

# Request for information held by Ministry of Justice relating to investigation by Hon Ian Binnie QC into David Bain's compensation claim

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| <b>Legislation:</b>      | Official Information Act 1982, ss 6(c), 9(2)(a), 9(2)(ba)(i) and 9(2)(f)(i) (see appendix for full text) |
| <b>Requester</b>         | Fairfax Media  |
| <b>Agency:</b>           | Ministry of Justice  |
| <b>Request for:</b>      | Information relating to David Bain's claim for compensation for wrongful conviction and imprisonment     |
| <b>Ombudsman:</b>        | Dame Beverley Wakem  |
| <b>Reference number:</b> | 326676   |
| <b>Date:</b>             | November 2015  |

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## Summary

In December 2011 a Fairfax Media journalist requested the Minister of Justice to provide –

*... all information [it held] referred to Justice Ian Binnie for his investigation and determination into David Bain's claim for compensation for wrongful conviction and imprisonment.*

The Minister transferred the request to the Ministry for a response. In February 2012, Fairfax Media complained to this Office about the Ministry's withholding certain information. Before receiving the request, the Ministry released a substantial amount of information within the request. By that time there was also a significant amount of information in the public domain relating to the two criminal trials Mr David Bain faced. (At his first trial, Mr Bain was found guilty of five charges of murder and was sentenced to life imprisonment; at his second trial, he was found not guilty of the same charges.) Accordingly, my investigation of Fairfax Media's complaint was limited in its scope. During my investigation, the Minister of Justice released Hon Ian Binnie QC's report and the report of Hon Robert Fisher QC critiquing that report. The release of those two reports further limited the scope of my investigation.

For the reasons provided in this opinion, I formed the opinion that:

- the Ministry was entitled to rely on section 6(c) (prejudice to maintenance of the law) of the Official Information Act 1982 (OIA) to withhold a communication concerning deliberations of the jury at Mr Bain's retrial and the reference to that communication in a letter of 25 March 2010 from Duncan Cotterill, solicitors for Mr Bain, to the Minister of Justice;
- as an affidavit sworn by Mr Bain on 10 December 2009 in support of his claim for compensation is now in the public domain, it is unnecessary for me investigate whether the Ministry was entitled to rely on section 9(2)(a) (protection of privacy) and section 9(2)(ba)(i) (protection of information subject to an obligation of confidence) to withhold the affidavit in response to the request; and
- the Ministry was entitled to rely on section 9(2)(f)(i) (protection of confidentiality of communications with the Sovereign or her representative) to withhold Mr Bain's petition for mercy and supporting information.

## My role

1. As an Ombudsman, I am authorised to investigate and review, on complaint, any decision by which a Minister or agency is subject to the OIA. My role in undertaking an investigation is to form an independent opinion as to whether the request was properly refused.

## Request for information

2. By letter dated 9 December 2011, Ms Kirsty Johnston, a Fairfax journalist, made the following request to the Minister of Justice (transferred to the Ministry on 15 December 2011):

*... all official information referred to Justice Ian Binnie for his investigation and determination into David Bain's claim for compensation for wrongful conviction and imprisonment.*

## Ministry's response to request

3. In a letter dated 2 February 2012 to Ms Johnston, the Ministry of Justice Acting Chief Legal Counsel stated:

*Justice Binnie has been instructed by the Minister of Justice to assess Mr Bain's application for compensation. A range of material, listed in the table below, has been referred to Justice Binnie by the Ministry to date. Where copies of information have been withheld, an explanation and reference to the applicable section of the Official Information Act 1982 ('OIA') is provided in the table.*

*The usual approach to compensation claims is for the applicant and the Crown Law Office to be treated as parties to the application. We are withholding details of and copies of submissions provided by these parties in accordance with s 9(2)(ba) of the OIA to protect information subject to an obligation of confidence where the making available of that information would be likely to prejudice the supply of similar information and damage the public interest. We do not consider there to be any other public interest considerations which outweigh the need to withhold this information.*

4. Prior to the receipt of the request, the Ministry had released a substantial amount of information relating to Mr Bain. The Acting Chief Legal Counsel indicated in her letter that it was willing to release further information within the request and certain information was publicly available.

