

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2012-674-AP-341

9/14/2012

Office of the Access to Information and Privacy Commissioner of New Brunswick

Case about access to inmate nutritional information in New Brunswick correctional facilities

INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). This Report stems from a Complaint filed with our Office on January 26, 2012.

2. The Applicant sought the following information from the Department of Public Safety ("the Department") on December 8, 2011:

I am writing to request information under The Right to Information & Protection of Privacy Act regarding inmate nutrition within the New Brunswick Correctional system.

Specifically, I request the daily calorie content, meal frequency, and serving/portion sizes currently provided to New Brunswick provincial inmates.

It is my understanding that the menu for inmates changed in the spring of 2011, and was to be reviewed in the fall of 2011. I would like to have provided this information for both pre & post fall review.

("the Request")

3. The Department provided a response granting partial access to the requested information with the following explanation on December 22, 2011:

Reference is made to your correspondence dated December 8, 2011 and received December 12, 2011 requesting the following:

[text of Request as reproduced above]

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

In keeping with the provisions of section 7(3) of the Act certain parts of some documents being released have been severed. In addition, information that did not pertain to your request was severed as well. Instances where this occurred are obvious.

("the Response")

4. Along with the Response, the Department released the following records with some information redacted:

- a) copies of the new menus and standardized recipes that were implemented in April 2011; and

- b) notes of staff meetings in which inmate nutrition and meal plans were discussed in March and December 2011.
5. The Applicant was not satisfied with the Response and the records received and filed a complaint with our Office on January 26, 2012.
6. The crux of the Applicant's complaint is that the Department did not provide information about the daily caloric allowances for inmates in the Provincial correctional system. In submitting the complaint, the Applicant included the following comments:

I again request that the NB Dept. of Public Safety provide complete nutritional information, including but not limited to daily caloric allowances for provincial inmates. I request that quantities received by those incarcerated at the Saint John Regional Correctional Center be included.

As explained to me by officials in the Dept. of Public Safety, provincial inmates are fed in accordance with the Canada Food Guide. According to the Canada Food Guide a sedentary level male 19-30 years old requires 2500 calories daily, including 8-10 servings fruit & vegetables, 8 servings grain products, 2 milk & alternatives and 3 meat & alternatives. Information provided did not confirm this is occurring.

The information provided by the NB Dept. of Public Safety in response to my request under the Right to Information & Protection of Privacy Act regarding inmate nutrition within the New Brunswick Correctional system was incomplete and conflicting...

("the Complaint")

COMMISSIONER'S POLICY ON THE COMPLAINT PROCESS

7. As in all complaint investigations, both the applicant and the public body are advised at the outset of the Commissioner's Policy on the Complaint Process. That process is designed to respect the law, to encourage both cooperation and transparency, all the while reaching for a satisfactory resolution for both the applicant and the public body in accordance with the requirements of the *Act*. This approach is based on the notion that it is preferable for all parties concerned to resolve complaints informally, and for all parties to become more familiar with their rights and obligations under the new legislation. Educating the public about the application of this law is an important part of the mandate of this Office.

8. Accordingly, our Office first seeks to resolve the matter informally, to the satisfaction of both parties, and in accordance with the rights and obligations set out in the *Act*. For all intents and purposes, in both the informal resolution process and the formal investigation, the Commissioner's work is the same: assessing the merits of the complaint and achieving a resolution that is in accordance with the *Act*.
9. When this is not possible, the Commissioner concludes her work with a formal investigation and publishes her Report of Findings (*Note*: A full description of the steps involved in the Commissioner's informal resolution process can be found in **Appendix A** of this Report).

INFORMAL RESOLUTION PROCESS

10. The informal resolution process first requires our review of the request, the response provided by the public body, and any comments provided by the applicant in making the complaint. Then, we meet with officials of the public body to discuss our complaint resolution approach, to determine how the public body processed the request, and to review any records that relate to the request. After this review, if we do not agree with the response, we provide the public body with our written preliminary findings. This is done with a view to make the public body aware of the various rules in the *Act* regarding access, disclosure, and privacy in relation to the requested information. These findings are to guide the public body should it decide to continue with the informal resolution process and prepare a "revised response" to resolve the applicant's complaint to the satisfaction of all concerned and in conformity with the *Act*.
11. Our initial step in this case was to review the Request, the Response, and the comments made by the Applicant in the Complaint. We then met with the Department's officials in February 2012 to commence our discussions about how the Department processed the Request. We were provided with background information and an overview of how the Department has addressed inmate nutrition and were able to conduct a review of the relevant records.

