



Request for information concerning Police decision not to lay charge of manslaughter following death from careless discharge of firearm

Legislation:	Official Information Act 1982, s 9(1) and 9(2)(h) (see appendix for full text)
Agency:	New Zealand Police
Ombudsman:	Professor Ron Paterson
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Summary

On 7 April 2012 Christopher Dummer was hunting in the Aorangi Forest Park, South Wairarapa, when he fatally shot Alexander Cameron McDonald. Mr Dummer pleaded guilty to a charge of carelessly using a firearm causing death under section 53(1) of the Arms Act 1983. He was convicted of that charge on 24 August 2012 and sentenced to nine months imprisonment. The complainant requested from the Police information regarding the decision to charge Mr Dummer with careless use of a firearm causing death, rather than manslaughter. The Police withheld the information under section 9(2)(h) of the Official Information Act 1982 (OIA) in order to “*maintain legal professional privilege*”.

I accept that the legal professional privilege ground applies, but consider that the overall public interest made it desirable for the Police to provide the complainant with a summary of the reasons for the decision to lay the lesser criminal charge. The complainant was entitled, as is the public, to a fuller explanation from the Police about why they decided to charge Mr Dummer with the lesser charge of carelessly using a firearm causing death. Disclosure of a summary of reasons for this decision serves to increase the transparency of the decision-making process and to promote the accountability of the Police for their decision. The Police have now provided the complainant with the summary of reasons.

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. The Police are subject to the OIA. My role in undertaking an investigation is to form an independent opinion on whether the request was properly refused.

Background

The request

2. On 31 July 2012, the complainant wrote to the Police and requested the following information:

“ ... all information on this case relevant to how and why the Police made the decision to only charge Mr C. Dummer with ‘careless use’ of a firearm, rather than charge him with ‘manslaughter’.”

3. By letter dated 17 August 2012, Inspector Sean Hansen refused the complainant’s request, and advised him:

“As the officer in charge of the investigation, I can advise you that a thorough criminal investigation was completed by Police. Following this, a legal opinion

was sought through our Legal Adviser. In addition to this, prior to Mr Dummer being charged, I discussed the matter with the Wellington Crown Solicitor.

The written legal opinion provided is privileged and accordingly not subject to release pursuant to Section 9(2)(h) of the Official Information Act 1982.”

The complaint

4. In September 2012, the Ombudsman received a complaint about the Police’s withholding of the information at issue.
5. In his letter of complaint, the complainant commented:

“This case is in my view a matter of significant public interest and ongoing importance. I am a hunter myself and I believe there is a systemic miscalculation and misapplication of NZ law by the Police re such shootings.

...

Surely there is some information that can be released to explain [the Police] decision for the much lesser charge.

... [T]here is a serious risk that the Police are significantly misapplying NZ law and being seen to create an injustice in so doing and to some degree endangering public safety in future by inadequately penalising such misbehaviour and the public need to know the basis for a case such as this being a charge of Careless-use rather than of manslaughter.”

Investigation

6. In May 2013, the Ombudsman notified his investigation of the complaint to the Police and requested copies of the information at issue.
7. By letter of 9 May 2013, the Police provided a report and copies of the information at issue.
8. In November 2013, in response to the Ombudsman’s request, the Police provided a copy of their entire file relating to Mr Dummer’s prosecution.
9. In June 2014, after considering the information at issue, the Police reasons for withholding it, and the complainant’s views, I formed a provisional opinion on the complaint and provided it to the Police and the complainant for comment.
10. In June 2014, the Police provided advice to the effect that they accepted my provisional opinion.
11. In October 2014, the complainant provided comments on my provisional opinion.

Analysis and findings

Information at issue

12. The information at issue consists of:
 - a. Three legal opinions:
 - i. a legal opinion of 8 July 2012 from a Police solicitor to the officer in charge of the Police investigation;
 - ii. a legal opinion of 17 April 2008 of the Crown Solicitor, New Plymouth, relating to another prosecution arising from the death of a person from the discharge of a firearm; and
 - iii. a legal opinion of 16 November 2010 of the Crown Solicitor, Rotorua, arising from the death of a person from the discharge of a firearm.
 - b. Two reports of May 2012, from the officer in charge of the Police prosecution and an assisting officer, which had been submitted to Police Legal Services for legal advice relating to the charge to be laid against Mr Dummer.