## Notification of complaint

5. In February 2012, Ms Johnston complained to this Office regarding the Ministry's withholding of certain information in response to her request.
6. The Ministry of Justice was notified in a letter dated 30 April 2012 of my intention to investigate Ms Johnston's complaint. The information then appearing to be at issue was described as follows:

- *an application to Governor-General for exercise of the Royal prerogative of mercy by David Cullen Bain – 15 June 1998; and*
  - *a notification of claim for compensation by David Cullen Bain – 25 March 2010.*
7. Accordingly, my investigation is restricted in its scope, despite the voluminous material generated by, or in relation to, the several court hearings concerning Mr Bain, especially taking into account the fact that the reports of Hon Ian Binnie QC and Hon Robert Fisher QC to the Minister of Justice concerning Mr Bain’s claim for compensation are in the public domain. (I refer later to those reports).

## Ministry’s response to complaint

8. In a letter of 30 May 2012, the Acting Chief Legal Counsel provided the Ministry’s report in response to the complaint. With that letter, she provided:
- a. a copy of Mr Bain’s petition for the exercise of the royal prerogative of mercy, consisting of “Volume I: Petition” and “Volume II: Supporting Documentation”;
  - b. a document described as being ‘*Notification of a claim for compensation by David Cullen Bain – 25 March 2010*’; and
  - c. a copy of a communication concerning Mr Bain’s second trial.
9. The Ministry more precisely described the notification of claim documents as follows:
36. *The notice of application for compensation for wrongful conviction and imprisonment consists of a 2 page letter from Mr Bain’s representatives, appending an affidavit sworn by Mr Bain and an unsolicited letter sent to Mr Bain’s representatives by [name omitted]. The letter from Mr Bain’s representative covers preliminary matters of process, including candidates who could be appointed to any inquiry. In a number of places the letter refers to Mr Bain’s personal and financial circumstances, matters that are canvassed in more detail in Mr Bain’s appended affidavit.*
10. The letter clarified the grounds the Ministry relied on to withhold the information at issue. In summary, the Ministry relied on section 6(c) to withhold the communication concerning Mr Bain’s second trial, and on section 9(2)(a), 9(2)(ba)(ii) and 9(2)(f)(i) to withhold all the information at issue.

## Chronology

11. The following is a brief chronology of important dates relevant to this Office’s investigation:

- 25 May 1995: Mr Bain was found guilty by a jury at the Dunedin High Court of the murder of five members of his immediate family.
- 15 June 1998: Mr Bain petitioned the Governor-General for the exercise of the Royal prerogative of mercy. (Before lodging his petition, Mr Bain had exhausted his rights of appeal except his later right of appeal to the Privy Council.)
- 17 December 2002: In response to a reference by the Governor-General to it, the Court of Appeal advised the Governor-General there was sufficient evidence to justify the Governor-General referring Mr Bain's full case to it for an appeal.
- 15 December 2003: The Court of Appeal dismissed Mr Bain's appeal consequent on the Governor-General's referring the full case to it.
- 10 May 2007: The Privy Council allowed Mr Bain's appeal, quashed his convictions and ordered a retrial.
- 5 June 2009: At his retrial, Mr Bain was found not guilty on all counts of which he had been previously convicted at his first trial.
- 25 March 2010: Duncan Cotterill, Mr Bain's solicitors, wrote to the Minister of Justice seeking compensation for Mr Bain.
- 30 August 2012: Hon Ian Binnie QC, a retired Judge of the Supreme Court of Canada, provided his report to the Minister of Justice on Mr Bain's compensation claim.
- 13 December 2012: Hon Robert Fisher QC provided his interim report to the Minister of Justice on Mr Bain's compensation claim (essentially, a critique of Hon Ian Binnie's report).
- The then Minister of Justice, Hon Judith Collins, released copies of the reports of Hon Ian Binnie QC and Hon Robert Fisher QC.
- The Ministry placed copies of the reports on its website.