Context

12. The Department implemented changes in April 2011 to standardize meal plans for all Provincial correctional facilities and to improve the overall nutritional value of the food provided to inmates.

13. We understand that there is no policy in place governing inmate nutrition and prior to April 2011, menu planning for inmates was done at the institutional level and often included high-fat processed foods. In an effort to ensure that inmates had access to more nutritious foods in all Provincial institutions, the Department developed a standardized menu based on general nutritional needs for sedentary males aged 19 to 30. The meal plans were reviewed on an informal basis by a registered dietician and nutritionist before being implemented. In developing the standardized menu plan, the Department did not consider or calculate caloric information.
14. Currently, the standardized menu is used in all Provincial institutions for both male and female inmates, with exceptions being made for those with different needs on a case-by-case basis (for example: food allergies, diabetes, pregnancy, etc.).

Search of records

15. In searching for the relevant records to respond to the Request, the Department identified the new standardized menu and recipes as well as minutes of staff meetings where the meal plan for Provincial inmates was discussed. These constituted all of the records in its possession which related to the Request.
16. In preparing its Response to the Request in December 2011, the Department did not have concerns about the disclosure of most of the information contained in the relevant records; therefore, those records were provided to the Applicant with some redactions for the names of three individuals on the standardized menu as well as information in the staff meeting notes that was not relevant to the Request.
17. While the Applicant was specifically seeking information about caloric amounts, the Department explained to us during our investigation that it revamped the meal plan at its own discretion and implemented the changes based on general health concerns for inmates in the Provincial correctional system as well as economic efficiencies by standardizing the contracts for the provision of food supplies. The Department was not required to and did not find it necessary to conduct a caloric analysis of the meal plan. As a result, the Department has no records in its possession that contain this specific information.
18. Based on the Department's explanation of the conduct of the review and implementation of the new standardized meal plan, we are satisfied that the Department conducted an adequate search for records that related to the Request, and

we are satisfied that it does not have any records in its care and control that specifically contain information on the daily caloric amounts as requested by the Applicant.

Format of the Response

19. While the Response and records provided to the Applicant addressed the meal frequency and serving/portion sizes part of the Request, the Response was silent on the question of the daily calorie content. As such, we find that the Department's Response did not fully respond to the Applicant's Request, as it did not address this part of the Request.
20. We are of the view that the Department could have provided a clearer response by indicating that it was granting access to the records that relate to the meal frequency and portion sizes, while also indicating that the Department did not have any records in its possession that contain information regarding the caloric content of the meals provided to inmates. The Complaint is based mainly on the fact that the Department did not provide information about the caloric content and did not provide any explanation for this in the Response.
21. It is important to mention that in preparing a response to a request, a public body is obligated under section 14 to ensure that an applicant receives a meaningful response. In particular, subsection 14(1) provides:
 - 14(1) In a response under subsection 11(1), the head of the public body shall inform the applicant
 - (a) as to whether access to the record or part of the record is granted or refused,
 - (b) if access to the record or part of the record is granted, the manner in which access will be given, and
 - (c) if access to the record or part of the record is refused,
 - (i) in the case of a record that does not exist or cannot be located, that the record does not exist or cannot be located;
 - (ii) in the case of a record that exists and can be located, of the reasons for the refusal and the specific provision of this Act on which the refusal is based....
22. The language of section 14 refers to "records", rather than to the request as a whole. This section obligates a public body to identify the relevant records it has in its custody and control in responding to the request. Where a public body does not have any records that contain the requested information or cannot locate any such records, the

public body must treat this as a “refusal of access” and it must indicate this in the response.

