

## Request for due diligence report, site visit reports and reference checks

<b>Legislation</b>	Official Information Act 1982, ss 9(2)(ba)(i), 9(2)(g)(i)
<b>Agency</b>	Department of Corrections
<b>Ombudsman</b>	Peter Boshier
<b>Case number(s)</b>	416641
<b>Date</b>	August 2017

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*Section 9(2)(ba)(i) applies in part to the due diligence report and to the correspondence from supplier—public interest in accountability of Department for steps taken to satisfy itself regarding supplier’s performance—sections 9(2)(ba)(i) and 9(2)(g)(i) apply to information obtained from site visits, but not to the executive summary of the reports—public interest in accountability for decision to award contract—sections 9(2)(ba)(i) applies to reference checks—release would deter referees from providing full and complete information in future—public interest requires release of summary information about the reference checks*

A requester complained about the Department of Corrections’ decision to withhold information about contracts awarded to Serco and G4S under sections 9(2)(ba)(i) (confidentiality) and 9(2)(g)(i) (free and frank opinions) of the OIA.<sup>1</sup> The information related to:

- tenders for a contract to supply Electronic Monitoring (EM) services to the Department; and
- Serco’s contract to manage Mt Eden Corrections Facility (MECF), which was awarded following a competitive tender process in 2011.<sup>2</sup>

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<sup>1</sup> The Department also relied on s 9(2)(b)(ii), but the Chief Ombudsman did not need to consider that provision because the commercially prejudicial information was also protected by section 9(2)(ba)(i).

<sup>2</sup> The contract ended in March 2017 after allegations about the safety of prisoners and staff and the use of contraband.

## EM services tender

In May 2013, the Department issued a Registration of Interest (ROI) for EM services. Serco and G4S successfully made it past the ROI stage. Later in 2013, Serco and G4S were referred to the Serious Fraud Office (SFO) in the United Kingdom (UK) for overcharging the Ministry of Justice in EM contracts. In response, the Department placed its tender process for a new EM supplier on hold to conduct due diligence investigations.

The Department made enquiries with overseas jurisdictions and sought responses from Serco/G4S. It generated a report, which it sought to withhold under section 9(2)(ba)(i) of the OIA on the basis that it was subject to an obligation of confidence, and release would prejudice the ongoing supply of information from overseas jurisdictions and Serco/G4S.

The purpose of the report was to understand how other prison services responded to the UK SFO investigation and to identify if there were other vendors that could fulfil the Department's EM requirements. The report included a table summarising responses to five questions about the performance Serco/G4S. It also included a '*Summary of Findings*' and '*Recommended Next Steps*'. The report recommended that Serco/G4S remain in the procurement process, and that the process be extended to include additional vendors.

The Chief Ombudsman accepted that specific comments provided by overseas officials were subject to an obligation of confidence, and that '*there [was] a real risk that [disclosure] would make those involved reluctant in the future to assist the Department with these types of enquiries*'. However, the obligation of confidence did not extend to the overall findings and recommendations of the report, which included broad reference to the information provided, but did not attribute it to particular jurisdictions. Nor did it apply to information about Serco/G4S's overseas contracts, which was already in the public domain.

The Chief Ombudsman also noted the public interest in releasing information about the steps the Department took to satisfy itself about the performance of Serco and G4S in light of the concerns raised. While neither was the successful bidder, both companies remained in the tender process despite the UK fraud investigation. Accordingly, even if section 9(2)(b)(ii) applied, some infringement of confidentiality would be warranted for reasons of accountability.

An appendix to the report contained correspondence between the Department and Serco/G4S. The Chief Ombudsman saw no basis for the Department's letters to Serco/G4S to be treated as confidential in terms of section 9(2)(ba)(i). They were not '*supplied*' to the Department and contained material already reported in the media about the UK SFO investigation.

However, Serco/G4S could legitimately expect confidentiality in respect of the detailed operational information they supplied in response to the Department. If that information was released, the companies would not be so forthcoming in future. There was a clear public interest in the Department receiving a fulsome response to these types of enquiries, including any relevant operational details.

While the detailed operational information was protected, there was no reason to withhold more general information supplied by Serco/G4S. The Chief Ombudsman stated:

*...given the commercial incentives for the companies to provide assurances to the Department, notwithstanding any confidentiality issues, I am not persuaded that the release of the more general information would create any prejudice to the future supply of information.*

*Overall, while I recognise the need to protect confidentiality in relation to the detailed information, I do not consider that section 9(2)(ba)(i) applies carte blanche. As referred to above, there is a public interest in information which demonstrates the steps that the Department took to confirm that G4S/Serco should remain involved in the procurement process, and the assurances received in response.*

The Chief Ombudsman concluded that section 9(2)(ba)(i) provided good reason to withhold the due diligence report in part.

## MECF tender

In the course of evaluating Serco's ultimately successful tender to manage MECF, the Department undertook site visits at existing Serco-run facilities overseas and carried out reference checks with Australian and UK government officials. It generated site visit reports (withheld under sections 9(2)(ba)(i) and 9(2)(g)(i) of the OIA) and reference check reports (withheld under section 9(2)(ba)(i) of the OIA).

### Site visit reports

The Chief Ombudsman was satisfied that access to the Serco-run facilities and discussions with relevant parties which were summarised in the site visit reports occurred on a confidential basis. The reports were heavily reliant on the ability of the Department to have an open discussion about the operation and performance of the prisons. While Serco was unlikely to deny access to facilities under its management in future, there was a credible risk that participants would be more guarded in the information they provided. This would undermine the ability of the Department officials to make properly informed assessments during tender processes.

However, the Chief Ombudsman did not consider that the executive summary of the reports could be properly described as having been supplied in confidence. The opinions of the site visit reports were essentially internal Departmental communications. The only basis for claiming protection for such material under the OIA was if it disclosed confidential operational details, which it did not.

In relation to section 9(2)(g)(i) of the OIA, the Chief Ombudsman acknowledged the importance of site visit teams not feeling inhibited in expressing their free and frank opinions. However, the reports were written in a professional style and did not contain any comments of a cavalier or critical nature. The Chief Ombudsman believed the site visit team would continue to provide their honest and considered appraisals if the executive summary of the reports were released.

There was also a strong public interest in release of the executive summaries to promote accountability for the Department's decision to award the contract to Serco.

The Chief Ombudsman concluded there was no good reason to withhold the executive summaries of the site visit reports.

## Reference check reports

The Chief Ombudsman commented that references and background checks or information about performance, otherwise known as evaluative material, are generally undertaken in a confidential environment. Assurances of confidentiality are often provided in order to ensure that candid comments about a subject's performance can be elicited. This encourages referees to supply information, which they may otherwise be reluctant to divulge. If the specific comments did not remain confidential, this is likely to deter participants from providing full and complete information to the Department in the future. This would hinder the Department's ability to make informed decisions about the risks of entering into commercial arrangements. It was in the public interest that the Department receives quality information and opinions in this context.

While the information obtained by the Department during the reference checks was justifiably regarded as confidential in terms of section 9(2)(ba)(i), the Chief Ombudsman identified a strong public interest in releasing information about this aspect of the tender process: *'It is important that the public has confidence that any government Department has undertaken appropriate reference checks'*. The accountability interest was heightened by concerns about Serco's performance (which ultimately led to the contract ending). The Chief Ombudsman concluded that the public interest required disclosure of summary information to show that references were obtained, the number of references, the position of the referees, and the general nature of the references.

The Department accepted the Ombudsman's opinion and released the relevant information.

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