

Request for taser camera footage

Ombudsman's opinion

Legislation:	Official Information Act, s 9(2)(a)
Agency:	New Zealand Police
Ombudsman:	David McGee
Reference number(s):	290369
Date:	28 June 2012

Summary

This document summarises the opinion I formed in relation to a third party request to Police for taser camera footage of two individuals who had been tasered by Police.

The requester, Chris Cooke, of TVNZ, had provided Police with written confirmation from these individuals that they were content for Mr Cooke to have copies of the footage.

Police refused Mr Cooke's request for a copy of the footage on privacy grounds, however Mr Cooke was invited to view the footage at Police premises. Mr Cooke wanted a copy of the footage and therefore complained to me about the Police decision.

During my investigation and review, Police indicated that the written permission provided by Mr Cooke was not adequate to satisfy Police as to the identity of the individuals concerned or that the individuals were aware of the potential consequences of release of this footage to the media. Police also considered that the footage should be withheld to protect the privacy of the police officers involved.

After consulting with the Privacy Commissioner on the privacy issues, I formed the opinion that privacy could not be a reason for withholding a copy of the footage if the tasered subject genuinely consented to its release to a third party and that consent was informed.

Consent would also be required from any other civilian appearing in the footage who could be independently identified through their association with the incident or the tasered subject. If the footage merely captures a bystander or someone who has no connection with the tasered individual and the images are fairly fleeting, then I proposed that pixellation or smudging would likely be sufficient to address any privacy concerns.

Generally it will not be necessary to withhold taser camera footage for the sole purpose of protecting the privacy of the officers involved. But, in some circumstances an officer's privacy interests might be heightened depending on the nature of the incident. In that case, withholding under section 9(2)(a) might be justified.

The question of how Police can be satisfied that consent has been obtained and a person's capacity to consent were also canvassed with Police and the Privacy Commissioner. In the event, these matters have been left for Police to address in guidelines that are being developed for future requests for taser footage.

To resolve the case at hand, my Office consulted independently with the individuals in the footage and confirmed that they consented to release of the footage to Mr Cooke subject to some conditions described in the body of my opinion.

At the conclusion of my investigation I formed the opinion that section 9(2)(a) did not justify a refusal of Mr Cooke's request.

Post script: After receiving and considering my provisional opinion, Police decided to release the footage to Mr Cooke.

Relevant statutory provisions

Official Information Act section 9(2)(a) (privacy).

See the [Appendix](#) for the full text of this provision

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Request

1. In May 2010, Chris Cooke, Producer of the Sunday Programme for TVNZ, made several Official Information Act (OIA) requests to Police for information about taser use. Among those requests, he asked for copies of taser camera footage from two incidents where the taser was deployed.

Information at issue

2. The first piece of footage relates to Mr A. For the first 23 seconds of this footage, the officer had his finger over the camera so the video is obscured but the audio is clear. The rest of the video depicts an officer helping Mr A after the taser has been discharged and he has been handcuffed. Mr A converses with the two officers about why he was carrying a knife and his mental health difficulties.
3. The second piece of footage covers Mr B being tasered. Mr B's wife also appears in the footage at the beginning and can also be heard discussing her husband's injuries and need for an inhaler. No Police officers' faces are visible in the footage although the voice of the officer discharging the taser is heard.

Refusal

4. By letter dated 26 July 2010, Superintendent Kelvin Powell wrote to Mr Cooke advising him that Police were prepared to allow him to view the footage of Mr A but that his request for a copy of the footage was refused pursuant to section 9(2)(a). Mr Cooke was also granted access to the footage of Mr B being tasered but, again, he was refused a copy of that footage under section 9(2)(a).