23. Similarly, when a public body does have records that relate to the request but decides to refuse access to any portion of the information contained in the records, this also must be indicated in the response. Any information which is redacted or withheld in entirety (access is refused) must have an explanation regarding the reason(s) for the refusal.

Use of Index of Records

24. To provide some assistance in the proper format of a response, we encourage all public bodies to consider preparing an index of records when processing a request for information. Ideally, an index of records:
- identifies each relevant record or category of records;
 - briefly describes the nature of the information contained in the record or category of records;
 - states whether access to all or part of the record is being granted or refused; and,
 - identifies any reasons why access to any information is being refused in accordance with specific relevant provisions of the *Act*, including if a record does not exist or cannot be located.
25. Setting out the basic components of a response in this manner will hopefully help applicants better understand what records the public body has, what information (if any) is being withheld, and the reasons why.

Best practices for redactions

26. As indicated earlier, the Department released a number of records in providing its Response to the Applicant. Some of the information in the records was blacked out (redacted) by the Department. There were no explanations next to the redactions describing why information was being withheld or what type of data was not being provided.
27. With regards to severing information from records that will otherwise be released, we suggest as a best practice that notations be made on the redacted records as to why the information is being severed. A handwritten note on the record itself indicating the

exception provision that applies to the redaction is sufficient. This is particularly important where some information is being redacted for different reasons (for example, where there is more than one applicable exception to disclosure in the *Act*).

28. Adding a small note on the copy of the redacted records will enable the applicant to better understand why the redactions were made. Sometimes, a complaint regarding a response is filed solely on the basis that an applicant was not able to decipher why some portions of the records were redacted (not possible to determine the type of information blacked out), or that the applicant was not given an explanation as to why these portions were withheld.
29. In this case, the Department redacted the names of some individuals and portions of the records containing information that the Department deemed as non-relevant to the Request. Explanations were provided to us as to why the records were redacted; however, the Applicant did not receive those explanations, and as a result, might not understand why this was done.
30. Consequently, adding a small note on the copy of the redacted records that the Department gave to the Applicant would have enabled the Applicant to understand why the redactions were made on the records:
 - a) next to the redacted names on the standardized menu, a note stating the an employee name was redacted due to privacy concerns under subsection 21(1);
 - b) next to portions of non-relevant information in the staff meeting notes, a note stating that this portion contained information that was not relevant to the Request.
31. The proper format of the Response should have indicated that the names of individuals were redacted from the standardized menu under subsection 21(1) and adding a brief explanation as to why the exception applied. Similarly, the Response should have indicated that the information redacted from the staff meeting notes was not relevant to the Request.
32. Having said this, however, we must provide more findings on the question of when it is appropriate to redact the names of individuals. We address the substantive issue of information withheld under subsection 21(1) below.

Subsection 21(1) – Personal Information

33. The Response made reference to subsection 21(1) but it did not indicate what information was being withheld or why the exception applied to this information. We also found that the names of three individuals were redacted from the Provincial menu; however, it was not clear to us why this information was redacted, simply that it raised an unreasonable invasion of privacy under subsection 21(1).
34. These three individuals were officials who vetted and approved the new standardized menu plan. We noted that these individuals appeared to be public sector employees and accordingly, disclosure of this information would not constitute an unreasonable invasion of their privacy as contemplated in subsection 21(1).
35. While it is true that the name of an individual falls within the definition of 'personal information' found in section 1 of the *Act*, subsection 21(3) sets out a number of circumstances where the disclosure of personal information is deemed not to be an unreasonable invasion of a that individual's (third party) privacy. In this regard, subsection 21(3) states that the disclosure of names of officers and employees of public bodies is permitted:

21(3) Despite subsection (2), disclosure of personal is not an unreasonable invasion of a third party's privacy if...

(f) the information is about the third party's job classification, salary range, benefits, employment responsibilities or travel expenses

(i) as an officer or employee of a public body...

36. The spirit and intent of the *Act* is to encourage openness and transparency of public bodies in conducting public business. We interpret this provision broadly as including the name of individuals when they are acting in their professional capacity as public servants of the Province, including the names of employees of other public bodies.