## Response to petition for mercy

12. In response to Mr Bain's petition, on 18 December 2000, the Governor-General referred certain questions to the Court of Appeal for its opinion arising from his petition. On 17 December 2002, the Court of Appeal provided the Governor-General with its opinion on those questions, in response to which, on 24 February 2003, the Governor-General referred to the Court of Appeal the question of the five convictions of Mr Bain for the murder of his family members.

13. The Court of Appeal described the process as follows:<sup>1</sup>

*[3] On 24 February 2003 the Governor-General, acting pursuant to section 406(a) of the Crimes Act, referred to this Court the question of the five convictions of David Bain for the murder of his family members. A reference under s 406(a) has the effect of an appeal against the convictions so referred. Hence this Court must consider the matters arising as if David Bain was appealing against his convictions a second time.*

14. Mr Bain's petition has, in a legal sense, been dealt with. It resulted in the referral by the Governor-General of certain questions to the Court of Appeal and the provision of the Court of Appeal's opinion to the Governor-General, which in turn led to the Court of Appeal's decision to dismiss Mr Bain's appeal. Mr Bain then appealed successfully that dismissal to the Privy Council, which ordered a re-trial. At his retrial, Mr Bain was acquitted of all five murder charges he faced.
15. No decision has been made on Mr Bain's claim for compensation.

## Information remaining at issue

16. On 13 December 2012, Hon Judith Collins released a copy of Hon Ian Binnie's reports – there were in fact two reports with the same date. Both are described as being:<sup>2</sup>

*Report for the Minister of Justice on compensation claim by David Cullen Bain by Hon Ian Binnie QC.*

17. On the same day, the Minister of Justice released Hon Robert Fisher QC's report, and the Ministry placed the three reports on its website.
18. Forming part of Hon Ian Binnie's reports was a "Book of Documents". The documents in this book are "tabbed". "Tab C" describes two of the documents (clearly then forming part of the information at issue) as follows:

*Claim letter from the law firm of Duncan Cotterill to the Minister of Justice by letter dated 25 March 2010, supported by an affidavit sworn by David Bain on 10 December 2009.*

19. "Tab C" is not a complete description of these two documents. A more complete description is:

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<sup>1</sup> *R v Bain* [2004] 1NZLR 638, 639.

<sup>2</sup> One of the reports has the following annotation on its frontispiece: "(supplemented in response to questions raised by the Minister at our meeting of 13 September 2012)."

- a. letter dated 25 March 2010 from Duncan Cotterill, solicitors for Mr Bain, to the Minister of Justice with paragraph 4 of that letter redacted referring to the communication concerning Mr Bain's retrial;
  - b. affidavit sworn by Mr Bain on 10 December 2009 in support of his application for compensation; and
  - c. copy of the communication concerning Mr Bain's second retrial (enclosed with Duncan Cotterill's letter).
20. Accordingly, the documents described in "Tab C" of the "Book of Documents" are in the public domain by virtue of their being on the Ministry's website, except in two respects. Those two respects are:
- a. the communication concerning Mr Bain's retrial; and
  - b. the redacted paragraph 4 of Duncan Cotterill's letter referring to the communication concerning Mr Bain's retrial.
21. The remaining information now at issue is thus:
- a. the communication concerning the retrial;
  - b. paragraph 4 of Duncan Cotterill's letter;
  - c. the petition; and
  - d. the information in support of the petition.
22. At no time, as I understand the position, has the Ministry of Justice released or revealed to Fairfax Media the contents or the author of the communication concerning Mr Bain's retrial.

## Communication concerning retrial

23. The Ministry relies on section 6(c) of the OIA, as well as section 9(2)(a) and 9(2)(ba)(i), to withhold the communication concerning Mr Bain's retrial and paragraph 4 of Duncan Cotterill's letter referring to that communication.
24. In light of the opinion I have formed regarding the Ministry's reliance on section 6(c) to withhold that information, it is not necessary for me to provide an opinion on the Ministry's reliance on other grounds.
25. Section 6(c) reads:

*Good reason for withholding information exists, for the purpose of section 5, if the making available of that information would be likely –*

...