Section 9(2)(h) Official Information Act 1982

13. Section 9(2)(h) of the OIA provides “*good reason*” to withhold information “*if, and only if, the withholding of the information is necessary to ... maintain legal professional privilege*”.
14. Reliance on the section 9(2)(h) withholding ground is subject to the section 9(1) public interest override, where:

“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.”
15. The Police relied on section 9(2)(h) of the OIA to withhold the information at issue. In a letter of 22 November 2013, the Police commented:

“The prosecutorial discretion of the Police in relation to charging decisions is well recognised in law. The Courts have shown a marked reluctance to entertain any review of the Police discretion to either prosecute or not prosecute. For instance, Randerson J. traversed the topic in his decision in Polynesian Spa Ltd v Osborne [2005] NZAR 408, particularly in paragraphs 61 and 62.

...

In relation to [the complainant’s] information request, ... [p]rivileged information has already been withheld under section 9(2)(h). There does not

appear to be any countervailing public interest grounds in terms of subsection (1) that would outweigh the withholding grounds provided in subsection (2). [The complainant's] request appears to be based on private interest rather than any clear public interest."

16. I have no authority to investigate the exercise of prosecutorial discretion by the Police.
17. I accept that all the relevant material falls properly within the protection afforded by the legal professional privilege withholding ground.
18. The strength of legal professional privilege has often been recognised by the courts and its principles are well settled. Glazebrook J, in delivering the judgment of the Court of Appeal in *Shannon v Shannon*¹ referred to the Privy Council's advice in *B v Auckland District Law Society*² and stated:³

"[36] ... [L]egal professional privilege is more than an ordinary rule of evidence. It is a fundamental condition on which the administration of justice as a whole rests and is not for the benefit of any particular client but in the wider interests of all those who might otherwise be deterred from telling the whole truth to their solicitors.

[37] The Privy Council rejected any suggestion that there should be a balancing exercise when considering the admissibility of privileged material ... legal professional privilege is itself the product of a balancing exercise between competing public interests whereby, subject to the well-recognised crime or fraud exception, the public interest in the perfect administration of justice is accorded paramountcy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant evidence. ... The rationale is that a lawyer has to be able to give a client an absolute and unqualified assurance that whatever a client reveals in confidence will never be disclosed without the client's consent. Such an assurance is inconsistent with the existence of a balancing exercise."

19. Whether the legal opinions were internal or external legal opinions makes no difference to the strength of the public interest in the maintenance of legal professional privilege.

¹ [2005] 3 NZLR 757.

² [2004] 1 NZLR 326.

³ Footnote 1 at 766.

20. A further consideration is whether the Police waived privilege in the advice by their use of the opinions. In *Shannon v Shannon*, with reference to its decision in *Ophthalmological Society of New Zealand Inc v Commerce Commission*,⁴ the Court of Appeal stated:⁵

“[55] ... The test is that set out by this Court in Ophthalmological Society ... and involves an assessment of whether a party’s use of privileged material has destroyed confidentiality.

[56] ... The Court [in the Ophthalmological Society case] recognised that the fairness factor can be important in cases where there has been partial disclosure of legal advice and the consideration is whether natural justice requires disclosure of the whole advice. What must be assessed objectively in all cases, however, is the consistency of the conduct with maintaining the privilege. That requires close analysis of the particular context, what the issue is in relation to the privilege, how the evidence relates to that issue, and the question of whether there is inconsistency that could lead to injustice if the privilege is upheld. The weight to be given to fairness will depend on the circumstances, including the character of the privilege said to have been waived.”

21. There is no evidence that the Police waived the privilege or “*destroyed confidentiality*” in the privileged material by the manner in which they have used or referred to the advice given in the legal opinions.
22. In considering whether the section 9(1) public interest override applies, I took into account that there were significant public interest considerations favouring the disclosure of further information to the complainant. The complainant was entitled, as is the public, to a fuller explanation from the Police about why they decided to charge Mr Dummer with the lesser charge of carelessly using a firearm causing death. Disclosure of a summary of reasons for this decision serves to increase the transparency of the decision-making process and to promote the accountability of the Police for their decision.
23. In a letter of 18 June 2014 to the complainant, the text of which is set out in appendix 2, the Police provided a summary of reasons for the decision to lay the lesser charge of carelessly using a firearm causing death.
24. In my opinion, the provision by the Police of the summary of reasons for laying the lesser charge satisfies the public interest considerations under section 9(1) of the OIA, and appropriately reflects the balance between:
- a. the interest in maintaining legal professional privilege; and
 - b. the public interest in the Police providing the public with an appropriate explanation for the decision to lay the lesser charge.