Revised Responses

37. As we continued to investigate the matter and work with the Department to resolve this Complaint informally, the Department opted to issue two separate revised responses to the Applicant, one in May and one in August of 2012.
38. The revised responses put into effect the findings we shared with the Department in order to provide a response that is compliant with the *Act*. In these revised responses,

the Department provided additional clarification about the records that were released to the Applicant, as well as granted access to additional information that was not available at the time of the Request, in the form of the Christmas menu for 2011.

NEXT STEP – INPUT FROM THE APPLICANT ON THE REVISED RESPONSES

39. In accordance with our informal resolution process, we invited the Applicant to provide us comments as to whether the revised responses proved satisfactory to resolve the Complaint. Comments received from the Applicant at the end of August of 2012 demonstrated that this was not the case.
40. The Applicant disagreed that the Department's revised responses provided a full and complete response to the Request. The Applicant did not accept that it was not possible to obtain the caloric content of inmate nutrition in New Brunswick. The following is a summary of the Applicant's comments and concerns:
 - a) the Christmas menu provided in the revised response appeared to be dated April 2011, but had not been released with the Response in December 2011;
 - b) the Department was contradicting itself in not being able to provide caloric content of meals when it had previously indicated the caloric content had been considered;
 - c) the Department was neglectful in not considering caloric content of meals provided to provincial inmates and that this neglect should be corrected immediately, and to calculate the calories and portions currently given to inmates and provide this information promptly;
 - d) the Department consider the nutritional needs of persons in custody to ensure adequate nutrition; and
 - e) these concerns must be resolved without delay as the health of hundreds of persons in the care of the Department is at stake.
41. Given the Applicant's comments, we could not continue with the informal resolution process; therefore, we proceeded to complete the investigation of this matter, which included another full review of the Request, the Response, the Complaint, the Department's revised responses, the Applicant's subsequent comments on the revised responses. Upon careful review of the entire matter, we nevertheless found that the Department has provided a full and frank disclosure of the information in its custody and control in relation the Request.

42. In this Report of Findings, we also seek to answer the Applicant's remaining questions. It is with these questions in mind that we first explain our oversight role with a particular focus on the purpose of the *Act* in allowing citizens to access information held by public bodies.

Role of the Office of the Commissioner

43. The Office of the Commissioner has been created to oversee the promotion and the proper application of rules regarding access to information found in records held by public bodies and the protection of privacy. These rules have been codified in the *Act* and grant individuals the right to request access to information, subject only to limited and specific exceptions.
44. When an applicant is not satisfied with the response he or she receives from a public body and files a complaint with the Office of the Commissioner, it is our task to investigate whether the public body has granted access to all the information that was relevant to the request in its possession and control, subject to any applicable exceptions to disclosure of that information. In other words, our role is to ensure that the applicant has received the information he or she is entitled to receive.

Applicant's remaining concerns

45. In this present matter, the Applicant sought access to the caloric content of meals provided to inmates in Provincial correctional institutions that are run by the Department. The Department indicated at the outset that it did not have information regarding caloric content. Instead, the records indicated that the Department showed the new meal plans to dietitians and nutritionists for their review and recommendations. That review was based on the nutritional and caloric requirements found in the Canada Food Guide; however, no records and thus no information was provided by these dietitians and nutritionists to the Department setting out the caloric content of the meal plans.
46. The question as to whether this information should exist is a good question and we appreciate the Applicant's concerns about the details of the meal plan and the Department's development and implementation of the meal plan in relation to caloric content. The fact remains that as the oversight body on the issue of access to information, we cannot address such concerns. We can only investigate which records are in the control and custody of the Department and whether an applicant received

