

# Office of the Ombudsmen

Te Tari -o- Ngā Kaitiaki Mana Tangata

FV

Our Ref: W58046

27 May 2008

Ms Margo Baars  
Human Rights Foundation  
P O Box 106343  
Downtown  
**AUCKLAND**

Dear Ms Baars

I refer to my letter of 16 April 2008 in which I advised that I had formed my provisional view on your complaint, and was awaiting the Police response, as well as for further comments from the Privacy Commissioner. I received the Privacy Commissioner's comments, however I have not received any response from the Police.

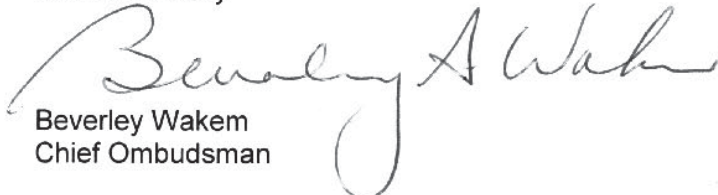
In the absence of a response from the Police within the notified timeframe, I have adopted my provisional view as my final view. I have today written to the Commissioner of Police, expressing my final view that the Police were wrong to withhold the majority of the information at issue. In my opinion, once any identifying details are removed in respect of officers, witnesses and subjects of a taser deployment, it is not necessary to withhold the residual information under any of the withholding grounds raised by Police during the course of this investigation.

I have **attached** excerpts from my letter of 16 April 2008 to Mr Broad, which provides the reasons for my provisional view, and which I have adopted as my final view.

I have made a formal recommendation under the Official Information Act that the Police now release the information previously withheld apart from any identifying details. I have also advised Hon Annette King, the Minister of Police, of my recommendation.

I will write to you again once the Commissioner of Police has informed me of the steps he intends to take to implement my recommendation.

Yours sincerely



Beverley Wakem  
Chief Ombudsman

**Encl:** Extracts from my provisional view of 16 April 2008

## Extracts from my provisional view now adopted as my final view

### “Information at issue and Police grounds for withholding

The bulk of the information covered by Ms Baars' request is contained in the tactical options reports. Below, I have set out the types of information contained in the tactical options reports, and the police position on each part:

1. **Names and identifying details of individual officers:** these have been deleted in reliance on s9(2)(a). This is not contested by the requester; thus, these deletions will remain and are not subject to my investigation.
2. **Names and identifying details of subjects/offender:** these have also been deleted in reliance on s9(2)(a), and the requester does not contest these deletions either.
3. **Taser serial numbers:** these numbers were originally deleted from the information sent to Ms Baars; however, Police have confirmed that these numbers will now be released.
4. **Certification details of individual officers:** Ms Richardson advised in her letter of 19 December 2007 that the Police have reconsidered withholding this information and have agreed, in light of the public interest considerations, to release the certification information that is “taser relevant”. Ms Richardson explains that this means:

*“Police will release to Ms Baars information that the officer is ‘Taser certified’ and is up to date with their first aid training as both are requirements for any officer who uses the Taser.”*

The other certification information is still being withheld in reliance on section 9(2)(a).

5. **Officer's individual account of incident:** the Police have relied on sections 9(2)(a), 9(2)(g)(i) and 6(c) to withhold this information.

Police have relied on section 9(2)(a) on the basis that each incident account “contains personal information about the individual officer” by virtue of the fact that the officer has written it. The Police consider that it is necessary to withhold the officer's description of events in order to protect the officer's privacy. This is notwithstanding the fact that all identifying information about the officer and the subjects would be deleted from the account.

Police have relied on section 9(2)(g)(i) because the subjective account is a free and frank internal communication from an officer in the course of his duty. Police are concerned that release of this information will inhibit officers from providing free and frank information in the future which would be

contrary to the public interest given the importance of monitoring the use of tactical options.

In her letter of 19 December 2007, Ms Richardson raised section 6(c) as another withholding ground. She cited the High Court case of *Tonkin v Manukau District Court* [2001] BCL 826, where in an oral judgment on a request for criminal disclosure, Justice Hansen referred to internal options documents being protected from disclosure under section 6(c).

6. **Supervisor's comment:** Police have relied on the same arguments as those set out in paragraph 5 above, to withhold this information. "

[.....]

#### **Certification details of individual officers**

Ms Richardson has confirmed that the certification details of the individual officer are automatically generated as part of a tactical options report. I understand that "certification" refers to the training a Police officer will have had in the use of various weapons, methods of subduing people, medical training, and advanced driving. The details on the report show the date a certificate was issued and the date of expiry.

The Police initially sought to withhold all certification information in reliance on section 9(2)(a). In his letter of 5 November 2007, Mr Belgrave asked the Police to explain why it was necessary to withhold any certification information to protect a Police officer's privacy when the identifying details of the officer have been removed from the report.

