



Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Tricia Ralph

REVIEW REPORT 21-13

October 12, 2021

Department of Justice

Summary: The *Correctional Services Act* authorizes correctional facilities to record inmate telephone calls. The applicant requested copies of telephone calls he made from a correctional facility while he was an inmate there. The Department of Justice (public body) denied the applicant's request because it said that it could not locate any responsive records, as unless flagged, the telephone calls would have been automatically deleted after 90 days. The Commissioner finds that the public body did not take adequate steps to confirm that the recordings do not exist. The Commissioner recommends that the public body contact the service provider of its phone recording system within 30 days to confirm whether the records were in fact deleted, and if not, collect them from the service provider and provide them to the applicant within 10 days of receipt.

INTRODUCTION:

[1] The applicant was an inmate at a correctional facility. The correctional facility was authorized to record the applicant's telephone calls and was required to delete them after 90 days if not flagged.¹ During his incarceration, the applicant made a number of telephone calls out of the facility. The applicant sought a copy (audio recording or transcript) of his telephone calls more than 90 days after the calls were made. The Department of Justice (public body) denied the applicant's request because it said the files must have been destroyed according to their retention period. The applicant filed a request for review with the Office of the Information and Privacy Commissioner (OIPC).

ISSUES:

[2] Did the public body meet its duty to assist the applicant by conducting an adequate search as required by s. 7(1)(a) of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*?

¹ See s. 55 of the *Correctional Services Act*, [SNS 2005, c 37](#) and s. 60(7) of the *Correctional Services Regulations*, [NS Reg 99/2006](#).

DISCUSSION:

Burden of proof

[3] Section 45(1) of *FOIPOP* states that the burden is on the head of the public body to prove that the applicant has no right of access to the record or part of the record.

Did the public body meet its duty to assist the applicant by conducting an adequate search as required by s. 7(1)(a) of *FOIPOP*?

[4] For the reasons set out below, I find that the public body did not meet its duty to assist the applicant by conducting an adequate search for the responsive records.

[5] The requirement to conduct an adequate search arises out of the duty to assist provision in s. 7(1)(a) of *FOIPOP*. Section 7(1)(a) of *FOIPOP* states:

7 (1) Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall
(a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely;

[6] The public body's position was that it had conducted an adequate search and fulfilled its s. 7(1)(a) obligations. It noted that previous review reports have set out that the standard of assessing its actions is one of reasonableness and not perfection.²

[7] In terms of how it conducted an adequate search, the public body first explained the legal landscape of its authority to record inmate telephone calls. This authority arises from s. 55 of the *Correctional Services Act*,³ which allows the superintendent of the correctional facility to record inmates' telephone calls unless they are between the inmate and his lawyer or any other prescribed person. The *Correctional Services Regulations* specify that any recordings taken must not be kept for longer than 90 days unless there are reasonable grounds to believe that the inmate was involved in (a) illegal activities; (b) harassing or causing harm to others; or (c) an activity that may jeopardize the safety, security or operation of the correctional facility.⁴

[8] In this case, the applicant made his access to information request in November 2016, for a time period covering April to July 2016. As such, the 90-day hold period required by the *Correctional Services Regulations* had just passed by the time the applicant made his request. The applicant said that the calls did fit into the criteria that can trigger an exception to the 90-day destruction requirements (i.e., the calls were about illegal activities, harassing or causing harm to others, or an activity that may jeopardize the safety, security or operation of the correctional facility).

² See *NS Review Report FI-13-52, Nova Scotia (Community Service) (Re)*, [2014 CanLII 4519 \(NS FOIPOP\)](#). This principle was more recently cited in *NS Review Report 21-05, Department of Community Services (Re)*, [2021 NSOIPC 5 \(CanLII\)](#).

³ *Correctional Services Act*, [SNS 2005, c 37](#).

⁴ See s. 60(7) of the *Correctional Services Regulations*, [NS Reg 99/2006](#).

