



## Request for taser camera footage and tactical operations report

<b>Legislation</b>	Official Information Act 1982, ss 6(c), 9(2)(a), 9(2)(ba)(i) and 9(2)(g)(i) (see Appendix for full text)
<b>Requester</b>	A current affairs producer from Television New Zealand
<b>Agency</b>	New Zealand Police
<b>Ombudsman</b>	Judge Peter Boshier
<b>Case number(s)</b>	416215
<b>Date</b>	March 2017

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## Summary

This opinion relates to a request by a current affairs producer from Television New Zealand (the TVNZ Producer) to the New Zealand Police to view taser camera footage, and for a copy of the associated tactical options report (TOR), relating to an incident where a man was tasered following a vehicle collision.

Police refused the request for the taser camera footage under section 9(2)(a) of the Official Information Act 1982 (OIA), on the basis that withholding the information was necessary to protect the privacy of the individual who was tasered.

Police also refused the request for the TOR under sections 6(c), 9(2)(ba)(i) and 9(2)(g)(i) of the OIA, due to concerns that the release of such reports could cause Police officers to be more cautious in how they express themselves, which, in turn, would undermine the value of these reports as tools in the accountability framework for the use of force.

During the course of my investigation I met with Police to discuss their concerns, I sought the views of the tasered individual who was the subject of the requested information (without success), and consulted with the Privacy Commissioner about the privacy interests at stake in this case.

I formed the opinion that the Police refusal of the request to view the taser camera footage was justified on privacy grounds. While the footage, in this instance, did not reveal much more than was already in the public domain, I accepted that there were nevertheless privacy interests sufficient to attract the protection of section 9(2)(a). I did not identify any countervailing public interest in release of the footage on this occasion.

I also formed the opinion that there was no basis to refuse the request for a copy of the TOR. Police accepted my opinion and a copy of the TOR, with personal details redacted, was released to the TVNZ Producer.

My opinion on this complaint follows a series of earlier opinions from former Chief Ombudsman Dame Beverley Wakem and former Ombudsman David McGee. It is worth noting that the position of Ombudsman is a personal Office. I am, therefore, not bound by the approaches or views of my predecessors. While those opinions inform my own approach, this complaint has allowed me to articulate my general views on Police refusals of requests for taser camera footage.

## Background

1. In March 2015, the Wairarapa Times-Age reported that the Police had tasered a *'hostile crash victim'* who had received head injuries in a vehicle collision and wandered away from the scene. The individual was not named in this article.
2. In August 2015, the TVNZ Producer emailed Police with a request to view the taser camera footage associated with the above incident:

*I refer to the newspaper report below regarding the tasing of a man in the Wairarapa in March of this year.*

*I would like to come to a police station and view the video footage from the taser to confirm that the taser was discharged in line with police procedure.*

*I realise that there are privacy issues here in regards to the man who was tasered.*

*Could you please consult with the man and relay the purpose of my request and seek his permission for me to view the footage.*

*It is not necessary for me to know his name unless he wishes me to.*

*I am not requesting a copy of the footage for the purpose of broadcasting it. As stated my purpose is just to come to a police station and view the footage to see if it was discharged in line with police procedure.*

3. On 24 September 2015, the TVNZ Producer made a further request for a copy of the tactical options report (TOR) associated with this incident. A TOR is a report filled in by a Police officer following an incident involving the use of force. It is one of the internal accountability mechanisms Police have in place for monitoring the use of force, and is signed off by a supervising officer.
4. On 19 October 2015, Police refused the TVNZ Producer's request to view the taser camera footage under section 9(2)(a) of the OIA to protect the privacy of the tasered person. Police commented as follows:

*Police believe that the tasered individual has significant privacy interests to be protected, and that it would not be appropriate to release TASER footage, even for viewing, in the absence of informed consent. Furthermore, Police consider that it is not a role of Police to seek informed consent from a tasered individual.*

5. In this letter Police also refused the TVNZ Producer's request for the TOR relating to the same incident under sections 6(c) and 9(2)(ba)(i) of the OIA with the following explanation:

*Police require a tactical options report to be submitted whenever a specified tactical option is used or a certain level of force is employed in restraining or arresting a subject. The tactical options report requires a considerable level of detail to describe the circumstances, decision making process, and justification for the level of force or tactical option used. Police consider that public disclosure of this information would likely prejudice the supply of similar information in the future.*

6. On 2 November 2015, the TVNZ Producer complained to the Chief Ombudsman about the decision on the requests. In relation to the refusal of the request to view the camera footage the TVNZ Producer stated:

*In exploring ways to address privacy concerns I asked that the police seek permission from the man who [was] tasered for me to view the footage. The police do carry out acts to address privacy concerns already, by [w]ay of manual redactions and pixelation, in fulfilling their obligations under the OIA. This request and the resulting act on their part is no different.*

7. In relation to the refusal of the TOR, the TVNZ Producer commented that the newspaper report suggested the individual was dazed and confused following the crash. The TVNZ Producer wanted to understand why Police thought it appropriate to use a taser on the individual in these circumstances.