Complaint

5. Mr Cooke complained to me about the decision to refuse him an actual copy of the footage. He noted:

“Mr [A] and Mr [B] have both provided signed permission directing the Police to release a copy of the video of them being tasered to us. So in respect of them there are no privacy issues. In respect of other people who may be in the video the Police have the provision to hold back this part if they wish, as they often do when releasing information. This may be in the form of them electronically smudging out the faces of the officers if they feature in the video”

Previous similar complaint

6. I investigated a similar complaint in 2010 made by Simon Bradwell for TV One News (my reference W61471). Mr Bradwell's request was initially refused by Police under section 6(c) as the offender who had been tasered was facing trial on a number of charges and release of the footage could have prejudiced his right to a fair trial. I accepted that Police were correct to refuse Mr Bradwell's request under section 6(c) at the time he made it.
7. During my investigation, the criminal proceedings came to an end. I therefore considered the application of section 9(2)(a) to Mr Bradwell's request as I did not accept that section 6(c) would be an appropriate withholding ground once the criminal proceedings had concluded. Attempts had been made to contact the offender via his lawyer to see whether he had any objection to release. In the absence of any response from the offender I proceeded on the basis that the offender had not consented to release of the footage.
8. While Mr Bradwell had undertaken to pixellate the offender's face during any television broadcast of the footage, I did not consider that pixellation would fully mitigate the privacy concerns. I therefore formed the view that, in the absence of consent, Police were entitled to rely on section 9(2)(a) to refuse Mr Bradwell's request.

Issues in Mr Cooke's complaint

9. Mr Cooke's request differed significantly in that he had obtained a form of consent from the two subjects who were tasered for the information to be released. Police expressed concerns about the adequacy of the documentation supplied by Mr Cooke in this regard and I discuss this further below.
10. The Police agreed that Mr Cooke could view the footage, however his request for an actual copy of the footage was refused. Section 16(2) of the OIA provides that information should be made available in the form preferred by the requester unless to do so would:
 - (a) *impair efficient administration*
 - (b) *be contrary to any legal duty of the department or Minister of the Crown or organisation in respect of the document; or*
 - (c) *prejudice the interests protected by section 6 of section 7 or section 9 and (in the case of the interests protected by section 9) there is no countervailing public interest.*
11. Police maintain that to supply Mr Cooke with a copy of the footage would prejudice the interests protected by section 9(2)(a). The justification for Police's position on allowing Mr Cooke to view the footage rather than have a copy therefore turns on the application of section 9(2)(a).

12. Section 9(2)(a) provides good reason for refusal of information, subject to the countervailing public interest in disclosure if, and only if, it is necessary to “*protect the privacy of natural persons, including that of deceased natural persons*”.
13. The key issue for my consideration is whether section 9(2)(a) still applies to taser camera footage if the tasered subject has consented to release. Further issues regarding other persons identified in the footage also arise.

Police concerns about release

14. The Police report to me gave the following reasons for declining to release a copy of the footage:

“Mr Cooke states that there are no privacy issues as Mr [A] and Mr [B] provided “signed permission”. I note that in the case of Mr [A], there was simply an email from the email address ..., obviously not signed, and there was no proof of identity. Similarly with the letter from Mr [B], no proof of identity was provided. Further, the authorisations were provided via Mr Cooke by email and not directly from the individuals.

Police also has concerns about Mr [A]’s mental health issues, and in particular about his capacity to provide authorisation. Police attempted to contact Mr [A] to discuss the request and potential disclosure with him, and to confirm his authority but did not hear back from him.

Further, Police officers involved in the incident with Mr [A] advised that they did not want the information to be made available to TVNZ. I am advised that at the time of responding to the request, Police did not have the technology to smudge the officer’s faces as suggested by Mr Cooke. Even if that technology has been available, Police still have concerns about the disclosure of the information, as Mr [A] would remain identifiable to those who knew him or knew of his circumstances and involvement in the incident.

Police considers that section 9(2)(a) provides good reason to refuse Mr Cooke copies of the footage, particularly as Police have been unable to verify the authorisations provided by Mr Cooke, and as the police officers involved have expressly stated that they do not want the footage disclosed. Police does not consider there is a public interest which outweighs the privacy interest of the individuals involved. I note that in your response to a previous complaint made by TVNZ to your office about Police’s refusal to provide Taser Cam footage (your reference W61471) you found that section 9(2)(a) applied and that it was open to Police to refuse the request on that basis.”