- access to all of the information to which he or she is entitled to in answer to a request. We are not empowered to tell the Department that the information should be created or should exist in its records.
47. In this regard, we take measures to ensure that the Applicant has received all the information held by the Department in relation to the Request that the Applicant was entitled to access under the *Act*. Conversely, the Applicant's comments are formulated on how the Department administers its policies and programs in relation to inmate nutrition, and these questions are separate matters which we cannot address under the *Act*.
48. Accordingly, we cannot address the claim by the Applicant that the health of inmates is at issue and that the Department is neglectful in not considering caloric content to provincial inmates, nor can we address that the Department correct this concern, consider the nutritional needs of persons in custody to ensure adequate nutrition and calculate the calories and portions currently given to inmates in order to provide this information to the Applicant.
49. As for the matter of the Christmas Menu provided in the revised responses that appeared to be dated April 2011, but which had not been released at the time of the Request, we obtained clarification from the Department on this point. The Department confirmed that the Christmas Menu was not developed as part of the review of inmate nutrition in the spring of 2011, but as per established practice, was developed just before the holiday season in December 2011. The copy of the 2011 Christmas Menu that the Applicant received was in Excel spreadsheet format and has the same header information as found on the standardized menu, indicating that the "starting date" was April 2011. The Department stated that the Christmas menu was at some point inputted into the same Excel spreadsheet format as the standardized menu, hence the reason for the matching headers on both documents. The Department also emphasized that it had no issue providing this kind of information to the public generally and that if it had been available when the Applicant made the Request, it would also have been provided with the Department's Response.
50. Based on our review of the matter and discussions with the Department, we are satisfied that the 2011 Christmas Menu was not available at the time of the Request.
51. We also find that the Department's assertions and responses that it did not have information in its records regarding the caloric content of inmates' meals are correct.

Conclusion

52. Based on our investigation of the Complaint, we are satisfied that the Department identified all of the relevant documents in its possession and provided the Applicant with all of the relevant information in its original response along with the additional information it provided in the two subsequent revised responses.

53. Consequently, there is no need for us to issue recommendations in this matter.

Dated at Fredericton, New Brunswick, this ____ day of September, 2012.

Anne E. Bertrand, Q.C.
Commissioner

Appendix A

Complaint Matter: 201_ - ____ -AP- ____
_____, 201_

Office of the Access to Information and Privacy Commissioner of New Brunswick

“Complaint Process”

January 2011

Office of the Access to Information and Privacy Commissioner for New Brunswick

Complaint Process

***Right to Information and Protection of Privacy Act* (chap. R-10.6)**

The New Brunswick *Right to Information and Protection of Privacy Act* allows for the Access to Information and Privacy Commissioner to establish the process in investigating a complaint. In that regard, the *Act* allows the Commissioner to proceed in two ways upon the receipt of a complaint: by investigating the complaint, or by taking any appropriate steps to resolve the matter informally.

Upon a thorough analysis of the *Act*, including a strong adherence to its purpose and spirit, the Commissioner has adopted a policy to treat all complaints in the first instance by way of informal resolution. The complaint process policy is premised on the notion that it is preferable for all parties concerned to resolve complaints informally, and for both parties to become more familiar with their rights and obligations under the new legislation. Educating the public of the application of this new law is an important part of the mandate of the Commissioner's Office.

It is hoped that such a process will pave the way for improved requests for information and response procedures in the future and limit the need for the filing of complaints. The informal approach to the investigation of all complaints is intended to encourage both cooperation and transparency, all the while intending to reach a satisfactory resolution to both the public and the public body in accordance with the requirements of the *Act*.

In an informal resolution process, it is incumbent upon the Commissioner to resolve the complaint to the satisfaction of all the parties, and in a manner consistent with the purposes of the *Act*.

Below are the 6 Steps involved in the complaint investigation process.

Informal Resolution Process

Step 1 – Review

In all cases, upon receipt of a complaint, letters are issued to both the applicant and the public body indicating that the Commissioner seeks to resolve the matter informally. A deadline is initially set to try to do so within 45 days of the date of receipt of the complaint to our Office.

Although it is called an 'informal resolution process', the Commissioner's Office must review the nature of the substance of the complaint, which includes the initial request for information and the response by the public body, which are the same steps undertaken in any investigation process.

Our Office then meets with the public body's officials to review all relevant records relating to the request, and this may include requesting further information in order for us to fully understand which records may be relevant to the request. This meeting should be held shortly after the initial letter to the parties.

