

**Report of Findings: 19/20-AP-202**  
***Right to Information and Protection of Privacy Act***  
**Department of Justice and Public Safety**

**July 30<sup>th</sup> , 2021**

**Summary:** The Applicant made an access request to the Department of Justice and Public Safety for all information about the Province's relationship with the third party company that provides telephone services in New Brunswick's correctional facilities, including the service contract, legislation, regulations, correspondence, etc., and documents pertaining to the provision of services such as phone calls and monetary gifts to inmates. The Department provided the Applicant with its telephone communications policy for Correctional Services and refused access in full to the contract, stating that the third party did not consent to disclosure under ss. 22(1)(c)(i), (ii), and (iii) (disclosure harmful to a third party's business or financial interests). The Applicant was not satisfied with the Department's response and filed a complaint with this Office.

Unfortunately, before the Ombud concluded this investigation, the Applicant passed away, thus rendering the question of access rights moot. The Ombud found that the Department had failed to meet its duty to assist the Applicant in this case. The Department failed to provide timely and meaningful responses to this Office during the investigation process, raising concerns about the Department's current resource capacity to meet its obligations under the Act. The Ombud recommended that the Department review its access to information policies and practices, including the duty to assist, review its current resources for processing access requests and implement additional resources if necessary, and to cooperate in a timely and meaningful manner with this Office.

**Statutes Considered:** [Right to Information and Protection of Privacy Act](#), SNB, c. R-10.6, ss. 9, 11(1).

**Authorities relied on:** New Brunswick Office of the Ombud, [Duty to Assist and Meaningful Responses](#); New Brunswick Office of the Ombud, [Report of Findings 19/20-AP-192](#) (July 13, 2021, publication pending).



## I BACKGROUND

1. On November 17, 2019, the Applicant made an access request to the former Department of Public Safety (currently the Department of Justice and Public Safety, "the Department") for all information about the Province's relationship with the third party company that provides telephone services in New Brunswick's correctional facilities, including the service contract, legislation, regulations, correspondence, etc., and documents pertaining to the provision of services such as phone calls and monetary gifts to inmates. The timeframe was from the beginning of the contract to the date of the request.
2. The Department responded by letter dated January 13, 2020, providing the Applicant with a copy of the telephone communications policy for Correctional Services and refusing access to the contract for the following reason:

Please be advised that the third party has been contacted and they do not consent to the release of the contract pursuant to section 22(1)(c) which states that the head of a public body shall refuse to disclose to an applicant information that would reveal commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to

- (i) harm the competitive position of a third party,
- (ii) interfere with contractual or other negotiations of a third party,
- (iii) result in significant financial loss or gain to a third party.

Pursuant to the sections above, the service contract is being withheld.

3. The Applicant was not satisfied with the Department's decision and submitted a complaint to this Office.
4. The matter was not resolved informally and I proceeded to conduct a formal investigation pursuant to s. 68(3) of the Act.

## II ISSUES

5. The purpose of a formal investigation is to determine whether the public body has fulfilled its obligations and respected the Applicant's access rights under the Act and to address any issues that were unable to be rectified during the informal resolution process.

6. In this case, the outstanding issues were whether the Department had conducted an adequate search for the relevant records and whether the Department had properly relied on ss. 22(1)(c)(i), (ii), and/or (iii) to refuse access in full to the contract between the Province and the third party.
7. Unfortunately, during the formal investigation process, our Office learned the Applicant had passed away. This rendered the question of access rights moot. I considered ceasing my investigation of this complaint on that basis; however, given the deficiencies in the Department's initial processing of this request, the level of cooperation this Office received from Department officials during the informal and formal investigation processes, and my concerns about its overall capacity to reasonably meet its obligations under the *Act*, I decided that these need to be further addressed through a Report of Findings.
8. The issues that I will address in turn below are:
  - whether the Department met its duty to assist the Applicant under s. 9 of the *Act*;
  - the level of cooperation received by this Office from Department officials during the investigation of this complaint; and
  - based on recent interactions between this Office and the Department, whether the Department's current allotted resources for managing its obligations under the *Act* with respect to access requests are sufficient.

