Report of Findings: 23/24-AP-099
Department of Justice and Public Safety

June 28, 2024

Revised: July 9, 2024

Citation: New Brunswick (Justice and Public Safety) (Re), 2024 NBOMBUD 5

Summary: The Applicant made an access request to the Department of Justice and Public Safety for records relating to a new correctional facility in the Fredericton region, including communications with municipalities and selection criteria. In response, the Department provided the Applicant with partial disclosure, relying on ss. 21(1) (unreasonable invasion of third party privacy) and para. 26(1)(a) (advice to a public body) to refuse access to the rest of the information at issue. The Applicant subsequently filed a complaint with this office.

During the investigation of this complaint, the Department conducted a further search, identified a substantial number of additional relevant records, and subsequently disclosed much of this and the previously withheld information to the Applicant. The Department continued to withhold some information under ss.16(1.1) (information is not relevant), ss. 21(1), and para. 26(1)(a).

The Ombud found that the Department did not meet the duty to assist under section 9, given the substantial amount of records missed in the initial processing of the request and resulting incompleteness of its response. The Ombud also found that the Department failed to meet the burden of proof to substantiate its continued reliance on para. 26(1)(a) to refuse access to some of the remaining information at issue.

The Ombud recommended that the Department make improvements to its internal practices to better meet its duty to assist obligations in conducting reasonable searches. The Ombud also recommended that the Department disclose some additional information where it did not meet the burden of proof under para. 26(1)(a).

Statutes Considered: *Right to Information and Protection of Privacy Act*, SNB 2009, c. R-10.6, sections 9, 16(1.1), 21(1), 26(1)(a), 84(1).

Authorities Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII), [2014] 2 SCR 3, *New Brunswick (Justice and Public Safety) (Re)*, 2023 NBOMBUD 3 (CanLII).

INTRODUCTION

[1] The Applicant made an access request under the *Right to Information and Protection of Privacy Act* ("the *Act*") to the Department of Justice and Public Safety ("the Department") for the following information between August 1, 2022 and August 5, 2023:

> Any and all records including but not limited to emails, text exchanges, briefing reports, presentations, proposals, application documents, letters relating to placement, construction, criteria and development of a new correctional facility in the Fredericton region – including email exchanges between the City of Fredericton, Nackawic, Grand Lake, Woodstock, Arcadia, and any other municipalities seeking to secure the jail. As well, any documents that relate to the change of criteria after the jail was pulled in May 2023.

[2] The Department responded by providing the Applicant with partial disclosure, relying on ss. 21(1) (unreasonable invasion of third party privacy) and para. 26(1)(a) (advice to a public body) to refuse access to the rest of the relevant information.

[3] The Applicant was not satisfied with the Department's response and filed a complaint with this office.

[4] Informal resolution was unsuccessful, which led me to conduct a formal investigation under subsection 68(3) of the *Act*.

ISSUES

[5] Prior to the issuance of this report, the Department agreed to conduct further searches, identified a substantial number of additional relevant records, and subsequently disclosed much of this and the previously withheld information to the Applicant, thus significantly reducing the scope of this investigation.

[6] The remaining outstanding issues are whether the Department properly met its duty to assist under section 9 by conducting a reasonable search and whether the Department properly refused access to the information it continued to withhold under ss. 16(1.1) (information is not relevant), ss. 21(1) (unreasonable invasion of third party privacy), and para. 26(1)(a) (advice to a public body).

APPLICANT'S POSITION

[7] In making this complaint, the Applicant questioned the Department's reliance on the third-party privacy exception (ss. 21(1)), noting that the request was not for third party information and arguing that municipalities, as public bodies that are also subject to the *Act*, should not be protected by third party considerations. The Applicant noted

that the Department did not disclose any records showing communications between the Department and municipalities in its response.

[8] The Applicant submitted that communications from municipalities to the Department on this issue should be part of the public record, as the new correctional facility is being built to alleviate stress on the public justice system. The Applicant noted that the Province is expending taxpayer funds to build the new facility and thus is accountable for how it spends this money. The Applicant pointed to the fact that the City of Fredericton had spent a significant amount of funds to prepare for the construction of a new facility before the Province decided not to proceed with this location, and argued that if municipalities and governments are spending money and subsequent advice leads the Minister to reverse course at the loss of taxpayer funds that the public deserves to know why.

