



Report of Findings: 22/23-AP-068
Department of Justice and Public Safety
June 30, 2023

Citation: New Brunswick (Justice and Public Safety) (Re), 2023 NBOMBUD 2

Summary: The Applicant made two access requests to the Department of Justice and Public Safety for copies of recorded telephone calls that they placed while they were an inmate at a Provincial correctional facility. The Department denied the requests in full, relying on section 21(1) (unreasonable invasion of third party privacy) and explaining that a court order and consent of the other parties to the call would be required for disclosure. The Applicant subsequently filed a complaint with this office.

The Ombud found that the Department did not meet the duty to assist under section 9 by failing to conduct a search for and secure call recordings upon receipt of the requests and in not providing the Applicant with a meaningful response. The Department's failure to secure the records in this case resulted in them being permanently deleted from the Inmate Telephone system, leaving the Applicant with no meaningful recourse to challenge the Department's decision.

The Ombud recommended that the Department make a number of improvements to its internal practices to better meet its duty to assist obligations to individuals in custody in provincial correctional institutions.

Statutes Considered: [Right to Information and Protection of Privacy Act](#), SNB 2009, c. R-10.6, sections 9, 14.

Authorities Considered: N/A

INTRODUCTION

[1] The Applicant was an individual in custody in a provincial correctional institution, which falls under the Public Safety mandate of the Department of Justice and Public Safety (“the Department”). During that time, the Applicant placed several telephone calls through the Inmate Telephone System used in provincial correctional institutions. The Inmate Telephone System is a third party platform that is configured to automatically record all calls placed, with some exceptions (for example, calls between inmates and lawyers will not be recorded where the inmate indicates this is the purpose of the call).

[2] Each call placed on the system is assigned a call number. Recorded calls are kept on the system for 90 days, after which they are permanently deleted unless they are flagged for retention by Department/correctional staff.

[3] In this case, the Applicant had received a list of their call numbers, which they then used to make two access requests under the *Right to Information and Protection of Privacy Act* (“the Act”) for the recordings of specific calls from 2021 and 2022.

[4] The Department responded by refusing access under section 21(1) (unreasonable invasion of third party privacy). The Department’s response noted that the Applicant had previously met with the Deputy Superintendent, who had advised the Applicant that consent of the parties the Applicant had spoken with would be required to obtain the recordings and that the calls recorded in the system could only be disclosed through a court order.

[5] The Applicant was not satisfied with the Department’s response and filed a complaint with this office. In making this complaint, the Applicant explained the reasons why they were requesting the calls and why obtaining the recordings were important to them. The Applicant also expressed disagreement that the call recordings could be protected on the grounds of third party privacy, given that the Applicant was a participant in the calls and that for the calls requested, the Applicant was speaking with individuals acting in their professional, not personal, capacity.

[6] While the Department was cooperative during the informal resolution process of this file, the nature of the concerns raised in the Department’s handling of these requests and the resulting impact on the Applicant’s access rights led me to conduct a formal investigation under section 68(3) of the Act.

ISSUES

[7] The issues to be addressed are as follows:

- a. Did the Department meet its duty to assist the Applicant as required by section 9?

- b. Did the Department correctly apply section 21(1) as to refuse access to the requested telephone recordings?

DECISION

[8] The relevant provisions of the *Act* are as follows:

9 The head of a public body shall make every reasonable effort to assist an applicant, without delay, fully and in an open and accurate manner.

...

21(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.

Duty to assist: Search for records

[9] The duty to assist under section 9 requires public bodies to “make every reasonable effort to assist an applicant, without delay, fully and in an open and accurate manner.”

[10] In this case, Department officials advised that, upon receipt of the Applicant's requests, no steps were taken to search for and preserve any of the requested recordings that may have been on the Inmate Telephone System as the Department did not consider granting the Applicant access to them.

[11] Department officials explained that the system is programmed to automatically scrub/delete all call recordings on the system after 90 days unless they have been flagged for retention, which can be requested by corrections or Departmental staff. At the 90-day mark, recordings are permanently deleted and cannot be recovered by the system. The Department submitted that there is no way to retrieve the deleted call recordings.

