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## OBFC Investigation Shower Accommodations February 2023

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### Report Summary

The Office of the Ombuds for Corrections (OBFC) received a complaint related to lack of shower accommodations for a transgender incarcerated person at a Minnesota Correctional Facility (MCF).

Based on our review of Department of Corrections (DOC) Policy 202.045, we found that the denial of shower accommodations was unreasonable. Additionally, we found that Policy 202.045, which directs consultation with the incarcerated person, was likely violated.

The Ombudsperson for Corrections recommended the following:

- Accommodate complainant's request to shower without others being able to view them.
- Review Gender Identity Committee processes to ensure compliance with requirement to consult with incarcerated person and consider a mechanism for tracking consultation completion.
- Update relevant incarcerated people on policy changes so they can resubmit requests to the Facility Gender Identity Committee. In addition, the Facility Gender Identity Committee and Agency Gender Identity Committee should consider reviewing previous relevant denials, if they are not already doing so.

The DOC has agreed with the recommendations.

## **Summary Description of Incident**

In the spring of 2021, complainant submitted a request by kite to the previously named Transgender Committee to have a shower curtain installed in a shower in their living unit or approval to shower privately. Currently, when incarcerated people are out on flag (recreation time inside the living unit) showers are visible to anyone who is not in their individual cell, as the showers are in the center of the living unit.

The Transgender Committee, without involving complainant in any discussions, forwarded their recommendation report to the Deputy Commissioner (DC). Within two weeks, the DC confirmed a recommendation report from the Transgender Committee, a copy of which was provided to complainant with a letter from the Transgender Committee dated less than a week later, with the final approved recommendation regarding this request.

The MN DOC Transgender Committee recommendation was that as the showers are already single cell that no additional accommodation was necessary and any loitering by others should be reported.

The complainant's issue was not resolved with the committee's recommendation as the shower doors/partitions are short and predominately obstruct a mid-waist view. According to complainant, their private areas are visible over the top of the shower door/partition.

It also appears that complainant had not been contacted by any member of the Transgender (now Gender Identity) Committee to discuss the request, to speak with them about their final decision and how it might impact them, or to work with them towards finding an alternative.

The relevant Transgender Committee Recommendations Report is simply an accounting of who was present at the meeting, along with an explanation of complainant's request although it erroneously identifies the request as including both a shower curtain and being allowed to shower on their own. However, complainant's request specifically asks for one or the other, not both a curtain and private shower time.

Additionally, complainant reportedly was told that many of the related policies were being reviewed so once that happened, they might be able to update the complainant regarding their situation. With some of the recent changes made regarding policies related to gender nonconforming and transgender incarcerated individuals, complainant had hoped the committee would update their decision. However, as it has been so long and complainant had not heard back from anyone and continued to struggle, it seemed appropriate to file a complaint with our office.

## **OBFC Investigative Actions**

On January 20, 2023, the OBFC received the complaint.

Given the concern about the previous response, and that no one had followed up, as well as the larger systemic implications, the OBFC accepted the complaint for investigation.

As a part of this investigation, an Assistant Ombuds Investigator interviewed the complainant, reviewed applicable documents and communications, and reviewed MN DOC Policies.

## **OBFC Findings**

**Based on our review of DOC Policy 202.045 at the time of denial, the OBFC finds that the denial to complainant's request to shower in a manner that did not expose private areas was unreasonable.**

Additionally, the directive that left the incarcerated person responsible to report any leering or loitering instead of accommodating a reasonable request, which put them in an even more vulnerable situation.

**Policy 202.045 Management of Transgender/Gender Non-Conforming/Intersex Offenders/Residents was likely violated.**

When this decision was made, DOC Policy 202.045, Procedures, B., Placement, 4. <sup>1</sup>, required that:

The transgender committee makes recommendations regarding facility placement and other matters that it deems necessary to maintain the offender's/resident's safety, such as single cell/room or shower restrictions. The committee **must** consult with the offender/resident and may seek consultation from outside health care providers to assist in making its recommendations. The committee considers factors such as the offender's/resident's security level, criminal/adjudication and disciplinary history, current gender expression, medical and mental health needs, vulnerability to sexual victimization, and the likelihood of perpetrating such abuse on other offenders/residents.

The policy was updated on January 31, 2023, and this is a continued requirement. DOC Policy 202.045, C.3. states that:

The committees must consult with the incarcerated person and may seek consultation from outside health care providers to assist in making recommendations and decisions.

The OBFC was not able to find any documentation or indication that the committee consulted with complainant per policy after receiving their request.

Had complainant been consulted, clarification would have been made on their request. Complainant's request clearly states they were asking for either a shower curtain or private shower time. However, the committee's recommendation report states they were asking for both.

Additionally, complainant could have provided additional clarification regarding the need for those items as the "single stalls" do not actually provide needed privacy for complainant's private areas.