DEPARTMENT'S POSITION

[9] We received some limited representations from the Department as part of the efforts to informally resolve this matter.

[10] During these exchanges, the Department explained that it relied on the unreasonable invasion of privacy exception under ss. 21(1) to withhold information that would identify individuals, such as the names of reporters who submitted media requests.

[11] As for the Department's reliance on the advice to a public body exception under para. 26(1)(a), the Department referred to a letter provided by the Deputy Minister to this office in response to a different access complaint on a similar matter, at which time the Department submitted:

> …These records consist of advice to and by a public body and ministers that could reasonably be expected to reveal advice, proposals, and recommendations as well as its positions, plans and criteria developed for the purpose of negotiations. Therefore, records should be excluded from disclosure under subsections 26(1)(a) and 26(1)(b) and thus not subject to disclosure. Quality decisions by ministers rely in part on candid and confidential advice within the public body, and if the discussions and advice to ministers are to be publicly disclosed, the effects would be chilling.

[12] When the matter escalated for investigation at my direction, I invited the Department to provide any further comments or representations it may wish to make about should it remain of the view that any of the information at issue falls within the scope of the para. 26(1)(a) exception.

[13] As this is a discretionary exception to disclosure, I specifically asked that the Department explain how it exercised its discretion should it decide to continue to refuse access to any of the information at issue, including an assessment of the public interest in disclosure of some or all of the information at issue. I also took this opportunity to remind the Department of its burden of proof to show that the Applicant has no right of access under ss. 84(1) of the *Act*.

[14] While the Department cooperated with the investigation by conducting a further search and disclosing a substantial additional amount of information to the Applicant, it did not provide any further explanations or representations for my consideration.

ANALYSIS AND DECISION

Section 9: Duty to assist

[15] The duty to assist that applies to all public bodies is set out in section 9 of the *Act*:

> 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.

[16] The duty to assist obligation compels all public bodies to be helpful and assist applicants throughout the processing of an access request. The duty to assist includes having discussions with applicants to ensure the public body understands what information they are seeking, conducting a reasonable search for the relevant records, and providing meaningful responses to requests.

Duty to assist: reasonable search

[17] While not raised by the Applicant in making this complaint, when the matter escalated for investigation, it appeared from the package of records provided for our review that the Department may have missed some records during its initial search, which prompted me to ask the Department to conduct a further search.

[18] The Department's subsequent search efforts resulted in identifying an additional 116 pages of records, in addition to the approximately 200 pages of records retrieved in its initial search.

[19] The Department did not provide submissions about how it conducted its search for records or how the records were missed during its initial search efforts. The Department did share that at the time that it was processing this request, it was also processing other requests relating to the new correctional facility, all of which were worded differently and covered different timeframes, which might explain how this oversight occurred.

[20] To the Department's credit, it took the search concerns seriously and efforts were made to promptly rectify this issue once brought to its attention, following which the Department disclosed most of the information in the additional records, along with much of the information that it initially withheld, to the Applicant.

[21] While we were able to successfully address this issue at the investigation stage, I raise it as a point of concern as the Applicant had no way to assess or question the adequacy of the Department's search based on the Department's initial response to the request. As the response did not address whether the Department had any information in relation to the specific points of the request and merely stated that information that was not being provided under the claimed exceptions to disclosure, the Applicant was left without any understanding of what information the Department had in its custody and control or a sense of how much information had been withheld in full.

[22] As a substantial number of records were overlooked in the Department's initial search, I find that the Department's response did not meet the duty to assist as it was not fully accurate or complete.

[23] While the standard that a public body must meet in conducting a search for records is reasonableness, not perfection, I find that there should have been opportunities in the Department's initial search and subsequent review and approval process that could have prevented this situation before the response was issued to the Applicant.

[24] To reduce the risk of a similar search issue occurring in the future, I recommend that the Department implement a standardized form that would track the progress of searches conducted for all access complaints, including who was tasked with conducting searches, individual search results, approval timelines and sign-offs, and similar information to properly document the search efforts undertaken.

[25] In addition to having this internal tracking tool to assist the Department in processing access requests, including potentially highlighting any gaps or deficiencies before a response is issued, this would enable the Department to more readily address any concerns raised about how it conducted its search for records. It may also help this office more efficiently address search concerns in future complaint investigations.