- c. *to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial;*
26. In support of the Ministry's contention that release of the communication could constitute contempt of court, the letter of 30 May 2012it referred to *Solicitor-General v Radio New Zealand*.<sup>3</sup> In that case, the High Court stated:<sup>4</sup>

*Turning to ... the preservation of frankness in jury deliberations, since the strength of the jury process lies in the verdict clearly all jurors must be able and should be encouraged to contribute towards reaching it. Their participation should be in the certain knowledge that their own views may be expressed without fear of subsequent exposure, otherwise individuals, particularly the less forthright, experienced or confident, will be deterred from advancing opinions lest they be subsequently exposed to public criticism or ridicule. ...*

*It is necessary to remember that a jury is brought together by compulsion to perform a public duty, a responsible and often difficult task requiring the courage to speak up in the jury room and sometimes to contribute to a decision unpopular with at least some members of the community. The desired qualities will not be promoted or safeguarded if afterwards inquiries are permitted revealing the process by which diverging views and opinions were melded into the final unanimous verdict.*

27. Section 6(c) is, in part, concerned with the protection of the right to a fair trial. Putting to one side the fact that the author of the communication made it plain that it was to be kept confidential, the law is reasonably clear in this area. There is a real risk of interference with the administration of justice if the deliberations of jurors are not kept confidential. The communication referred to matters relating to such deliberations.
28. The decision of the High Court in the Radio New Zealand case supports the Ministry's reliance on section 6(c) to withhold the communication and the reference to it in Duncan Cotterill's letter.

## Opinion

29. It is my opinion that the Ministry was entitled to rely on section 6(c) to withhold the communication concerning Mr Bain's retrial and para 4 of Duncan Cotterill's letter referring to that communication.

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<sup>3</sup> [1994] 1 NZLR 48.

<sup>4</sup> fn 3 at 54.

## Affidavit of David Bain

30. The Ministry relied on section 9(2)(a) and 9(2)(ba)(i) to withhold the balance of the information at issue, including Mr Bain's affidavit.
31. Section 9(2)(a) and 9(2)(ba)(i) provide:
- (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*
    - ...
    - (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;*
32. The interests protected by section 9(2)(a) and 9(2)(ba)(i) are subject to section 9(1) of the OIA which reads:
- (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.*
33. Despite the fact that Mr Bain's affidavit is in the public domain, as the Ministry relied on section 9(2)(a) that document, , I consulted with the Privacy Commissioner on the merits of the Ministry's reliance on that ground in relation to Mr Bain's affidavit in accordance with section 29B of the OIA.
34. In respect of Mr Bain's affidavit, the Privacy Commissioner stated:

### **Mr Bain's affidavit**

*Part of the documentation provided to Justice Binnie was the affidavit from Mr Bain dated 10 December 2009. That affidavit contains intimate details of Mr Bain's imprisonment, his financial circumstances, his state of mental health, and his family circumstances. Mr Bain frankly recounts the personal impact that the events have had on him. The privacy interest in this information is, on the face of it, very high.*

*It is unclear whether this information has been publicly released in any form (for instance in Mr Karam's books or in court evidence). If the information is in the public domain, the privacy interests are lower, though a first-hand account from Mr Bain still has an impact that third-hand accounts may not have. It is also evident from the affidavit that ongoing publicity and repetitions of information may be traumatic for him. If it is not already public, the public interest in releasing it appears to be low.*

*If the affidavit is among the documents that you are considering, I therefore recommend that you consult with Mr Bain to identify what he has already voluntarily put into the public domain and what his view on releasing the document might be.*

35. Mr Joe Karam, on Mr Bain's behalf, has clearly indicated in communications with this Office that Mr Bain does not wish the balance of the information to be released.
36. In normal circumstances, I accept that Mr Bain would be entitled to have his privacy protected under section 9(2)(a) in respect of certain sensitive matters referred to in his affidavit, but this is not a case where it is necessary to withhold that information under that provision. Mr Bain's affidavit is now in the public domain – it is on the Ministry's website – the formal release of it by the Ministry to Fairfax Media will not compromise his privacy any further. Doubtless, many members of the public have downloaded Mr Bain's affidavit or read it on-line, given the extensive publicity by news media to Hon Ian Binnie's reports containing a copy of the affidavit.
37. Similarly, while Mr Bain's affidavit may once have been subject to an obligation of confidence in terms of section 9(2)(ba)(i), the extensive publicity given to it means it has lost its confidential character, with the result the Ministry cannot rely on that ground to withhold the affidavit.
38. Accordingly, it is unnecessary for me to investigate whether the Ministry was entitled to withhold Mr Bain's affidavit under section 9(2)(a) and section 9(2)(ba)(i) in response to the request.