**Policy 202.045 Management of Transgender/Gender Non-Conforming/Intersex Offenders/Residents likely needs process review for following policy and may need additional criteria or frameworks.** When this decision was made, DOC Policy 202.045, Procedure, D., Showers, Undergarments, and Special Property Requests, 1. <sup>2</sup>, required that:

Transgender, gender non-conforming, and intersex offenders/residents **must** be given the opportunity to shower separately from other offenders/residents if deemed appropriate by the transgender committee.

The policy was updated on January 31, 2023, and DOC Policy 202.045 Procedure F. Single Cell, Showers, Undergarments, and Special Property Requests states:

2. Incarcerated people who are transgender, gender diverse, intersex, or nonbinary **must be given the opportunity to shower separately in a manner so as to prevent viewing by other**

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<sup>1</sup> MN DOC Policy 202.045 Management of Transgender/Gender Non-Conforming/Intersex Offenders/Residents

<sup>2</sup> MN DOC Policy 202.045 Management of Transgender/Gender Non-Conforming/Intersex Offenders/Residents

**incarcerated people**, unless the facility gender identity committee has articulable safety or security concerns.

In reviewing complainant's current situation, the OBFC's position is that a shower that is visible to those on the flag in the living unit, with a door/partition that does not cover this person's private areas, fits within this policy directive. Further, the previous policy did not provide any criteria the committee may consider when determining whether the request for a private shower would be deemed appropriate.

Additionally, a single shower stalls does not afford the requisite level of privacy to the complainant. Complainant's private areas are exposed and therefore, the updated policy standard that requires showering in a manner to prevent viewing by other incarcerated people has not been met.

At the time of last correspondence, complainant remains on a regular shower schedule, which forces them to shower when others are on the flag and moving around inside the living unit, requiring them to expose their private areas that are visible above the top of the shower door/partition.

Further, there does not seem to be a mechanism in place to review or address complainants or others previous accommodation denials.

## **OBFC Recommendations**

Due to the vulnerable situation of the complainant as well as the larger systemic concerns related to this complaint, recommendations were made to address this issue as quickly as possible for the complainant, but also to review the systemic issues that led to a failure to accommodate their reasonable request sooner.

We recognize and appreciate the long-term efforts that went into recently updating the policy but have concerns that likely were not addressed by the updates and do not want to delay recommendations as described below.

**Accommodate complainant's need to shower separately without others being able to view them:** Provide either a shower curtain (or some other suitable visual barrier), or provide for a time to shower when others are in their cells.

The facility can accommodate this in several ways, which may include a shower curtain that extends above the top of the shower stall door/partition in one of the shower stalls in complainant's living unit. The stall can still be used by other incarcerated people but would be the only shower stall the complainant would be required to use for showering. Some facilities have indicated that they either use a shower curtain in some shower stalls or provide for a private shower time for transgender incarcerated persons. At facilities using curtains, the curtains extend above the shower stall door and covers the individual from approximately their neck to their knees. Security staff are still able to safely monitor the incarcerated person while accommodating their privacy.

An alternate option would be to allow complainant to shower at a time when other incarcerated persons are locked in their cell, such as during count.

*Note: this was accommodated a few days after the facility received the recommendation and the OBFC has received reports that the complainant is satisfied with the accommodation. See DOC response below.*

**Review Gender Identity Committee processes to ensure compliance with Policy 202.045 which requires consultation with the incarcerated person.** DOC Policy 202.045, C.3. requires that, “The committees must consult with the incarcerated person and may seek consultation from outside health care providers to assist in making recommendations and decisions.”

In this case, there was no indication that this occurred. Meeting with an incarcerated person regarding their request would allow the incarcerated person an opportunity to explain their reasoning more clearly and could provide an opportunity to work with the committee to find resolutions.

There does not currently seem to be a mechanism for ensuring consultation.

It would be up to the DOC to review and develop a reasonable process for ensuring this takes place, but it should include a mechanism for documenting consultation with the incarcerated person. Committee recommendations and responses could include either a check box or could contain a statement that committee members met with the incarcerated person requesting the accommodation and whether the recommendation was agreeable to both the committee and incarcerated person, or whether the recommendation comes solely from the committee when not in agreement. This would ensure that policy is being followed and that the required consultation with the incarcerated person is taking place and then it could also be part of the tracking in ODocS per 202.045 C.6. as it would be on the committee response.

Additionally, a prompt response requirement is included in the updated policy. A prompt response is not defined and can be interpreted in various ways. Any internal framework or process guidance for staff should also include a standard for what the committee aspires to meet the meaning of a prompt response.

**Facility staff should update relevant incarcerated people regarding policy changes so they can resubmit requests to the Facility Gender Identity Committee.**

The Facility Gender Identity Committee should consider reviewing previous denials of single-cell assignments, showering arrangements, special property, and search procedures for relevant incarcerated people to see if they should now be accommodated under the updated policy. Incarcerated persons who have previously requested being able to shower without others being able to view them under the previous policy should be accommodated immediately unless there are “articulable safety or security concerns.”

