

# OMBUDSMAN'S FINDING ON COMPLAINT BY TELEVISION NEW ZEALAND LTD (TVNZ) AGAINST POLICE UNDER THE OFFICIAL INFORMATION ACT 1982 (OIA)

## Background

In March 2009 TVNZ sought from the Police a copy of the footage of an incident that had been recorded by a taser camera (that is, a camera attached to a taser that is activated when the taser is engaged). The Police refused to supply this information relying on sections 6(c) and 9(2)(a) of the OIA.

Section 6(c) is a conclusive reason for withholding official information if the making available of that information 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. Section 9(2)(a) provides a good reason for withholding information if the withholding is necessary to protect the privacy of natural persons. But section 9(2)(a) (unlike section 6(c)) is subject to any overriding public interest that exists in disclosing the information.

In response to the Police refusal, TVNZ offered to protect the identity of the subject by pixelating his face and other identifying features. However, the Police responded that this did not change their position. The Police stated:

*“Section 6(c) of the Official Information Act applies to the disclosure of the information at issue while a matter is the subject of proceedings before the Court. While the incident that the taser cam footage relates to is currently before the Court Police consider that any release of the information in any form would be likely to prejudice the maintenance of the law including the accused’s right to a fair trial.*

...

*The need to protect the privacy of the individual in respect to any third party that requests information about a natural person that is held by Police includes requests from media representatives. Although pixelation may obscure the identity of the individual from television viewers if the footage is subsequently aired, the privacy of the individual would be compromised through the disclosure of the non-pixelated information to you.*

*In addition, the privacy interests of parties other than the individual who was tasered must also be considered. The camera footage includes an audio recording. Disclosing the footage in any form may also prejudice the right to privacy of other individuals whose involvement may also have been captured.”*

## Maintenance of the law/right to a fair trial

At the time Police responded to TVNZ’s request the subject of the footage had been charged and was awaiting trial.

It is a fundamental right of an accused to receive a fair trial by an impartial court. This right is contained in the New Zealand Bill of Rights Act 1990. Section 25 provides that everyone who is charged with an offence has, among other

minimum rights in relation to the determination of the charge, the right to a fair and public hearing by an independent and impartial court and the right to be presumed innocent until proved guilty according to law.

*The Laws of New Zealand, Human Rights: Part II Rights and Freedoms* notes at paragraph 114: “No right is more inviolate than the right to a fair trial. Not only is it the fundamental right of the individual but it permeates the very fabric of a free and democratic society”.

It seemed to me that the release of this footage had the potential to prejudice the conduct of a fair trial. As Abbott J noted in *Department of Labour v Bridgestone/Firestone New Zealand Ltd* [2002] DCR 357, it is important to avoid situations where information could be used to influence a trial, even those trials which are heard by a Judge alone. Although there might be less potential to influence a Judge than a jury, defendants and witnesses are not as able as a Judge to discard such influences. Accordingly, my view was that *at the date of TVNZ’s request*, the Police had good reason under section 6(c) to withhold this footage to protect the trial process. As Robertson J said in *R v Chignall & Walker* (1990) 6 CRNZ 476 – “there is always a need to endeavour to curb speculation which seeks to influence either directly or indirectly the proper conduct of any criminal trial”.

I did not consider that pixelation would have protected against this prejudice. As the Police pointed out, many people involved in the prosecution of the accused would have known who he was in any broadcast of edited footage.

Whether section 6(c) continued to apply once the proceedings had concluded was not a matter that required a finding in the circumstances of this case. I nevertheless observe that I will not readily be persuaded as a general proposition that withholding of taser cam footage will be necessary for the maintenance of the law after proceedings are concluded. Admittedly, there may be occasions where section 6(c) will continue to apply to such information even in the absence of court proceedings, for example, where there is a need to protect the identity of informants or investigative techniques. But in my view after proceedings have concluded the case for the continued application of section 6(c) is considerably weakened. Its applicability will depend solely upon the particular facts of the case.

## **Privacy**

But section 9(2)(a) is also of relevance. The footage obviously contains personal information about an individual and pixelation does not fully mitigate these privacy concerns. There had been previous media coverage of the use of a taser in this case and the subject appeared in open court on charges in relation to the incident. I accepted that if pixelation was used, the subject is only likely to be identified by people who already know about the incident. However, there is more than just the subject’s identity at stake. The people who know about the event will not necessarily be aware of the detail of the subject’s comportment at the time of his arrest and the presentation of the taser. In my view any person has a high privacy interest in these circumstances. The Privacy Commissioner agreed with this view.

During the course of my investigation, the Police contacted the subject's lawyer to obtain the subject's views about the release of the footage to TVNZ. No response was received. However, even in the absence of a response I consider that this personal information is of a kind that most people would not usually wish to have disclosed and I am unwilling to presume that silence is consent. In these circumstances the withholding of the footage is necessary to protect the subject's privacy and that impediment to its release could only be met by the consent of the person concerned. Notwithstanding this, if the public interest warrants it, the information must still be released. I have viewed the footage and I do not consider that the privacy interests are outweighed by other considerations which render it desirable, in the public interest, to make the information available. There is nothing in respect of this particular incident that I have seen that suggests that the public interest in release is greater than the general privacy interest that anyone in the subject's position has in such material about them being supplied to a third party.

### **Footage filmed by the Police**

TVNZ made the following submission:

*"The taser was deployed in a public place. The incident was in public view, and could have been filmed by news cameras if they had been present at the time. News organizations would legally be able to film and broadcast the man's image and identity without breaching privacy law. I accept that his image would be pixellated until the court case was decided, but after that point his face and name could be broadcast without restriction. We are proposing a watered-down version of what we could legally show, had we been on the scene at the time."*

I do not accept TVNZ's analogy with news organisations (had they been present) filming the incident. The Police filmed the incident in carrying out their law enforcement duties. Whatever use another organisation may be free to make of the footage does not necessarily apply to supply of it by the Police. The Police's retention of the material is subject to ongoing confidentiality and privacy restrictions that may not apply at all or at least not to the same degree to other organisations. In my consideration of this complaint I have concentrated on the privacy implications though I could also have approached the matter on the basis of the Police's confidentiality obligations (section 9(2)(ba)). I have not done so because the result would be the same.

### **Opinion**

At the time of the request, sections 6(c) and 9(2)(a) gave good reason to withhold the information.

My view is that section 9(2)(a) does provide a good reason for continued withholding of this information in the absence of the subject's consent.

David McGee  
Ombudsman  
February 2010