## Opinion

39. It is my opinion that it is unnecessary for me to investigate whether the Ministry was entitled to rely on section 9(2)(a) and 9(2)(ba)(i) to withhold Mr Bain's affidavit in response to the request.

## Petition and supporting information

40. The essential basis of Mr Bain's petition and the supporting information, including Mr Bain's affidavit, is in the public domain. Many of the grounds of the petition are

referred to in some detail in the reports of Hon Ian Binnie QC and Hon Robert Fisher QC, High Court decisions and rulings,<sup>5</sup> Court of Appeal decisions,<sup>6</sup> Supreme Court decisions<sup>7</sup> the Privy Council's advice,<sup>8</sup> and books published by Mr Bain's advocate, Mr Joe Karam. A report commissioned by the then Minister of Justice, the report of Sir Thomas Thorp provided in 2003, also identifies and discusses certain grounds relied on in the petition.

41. As stated, the Ministry relies on section 9(2)(a), 9(2)(ba)(i) and 9(2)(f)(i) to withhold the balance of the information at issue, that is 'Volume I: Petition' and 'Volume II: Supporting Documentation'.
42. In light of the opinion I have formed concerning the Ministry's reliance on section 9(2)(f)(i), it is unnecessary for me to form an opinion on the other grounds relied on.
43. Section 9(2)(f)(i) provides good reason for withholding information in the following circumstances:

*Subject to section 6, 7, 10 and 18, this section applies if, and only if, the withholding of the information is necessary to ... maintain the constitutional conventions for the time being which protect ... the confidentiality of communications by or with the Sovereign or her representative.*

44. Section 9(2)(f)(i) is subject to section 9(1).

## Discussion

45. In her letter of 30 May 2012, the Acting Chief Legal Counsel stated:

*Application for Royal prerogative of mercy*

*Content*

15. *The application is directed to His Excellency The Governor-General of New Zealand, formally requesting the exercise of the Royal prerogative of mercy. The application contains two volumes, the first containing detailed written submissions on the grounds of the application, and the second containing documentary evidence relied on. The evidence in the second volume includes statements and other material gathered subsequent to the first trial and relied on by Mr Bain as "fresh" evidence in his application.*

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<sup>5</sup> *R v Bain* HC Christchurch, CRI 1994-012-217294, 2 March 2009.

<sup>6</sup> e.g. *R v Bain* [2004] 1 NZLR 638 and *R v Bain* [2010] 1 NZLR 1.

<sup>7</sup> e.g. *R v Bain* [2010] 1 NZLR 1 and *Bain v R* [2009] NZSC 59.

<sup>8</sup> *Bain v R* [2007] 23 CRNZ 71; [2007] UKPC 33.

### Context

16. *Applications for the Royal prerogative of mercy are made by private citizens to the Governor-General. By convention the Governor-General seeks the advice of the Minister of Justice, who in turn seeks advice on applications from officials in the Ministry of Justice. The Governor-General may ultimately grant a free pardon, refer a case back to the appellate courts or decline the application.*
17. *The Royal prerogative of mercy is an important constitutional safeguard for persons who have exhausted all available remedies in the criminal justice system. The investigation of Royal prerogative applications and the provision of advice to the Minister of Justice must follow a careful process, with natural justice and fairness to the applicant as important considerations. It is frequently necessary to make further inquiries and appoint independent counsel to inquire into matters. It is often critical to be able to develop and provide free and frank advice with a degree of confidentiality. It is particularly important that both applicants and those providing advice to the Minister and Governor-General are not unduly inhibited by the prospects of material related to an application being released.*
18. *The Ministry's primary concern when dealing with OIA requests for material related to Royal prerogative applications is to preserve the integrity of the process for advising on applications. There is clearly a strong public interest in ensuring applications are determined according to a fair and robust process. We consider that disclosing material (in particular, material supplied by applicants) to the public or media has the potential to prejudice the determination of applications in some circumstances, and therefore damage the wider public interest and the interests of applicants. The need to protect the integrity of government processes is recognised in a number of the grounds for withholding information under the Act (e.g. ss 9(2)(ba), (f) and (g)).*
19. *The determination of Royal prerogative applications is unlike other democratic decision making processes of government, where the release of official information can serve an important function in facilitating public participation in decision making. The advice provided to the Minister on applications often turns on detailed and complex legal analysis that should not be influenced by the weight of public opinion.*
20. *The Ministry will sometimes make written advice provided to the Minister publically available once the process is complete. Advice provided by Sir Thomas Thorp and the Ministry of Justice on Mr Bain's*