15. My staff also had discussions with Police about their concerns regarding release of taser camera footage. I understand from Police that no copies of taser camera footage have previously been released in response to an OIA request, nor did Police have records of

ever having received a request for taser camera footage under the Privacy Act. It is likely then that my previous findings on Mr Bradwell's complaint, combined with my findings at the conclusion of this current investigation will have implications for how Police handle such requests in the future.

16. Police indicated strong opposition to release of taser camera footage in response to either an OIA or Privacy Act request and that they would seek to maintain control of the actual footage even under the criminal disclosure regime. Police provided me with an example of a Court order under section 30 of the Criminal Disclosure Act in which three defendants sought copies of taser camera footage of themselves. Police had opposed the order which the District Court Judge granted. However, stringent conditions were placed on the disclosure to allay Police concerns about the footage escaping into the wider media market and finding its way onto websites such as YouTube.
17. From the Police submissions in this case, and the previous case, it is clear that Police concerns about release of taser camera footage extend beyond the issue of privacy of the individuals captured in the footage. Police have expressed the view that release of such footage will inevitably lead to adverse publicity thereby undermining public trust and confidence in the Police. In this regard, Police argued that section 6(c) would be a reason to refuse a request regardless of whether court proceedings were in train. I did not accept this submission in the previous case, nor do I accept it now. My investigation into Mr Cooke's complaint therefore has focussed solely on the privacy issues arising from release of the footage.

Analysis

Privacy of tasered person

18. My starting point was that I did not consider section 9(2)(a) could apply as a withholding ground in respect of the tasered person if that person has given informed consent to release of the footage. If the subject of the information at issue has expressly waived any concerns about privacy (assuming they are competent to do so and have been fully informed of the consequences), how can it be necessary to withhold the information in order to protect the subject's privacy?
19. As required by section 29B of the OIA, I sought the opinion of the Privacy Commissioner on this issue and met with her in August 2011 to discuss the matter. Following our discussion, the Privacy Commissioner provided me with her views in writing. Her comments about the application of section 9(2)(a) to the taser subjects were as follows:

"I consider that in general terms the privacy of individuals who are being restrained by the police in whatever manner, are situations containing significant privacy interests. The indignity of being restrained and the subsequent loss of freedom are potentially highly embarrassing and I believe most people would consider such events to have a high privacy value. It could

be argued that any person who willingly allows a public airing of a restraining event has a cavalier attitude to privacy that might be regretted in the future.

I agree that if adequate consent has been obtained from the taser subjects, a section 9(2)(a) privacy argument would be difficult to sustain. However, the release of personal information such as Taser footage carries with it some very undesirable privacy outcomes for individuals. For example once it is released into the public arena it will be difficult to retrieve, and in many unforeseen ways, may result in significant humiliation to an unsuspecting Taser victim. I believe that consent in this instance ought to be informed consent of some considerable integrity."

20. The Privacy Commissioner concluded:

"In summary I consider that the privacy interest of the subjects of restraint by Taser is high. Such privacy interests may be overridden by the fully informed consent of the taser victim."

21. During our consultations, the Privacy Commissioner expressed her concern with the general release of film footage that exposes the legal use of force. In her view, this will inevitably lead to such footage becoming an entertainment commodity which she considers erodes privacy on a broad scale and introduces an element of derision for all concerned. The Privacy Commissioner noted that while this may have become common practice in other jurisdictions, she does not agree that such practices are healthy or appropriate in building a privacy friendly community.
22. I have sympathy with the sentiments expressed by the Privacy Commissioner about the undesirability of such footage becoming "an entertainment commodity". However to my mind, in the context of freedom of information law, a fundamental premise is the expectation that an individual ought to be able to have access to information about themselves. What that individual then decides to do with the information is their choice. Where that person genuinely consents to release to a third party (so that in effect the third party's request is a surrogate for a request from that person) it is difficult to see how the position can be different. In the absence of any legislative provision specifically restricting access to taser footage, it does not seem to me that there can be any broad exemption from release under the OIA, whatever the wider justification for the Privacy Commissioner's concerns.

