

## Request for information about death in custody

<b>Legislation</b>	Official Information Act 1982, ss 9(2)(a), 18(f)
<b>Agency</b>	Department of Corrections
<b>Ombudsman</b>	Peter Boshier
<b>Case number(s)</b>	489358
<b>Date</b>	19 November 2019

*Request for all correspondence about death in custody—unreasonable to rely on sections 9(2)(a) and 9(2)(ba)(i) without compiling and reviewing the information—subsequent reliance on section 18(f) (substantial collation or research) also unjustified—request for transcripts of interviews—audio recordings considered for release as no transcripts existed—section 9(2)(a) provided good reason to withhold audio recordings—privacy not negated by unauthorised release of Inspectorate report—Department consulted requester about correspondence sought—requester refined their request removing the reason for refusal—complaint resolved*

### Background

A journalist asked the Department of Corrections for the following information about a prisoner who had died in the Department's custody:

*Transcripts of interviews with prisoners who tried to help*

*Transcripts of interviews with guards or other staff involved in the incident*

*All correspondence by Corrections staff—emails, reports, memos, messages—relating to this death [over 5 months].*

The Department refused the request under section 9(2)(a) of the OIA, to protect the privacy of natural persons, and section 9(2)(ba)(i), to protect information subject to an obligation of confidence. The Department noted that the requester already had a copy of the Inspectorate's Death in Custody report.

The journalist complained to the Ombudsman.

## Investigation

When the Chief Ombudsman commenced an investigation, the Department advised that in fact no interview transcripts had been created. It provided audio recordings of the interviews, which it withheld under sections 9(2)(a) and 9(2)(ba)(i) of the OIA.

It also said the request for ‘*all correspondence*’ should have been refused under section 18(f) of the OIA, because it required substantial collation or research to make this information available. It had located 1795 emails on its server, at an average length of 4.27 pages. Assuming 4 minutes to review each of the approximately 7,665 potentially relevant pages, this would take over 500 hours of staff time.

## Correspondence

In his provisional opinion, the Chief Ombudsman considered that the Department’s initial decision to refuse the request for all correspondence under sections 9(2)(a) and 9(2)(ba)(i) of the OIA was unreasonable.

The fact that the Department later relied on section 18(f) suggested that it had made no attempt to compile or review the information at issue before withholding it under sections 9(2)(a) and 9(2)(ba)(i). While there may well have been good reason to withhold at least some of the information at issue, this could not be determined without reviewing it. The administrative difficulties involved in meeting the request should have been identified and managed at the outset.

The Chief Ombudsman also considered that reliance on section 18(f) of the OIA was not warranted. That section applies if ‘*the information requested cannot be made available without substantial collation or research*’.

He noted that section 18(f) should be used as a last resort, when all other mechanisms for dealing with an administratively challenging request have been exhausted. Agencies have a duty to provide reasonable assistance to a requester,<sup>1</sup> and to consider consulting with them.<sup>2</sup> Agencies must also consider whether charging or extending would enable the request to be met,<sup>3</sup> or whether there are other ways to meet the request in preference to refusing it outright.

The Chief Ombudsman acknowledged that 1795 emails was a lot, but observed that many of the emails were duplicates. The amount of work involved appeared to have been overestimated, and the Department did not appear to have consulted the requester, or considered any of the other mechanisms available under the OIA to manage the request.

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<sup>1</sup> See s 13 OIA.

<sup>2</sup> See s 18B OIA.

<sup>3</sup> See s 18A OIA.

## Audio recordings of interviews

In his provisional opinion, the Chief Ombudsman noted that, although the Department did not hold the transcripts that were originally requested, it was appropriate to consider the audio recordings for release, in light of its obligation to provide reasonable assistance.<sup>4</sup>

Section 9(2)(a) of the OIA provides good reason to withhold official information if, and only if:

- it is necessary to protect the privacy of natural persons; and
- the need to withhold is not outweighed by other considerations which render it desirable, in the public interest, to make the information available.

Privacy is the only withholding ground mentioned in the purposes section of the OIA. Section 4(c) states that one of the purposes of the OIA is to protect official information to the extent consistent with the public interest and *‘the preservation of personal privacy’*. As noted by former Ombudsman Nadja Tollemache, this provides *‘statutory recognition of the importance of the protection of personal privacy and serves as an indication that the interests represented by section 9(2)(a) of the Act are strong ones’*.<sup>5</sup>

The Chief Ombudsman noted that the recordings contained personal information about the deceased, including details of his health and the circumstances of his death, as well as his appearance and presentation at time of death. This information was deeply personal.

The fact that the prisoner was recently deceased did not erode his privacy interest. Section 9(2)(a) explicitly permits the withholding of personal information about deceased persons in order to protect their privacy.

The recordings also contained personal information about other prisoners and staff, including their involvement in the incident, their views on what happened, and how the incident affected them. The privacy interest was stronger for the prisoners involved, but this did not mean that the staff had no privacy interest.

The Chief Ombudsman noted that the Inspectorate report on the death in custody had been leaked to the media by persons unknown. However, the improper release of official information does not defeat otherwise legitimate privacy interests.

The Chief Ombudsman consulted the Privacy Commissioner, who agreed that the high privacy interest in this information was not lessened by the leaked information or the prisoner’s passing.

The Chief Ombudsman acknowledged the countervailing public interest in release of official information to promote the Department’s accountability to the family of the deceased, and the public generally. However, this public interest appeared to have been met through the Coroner’s involvement (as in the case of every death in custody) and the Inspectorate investigation. The Department had confirmed that the recommendations in the Inspectorate

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<sup>4</sup> See s 13 OIA.

<sup>5</sup> *Ninth Compendium of Case Notes of the Ombudsman* at 180. Available from the Office of the Ombudsman.

report had been implemented. The public interest did not require disclosure of the recorded first-person accounts provided to the Department by staff and prisoners.

## Outcome

On the matter of the audio recordings, the Chief Ombudsman formed the opinion that section 9(2)(a) provided good reason to withhold this information. On the matter of the correspondence, the Department decided, after considering the Chief Ombudsman's provisional opinion, to consult the requester. The requester agreed to refine his request to communications with the prison director. This enabled the request to be met without substantial collation or research, although some information was withheld on privacy grounds. This action by the Department resolved the matter to the complainant's satisfaction, and the Chief Ombudsman discontinued his investigation.

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