The Police are now prepared to release certification information that is "taser relevant" as explained above. This will mean that certification for use of the taser and first aid qualifications will be released. Ms Richardson responded to Mr Belgrave's letter regarding the remaining certification information as follows:

*"Police do not consider that it is necessary to release the remaining certification information as it is not relevant to the use of the taser. Notwithstanding the comment that it was unclear how the release of all of the certification information in the absence of the individual officers identifying details would infringe on the officer's privacy, many people will know the identity of the officers concerned, including other members of Police and members of the public who were present at the incident. Police consider that the public interest considerations are met through the release of the relevant certification information and refuse to release the remaining information pursuant to section 9(2)(a) of the Official Information Act 1982."*

The certification information is covered by Ms Baars' request, and in her complaint she confirmed that she would like this information released.

The correct test to be applied then is not whether it is "*necessary to release*" the remaining information, but rather, whether it is necessary to withhold it. The fact that the Police do not consider the certification information to be "*relevant to the use of the taser*" is not a reason to withhold the information requested.

### **Section 9(2)(a)**

Section 9(2)(a) provides that information may be withheld subject to section 9(1) 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."*

Before accepting that section 9(2)(a) protects certain information from release, an Ombudsman on review must be satisfied that the withholding of the information requested is **necessary** to protect the privacy of natural persons.

I am of the view that where the identifying details of the individual officers have been removed, it is not possible for the general public to match up that information with a particular individual. Thus, in the vast majority of cases, the privacy of an officer is not an issue that arises.

Ms Richardson comments that Police colleagues, subjects of the taser deployment, and witnesses involved in a particular incident will know the identity of the officer concerned. Ms Richardson suggests that release of the certification information would enable those few individuals to work out what training the deploying officer had in the use of tactical options at the time of the taser deployment.

Even if I accept that possibility, I do not consider that it is necessary to withhold information regarding a Police officer's professional training in the use of tactical options to protect that officer's "privacy". An officer's mandate to use a tactical option against a member of the public is not something I consider private information given the role that Police perform. In the majority of professions, information about a person's professional qualifications is publicly available as part of the accountability structure for those professions. I do not see then why release of a Police officer's professional qualifications raises issues of privacy.

My provisional view is that section 9(2)(a) does not apply to this information, particularly in light of the fact that the identifying details of the officer concerned will be removed.

### **Officer's individual account of taser deployment**

#### **Section 6(c)**

Section 6(c) provides as follows:

**"6. Conclusive reasons for withholding official information—**

*Good reason for withholding official information exists, for the purpose of section 5 of this Act, if the making available of that information would be likely—*

...

*(c) To prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial;*

The Court of Appeal has interpreted the phrase 'would be likely' as meaning 'a serious or real and substantial risk ... a risk that might well eventuate' -*Commissioner of Police v Ombudsman* [1988] 1NZLR 385, 388.

Ms Richardson gives the following explanation for why the Police consider section 6(c) applies to the officer's account and the supervisor comment:

*"... Police consider that it also has good reasons to withhold the information pursuant to section 6(c) of the Official Information Act 1982.*

*In the case of T v Manukau District Court & Anor, (High Court Auckland, Hansen J, 26 July 2001, Hansen J considered an appeal by T in relation to the disclosure of two documents. Police acknowledge that the facts considered by Hansen J related to discovery in Court proceedings but consider that his reasoning also applies to the Police decision to refuse to disclose the individual officer's account and the supervisor's comments in this instance.*

*In refusing disclosure, Hansen J determined that the documents were of doubtful relevance and likely to be of limited, if any, assistance to the defence. Hansen J also commented that the documents were entitled to the protection available under s6(c) of the Official Information Act 1982. At page 4 and 5 of the decision Hansen J stated:*

*"..it is necessary and desirable that police officers should be able to communicate internally in writing without fear that matters of opinion and comment will later be disclosed. I see it as necessary to the efficient workings of the police and in no way contrary to the right to a fair trial for internal memorandum to be protected from disclosure in proper cases. Informal communications in which tentative, provisional and subjective views are expressed, must be a necessary part of the investigation and detection of offences. As long as they do not contain evidence which is not available from other sources..."*

[verbatim]

I do not find the reference to *Tonkin v Manukau District Court* (supra) helpful in the circumstances of this investigation. As the Police acknowledge, Justice Hansen's decision was about criminal discovery. His Honour's decision was approved in the subsequent Court of Appeal decision *Taylor v R* (17 December 2003) which also

dealt with the issue of disclosure in criminal cases. In that case, the Court of Appeal pointed out that the purpose of disclosure *"is to ensure that the defence has access to the primary material held by the police"* in the context of an adversarial system.

