



Request for information held by Crown Law Office relating to investigation by Hon Ian Binnie QC into David Bain's compensation claim

Legislation:	Official Information Act 1982, s 2(1) (see appendix for full text)
Agency:	Crown Law Office
Ombudsman:	Dame Beverley Wakem DNZM, CBE
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Summary

The requester (a news media organisation) made two requests to the Crown Law Office for information it held relating to an investigation by a retired Judge of the Supreme Court of Canada, Hon Ian Binnie QC, into a claim by Mr David Bain for compensation against the Crown.

On 5 June 2009, at his retrial, Mr Bain was found not guilty on five counts of murder. To assist Hon Ian Binnie QC in his investigation from a legal and Law Officer perspective on matters of law and fact, the Solicitor-General at the time assigned Crown Counsel in that office's employ and retained outside counsel.

I am of the opinion that information held by the Crown Law Office in that context was held on behalf of the Solicitor-General for the time being acting as a Law Officer of the Crown. Information so held by the Crown Law Office is not official information within the meaning of the Official Information Act 1982 (OIA).

My role

1. As an Ombudsman, I am authorised to investigate and review, on complaint, any decision by which an agency subject to the OIA refuses to make official information available when requested. My role in undertaking an investigation is to form an independent opinion as to whether the request was properly refused.

Background

Hon Ian Binnie QC's investigation

2. In November 2011, the then Minister of Justice, Hon Judith Collins, appointed Hon Ian Binnie QC, a former judge of the Supreme Court of Canada, to investigate, and to present a report to her on, a claim for compensation by Mr David Bain against the Crown following his acquittal of five counts of murder at his retrial. He conducted his investigation in camera. On 30 August 2012, Hon Ian Binnie QC presented his report to the Minister of Justice.
3. The Solicitor-General at the time was responsible for assisting Hon Ian Binnie QC in his investigation from his perspective as a Law Officer on matters of law and fact. The Solicitor-General gave this assistance through Crown Counsel as well as outside counsel, all of whom were acting on the Solicitor-General's behalf. I see information generated in that context, where it is held by the Crown Law Office, as being held, in the first instance, on behalf of the Solicitor-General as a Law Officer.

First request

4. On 19 June 2012, the requester sought:

"A copy of the information provided to Justice Binnie regarding the David Bain case."

5. On 19 June 2012, the Crown Law Office refused the request.

6. In an email of 5 July 2012, the Crown Law Office explained its refusal as follows:

“Crown Law accepts it is subject to the Official Information Act.

However, in this case the information you have requested is work that is being done as part of the office’s Law Officer role and material generated in the course of that role falls outside the Act.

Even if the Official Information Act did apply to the information you have requested, the information would be withheld because good reason for withholding the information exists. Making available the information would be likely, under s 6(c) of the OIA, to prejudice the maintenance of the law. In addition, good reason for withholding this information exists, because withholding the information is necessary to protect the privacy of natural persons, including that of deceased natural persons (s9(2)(a)); to protect information which is subject to an obligation of confidence, where the making available of the information would be likely to prejudice the supply of similar information, and it is in the public interest that such information should continue to be supplied; or would be likely otherwise to damage the public interest (s9(2)(ba)), and to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by officials (s9(2)(f)(iv)).

Even if the OIA did apply, we do not consider, that the withholding of this information under the parts of s 9 cited above is outweighed by other considerations rendering it desirable, in the public interest, to make that information available.”

7. In subsequent discussions with the Crown Law Office, it advised that the request had been refined to the following information, all forming part of the information before Hon Ian Binnie QC:
- the Crown’s memorandum in response to a document submitted by Mr Bain’s representative, Mr Joe Karam, to Hon Binnie (*“List of Evidential Shifts in Crown case against David Bain and relevant nondisclosure”*);
 - the Crown’s response to Mr Bain’s claim for compensation for wrongful conviction; and
 - the Crown’s response (and attachments) to *“supplementary questions”* posed by Hon Ian Binnie QC.

Second request

8. In an email of 15 August 2012 to the Crown Law Office, the requester referred to its understanding that:

“a staff member from Crown Law Office was present when Justice Binnie interviewed David Bain in Auckland.”

With reference to that meeting, the requester sought:

“a copy of any written material and any audio or video material that Crown Law Office holds relating to this meeting.”

9. In an email of 15 August 2012 to the requester, the Crown Law Office stated:

“Your request of 15 August 2012 regarding Justice Binnie’s interview with David Bain is declined for the same reasons as set out in [our] email to you of 5 July 2012 – ie. primarily on the basis that Crown Law Office’s role in the compensation claim falls within the Law Officer function and hence outside the ambit of the Act. Alternatively s 6(c), s9(2)(a), (ba) and (f)(iv) are also relied upon.”

Complaint

10. In an email of 27 June 2012 to this Office, the requester complained about the Crown Law Office’s refusal of its first request.
11. In an email of 26 August 2012 to this Office, the requester complained about the Crown Law Office’s refusal of its second request.
12. In this opinion, I refer to the information which was the subject of the first request (as later refined) and the second request as “the information at issue”.

Investigation

13. In letters of 31 July 2012 and 23 November 2012 respectively, this Office notified the Crown Law Office of my intention to investigate the requester’s complaints regarding the Crown Law Office’s refusal to provide the information at issue.
14. In response, the Crown Law Office provided to this Office copies of all the information at issue and its reasons for refusing the requests.
15. After considering the information at issue and the Crown Law Office’s reasons for withholding it, in December 2014 I formed a provisional opinion on the complaint and provided a copy of it to the requester for comment.
16. In an email of 15 January 2015, the requester advised that it had no comment to make on my provisional opinion.
17. In a letter of 5 February 2015, the Crown Law Office advised it had no comment to make on my provisional opinion.