## Investigation

8. On 12 September 2016, I notified Police of my investigation into the TVNZ Producer's complaint and requested a meeting to discuss Police's concerns regarding requests for taser-related information. I met with Police on 5 October 2016.
9. I was supplied with a copy of the taser camera footage, which I have viewed. A copy of the TOR was also provided to me and, during the course of the investigation, Police suggested that section 9(2)(g)(i) might also be applicable.
10. Attempts were made by this Office to contact the individual who was tasered for his views on release, but no response to our enquiries was received.
11. I consulted with the Privacy Commissioner, and received his views in relation to the taser camera footage and the information contained in the TOR.
12. I formed a provisional opinion on the TVNZ Producer's complaint in January 2017 and sought comments from the Police and the TVNZ Producer.

## Taser camera footage

### Information at issue

13. The information at issue comprises approximately 40 seconds of taser camera footage. While it shows the individual being tasered, for the majority of the time the person's body takes up the whole picture frame. The individual's face is visible on two very fleeting occasions and the quality is such that it is hard to make out the features. The individual's T-shirt is also visible. The audio track features the Police officer telling the individual to get down on the ground and the sound of the taser.

### Privacy considerations

14. Previous Ombudsmen David McGee and Dame Beverley Wakem formed opinions on earlier complaints about the refusal of taser camera footage. Those opinions inform my own approach, which is to confirm that the essential issue in requests for taser camera footage is whether it is necessary to refuse the request in order to protect the privacy of individuals featured in the footage (section 9(2)(a) of the OIA refers).

15. In order to determine whether the Police's refusal on the basis of privacy was justified, I have considered the following questions:
- Is the individual featured in the footage identifiable?
  - What is the view of the individual featured in the footage about release?
  - What does the camera footage reveal about the individual?

### Is the individual featured in the footage identifiable?

16. Police accepted that it would be difficult to identify the subject of the footage given what is actually shown on camera. Police raised the possibility of the person being able to be identified by others who knew of the incident if a copy of the footage were to be released. However, Police acknowledged that in this instance the TVNZ Producer had only sought to view the footage, rather than for a copy of the footage to be released. Police confirmed that it would be simple to pixelate the fleeting image of the individual's face.
17. However, during my investigation, a check of the internet confirmed that another article was published by the Wairarapa Times-Age in May 2015, about the same incident. This time the individual was named as he had been convicted of an offence. The details in the second article match some of the details in the first article to the extent that it would be reasonable to assume that they related to the same individual.
18. On receipt of further correspondence from the TVNZ Producer, it became apparent that the TVNZ Producer was aware that the individual involved in the car crash had been publicly identified. The TVNZ Producer had sent a further request to Police on 27 October 2015, requesting permission to view the footage with the individual's face pixelated. Inspector Jimi McGrogan again refused the TVNZ Producer's request, and in an email of 18 November 2015, made reference to the subject of the taser incident as '*an already publicly identified person*' therefore pixelation would not operate to obscure his identity.
19. The individual in the footage is identifiable, and has in fact been publicly identified. I agree that pixelation cannot remedy this.

### What are the views of the individual featured in the footage?

20. Police had not consulted with the individual featured in the footage. Police took the position that they would only consult with an individual where there was a possibility that the public interest might outweigh the reason for withholding and thus the footage might be released.
21. This position assumes, as a starting point, that the information ought to be withheld. However the starting point under the OIA is the principle, set out in section 5, that '*information shall be made available unless there is good reason for withholding it.*'
22. If a potential privacy interest is identified, then the decision maker still needs to consider whether it is necessary under section 9(2)(a) to withhold the information in order to

protect the privacy of the person to whom it relates. Integral to the concept of privacy is the notion that a person should be able to exert some control over what happens to information about them. While the person concerned does not have a right to veto the release of their personal information, his or her views about whether its release would infringe privacy will be relevant. If the person involved (assuming competence) does not have concerns about release of the information about them, being fully aware of the impact it may have on them, then it is difficult to envisage a situation where section 9(2)(a) would nevertheless be a basis on which to withhold the information.