Privacy of other civilians in the footage

23. In some instances, other individuals will also feature in the footage, such as in the case of Mr B's wife. In the footage of Mr B being tasered, his wife is also visible and audible. If Mr B's wife does not consent to release, then I accept that section 9(2)(a) would apply and, in that case, that any privacy concerns would not be resolved by pixellation because she would still be identifiable due to her relationship to Mr B.

24. I wrote to the Privacy Commissioner and the Police suggesting that where any other civilian is captured in the footage who could be independently identified through their association with the incident or the tasered subject, that person's informed consent would also need to be obtained. But if the footage merely captures a bystander or someone who has no connection with the tasered individual and the images are fairly fleeting, then I proposed that pixellation or smudging would be likely to be sufficient to address any privacy concerns.
25. The Privacy Commissioner responded with the following comments in respect of other civilians captured by the footage:

"Third parties, other than the police and the accused person also have privacy interests. A myriad of people could be involved, from supporters and family of the accused, hostages of the accused through to innocent bystanders. In all cases I believe innocent third parties have a moderate to high privacy interest depending on their circumstances. In the case of Mr [B] I understand his wife is the female captured early in the video footage along with her voice comments. Without further understanding of the circumstance, I see her as an innocent bystander whose privacy interest should be described as high.

In most cases I would expect that third parties filmed as a consequence of a Taser incident might have their privacy interests protected by active pixellation of their images, and in appropriate cases consideration ought to be given to redaction of audio recording of third parties. Their fully informed consent would negate privacy considerations under 9(2)(a)"

26. The Police commented:

"Police agrees that when a tasered individual has provided valid and informed consent for the disclosure of taser camera footage to the media, Police would need to seek the views of any other third parties shown in the footage. The weight that Police would give to the third party's views would depend on the particular context of the request and whether, as is the case with the request for footage of Mr [B], the third party's relationship with the tasered individual would identify him or her even if the images were pixellated.

Police also agrees that any concerns about the privacy of bystanders could be addressed with pixellation."

27. The views of the Privacy Commissioner and Police accord with my own in respect of other civilians captured by the footage.

Privacy interests of Police officers in the footage

28. I am not persuaded that it is necessary to withhold taser camera footage to protect the privacy of a Police officer in the course of performing his or her duty.

29. As a general rule, I do not think it appropriate that a Police officer could effectively “veto” release by raising privacy concerns in a situation where the person being tasered and other civilians have consented to release of the footage.
30. The use of cameras on tasers was introduced as an accountability, as well as an evidence gathering mechanism. Police officers in the footage will be aware that they are being filmed at the time the filming is happening. Officers involved in a taser incident know that the footage will be watched by their superiors and might be submitted as evidence in court or to the Independent Police Conduct Authority if a complaint is made about a taser incident. I do not consider therefore that Police officers could be said to have a strong expectation of privacy in these circumstances.
31. I expressed the above views to the Privacy Commissioner and the Police and asked for their comments in response. The Privacy Commissioner commented:

“I agree that Police staff involved in restraining incidents cannot expect the same level of privacy as the ordinary citizen involved in the incident. However, I do not accept that they have no privacy interests. In the aftermath of a restraining event much scrutiny of police action will arise either as a result of the courts involvement in a subsequent criminal charge or the scrutiny of police behaviour vis an independent Police Conduct Authority (“IPCA”) action. In addition I understand that the application of force by the Police requires a report to be submitted to the Police Commissioner (within 3 days of the application of force) and that the Commissioner is regularly required to report to Parliament or the Minister. These events and scrutiny reduce privacy levels.....

.....I consider that the police staff do have privacy interests in their application of force during restraining incidents, although I consider that those interests are low.”

32. Police commented as follows:

“Police agrees that in most circumstances, the lack of consent of any Police officers in the footage ought not to work as a “veto” to any consent provided by the individual who has been tasered. However, Police would still wish to seek the views of the relevant officers when making a decision on a request, and consider those views in the context of a particular request. Police considers that there may be some circumstances which would increase Police officers’ privacy interests, for example if the footage captured an assault on an officer.”