### III FINDINGS

#### Section 9: Duty to assist

9. The duty to assist provision found in s. 9 of the *Act* compels all public bodies to be helpful and assist applicants throughout the processing of an access request:

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.
10. The duty to assist includes having discussions with applicants to ensure that the public body understands what information he or she is looking for, that a reasonable search for the relevant records is conducted, and that the public body provides a meaningful response to the access request.<sup>1</sup>

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<sup>1</sup> New Brunswick Office of the Ombud, *Duty to Assist and Meaningful Responses*.

11. In the present case, I find that the Department did not meet its time limit to provide a timely response to the Applicant's request within 30 business days of receipt as per s. 11(1) of the *Act*. The Department's response indicates that it received this request on November 18, 2019 and the response letter was dated January 13, 2020, which is 37 business days after receipt. As the Applicant did not raise timeliness as an issue in filing the present complaint, we did not question the Department on the reason for the delay. Presumably, the holiday period was a factor in the timing of the issuance of the Department's response; however, this is not a valid reason for not meeting the statutory time limit to respond under the *Act*.
12. I also find that the Department failed to conduct an adequate search for relevant records, given that the only two records it identified during the initial processing of this request as relevant were the telephone communications policy for Correctional Services and the contract between the Department and the third party. The Applicant's request was clearly broader in scope as it specifically requested "all information about the Province's relations with [the third party company]", including the contract itself and governing policies, but also correspondence and documents pertaining to the provision of services under the contract, such as phone calls and monetary gifts to inmates. It is my understanding that the Department did contact the Applicant after receiving the request, but it is unclear from the details provided by the Department whether there was a discussion at that time with the Applicant about the scope or wording of the request.
13. As will be discussed in greater detail below, the Department did eventually conduct further searches and provided some additional records for our review, which further supports a finding that the initial search efforts were lacking.
14. For these reasons, I find that the Department failed to conduct an adequate search for records as part of its duty to assist under s. 9 of the *Act*.
15. Based on this finding, I also find that the Department's response to this request was incomplete and inaccurate, as it did not initially identify all the relevant records in custody and control that were directly relevant to the request, and thus not in keeping with the requirements of s. 9 of the *Act*.

#### **Cooperation with complaint investigation**

16. Among the reasons why this matter was not able to be resolved during the informal resolution process and the investigation has taken so much time to complete, aside from the disruption caused by the Province-wide lockdown in spring 2020 due to the COVID-19 pandemic, is the fact that the Department, at times, failed to cooperate with our investigation in a timely fashion.

17. While the Department promptly responded to our notice of complaint and provided the relevant records as requested at the beginning of our review, the Department failed to cooperate with the informal resolution process in a timely manner.
18. As the question of the Applicant's access rights remained at issue despite efforts to affect an informal resolution of this matter, I issued a notice of formal investigation to the Department on February 25, 2021. At that time, I requested additional information and explanations from the Department to help me better understand how the parties arrived at the commission rate and fee structure as set out in the contract documents. I also asked that the Department conduct a further search for additional relevant records as per the wording of the Applicant's request, provide any further such records for my review, and to advise of its views on the Applicant's access rights to this additional information. I asked that this be provided by March 18, 2021.
19. On April 6, 2021, the Department informed this Office that it was amenable to disclose the contract documents to the Applicant, but not the fee structure and commission rate. The Department made no mention or reference to the additional information or explanations that I had requested in February 2021.
20. As of the date of writing of this report, the Department did not provide any further reply to the questions set out in the formal investigation notice of February 25, 2021, other than its communication about its willingness to partially disclose the contract of April 6, 2021.
21. The question of access rights to the contract between the Province and the third party was addressed by this Office in a recent Report of Findings (19/20-AP-192), which was the result of an access complaint from a different applicant for the same contract. In that case, I found that the contract should have been disclosed in full as neither the Department nor the third party had presented detailed and convincing evidence to merit a finding that ss. 22(1)(c)(i), (ii), or (iii) of the Act applied.
22. At a minimum, the Applicant in this case should have received a copy of the contract documents; however, the Department did not make any further disclosure to the Applicant. It is also possible that the Applicant would have been entitled to further information in the additional relevant records; however, given the circumstances, I do not require the Department to take any further steps to address this issue as the question of the Applicant's access rights are no longer at play.
23. While our complaint investigation experienced some unavoidable delays due to the Province-wide shut down due to the pandemic in early 2020, once this Office resumed normal operations and restarted the complaint investigation process in this case, we unfortunately did not consistently receive timely