23. If consultation does not take place, then the agency, or an Ombudsman on review, has to assume what the views of the person will be. Consulting the subject of the information is giving recognition to the privacy values that section 9(2)(a) seeks to protect – the opportunity for the person to have some influence over what will happen to the information about them. This may well reinforce the argument for a section 9(2)(a) refusal, alternatively it may not.
24. I made a number of attempts to consult with the subject of the taser camera footage by telephone and email. He did not respond. In the absence of hearing from him, I had to assume that he would not be in favour of the TVNZ Producer viewing the footage.

### What does the camera footage reveal about the individual?

25. Release of taser camera footage will, in some cases, reveal information about an individual that might not otherwise be known. For example, that the person had attracted the attention of Police and behaved in a manner that led to Police discharging a taser.
26. In this instance those facts are already in the public domain, including the individual's conviction for drink-driving, as a result of the newspaper articles.
27. The camera footage shows very little. Given this, and the fact that the TVNZ Producer has only sought to view the information rather than for a copy to be released, it could be argued that showing the footage to the TVNZ Producer would be unlikely to significantly impact on the individual's privacy.
28. I sought the views of the Privacy Commissioner on this point. The Privacy Commissioner's view was that the individual had a 'high privacy interest' in the footage on the basis described below:

*Despite the footage showing little information, as you note, the individual can be identified by linking the footage to the Wairarapa Time-Age articles. In my view there is an inherent indignity in being restrained by Police, particularly by way of Taser and I think that does give rise to a privacy interest. While the news articles have identified the individual and described the circumstances of his arrest, the taser camera footage and audio of the events adds an element not present in the public domain despite the limited nature of the footage.*

29. While I may not agree that the privacy interests in this particular footage are as high as the Privacy Commissioner would argue, I accept that there are privacy interests sufficient to require the protection of section 9(2)(a). Knowing the fact that a person has been tasered, or appears to be resisting Police, is not the same as watching it in action.

### **Countervailing public interest**

30. Where a withholding ground under section 9 applies, this is not an end to the matter. Pursuant to section 9(1), I must go on to consider whether the reason for withholding the information is *'outweighed by other considerations which render it desirable, in the public interest, to make that information available'*.
31. The TVNZ Producer has stated that the purpose of seeking to view the taser camera footage was to *'confirm that the taser was discharged in line with police procedure'*.
32. Former Chief Ombudsman Dame Beverley Wakem addressed similar arguments made in a previous complaint about a refusal of a request to view taser camera footage.<sup>1</sup>
33. I agree with Dame Beverley's comments that the media plays an important watchdog role in holding government to account for the powers that it has. However, I do not accept that this means that an individual journalist, or journalists as a class, should have open access to taser camera footage of individuals in order to monitor Police compliance. That function is fulfilled by the formal monitoring framework within Police for the use of force, the Police professional conduct division and, externally, by the Independent Police Conduct Authority (IPCA).
34. I acknowledge that in a particular case, there could well be public interest considerations that would outweigh individual privacy interests, to the extent that taser camera footage ought to be released. For example the Napier District Court recently granted a media request for access to taser camera footage which had become part of the court record, having been played during a trial.<sup>2</sup> There were features of this taser incident, including the death of the person tasered, and questions around the Police officers' conduct that led to a criminal prosecution, which meant there was a very strong public interest in release.
35. I can understand how the claim, in the Wairarapa Times-Age, that Police had tasered a person suffering head injuries from a car crash, might indicate a public interest in release of the footage in this instance too. However, I have viewed the footage, and as I have already described, the footage provides very little information about the context or the circumstances.

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<sup>1</sup> Opinion on case 290369: Access to view taser camera footage of 47 taser discharge incidents available at <http://www.ombudsman.parliament.nz/resources-and-publications/opinions/official-information-opinions>.

<sup>2</sup> *TVNZ and Ors v Knox and Ors* [2017] NZDC 3329.

36. Overall, while I do not consider the privacy interests in this instance to be particularly high, I do not consider that there are any public interest considerations that would outweigh those interests to support release of the footage.