*application was released in 2003, and provided in response to Ms Johnston's request. These reports provide a full summary of applications and the steps taken in the process, meeting the legitimate public interest in understanding why decisions have been reached.*

#### *Concern with release*

21. *Our primary concern with the release of Mr Bain's application is that to do so could unduly inhibit persons in making applications in the future and in this way prejudice the integrity of the overall process. In this instance we also consider the privacy interests of Mr Bain justify withholding the application.*
22. *We therefore consider that withholding the application is justified in this instance under ss 9(2)(a) and 9(2)(ba). We also rely on s 9(2)(f)(i), although we acknowledge that we did not rely on this provision in our response to the requester.*

#### *Section 9(2)(ba) and 9(2)(f)(i)*

23. *The application is clearly a 'communication ... with the Sovereign or her representative' that is subject to an obligation of confidence. The mutual understanding of both parties that the material provided was confidential is evidenced by the fact the Ministry sought and obtained undertakings as to confidentiality of any material that was disclosed to third parties in the course of this application.*
24. *In terms of s 9(2)(ba), we consider that release of the application would be likely to prejudice and inhibit the supply of information in applications made in the future, and that there is a strong public interest in Royal prerogative of mercy applications being made by applicants without feeling constrained by the prospects of public release of material they have provided. It is in the public interest that applicants are not inhibited from pursuing allegations that may establish that a miscarriage of justice has occurred. It is similarly in the public interest that any third party who is able to provide relevant evidence that an applicant intends to rely on is not inhibited in providing that evidence. In this respect it is significant that the Ministry does not have the power to compel any witness or the applicant to provide evidence. It is necessary that the Ministry receives a full and frank application pursuing all available grounds in order to fairly assess and advise on applications.*
25. *In relation to s 9(2)(f)(i), we consider that withholding the application is necessary to protect the convention regarding confidentiality of communications with the sovereign.*
26. *We recognise that the interest in preserving confidentiality may not be as strong once an application has been determined, the Ministry's*

*report has been made publically available, and some of the material has been subsequently considered in public court proceedings.*

27. *Although these matters reduce the expectation or scope of confidentiality attaching to the application itself, we do not consider they are sufficient to displace confidentiality. Applications are only released by the Ministry to third parties for the express purpose of enabling the development of accurate advice to the Minister and, as occurred here, undertakings as to confidentiality of such material are usually obtained. In this case, the application and evidence relied on by the applicant that was withheld go into considerably more detail than that which has so far been disclosed to the general public.*

## **Meeting with Ministry staff**

46. On 23 June 2015, Mr John Pohl, this Office's in-house counsel, and I met with Mr Jeff Orr, the Ministry's Chief Legal Advisor, to discuss the Ministry's concerns relating to the effect of releasing the petition and supporting information.
47. Mr Orr advised me the Ministry's invariable practice is to keep confidential information relating to petitions for mercy on the basis of a constitutional convention to that effect in terms of section 9(2)(f)(i).
48. At the meeting, Mr Orr expressed the Ministry's considerable concern about the potential impact the disclosure of the petition and supporting information would be likely to have on petitions for mercy now under consideration and future petitions. He instanced the likelihood of witnesses being reluctant to come forward, if they considered their evidence was likely to be placed in the public domain.
49. Not surprisingly, in the light of the Ministry's practice to keep confidential information relating to petitions, Mr Orr was unable to give any example where, to his knowledge, a witness (or a petitioner) would be inhibited from coming forward, if the information provided by the witness was released. However, he referred to the possibility that prisoners eligible for seeking parole may decide not to exercise their right to petition for mercy, as there was a real likelihood their failure to accept their guilt may prejudice their prospects of parole. Mr Orr also referred to the possible impact that disclosure of the contents of a petition may have on victims, especially prior to a decision being made.
50. Mr Orr was inclined to agree that the degree of information already in the public arena relating to Mr Bain's petition and supporting information was such that disclosure of those documents would not add anything of significance to that already available. The Ministry's concern was the very strong public interest, in its opinion, of maintaining the constitutional convention relating to communications with the Governor-General.