Paragraph 16(1.1): Information not relevant

[26] Paragraph 16(1.1) of the *Act* gives a public body discretion to refuse access to information if the public body deems it to be not relevant to the request:

> 16(1.1) The head of a public body may obscure information contained in a record referred to in paragraph 1(a) or (b) or sever information from a record

> referred to in paragraph 1(a) or (b) before giving the applicant a copy of the record or permitting the applicant to examine the record, if, in the opinion of the head, the information is not relevant to the request for information.

[27] While the Department did not raise this provision in its initial response, it relied on it to refuse access to some information in the records identified during its subsequent search efforts.

[28] The Department did not provide this office with explanations as to why it deemed the information refused under this provision to be not relevant to the request; however, having reviewed the information in question, I can accept that it was not directly relevant to the request.

[29] As an example, in one email that was partially disclosed to the Applicant, Department communications staff were communicating with the Deputy Minister about two issues, one of which was about the new correctional facility and the other about a different Departmental matter. The Department disclosed the portion that spoke to the new correctional facility but withheld the portion that discussed an unrelated matter.

[30] As another example, the Department disclosed an email with four one-page summaries of issues prepared for senior management as part of the budget process. The Department disclosed the document that spoke to the need for a new correctional facility but withheld the three other documents, which were about matters not specific to the new correctional facility.

[31] As I am satisfied from my review that the information withheld on this ground was not directly relevant to the Applicant's request, I do not require the Department to take any further action on this point.

Paragraph 21(1): Unreasonable invasion of third-party privacy

[32] The Department relied on this exception to refuse access to information it deemed to be an unreasonable invasion of privacy if it were to be disclosed. The Department relied on this provision to protect the names and contact information of citizens who shared concerns about the new correctional facility, the names of reporters who made media inquiries to the Department (but not the names of the media organizations, which were disclosed), and direct cell phone numbers and contact information for Department and other public officials.

[33] I find that the Department was required to protect the names and contact information of members of the public who brought forward concerns about the new correctional facility as disclosure of their information in this context would be an unreasonable invasion of their privacy.

[34] While I do not necessarily agree that some of the professional contact information for Department and other public officials would be an unreasonable invasion of privacy as contemplated by this provision, disclosure would not provide the Applicant with any additional meaningful information and thus I do not require the Department to take any further action on this point.

Section 26(1)(a): Advice to a public body

[35] Section 26(1)(a) is a discretionary exception to disclosure that allows public bodies the option to protect information where disclosure could reasonably be expected to divulge details related to decision-making processes:

> 26(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal
>
> (a) advice, opinions, proposals or recommendations developed by or for the public body or a Minister of the Crown…

[36] The purpose of this exception is to strike a balance between ensuring an effective and politically neutral public service that provides free, full, and frank advice on a proposed course of action and the public's right to meaningful access and transparency in government decision-making.[1]

[37] As this is a discretionary exception to disclosure, a public body must show that the information in question falls within the scope of the exception and that the public body exercised its discretion in deciding to refuse access.

[38] In reviewing the exercise of discretion, I may find that the public body erred in exercising its discretion where, for example, it did so in bad faith or for an improper purpose, it took into account irrelevant considerations, or it failed to take into account relevant considerations. Where this is the case, I can ask the public body to reconsider its position and exercise of discretion; however, I cannot substitute my own discretion for that of the public body.

[39] While the advice to a public body exception under para. 26(1)(a) of the *Act* does afford broad protection for information about decision-making processes, it is not consistent with the spirit and intent of the law to apply this provision in a blanket fashion and refuse access to information about decision-making processes on principle. Each request must be assessed on a case-by-case basis and determined on relevant factors and considerations, including the public interest in disclosure.

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[1] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII), [2014] 2 SCR 3, at paras. 43-46.

[40] While the Applicant has now received most of the information at issue, there remains the question of the information that the Department continued to withhold as advice under para. 26(1)(a) of the *Act*. A small number of records were refused in full, and some portions of the records that were otherwise disclosed to the Applicant were redacted on this ground.

[41] As explained above, the Department did not provide our office with substantive submissions as to why it was continuing to object to further disclosure, beyond its initial position that all the withheld information relating to the new correctional facility was advice and referring to the public policy reasons behind the advice to a public body exception.