The complaint from Ms Baars involves an entirely different set of circumstances. Ms Baars has asked the Police to provide her with the reports that record the deployment of tasers during a trial period. The Police are using these reports to advise the Commissioner to enable him to make an executive decision about the use of the taser as a tactical option. The principle involved here is about accountability for executive decision-making, rather than fairness of a court process.

I am not persuaded by the information before me that section 6(c) applies. The Police have not explained how release of the officer's account with identifying details removed would prejudice the maintenance of the law. "

[...]

**"Section 9(2)(a)**

In his letter of 5 November 2007, Mr Belgrave was not persuaded that section 9(2)(a) applied simply because the officer has written this account in his or her own words. Furthermore, any identifying information will have been removed so it will not be possible to identify an officer from the account.

I do not accept that the fact that an officer has written this account in his or her own words creates a privacy interest of itself. The logical extension of this argument would be that section 9(2)(a) would apply to all documents written by any individual author employed in the public sector.

Ms Richardson has submitted that Police and members of the public involved in a specific incident will know the individual officer; thus, *"an anonymised version is never going to be completely anonymous"*. The same can be said for the Police summaries that have been publicly released. The Police have not explained how release of an anonymised version of the officer's account will infringe on an officer's privacy any more than the release of the summaries has.

My provisional view is that section 9(2)(a) does not apply to this information.

**Section 9(2)(g)(i)**

Section 9(2)(g)(i) provides that information may be withheld if withholding is necessary to:

- "(g) Maintain the effective conduct of public affairs through...*
- (i) The free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty;..."*

When investigating and reviewing a decision to withhold information pursuant to section 9(2)(g)(i), an Ombudsman must be satisfied that:

- disclosure of the particular information would be likely to inhibit "*future free and frank expressions of opinion*"; and
- such future free and frank expressions of opinion are necessary for the "*effective conduct of public affairs*".

In relation to the Police reliance on section 9(2)(g)(i), I accept that there is a need for officers to be able to be free and frank in tactical options reports to maintain the effective conduct of public affairs. However, I do not consider that release of the information at issue is likely to inhibit how officers express themselves in a tactical options report. I therefore do not see how it is necessary to withhold this information to ensure officers continue to complete tactical options reports in the same way that they have in the past.

As Mr Belgrave noted, officers will always be aware that these reports are scrutinised by their superiors, or have the potential to be made available through discovery processes, or viewed by the Independent Police Conduct Authority. Furthermore, in the taser trial, the Police were publishing brief summaries of taser incidents on the Police website every month, and officers were aware that these summaries were being drawn from the officer's accounts in the tactical options reports.

My provisional view is that section 9(2)(g)(i) does not apply to the information at issue because I do not accept that release of the information would jeopardise the effective conduct of public affairs.

### **Section 9 (1)**

Given my view that none of the withholding grounds relied on by the Police apply to this part of the information at issue, it is not necessary for me to go on to consider the public interest considerations under section 9(1). However, it may be helpful for your response, if I indicate my current thinking regarding the public interest.

As the Police have recognised, the use of tasers by the Police is an issue that is of major importance to all New Zealanders.

Given that the decision on whether to equip Police with tasers is an executive one, with no provision for Parliamentary oversight, Cabinet approval, or Ministerial sign off, I consider that there is a particularly strong public interest in the accountability and transparency of the Commissioner's decision-making on this issue. In my view the best way to ensure this, is for the process to be as open and transparent as possible.

The Police have argued that the proactive release of the taser summaries on the Police website has already met this public interest consideration. I disagree.

The trial has been run by the Police, the summaries have been written by the Police, and the refusal to release any of the "raw data" from the pilot to outside parties has meant that there does not appear to have been any external review of how the Police have conducted the pilot. The production of these reports therefore seems inadequate to address the principle of accountability.

Secondly, I have read the summaries and compared them with the tactical options report accounts. In my view, many of the summaries are extremely brief, and have the overall effect of "sanitising" the original reports."

[....]

**"Supervisor's comment**

The Police have also relied on section 9(2)(a), 9(2)(g)(i) and 6(c) to withhold the supervisor's comments.

In her December 2007 letter, Ms Richardson gave the following explanation for why the Police consider the supervisor's comment should not be released:

*"I am also advised that the Supervisor's comments are an internal communication which is a necessary part of the reporting and accountability structure within Police. The supervisor's comments are written on the basis that the document is an internal communication that is protected from release to any third party. Police consider that to ensure that there continues to be effective communication between members of Police and supervisors it is necessary to protect that information from release to third parties."*

This argument appears to be directed at section 9(2)(g)(i). However for the same reasons expressed above, I do not consider that the evidence before me shows that release of this information without identifying details would inhibit a supervisor from free and frank expression on tactical options reports in the future. Again, I emphasise that my investigation is focused on the reports produced for the purpose of the taser trial. In this context, I do not see that it is necessary to protect this information from release to third parties. "