responses or cooperation from the Department. The only communication we received from the Department on this matter during the formal investigation process was an email indicating the Department's willingness to partially disclose the contract documents. We did not receive any further updates or responses from the Department. As the Department did not offer any reason for the delay, I can only speculate as to whether this was due to an abundance of other access-related obligations at the time or a blatant disregard of this Office's complaint investigation process.

24. In future complaint investigations with the Department, I am hopeful that this Office will receive more timely and meaningful cooperation during both the informal resolution and formal complaint investigation processes.

#### **Concerns with Department's current capacity to meet its obligations under the Act**

25. I take this opportunity to express my concerns about the Department's overall level of compliance and current capacity to meet its obligations under the Act. Based on recent interactions with the Department, this Office is aware that the Department has been experiencing a recent increase in the number of access requests received and has encountered some challenges in both the initial processing of access requests as well as timely compliance with recent complaint investigations.
26. In March 2020, at the beginning of the Province-wide shut down due to the pandemic, the Department informed this Office that it had seven active access requests at the time.
27. In May 2021, in communications about a separate matter, the Department informed us that it was then treating twenty-five active access requests, which was an all-time high number of active access requests for the Department since 2000. As for the Department's allotted resources for processing access requests, the Department indicated that it has tasked one employee with this responsibility. The Department also noted that it was then also dealing with a number of access complaint investigations with this Office.
28. It is not clear whether the current elevated volume of active access requests facing the Department is a short-term anomaly or a sustained increase that the Department can expect will continue; however, this does raise the question of whether the Department's current resource allotment for processing access requests is sufficient to allow it to meet its obligations to provide timely and meaningful responses under the Act.
29. On our Office's part, we have seen a slight increase in the number of access complaints against the Department over the past couple of years and are aware that some of the access requests that the


Department has handled during this timeframe were broad in scope and complex in nature; however, that is not the case with the present matter.

30. If the Department does not have adequate resources in place to meet its obligations under the *Act*, this could create a systemic issue that could, in turn, merit further intervention by this Office. While the Department may not yet be in such a situation, I am of the view that it would be prudent for the Department to review its existing practices, procedures, and resources with respect to its obligations under the *Act* at this time as a proactive measure. A recommendation on this point will follow.

#### IV RECOMMENDATION

31. Based on the above, while I find that the Department's initial response to the request was not in keeping with the Applicant's access rights under the *Act*, there is no need for me to recommend further disclosure under the circumstances.
32. Under the authority of s. 64.1(1)(h) of the *Act*, I recommend that the Department:
- review its policies and procedures for processing and responding to access requests, including the duty to assist requirements under s. 9 of the *Act*;
  - review its existing resources for handling and processing access requests and implement any necessary measures to ensure it has sufficient levels of trained staff to assist in meeting its statutory obligations to provide timely and meaningful responses to requests;
  - commit to timely and meaningful communication with this Office in future investigations, including timely responses to notices of formal investigations.
33. While recommendations issued under s. 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 s. 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 30<sup>th</sup> day of July 2021.

  
Charles Murray  
Acting Ombud for the Province of New Brunswick