## Analysis

51. Unlike certain countries, New Zealand does not have a special tribunal established to determine applications for pardon. Other than by the passage of an Act of parliament, the only means in New Zealand of obtaining a pardon is to petition the Governor-General to exercise the prerogative of mercy. That prerogative is personal and exclusive to the Sovereign, which, in New Zealand, is delegated to the Governor-General<sup>9</sup>. The Governor-General exercises the power on Ministerial advice - in practice, on the advice of the Minister of Justice.<sup>10</sup>
52. On receipt of a petition for mercy, the Governor-General may refer the question of conviction and sentence to the Court of Appeal or otherwise seek that court's assistance on any point relating to the petition.<sup>11</sup> However, only the Governor-General can grant a pardon in response to a petition.
53. Article 5 of the Bill of Rights 1688 (United Kingdom), in force in New Zealand, guarantees every convicted person the right to petition the Crown for mercy.
54. The prerogative of mercy is the '*foremost of the Crown's prerogatives in the administration of justice*'<sup>12</sup> and is a '*constitutional safeguard against mistakes*'.<sup>13</sup> As a leading text states:<sup>14</sup>

*The grant of a pardon is a recognition by the state that justice miscarried and that a reprieve should be granted.*

55. The effect of an unconditional pardon is more than clemency. A petitioner granted an unconditional pardon in New Zealand is deemed never to have committed the offence that is the subject of the pardon.<sup>15</sup>

### ***Evans v Attorney-General***

56. In *Evans v Attorney-General*<sup>16</sup> the Supreme Court of the United Kingdom considered whether certain correspondence of Prince Charles with Government Ministers seeking to influence their decisions – the Supreme Court called the correspondence '*advocacy correspondence*' – should be released in response to a Freedom of Information Act 2000 request by a Guardian newspaper journalist, Mr Evans. It held that it was in the public interest this correspondence should be released and it was not protected from release by

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<sup>9</sup> Letters Patent Constituting the Office of Governor-General of New Zealand 1983, (SR 1983/225), cl XI.

<sup>10</sup> Laws of New Zealand, Constitutional Law, para 155.

<sup>11</sup> Crimes Act 1961, s 406(a).

<sup>12</sup> Laws of New Zealand, Constitutional Law, para 155.

<sup>13</sup> *Burt v Governor-General* [1992] 3NZLR 672, 681 (CA).

<sup>14</sup> Laws of New Zealand, Constitutional Law, para 176.

<sup>15</sup> Crimes Act 1961, s 407.

<sup>16</sup> [2015] UKSC 21.

a constitutional convention. In reaching that decision, however, the Supreme Court affirmed the existence of the '*tripartite convention*', that is the British Monarch's right (and duty) to be consulted, to encourage, and to warn the Government, and stressed the importance, in the public interest, of upholding that convention, which should not be undermined by releasing of information falling within its compass.