33. However one characterises the privacy interest of police officers, I am of the view that generally it will not be necessary to withhold taser camera footage for the sole purpose of protecting the privacy of the officers involved. But, following the Police’s suggestion, I acknowledge the point made that in some circumstances an officer’s privacy interests might be heightened depending on the nature of incident, such as for example, an assault on an officer. In such a case section 9(2)(a) might well be applicable.

Authorisation from tasered person and other civilians featured in the footage

34. The Privacy Commissioner and I agree that Police will need to be satisfied that the person who was tasered and, where necessary, other civilians have genuinely provided informed consent to release the footage to the requester.
35. I have received comments from both the Privacy Commissioner and Police as to what the elements of any such consent ought to be in order that Police can be satisfied on the issue of consent.
36. The suggestions included the following:
 - a. that Police engage with the tasered subject and any civilians directly to obtain consent rather than via the requester;
 - b. on occasions Police may need proof of identification to be supplied;
 - c. ideally those featured in the footage should be shown the footage prior to giving consent;
 - d. the fact that Police will lose control of the footage and that it could end up being widely disseminated on the internet should be explained;
 - e. individuals should be advised that they are not obliged to provide consent and are entitled to take time to seek advice about providing consent should they wish to do so (such as advice from a lawyer or mental health care provider); and
 - f. if the individual does decide to give consent, this should be recorded in writing.
37. These suggestions all seem reasonable to incorporate into a standard guideline for Police dealing with future requests. Police have indicated that these elements would be able to be met most efficiently by meeting with the individuals concerned.
38. My only comment would be that Police ought to retain the flexibility (perhaps at a managerial level) to dispense with the requirement to meet the subject if Police are satisfied overall that the process they have used in a particular case is sufficient to establish that genuine and informed consent has been provided.
39. For example, I consider that an offer to show the footage to the subject perhaps accompanied with a description of the footage is sufficient to meet the test of informed consent. Some individuals might not consider it necessary to view the footage. If they still indicate their consent to release having been given an opportunity to view it, then this should not prevent its release unless there are other good reasons to doubt the reliability of their consent.
40. I am also aware that, while Police will want to contact the individuals directly, this might be most efficiently achieved by asking the requester to provide the contact details, or even to set up the meeting time. In the case at hand, it appears that Police were unable

to locate or contact the taser subjects at all. However, my Office was able to make direct contact very quickly with the assistance of Mr Cooke.

Capacity to consent

41. On occasion, the issue of whether a tasered subject is capable of providing informed consent may arise. The following comments I received from Police succinctly explain the concerns involved:

“A further issue in relation to consent is that Police would want to be satisfied that the individual was competent to make the decision. The issue of capacity is likely to arise on occasion, given the proportion of tasered individuals who have mental health problems. Police acknowledges the fact that an individual was mentally unwell at the time he or she was tasered will not automatically mean that he or she does not have the capacity to decide whether to provide the authorisation. In fact, we consider that in most instances, those individuals will be capable of making the decision. However, Police considers that it is necessary to think about what steps will be necessary in the rare cases where Police are concerned about capacity.”

42. Police have advised that they will be seeking input from a community reference group, the Police and Community Tactical Options Reference Group, as to how best to develop a policy that will cater for the occasions where Police do have concerns about an individual’s capacity to consent to release.
43. The question of capacity to consent arose in the context of the footage of Mr A, who at the time of the incident was clearly distressed and agitated. However at the time my staff spoke with Mr A (see below), he was lucid, calm and forthright about his mental state at the time of the incident and is currently well, attending therapy and seeking employment. I have no concerns about his capacity to understand the implications of providing consent to the release of the footage.

Application to this case

Views of taser subjects and other civilians in the footage

44. Police only raised concerns about the adequacy of the consent documentation provided by Mr Cooke in their report to me. Police did not convey these concerns to Mr Cooke so he did not have the opportunity to correct any deficiencies in this regard. As mentioned above, Police made attempts to contact the tasered subjects. However, no reply was received.
45. Given that Police did not have a clear policy on consent requirements for third party requests at the time of Mr Cooke’s request, and the length of time this investigation has taken, I considered it appropriate on this occasion for my Office to consult with Mr A and Mr and Mrs B directly.