[42] This leaves me in the position of having to make my own assessment about the Department's decision and whether it is in keeping with the Applicant's access rights under the *Act*, without the benefit of the Department's explanations to this effect.

[43] As this is a discretionary exception, I will continue my analysis keeping in mind that I cannot substitute my discretion for that of the Department. If a public body does not make a compelling argument that a discretionary exception applies, it is more likely that I will find that it did not meet the burden of proof and will recommend release of the information at issue.

[44] From my review of the withheld information, it appears that most of the information remaining at issue could be reasonably considered as advice, as it is similar in nature to the kinds of information this office has found to fall within the scope of this exception in other cases.

[45] Some of the information that the Department continued to withhold consists of discussions and details about properties that were considered but ultimately not selected as the location for the new correctional facility, including exact locations, as well as assessments and discussions about whether they met the site selection criteria and related considerations.

[46] The Department also withheld details of internal discussions on the preparation of briefing materials, including for the Minister, and how to respond to potential questions about various aspects of the decision-making process.

[47] I am satisfied that information of this nature can be considered as advice for the purposes of the para. 26(1)(a) exception and the Department could lawfully refuse access.

[48] The Department did not provide any submissions or explanations on its exercise of discretion in deciding to withhold these details, including its consideration of the possible public interest in disclosure. I thus encourage the Department to reconsider its

position and possible disclosure of these details, taking into account the fact that a final decision to locate the new correctional facility on a property in Grand Lake had been made at the time of the Applicant's request and the public interest in better understanding the province's decision.

[49] The Department also redacted dollar amounts in a document entitled "Corrections Facility in Fredericton region," but again did not provide any submissions as to how this information falls within the exception or why it should be protected. From my review, these again appear to be previously decided budgetary decisions, most if not all of which are already publicly known. I do not find that this information qualifies as advice and it should have been disclosed to the Applicant.

CONCLUSION

[50] I take this opportunity to note that this is the second time in less than a year that I have addressed substantially similar issues with the Department in relation to the subject matter of this request.

[51] I issued a Report of Findings[2] with recommendations to the Department last year on a related access complaint about the decision to build a new correctional facility in the Fredericton area last August, while the Department was in the process of treating the Applicant's request that led to this complaint investigation. In both cases, the Department initially refused to disclose most, if not all, of the requested information, maintained its objections to disclosure in large part throughout the informal resolution efforts, but substantively changed its position after these matters escalated to the investigation stage.

[52] While in both cases, the applicants' right of access to the requested information was eventually largely met in the end, this only occurred after considerable efforts were expended with the Department, which resulted in a significant delay in disclosure.

[53] I encourage the Department to continue to improve its processes for handling access requests with these considerations in mind, as doing so will not only further support transparency and compliance obligations under the Act, but it will also allow the Department to deploy its efforts more efficiently towards the timely resolution of complaints.

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[2] *New Brunswick (Justice and Public Safety) (Re)*, 2023 NBOMBUD 3 (CanLII).

RECOMMENDATION

[54] In light of the above, under the authority of para. 64.1(1)(h) of the *Act*, I recommend that the Department take the following steps:

- develop and implement a standardized form to track and document the progress and accuracy of searches undertaken for all access requests including who was tasked with conducting searches, individual search results, approval timelines and sign-offs, and similar information to properly document the search efforts undertaken;
- provide training to staff on conducting reasonable searches and reviewing search results to ensure better compliance with section 9 of the *Act*.

[55] While recommendations issued under section 64.1 are not subject to a legislated time period, 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.

[56] I also recommend under clause 73(1)(a)(i)(A) of the *Act* that the Department disclose the following to the Applicant, as this information was not properly withheld under para. 26(1)(a):

- a full copy of the undated document entitled “Corrections Facility in Fredericton region”.

[57] As set out in section 74 of the *Act*, the Department must give written notice of its decision with respect to these recommendations to the Applicant and this Office within 20 business days of receipt of this Report of Findings.

This Report was initially issued in Fredericton, New Brunswick on the 28th day of June, 2024 and reissued with corrections on this 9th day of July, 2024.

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Marie-France Pelletier
Ombud for New Brunswick