Informal Resolution Process

Step 2 – Preliminary Findings

Where the Commissioner is satisfied that the public body has made an adequate search and has identified and provided to the Commissioner all records relevant to the request for information, our Office then examines the initial response given by the public body against all records now provided in order to determine if the initial response conforms to the requirements of the *Act*.

The Commissioner communicates her preliminary findings in writing to the public body by letter, with a suggestion that a 'revised response' to the applicant's request for information be considered, if necessary. If a revised response is not required, the complaint process proceeds to Step 4.

The suggestion to consider a revised response is made with the continued intent of resolving the complaint informally.

In the event the public body chooses to proceed by proposing a revised response, a timeline during which the 'proposed revised response' must be submitted to the Commissioner is set based on the complexity of the work involved to prepare the proposed revised response. In most cases, and depending upon the complexity of the matter, it is hoped that the proposed revised response can be submitted to the Commissioner within 30 days of the date of receipt of the complaint.

Informal Resolution Process

Step 3 – Proposed Revised Response

In the event the public body chooses to provide the Commissioner with a proposed revised response, the Commissioner reviews the proposed revised response to ensure that it also meets the requirements of the *Act*. If the proposed revised response meets the requirements of the law, the Commissioner invites the public body to submit it to the applicant as a revised response, i.e., as a revised response in answer to the applicant's initial request for information.

If the proposed revised response does not meet the requirements of the law, the Commissioner will provide additional comments to the public body. It is important to note that it is not for the Commissioner to prepare nor to provide a revised response, but rather to assist the public body in its obligations under the *Act* to encourage the public body to provide a lawful response to the request for access.

Informal Resolution Process

Step 4 – Applicant's Comments

If the public body has provided and is prepared to issue a revised response which honors its obligations under the *Act*, the Commissioner issues letters to both parties indicating that a revised response will be submitted to the applicant. The public body issues the revised response directly to the applicant. In her letters to the parties, the Commissioner invites the applicant to review the revised response which he or

she will receive from the public body, and to provide comments regarding the revised response to the Commissioner. The applicant is usually accorded a period of 10 days within which to do so, depending on the complexity of the revised response. The Commissioner then reviews the applicant's comments on the revised response.

Or, in the event that a revised response was not required, the Commissioner issues letters to both parties informing them that the initial response to the request for information was appropriate and in conformity with the *Act*. In her letters to the parties in such a case, the Commissioner invites the applicant to provide comments to the Commissioner as to why he or she is of the view that the initial response to the request was inappropriate. The applicant is usually accorded a period of 10 days within which to do so, depending on the complexity of the matter. The Commissioner then reviews the applicant's comments.

If the culmination of these steps in the informal resolution process to date have gone beyond the initial 45 day timeframe allotted, our Office may decide to continue with the informal resolution process if there is a belief that a satisfactory resolution in accordance with the *Act* is possible.

Again, it is important to reiterate that our complaint process policy is premised on the notion that it is preferable for all parties concerned to resolve complaints informally. In this regard, both parties will become more familiar with their rights and obligations which will lead to improved requests for information and response mechanisms in the future.

Informal Resolution Process

Step 5 – Revised Response Satisfactory to Both Parties

In the event the applicant is satisfied with the revised response, or that the applicant provides comments which indicate that he or she is satisfied with the Commissioner's preliminary findings that the initial response is in accordance with the *Act*, the Commissioner concludes her investigation. This conclusion of the matter is confirmed by letters to both parties stating that the complaint has been resolved informally to the satisfaction of both parties.

In such an instance, there is no requirement for the Commissioner to file a formal report as there is no recommendation to be made to the public body on its response (revised or initial) to the request for information.

Informal Resolution Process – Formal Investigation

Step 6 – Revised Response Not Satisfactory to Both Parties

In the event the applicant is not satisfied with the revised response, and upon reviewing the comments obtained from the applicant, the Commissioner may decide to further investigate the matter. This step brings the informal resolution process to an end and converts the matter into a formal investigation process.

At the conclusion of the further investigation, if any, the Commissioner renders her findings and any recommendations in a formal report which is issued to both parties. The report will also be made available to the public on the Commissioner's Office website after de-identification (website has not yet been created).