46. The consultations were carried out by telephone at a pre-arranged time. The following matters were covered with Mr A, Mr B and Mrs B:
- a. The background to Mr Cooke's request to Police, the Police response, and the role of the Ombudsman in investigating that decision, and the fact that there has been no previous occasion where Police have released taser camera footage to the media.
 - b. The independence of the Ombudsman from Police and Mr Cooke, so that parties could be assured that my position was neutral in respect of canvassing what their views were as regards release.
 - c. The parties were asked to confirm that they had been approached by Mr Cooke for release of the taser camera footage taken by Police and what they understood he intended to do with the footage.
 - d. As none of the individuals had viewed the footage relevant to them (nor has Mr Cooke), a detailed description was given about what the footage showed including their overall demeanour, and what could be heard on audio.
 - e. A warning was given about the potential for this information to end up on the internet. In particular it is understood that, through TVNZ, the footage may well be available online for a limited time. This creates the potential for that footage to be downloaded onto other websites such as You Tube. While Mr Cooke had given us some assurances that in previous cases where this had occurred TVNZ had successfully pursued unauthorised use of the footage on other websites, there is no ability to be 100% sure that such footage would not end up elsewhere on the internet.
 - f. After discussing all of the above, each person was asked whether or not they were happy to consent to release of the footage to Mr Cooke and whether or not they had any conditions on that release.
47. I can report that my staff were satisfied that each speaker was the person they claimed to be. In particular, all the parties recalled the taser incidents in question and were aware of facts that others would not have known unless they had viewed the footage or been present at the time.
48. At the conclusion of these discussions, all the parties confirmed that they consented to Mr Cooke receiving a copy of the taser camera footage.
49. Mr and Mrs B were in agreement that the footage be released without any alterations. Their only concern was that any programme using this footage not be aired until after December 2011. Mr Cooke had assured Mr and Mrs B and this Office that their wishes would be complied within this respect. In the event, this time constraint is now moot as December 2011 has passed.
50. Mr A said that he was happy for the footage to be released directly to Mr Cooke. However, he had asked Mr Cooke for his image to be pixellated if the footage was used

in the programme being made as he did not wish to be identified. He is currently seeking employment and did not want his mental health status to be generally known to the public at large. He was asked whether he was concerned about the audio, and responded that he was happy for the audio to stay as it was. I note, however, that Mr A's name is quoted on the footage, therefore this part of the audio would need to be deleted or "bleeped".

51. I am of the view that Mr A, Mr B and Mrs B have all provided informed consent to the release of the footage to Mr Cooke. As Mr Cooke has agreed to abide by their wishes in terms of pixellation and the timing of the programme I am satisfied that Police can release the information with confidence that Mr Cooke will observe the conditions attached to the use of the footage.

Views of police officers in the footage

52. When Police responded to my notification of this complaint, I was advised that the police officers involved in the incidents did not want the footage to be made available to TVNZ. However as I have already indicated, as a general rule I do not consider that a police officer in the course of performing his or her duty has a privacy interest sufficient to justify the protection of section 9(2)(a).
53. In the particular pieces of footage at issue, there is nothing untoward or unusual about the incidents that would increase the privacy interests of the police officers involved.
54. I am therefore of the view that it is not necessary to refuse the request to protect the privacy of the police officers in the footage.

Ombudsman's opinion

55. In light of the consent provided by Mr A and Mr and Mrs B, I have formed the opinion that section 9(2)(a) does not provide good reason to refuse Mr Cooke's request for a copy of the taser camera footage.
56. I consider the footage can be released to Mr Cooke subject to the conditions that, if Mr Cooke intends to broadcast the footage of Mr A, he arrange for Mr A's face to be pixellated and the reference to his name is "bleeped" or deleted from the audio track.

Appendix 1. Relevant statutory provisions

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...