## Tactical Options Report

### Maintenance of the law

37. Section 6(c) of the OIA provides that a good reason exists to withhold information if making the information available would be likely to *'prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial'*.
38. Ombudsmen have previously accepted that section 6(c) is a legitimate withholding ground in scenarios where release of the information might prejudice a specific court proceeding or investigation. Generally reliance on section 6(c) will be temporary, because once those proceedings are over any prejudice will usually disappear.
39. In this case, Police confirmed that the TOR was not relevant to the court proceedings, which related to a charge of drink-driving and, in any case, those proceedings were over at the time the request was made.
40. It is not immediately apparent why Police relied on section 6(c) in these circumstances. Concerns were raised that the *'threat of disclosure'* of a TOR might deter Police from deploying a tactical option when needed.
41. I find it difficult to comprehend how release of a TOR could deter a Police officer from using a tactical option. Tactical options include the use of physical force, pepper spray, baton, taser, dogs and firearms. I would expect a Police officer's use of force in response to a perceived threat would be based on an immediate assessment of the circumstances unfolding and in accordance with their training. The notion that a Police officer's response would be stymied by the thought that the subsequent report might be released seems far-fetched.
42. I am not persuaded that the TOR should have been refused on the basis of section 6(c) of the OIA.

### Confidentiality

43. Section 9(2)(ba)(i) of the OIA protects the confidential supply of information. If making the information available 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, then it may be protected. An obligation of confidence may be express or implied.
44. Police argue that officers are supplying the information contained in the TORs confidentially. Police are concerned that release of TORs will affect the quality of the reports filed and reduce the amount of detail they contain, which would be detrimental

to the monitoring framework for tactical options and the overall goal of being accountable for the use of force.

45. I do not agree that the information in these reports can be characterised as having been supplied in confidence. In my view, most of the information contained in these reports is akin to what used to be recorded in Police notebooks, and is similar to what will end up being in a job sheet. This material is discoverable in court proceedings, as is the TOR itself. I do not see that there can be any reasonable expectation of confidentiality in this environment.
46. As for the claim that release of this information might prejudice the future supply of similar information, I am similarly unconvinced. As well as being discoverable, these reports are already subject to the scrutiny of an officer's superior, may end up being referred to a professional conduct process, or could be pertinent to an investigation by the Independent Police Conduct Authority (IPCA). In this context, I cannot see that the additional possibility of release under the OIA would have the chilling effect claimed. Police officers are aware that they operate in an environment where the OIA applies.
47. In my opinion, section 9(2)(ba)(i) of the OIA is not an appropriate ground to justify withholding these reports.

### **Free and frank expression**

48. Police subsequently expressed a concern about the need to preserve the flow of *'free and frank'* information, so I have also considered the application of section 9(2)(g)(i) of the OIA.
49. Section 9(2)(g)(i) is intended to avoid prejudice to the generation and expression of free and frank opinions which are necessary to the effective conduct of public affairs. Officers or employees of any department must, in the course of their duty, be able to express their opinions on relevant issues without inhibition.
50. These arguments are similar to those raised under section 9(2)(ba)(i). While I do not accept the premise that TOR information is supplied in confidence, I acknowledge Police wish to preserve a climate conducive to officers expressing themselves freely and frankly in these reports. I agree it is important that officers feel able to be forthcoming about the use of force in a particular instance and not to feel inhibited about doing so. The effective conduct of public affairs requires Police to have a robust accountability framework for recording and reporting on the use of force.
51. However, as I explained earlier, these reports are already being written in the knowledge that there is a potential for them to be used in court proceedings, professional conduct processes or IPCA investigations. I am sceptical of general claims that release of TORs under the OIA will have the overall inhibiting effect that Police fear.
52. I am not persuaded that section 9(2)(g)(i) will be a basis for withholding TORs in general. However, I accept that it may apply in some cases where an officer's account has been particularly forthcoming, and it is clear that release of the report, or those specific

comments, would impact on the willingness of officers to report with the same freedom and openness in the future.

53. The TOR at issue in this case is an example of a thorough and professionally written report by the officer involved. I have reviewed the report and there is nothing contained in this particular report that I can see that would justify refusing the request for it under section 9(2)(g)(i).

## Privacy

54. Police did not raise privacy grounds in their refusal of the TOR. However, given my conclusion that the TOR should be released, I accept that there would need to be some redactions to protect privacy.

## Chief Ombudsman's opinion

55. For the reasons set out above, I have formed the opinion that:
- a. the Police decision to refuse the TVNZ Producer's request to view the taser camera footage was justified on privacy grounds; and
  - b. the Police should not have refused the TVNZ Producer's request for a copy of the TOR.

## 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
    - (ii) would be likely otherwise to damage the public interest;
  - ...
  - (g) maintain the effective conduct of public affairs through—
    - (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; or