57. The Supreme Court can thus be seen to be drawing a distinction between the Sovereign's essential and incidental functions. It is not in the public interest for communications relating to the Sovereign's essential functions to be released. However, in respect of information relating to the Sovereign's incidental functions, (such as advocacy correspondence), a constitutional convention may not protect from disclosure that information.
58. The exercise by the Governor-General's powers pursuant to the prerogative of mercy is clearly one of the Governor-General's essential functions.
59. I am satisfied that the petition and supporting information are '*communications*' with the Governor-General within section 9(2)(f)(i), and, in terms of that provision, it is necessary to withhold those communications to maintain the constitutional convention protecting their confidentiality.
60. The question I must therefore address is whether the constitutional convention is, under section 9(1), outweighed by other considerations rendering it desirable, in the public interest, to make the petition and supporting information available.
61. Given the nature of the centuries old constitutional right constituted by the prerogative of mercy, which provides a safeguard against mistakes by our justice system, it will be a rare occasion when the strength of the public interest in maintaining confidence in that process is such that other public interest considerations outweigh the necessity to protect the convention.
62. In terms of section 9(1), the public has an interest in ensuring that our system of justice is administered in a transparent and open way. Petitions for mercy are part of that system.
63. Petitions for mercy are essentially considered in secret, at least until the stage the Governor-General decides to refer questions arising from petitions to the Court of Appeal or makes a decision on whether to grant a pardon or not. I accept the general principle that the administration of justice must not be hidden away. However, I must consider this complaint in the light of the system we have to consider petitions for mercy. Under the system we have, the Ministry cannot summons witnesses to provide information to assist its investigations concerning petitions or order that information, including witnesses' identities, be kept confidential.
64. I cannot consider this complaint in isolation, and without regard to the potential effect the release of the petition and supporting information may have on present and future petitions.

65. I accept the Ministry's concerns that there is a real risk that the release of the petition and supporting information may inhibit potential witnesses from coming forward to provide evidence relating to present and future petitions, fearful of being, or not willing to be, identified. That inhibiting effect may deprive petitioners of the opportunity of providing information to the Ministry (and thus to the Governor-General) in support of their petitions; in that way, the petitioners' constitutional right to seek a pardon and the pardon's safeguard against injustice may be potentially undermined. The Crown may similarly be deprived of the opportunity of presenting the evidence of witnesses, perhaps not called at a petitioner's trial, in support of a jury's decision to convict.
66. As the Ministry is unable to summons witnesses or order that information be kept confidential, the nervous or reluctant witness may simply refuse to assist the Ministry with its investigations. If that happens, there is a real risk that the quality of the Ministry's recommendations to the Minister of Justice may be affected, as may also be the quality of the Minister's advice to the Governor-General on the steps to be taken in response to petitions.
67. In my opinion, in any event, there is enough information in the public domain to satisfy the public interest (if any) in terms of section 9(1) in knowing the essential basis of Mr Bain's petition. The risk of the inhibiting effect on witnesses occurring through the release of further information outweighs any need in the public interest to know more.
68. In terms of section 9(1), I conclude that at this time the public interest in making available 'Volume I: Petition' and 'Volume II: Supporting Documentation' does not outweigh the need to protect the constitutional convention attaching to the confidentiality of communications with the Governor-General relating to petitions for mercy. (Different considerations may arise for consideration in terms of the public interest under section 9(1) if a decision is made on Mr Bain's claim to compensation.)

## Opinion

69. It is my opinion that the Ministry was entitled to rely on section 9(2)(f)(i) to withhold the petition and supporting information.

Dame Beverley Wakem DNZM, CBE  
Chief Ombudsman

## Appendix 1: Relevant statutory provisions

### Official Information Act 1982

#### 4 Purposes

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

- (a) to increase progressively the availability of official information to the people of New Zealand in order—
  - (i) to enable their more effective participation in the making and administration of laws and policies; and
  - (ii) to promote the accountability of Ministers of the Crown and officials,—and thereby to enhance respect for the law and to promote the good government of New Zealand:
- (b) to provide for proper access by each person to official information relating to that person:
- (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

#### 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.

#### 6 Conclusive reasons for withholding official information

Good reason for withholding official information exists, for the purpose of section 5, if the making available of that information would be likely—

- (c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or

#### 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  
...
- (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  
...
- (f) maintain the constitutional conventions for the time being which protect—
  - (i) the confidentiality of communications by or with the Sovereign or her representative:

## 18 Refusal of requests

A request made in accordance with section 12 may be refused only for 1 or more of the following reasons, namely:

- (a) that, by virtue of section 6 or section 7 or section 9, there is good reason for withholding the information...