Analysis and findings

18. In the light of my conclusion in respect of the Crown Law Office withholding the information at issue on the basis that it is outside the scope of the OIA, it is unnecessary for me to consider the other grounds on which the Crown Law Office relied to withhold that information.
19. I note that on 13 December 2013 the Minister of Justice released Hon Ian Binnie QC's report and the interim report of Hon Robert Fisher QC peer-reviewing Hon Ian Binnie QC's report. Mr Bain's claim for compensation remains undetermined.
20. The first issue for determination in respect of any OIA request is whether the information at issue is subject to the OIA.
21. Once it is established that the holder of the requested information is subject to the OIA, the question is then whether any of the exclusions in the definition of "*official information*" apply.
22. That the Crown Law Office is subject to the OIA is not in question. It is a Department of State named in Part 1 of Schedule 1 to the Ombudsmen Act 1975 (OA) and therefore subject to the OIA. However, the Solicitor-General's position is different.
23. The Crown has only two "Law Officers" – the Attorney-General being the senior Law Officer and the Solicitor-General being the junior Law Officer. Their respective roles and functions are outlined in a Crown Law Office Briefing Paper for the Attorney-General prepared by the then Solicitor-General, Terence Arnold QC, in August 2002. The paper may be found on the internet at:

<http://www.crownlaw.govt.nz/uploads/agbriefingpaper02.pdf>.
24. As the paper points out, the Solicitor-General holds office "*under an appointment (under prerogative rather than statutory power) from the Governor-General*". While section 44(2) of the State Sector Act 1988 makes the Solicitor-General the chief executive of the Crown Law Office, it is "*for the purposes of [that] Act*", the Solicitor-General being neither an employee of the State Services Commissioner nor otherwise accountable to the Commissioner. In other words, the office of Solicitor-General is distinct from the role of chief executive of the Crown Law Office given to the Solicitor-General by section 44(2) of the State Sector Act.
25. The distinction between the roles of the Solicitor-General as Law Officer of the Crown and chief executive of the Crown Law Office may also be seen in sections 9A and 9C of the Constitution Act 1986. Section 9A authorises the Solicitor-General to perform "*a function or duty imposed, or exercise a power conferred, on the Attorney-General*", and section 9C authorises him or her (with the Attorney-General's consent), to delegate to a Deputy Solicitor-General "*any of the functions or duties imposed, or powers conferred, on the Attorney-General*"; or (without the Attorney-General's consent), "*any of the functions or duties imposed, or powers conferred, on the Solicitor-General except for the power to delegate conferred by this subsection*". This suggests that the Crown Law Office's

functions do not include the performance of the Solicitor-General's Law Officer functions.

26. Other statutes reflect the point by making express provision for those cases where Crown Counsel may be authorised to perform Solicitor-General functions. These include:
 - section 15(1A) of the Crown Proceedings Act 1950;
 - section 2 of the Friendly Societies and Credit Unions Act 1982 (definition of 'Revising Barrister'); and
 - section 10C(2) of the New Zealand Council of Law Reporting Act 1938.
27. The Solicitor-General is not named in Parts 1 or 2 of Schedule 1 to the OA or in Schedule 1 to the OIA. Consequently, the Solicitor-General will not be subject to either of those Acts except when acting as an officer of an agency that is so subject. This happens when the Solicitor-General acts in the capacity of chief executive of the Crown Law Office. The Solicitor-General is subject to these Acts in that capacity by virtue of:
 - section 13(1) of the OA, which confers jurisdiction on an Ombudsman to investigate the actions of "*any officer*" of a department "*acting in his capacity as such officer*"; and
 - section 2(4) of the OIA, which specifies that "*information held by an officer ... of a department ... in that person's capacity as such an officer ... shall be deemed to be held by the department of which that person is an officer*".
28. In summary, the person who is chief executive of the Crown Law Office, when acting in that capacity, will be subject to the OA and the OIA, and information held by that person in that capacity will be official information. However, the fact that the chief executive of the Crown Law Office happens to be the Solicitor-General does not make all of the Solicitor-General's administrative acts or decisions subject to the OA; nor does it mean that all information held by the Solicitor-General is held by him or her in the capacity of chief executive of the Crown Law Office.
29. Paragraph (f) of the definition of "official information" in section 2(1) of the OIA excludes:

"any information which is held by a department, Minister of the Crown, ... solely as an agent ... and which is so held on behalf of a person other than a department or a Minister of the Crown in his official capacity ..."
30. This exclusion applies to information held by the Crown Law Office where it is held solely on behalf of the Solicitor-General or the Attorney-General in their respective Law Officer capacities.
31. Having read and considered the information at issue, I am satisfied that it all related to the role of those holding the office of Solicitor-General at the relevant time in the capacity of a Law Officer. I am further satisfied that the information was not held by the Crown Law Office for any other purpose.

32. Accordingly, for these reasons, I am of the opinion that the information at issue was not official information and was therefore not subject to the OIA.

Chief Ombudsman's opinion

33. It is my opinion that, as the information at issue was not subject to the OIA, the Crown Law Office was entitled to refuse to release that information to the requester.

Appendix: Relevant statutory provisions

Official Information Act 1982

2. Interpretation

(1) In this Act, unless the context otherwise requires,—

Department means a government department named in Part 1 of Schedule 1 of the Ombudsmen Act 1975 (other than the Parliamentary Counsel Office) ...

official information—

(a) means any information held by—

(i) a department; or

(ii) a Minister of the Crown in his official capacity; or

(iii) an organisation; and ...

...

(f) does not include any information which is held by a department, Minister of the Crown, or organisation solely as an agent or for the sole purpose of safe custody and which is so held on behalf of a person other than a department or a Minister of the Crown in his official capacity or an organisation;