[12] While many of the Applicant's requested call recordings would have already been deleted from the system by the time the Applicant made these requests to the Department, based on our review, it appears that there were three calls that would have still been on the system at that time. As the Department did not take steps to search for or flag the recordings in the system for retention, they were unfortunately automatically overwritten as per the established retention period for call deletion and thus no longer existed when the Applicant filed this complaint with our office.

[13] I find that the Department failed to meet its duty to assist the Applicant by failing to conduct a search for records at the time the requests were received.

[14] The Department's failure to do so in this case is particularly concerning as the subsequent deletion of the recordings has left the Applicant with no meaningful way to challenge the Department's decision. As the recordings no longer exist, there are no records for me to review and a recommendation for disclosure in the event that I were to find the recordings were improperly withheld would be pointless.

[15] During this investigation, Department officials indicated this was the first time they had received a request for this kind of information. While that may be the case, the Department has been subject to access to information legislation for many years and conducting a search for records is one of many required steps in properly processing access requests.

[16] As part of the duty to assist, the Department was required to conduct a reasonable search for records that were relevant to the requests, regardless of whether it intended to grant access or not. This requires that public bodies have knowledgeable staff conduct searches in the locations where relevant records might be reasonably held, which in this case would be the recorded calls in the system.

[17] Even if a public body is not able or is not planning on giving access to the requested information, a search must still be conducted and the relevant records gathered and reviewed, in the event that there may be some information that could be disclosed to the applicant. Further, when public bodies fail to conduct searches for records and a complaint is subsequently filed with this office, public bodies are required under section 70(3) to produce such records for our review upon request within 10 business days. If the search has not already been completed by the public body during the initial processing of the request, this can result in delays in the complaint process and impede our ability to address the issues in a timely manner.

[18] While the lack of search in this case did not delay our investigation, it unfortunately resulted in the remaining recordings being permanently deleted and effectively guaranteeing that the Applicant would not be able to access them.

[19] To their credit, Department officials acknowledged that this was a serious gap in its internal processes and committed to immediately flag all call recordings upon receipt of an access request. The Department advised that it is in the process of formalizing policy and protocols to support this process.

[20] As this is the case, I recommend that the Department provide a copy of the formalized protocols and policy for our review once finalized.

[21] If the Department does not have a documented retention schedule for call recordings in place, I recommend that it do so as part of this exercise.

[22] The Applicant also raised concerns about recordings being intentionally deleted and questioned whether this was something our office could look into.

[23] We spoke with Department officials to understand how calls are deleted in the system and whether Department or correctional staff have the ability to do this manually.

[24] The Department informed us that there is no way for corrections staff to intentionally delete calls from the system as this can only be done through the system programmers, who provide programming support to the overall system and are independent from the Department.

[25] From the information provided, it does not appear possible that corrections staff could have deleted the Applicant's calls from the system. Given that the calls would have been automatically deleted off the system after 90 days, I did not take any further steps to address this concern.

Duty to assist: Meaningful responses

[26] Part of the obligation to be open and accurate in treating access requests is ensuring that applicants receive meaningful responses, particularly where access is being refused. Providing meaningful explanations to applicants is a key component of the duty to assist and help applicants better understand why they are not receiving the requested information.

[27] The duty to assist includes providing applicants with sufficient and correct information about the access process and how decisions are made.

[28] In this case, in addition to relying on a mandatory exception to disclosure (section 21(1) – unreasonable invasion of third party privacy), the Department's response stated that consent of all parties involved on the calls in question would be required and that the only way the recordings could be released would be through a court order.

[29] For the reasons that follow, I find that the Department's explanations to the Applicant not in keeping with the duty to assist.

[30] On this point, Department officials advised that it has an informal policy that inmate telephone recordings are not released unless the requestor provides a court order.

[31] While there may be a legitimate question about who is lawfully entitled to access recordings of telephone calls placed by inmates in provincial correctional institutions, it does not follow that this approach could or should apply to an inmate seeking to access the recordings of the calls they participated in that were recorded on the system.