Additionally, the Agency Gender Identity Committee should consider reviewing facility placement requests that were denied under the previous policy.

## **DOC Response**

The following letter is the Department of Corrections response provided in accordance with Minnesota Statutes section 341.93 subd. 6.

March 6, 2023

Margaret Zadra, Ombuds  
MN Office of the Ombuds for Corrections  
540 Fairview Ave N, Suite 202  
St. Paul, MN, 55104

Dear Ms. Zadra:

Thank you for giving me the opportunity to respond to the recommendations in your February 2023 report pertaining to the Department of Corrections response to Shower Accommodations for Transgender Incarcerated Persons. I appreciate the thoroughness of your investigation into this matter.

As it pertains to the findings and recommendations, we accept them and support the recommendations of your office in whole. Below you will find detailed responses to the specific recommendations of your office.

**Accommodate [REDACTED] need to shower separately without others being able to view her:**

The plan as detailed below provides [REDACTED] the opportunity to shower daily with the necessary privacy. The plan will not require any modification to the shower or installation of additional equipment.

- Ms. [REDACTED] will utilize [REDACTED] as the designated showering location. This shower is not observable from the staff desk nor is it observable from cells. In addition, the current shower door allows for ample privacy while [REDACTED] is using the shower.
- [REDACTED] will be provided an opportunity to shower during times when other incarcerated persons are in cell, which occurs two times per day.
  - [REDACTED] AM Count – Once the unit count is clear, [REDACTED] would be able to come out and have 15 minutes to shower.
  - [REDACTED] Count – Once the unit count is clear, [REDACTED] would be able to come out again for a 15-minute shower.
- [REDACTED] may shower twice per day if she chooses.
  - The second shower time would be after the unit gym period so she would be provided an opportunity to shower after her gym period if she chose to participate.

**Review gender identity committee processes to ensure compliance with Policy 202.045 which requires consultation with IP.**

As you note, DOC Policy 202.045, C.3. requires that the committee consult with the incarcerated person making a request. In addition, the policy also allows consultation with outside health care providers to assist in making recommendations and decisions.

We agree that a meeting with the requesting incarcerated person regarding their request will allow the incarcerated person/requester an opportunity to explain their request more clearly. In addition, the meeting may provide an opportunity for collaboration with and between the incarcerated person and the committee to address concerns. The department has developed the following process for direct consultation and for documenting that consultation.

When a request/kite is received, the chairperson of the Facility Gender Identity Committee will schedule a committee meeting to internally review the accommodation request within one week of the request. Not more than two weeks from the date of request, the committee will hold a consultation meeting with the incarcerated person to ensure full understanding of the request and to discuss their accommodations. The objective is to discuss the requested accommodations to ensure they meet the incarcerated person's needs, possible limitations, or alternatives. Notes summarizing the meeting and meeting outcomes will be captured in memo format. The memo will be provided to the incarcerated person and will be loaded into that person's base file in ODocs.

**Facility staff should update relevant IPs on policy changes so they can resubmit requests to the Facility Gender Identity Committee.**

The Agency Gender Identity Committee (hereafter agency committee) will review denials of requests under the previous policy. In all instances that a request was denied, the agency committee will review it and refer to the facility committee for reconsideration. The facility committee chair will prepare a memorandum to each incarcerated person who had received a denial and communicate the opportunity for direct consultation with members of the Facility Gender Identity Committee (hereafter facility committee). Following consultation, the facility committee will consider the request in accordance with the new policy.

The chair of the agency committee will prepare a memorandum to each individual who identified as transgender or expressed interest in gender identity services, and will advise them of the new policy and provide them with a copy of the policy.

The facilities regularly use memo postings and Unit (incarcerated person housing units) Rep Group meetings to communicate policy changes. To ensure consistency across the facilities, the policy will be presented to unit representatives attending the meeting, which will allow the reps to ask clarifying questions. Following the meetings, the notes summarizing the meeting are posted for unit residents to review. We believe the combined approach of direct outreach to those the policy clearly impacts along with housing unit level outreach best ensures dissemination to the broadest audience.

Again, I want to thank you for your thorough review of these incidents, and the recommendations you've provided. We appreciate the work of your office and the opportunity to respond. Please do not hesitate to contact me if you have questions or require additional information.

Sincerely,



Paul Schnell, Commissioner  
Minnesota Department of Corrections

cc: Michelle Smith, Deputy Commissioner  
Nanette Larson, Assistant Commissioner  
Safia Khan, Chief of Staff  
Jesse Pugh, Warden, MCF-Rush City  
Liz Richards, Director, Victim Services and Restorative Justice  
John Melvin, Director, Office of Special Investigations  
Diana Maagard, PREA Compliance Manager  
Shanna Langston, Policy Chair, Gender Identity Policy