's guilt or innocence and his right or not to compensation.
3. In our letter of 25 March 2010, we expressed our grave concern about the ability of any New Zealand legal practitioner, Judge or former Judge to approach the issue of compensation without any knowledge of the case or preconceived notions relating to the case. It was suggested that it would be appropriate for any appointment of an independent inquirer or a Royal Commission of Inquiry to be from outside of New Zealand as occurred in the Royal Commission of Inquiry relating to Mr Thomas' case.
4. In light of the media response to your announcement that a compensation claim had been lodged, we believe that the convening of a Royal Commission of Inquiry, headed by an overseas Judge, is the appropriate way forward in terms of both justice and public perception. Having reviewed the terms of reference of the Thomas inquiry, we respectfully suggest that those terms provide a very suitable framework for such an inquiry.
5. We would be willing to engage with Ministry officials to discuss this matter further. We look forward to hearing from you both in relation to our letter of 25 March 2010 and the matters referred to herein.

Yours faithfully

Duncan McGill
Partner
Mobile +64 21 226 3530
d.mcgill@duncancotterill.com



Office of Hon Simon Power

MP for Rangitikei

Minister of Justice

Minister for State Owned Enterprises

Minister of Commerce

Minister Responsible for the Law Commission

Associate Minister of Finance

Deputy Leader of the House

20 APR 2010

Duncan Cotterill
Lawyers
PO Box 5326
AUCKLAND 1141

Attention: Mr Duncan McGill, Partner

Dear Mr McGill

Compensation Claim – David Cullen Bain

1. I refer to your letter dated 25 March 2010 providing formal notification of a claim by your client, Mr David Bain, for compensation for wrongful conviction and imprisonment, and your subsequent letter of 9 April 2010.
2. As you are aware, there is no legal right to compensation for wrongful conviction and imprisonment in New Zealand. Compensation may, however, be paid at the Government's discretion on an *ex gratia* basis. In the interests of fairness and consistency, Cabinet adopted guidelines in 1998 governing a claimant's eligibility for compensation and the quantum of any payment.

The Cabinet Guidelines

3. The Cabinet Guidelines provide that the category of claimants who are eligible for compensation is limited to those who have had their convictions quashed on appeal without order of retrial, or have received a free pardon. Eligible claimants must establish their innocence on the balance of probabilities to receive compensation.

Cases falling outside the Cabinet Guidelines

4. At the time of adopting the guidelines, Cabinet also decided that the Crown should have a residual discretion to consider claims that fall outside the Cabinet Guidelines in extraordinary circumstances where it is in the interests of justice to do so.
5. Claims under the Crown's residual discretion are assessed on a case-by-case basis. What constitutes "extraordinary circumstances" and "the interests of justice" is decided on the facts of each case.
6. At a minimum, and consistent with the Cabinet Guidelines for eligible claimants, a claimant must establish innocence on the balance of probabilities. But the bar is set higher for claims that fall outside the Cabinet guidelines – something more is required that demonstrates that the circumstances are extraordinary.

7. To qualify as extraordinary, the circumstances must include some feature that takes the applicant's case outside the ordinary run of cases in which appeals have been allowed. Examples of such circumstances include, but are not limited to:
- *unequivocal innocence* – i.e. cases in which it was demonstrable that the applicant was innocent beyond reasonable doubt, for example, due to DNA evidence, strong alibi evidence, etc; or
 - *no such offence* – i.e. the applicant had been convicted of an offence that did not exist in law; or
 - *serious wrongdoing by authorities* – i.e. an official admission or judicial finding of serious misconduct in the investigation and prosecution of the case. Examples might include bringing or continuing proceedings in bad faith, failing to take proper steps to investigate the possibility of innocence, the planting of evidence or suborning perjury.
8. The test of "extraordinary circumstances" is, however, inherently an open-ended one. Cases may have other extraordinary features that render it in the interests of justice that the compensation claim be considered, and it is up to a claimant to show the existence of such features.

Mr Bain's claim

9. In your letter of 25 March 2010 you state that you consider Mr Bain is entitled to compensation on an "extraordinary circumstances" basis, but say that the preparation of a formal claim would require extraordinary expenditure and consideration could take years, at great personal and financial cost to Mr Bain.
10. You have therefore suggested that the Cabinet Guidelines are not appropriate for the resolution of this case and have requested a meeting with me to "map out a way forward".

Application of the Cabinet guidelines

11. Strictly speaking, the Cabinet Guidelines do not apply to Mr Bain as his conviction was quashed following a retrial. However, the test for exercise of the Crown's residual discretion does apply to Mr Bain.
12. I take your first letter to suggest that it is inappropriate for the Government to require Mr Bain to establish either his innocence on the balance of probabilities or the existence of extraordinary circumstances.
13. The standard to be met by a person claiming compensation for wrongful conviction and imprisonment is not open to negotiation. Successive Governments have applied the Cabinet Guidelines and the Crown's residual discretion in recognition that compensation should only be paid on a principled basis. Proof of innocence on the balance of probabilities is a cornerstone of the compensation regime and to depart from it in an individual case would undermine its legitimacy and represent a return to the sort of ad hoc determination the current scheme was developed to avoid.

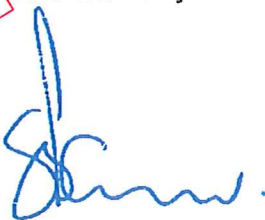
Matters of process

14. The process by which a claimant may seek to meet the standard is more flexible and Ministry of Justice officials are available to meet with you to discuss the options. At a minimum, it will require the preparation of more detailed submissions.
15. In both of your letters, you have expressed concern about the ability of any New Zealand legal practitioner, Judge or former Judge to approach the issue of compensation without any knowledge of, or preconceived notions relating to, Mr Bain's case. Accordingly, you have suggested that a Royal Commission of Inquiry headed by an overseas Judge, as occurred in the Arthur Allan Thomas case, is the appropriate response.
16. I do not consider it necessary to convene a Royal Commission of Inquiry to assess Mr Bain's claim. As you will be aware, the Royal Commission of Inquiry in Mr Thomas' case was appointed at a time when there was no framework in place for the assessment of claims of compensation for wrongful conviction and imprisonment. That is no longer the case.
17. If fairness dictates that Mr Bain's claim needs to be assessed by someone from outside the New Zealand legal fraternity, I am confident that can be accommodated within the existing framework. I have an open mind about that possibility.

Next steps

18. In view of my statements above, I do not propose to meet with you at this time.
19. The next step is therefore for you to prepare a substantive submission supporting the assertions you have made regarding Mr Bain's innocence and the existence of extraordinary circumstances applying to his case.
20. If you have any queries, or would like to first discuss the process with officials, you may contact the Ministry of Justice's Chief Legal Counsel, Mr Jeff Orr, at (04) 494 9755 or jeff.orr@justice.govt.nz

Yours sincerely



Hon Simon Power
Minister of Justice