[32] The *Act* does not require individuals to obtain a court order to request or receive recordings of their own calls placed through the system and the Department's reliance on an informal policy as part of the reason to refuse access is not in keeping with its duty to assist.

[33] Also, an applicant's right to access calls they participated in needs to be assessed on a case-by-case basis, rather than applying a blanket rule that recordings cannot be disclosed on the grounds of the other party's privacy as a matter of principle.

[34] In light of the above, I recommend that the Department revisit its approach to access requests of this nature, as court orders and third party consents are not requirements to make such access requests under the *Act*. Access rights must be determined in accordance with the spirit, intent, and applicable provisions of the *Act*, and as a general rule, the public body has the burden of proof to show that the Applicant has no right of access to telephone recordings, rather than placing additional burdensome requirements on applicants looking to exercise their access rights to this kind of information.

Duty to assist: Additional considerations for individuals in custody

[35] In the Applicant's communications with our office, they stated that they had made several attempts while incarcerated to discuss their intention to make requests for the call recordings with corrections staff and Department officials and that they were advised that the recordings would be preserved on the system. The Applicant also indicated that they had tried to reach the Department's Right to Information Coordinator to discuss making a request for the recordings but was unable to reach them.

[36] The Applicant expressed much frustration about this situation and felt that Departmental staff had been deliberately misleading and unhelpful, which the Applicant believes might have been an effort to ensure the recordings would never be made available.

[37] While I did not independently review or verify the Applicant's stated concerns on this point, I recognize that individuals in custody may have additional challenges in seeking assistance on how to exercise their access rights.

[38] On this point, I recommend that the Department, if it has not already done so, explore ways to have right to information request forms readily available at provincial correctional facilities.

[39] I also recommend that the Department take steps to ensure that corrections staff and management, as well as individuals in custody, are aware of the 90-day deletion period for recorded calls on the Inmate Telephone System. Individuals who wish to exercise their access rights to request their call recordings need to know that these will

usually only be retained in the system for a short period of time and will need to make their requests within the 90-day window, otherwise the calls will be permanently and irretrievably deleted.

Applicant's access rights to the requested recordings

[40] As indicated above, the Department refused access to the requested recordings under section 21(1), as it was of the position that disclosure of the recordings would be an unreasonable invasion of privacy of the other parties to the calls and that they could not be disclosed without the third party's consent.

[41] As the recordings no longer exist, having been deleted from the system prior to the Applicant bringing this complaint, I am unable to review them to assess whether the Department's reasons for refusal were in keeping with the Applicant's access rights under the *Act*. Even if I were to find that the Applicant had a right of access, the recordings no longer exist.

[42] I am thus unable to make a finding on the Department's decision to refuse access to the requested recordings.

RECOMMENDATION

[43] As I found that the Department did not meet its duty to assist under section 9, under the authority of section 64.1(1)(h) of the *Act*, I recommend that the Department:

- provide a copy of the new policy and protocols to immediately flag all calls upon receipt of an access request for our review once finalized;
- create a documented retention schedule for call recordings if this is not already in place;
- provide training for staff who process access requests on the new policy and protocols to ensure they are aware of the need to preserve recordings in the system if the Department receives an access request, regardless of whether the Department is considering disclosure;
- revisit its approach to responding to access requests from individuals in custody for their recorded calls and to cease advising them that court orders and third party consents are required for disclosure;
- explore ways to have right to information request forms readily available at provincial correctional facilities; and
- take steps to ensure that corrections staff and management, as well as individuals in custody in provincial correctional institutions, are aware of the 90-day deletion period for recorded calls on the Inmate Telephone System.

[44] While recommendations issued under section 64.1 are not subject to the legislated time periods for the Department to inform of its decision on whether it will accept recommendations on access rights as per section 74, I nevertheless ask that the Department inform this office whether it accepts the above recommendations within 20 business days of receipt of this Report of Findings.

This Report issued in Fredericton, New Brunswick this 30th day of June, 2023.

Marie-France Pelletier
Ombud for New Brunswick