⁴ [2003] 2 NZLR 145.

⁵ Footnote 1 at 770.

Ombudsman's opinion

25. For the reasons set out above, I conclude:
- a. section 9(2)(h) of the OIA applied to the information at issue; and
 - b. the provision by the Police of the summary of reasons for deciding to charge Mr Dummer with carelessly using a firearm causing death (under section 53(1) of the Arms Act 1983), rather than with manslaughter (under section 160(2)(b) of the Crimes Act 1961), satisfies the overriding public interest recognised by section 9(1) of the OIA.

Appendix 1. Relevant statutory provisions

Official Information Act 1982

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—
 - ...
 - (h) maintain legal professional privilege; or
 - ...

Appendix 2. Letter of 18 June 2014 to the complainant

“Official Information Act request regarding C Dummer

Your complaint to the Ombudsman has been referred to Police, with a request by the Ombudsman that Police consider providing you with a fuller explanation of the factors taken into account in deciding not to lay a charge of manslaughter against Mr Dummer.

Accordingly, the following is a summary of the law and factors taken into account.

The Prosecution Guidelines, which Police are obliged to comply with whenever they are considering a prosecution, provide that Police may not pursue a prosecution unless:

- 1. The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction, and*
- 2. Prosecution is required in the public interest. This test cannot be considered unless a prosecutor is first satisfied that the evidential test is satisfied.*

The evidential test is described in the Guidelines as:

‘A reasonable prospect of conviction exists if, in relation to an identifiable individual, there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.’

All hunters carrying a weapon are under the obligation of care imposed by section 156 of the Crimes Act 1961 which states:

‘156 Duty of persons in charge of dangerous things

Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes, operates, or maintains anything whatever, which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.’

However, even though a hunter might breach section 156 and accidentally kill another person, this does not necessarily mean that a charge of manslaughter will be available to the prosecution. This is because of section 150A which states:

*'Part 8
Crimes against the person
Duties tending to the preservation of life*

[150A Standard of care applicable to persons under legal duties or performing unlawful acts

- (1) This section applies in respect of—*
- (a) the legal duties specified in any of sections 151, 152, 153, 155, 156, and 157; and*
 - (b) an unlawful act referred to in section 160 where the unlawful act relied on requires proof of negligence or is a strict or absolute liability offence.*
- (2) For the purposes of this Part, a person is criminally responsible for omitting to discharge or perform a legal duty, or performing an unlawful act, to which this section applies only if, in the circumstances, the omission or unlawful act is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies or who performs that unlawful act.]'*

The offence of manslaughter is established in Part 8 of the Crimes Act. Therefore, the provisions of section 150A(2) above apply to it, meaning that if a person is killed by another person who has omitted to perform a legal duty, criminal responsibility for a Part 8 offence will only attach to the offender if the omission is a "major departure" from the standard of care expected of a reasonable person. In other words, mere negligence will not suffice; the conduct needs to have been grossly negligent.

The police investigating a hunting death will look at all the surrounding circumstances to try to determine whether the conduct of the offender can fairly be described as grossly negligent. Important to that exercise is a comparison of the conduct with previous hunting deaths, including what charges those offenders have faced and any commentary by the Courts.

There have only been two reported cases in New Zealand of a hunter being charged with manslaughter; namely the 2011 decision of the High Court in Mears and the 2012 decision in Davidson. In all other instances of hunters causing the death of a person through not carefully identifying their target the charge has typically been under section 53 of the Arms Act 1983 for careless use of a firearm, causing death. This offence carries a maximum term of imprisonment of 3 years.

In applying the Test for Prosecution under the Prosecution Guidelines, Police compared the evidence relating to Mr Dummer's case with a range of previous hunter shooting cases.

In terms of the Prosecution Guidelines, the investigators in this instance reached the view that the evidential test for manslaughter could not be satisfied; that is, it could not be said that there was a reasonable prospect of conviction for the offence of manslaughter. That view was reached after taking account of legal advice.

It is desirable that the law is applied consistently. In the case of sentencing, section 8 of the Sentencing Act 2002 requires that the court

‘(e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances;’

Although sentencing is the preserve of the courts, the desirability of consistency in respect of the police charging similar offenders committing similar offences in similar circumstances, is equally apposite.

I trust that this summary helps to explain the background reasoning that supports police charging decisions in relation to hunting accidents in which a person has been injured or killed.”