[9] The public body uses a contracted private service provider to operate the phone recording system. It is the service provider and not the public body that is tasked with deleting the records not required after 90 days. The public body has the ability to log in to the system to view the records held by the service provider, but the task of deleting the records lies with the service provider.

[10] The public body submitted that audio recordings are automatically destroyed by the service provider after 90 days unless flagged by the public body. It said that audio calls are destroyed by the service provider with a secure media eraser (secure shredding) at 90 days unless flagged manually by correctional facility staff. The public body also said the automatic delete function is built into the phone recording IT system without requiring further action by the service provider.

[11] In terms of whether it flagged the records, the public body said it looked and could see no flagged records that were responsive to the applicant's request. The public body said that its staff looked for call recordings under the applicant's name, date of birth and PIN number and found no recordings. As such, the public body ended its search there. Its view was that because the records were not flagged, they must have been deleted by the service provider. The public body did not contact the service provider to ask whether the records were in fact deleted because they had not been flagged. The public body assumed that because the 90-day period had passed, any responsive records would have been automatically deleted by the service provider.

[12] In this case, all signs point toward the records likely having been deleted by the time the applicant requested them. But the problem with the public body's response was that it did not confirm with the service provider whether this indeed happened. It assumed the service provider did and thought that was enough to satisfy its s. 7 obligations. It was not. It is entirely reasonable to expect that a public body would confirm records were in fact deleted rather than assume that they were because a policy (or in this case, law) required it. This is why, in my office's guidance document entitled *Duty to Assist #2: Conducting an Adequate Search: Guidelines for Public Bodies and Municipalities*,⁵ we specify that if records were destroyed in accordance with an approved retention policy, that a copy of the policy and retention paperwork be provided. Policies, and even laws, are often not followed. It is not reasonable to assume that something was done because it was supposed to be done.

[13] The nuance in this case is that the public body said the service provider would have used a secure media eraser to automatically delete the records. Again, that likely means the records were deleted, but it does not mean that they actually were. The public body did not tell me which media eraser product the service provider used. Most media erasers available online produce detailed audit trails. I don't know if that media eraser would have created an audit trail, but I would hope that the public body ensured its service provider had a means of verifying that destruction was actually taking place. It is important to note that public bodies cannot contract out of their responsibilities under *FOIPOP*.⁶ Rather, public bodies' obligations under *FOIPOP* extend to any contracted service providers. The public body maintains responsibility regardless

⁵ This document can be found [here](https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Search%20Guidelines%20%282019%2002%2025%29.pdf) on our website: <https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Search%20Guidelines%20%282019%2002%2025%29.pdf>.

⁶ *NS Review Report 18-11, Department of Transportation and Infrastructure Renewal (Re)*, [2018 NSOIPC 11 \(CanLII\)](#), at para. 58.

of whether it has contracted out this task. It is incumbent upon the public body to have a means to ensure records are deleted as required by law. One example of that would be the audit trail showing the records were in fact deleted. Asking your service provider to confirm it followed its obligations is not perfection, it is reasonable. Because the public body did not provide proof that the records were in fact deleted, it failed in its duty to assist the applicant.

FINDINGS & RECOMMENDATIONS:

[14] I find that:

1. The public body did not conduct an adequate search for records as required under the duty to assist provision set out in s. 7(1)(a) of *FOIPOP*.

[15] I recommend that:

1. The public body contact its service provider within 30 days and ask it to confirm whether the records were in fact deleted as required by the *Correctional Services Regulations*.
 - a. If the records do not exist, I recommend that the public body inform the applicant of that and provide him with a copy of the retention paperwork or audit trail demonstrating the same within 10 days of receipt of that information and then take no additional action.
 - b. If the records do exist, I recommend that the public body collect them from the service provider and provide them to the applicant within 10 days of receipt of the records.

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Tricia Ralph
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