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Nunavut Information and Privacy Commissioner
Nunavunmi Tuhaqtauyukhaliqinirmun Kanngunaqtuliqinirmun Kamisina
Commissaire à l'information et à la protection de la vie privée du Nunavut

Commissioner's Final Report

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Summary

[1] The Applicant, a former inmate in a Nunavut correctional facility, requested records related to their incarceration, including surveillance videos for a specific date. Justice disclosed 782 pages of records, but said that the videos had been overwritten. The Applicant requested review of Justice's search, including whether the videos should have been retained. The Commissioner finds there is no positive obligation to retain a surveillance video for a fixed period. In any event, there probably never was a directly relevant video. The Commissioner recommends Justice develop a policy on surveillance videos. The Commissioner also finds that Justice did not conduct a diligent search and recommends that the search be re-opened to cover records that were missed.

Nature of Review and Jurisdiction

[2] This is a review of disclosure by the Department of Justice. The request was filed under section 28(1) of the *Access to information and Protection of Privacy Act* (ATIPPA). I conducted my review under section 31(1).

[3] I have jurisdiction over the Department of Justice: ATIPPA, section 2, definition of "public body".

Issues

[4] The issues in this review are:

a. Did Justice have a legal obligation to keep the surveillance videos for longer than it did?
b. Did Justice conduct a diligent search for the requested records?

Facts

[5] The Applicant is a former inmate in a Nunavut correctional facility. In June 2022, the Applicant requested certain records related to their incarceration. The wording of the request is relevant to this decision, so I reproduce it here in full (with identifying information removed):

> any and all records of my personal information contained in my Department of Justice, and/or Nunavut Corrections Division, and/or [specific correctional facility] records, whether held at [specific correctional facility] or elsewhere, as the case may be, including all entries, notes, emails, and letters of [the warden] concerning or in any way related to me, all entries by C/O's, I/C's, the prison nurse, classification officers, or any other person, including all incident reports, nursing notes, data entries, logs, forms, and photographs, and any video record specifically requested, including [specific correctional facility] video of the evening and night of January 21st, 2020, for the period from December 1st, 2019, to the date of this Authorization and Consent.

[6] On September 22, 2022, Justice sent to the Applicant a disclosure letter with 782 pages of responsive records. The letter also said "…video recording on the evening of January 21st, 2020 is not available as the system memory only holds up to 2 years of data".

[7] The records were redacted only to the extent necessary to remove the name or numeric identifier of other inmates. The Applicant does not take issue with those redactions.

[8] The Applicant filed a request for review on January 25, 2023. This date was outside the 30-day period contemplated by section 29(1) of the ATIPPA. The Applicant has explained to me the reasons for the delay. Under section 29(2), I

extended the time for filing the request for review because it was fair to do so, and there was no prejudice to the Department of Justice.

[9] As part of my review, I have received written submissions from the Applicant, the last of which I received on May 9, 2023. Justice has supplied me with details of their search for records. I also met with senior staff of the Corrections Division to discuss the video surveillance systems in Nunavut's correctional facilities.

Law

Obligation to preserve records

[10] The Applicant raises an issue that has not, as far as I can determine, been raised before in Nunavut: whether a public body has a positive obligation under the ATIPPA to preserve records, specifically the surveillance videos from a correctional facility, for a fixed period.

[11] The ATIPPA itself is almost silent about the retention or disposal of records. There are only two references, neither of which is relevant to this case.

[12] The first reference is section 42, which is in Part 2 of the ATIPPA, the part dealing with privacy protection:

> 42. The head of a public body shall protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.
>
> (Emphasis added.)

The grammatical sense of this section is that "unauthorized disposal" is a data-security risk. Again, this provision is in Part 2 of the ATIPPA, dealing with privacy protection. The present case falls under Part 1, dealing with access to information.

[13] The second reference is section 44(b), also in Part 2 of the ATIPPA:

> 44. Where a public body uses an individual's personal information to make a decision that directly affects the individual, the public body must
>
> (a) make every reasonable effort to ensure that the information is accurate and complete; and
>
> (b) retain the information for at least one year after using it so that the individual has a reasonable opportunity of obtaining access to it.
>
> (Emphasis added.)

[14] The offence provisions in section 59 of the ATIPPA do not refer to the destruction of records as an offence. Neither is there anything in the *Corrections Act*, RSNWT 1988, c. C-22 (Nu), or the new *Corrections Act*, S.Nu. 2019, c. 13 (not yet proclaimed), that addresses records retention. The *Archives Act*, RSNWT 1988, c. A-6 (Nu), does lay down broad rules about the retention and disposal of government records, but there is nothing specific enough to be relevant to the present case.

[15] The "Records Retention and Disposition Authority" for Nunavut's correctional facilities, RDA 2005-10, which appears to have been adopted under the authority of the *Archives Act*, addresses many different kinds of correctional records but it does not address surveillance videos. Under the heading "Security", RDA 2005-10 lists the following categories of correctional security records, with their retention periods and final disposition:

a. Policies and Procedures / until superseded or obsolete / archival selection or destroy

b. General / 2 years / destroy

c. Incident Reports / 2 years / destroy

d. Shift Logs / 2 years / destroy

e. Monthly Summaries / 5 years / destroy

Diligent search

[16] A public body has a duty to undertake a "diligent search" for responsive records: *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraphs 12 to 15; *Department of Education (Re)*, 2021 NUIPC 10 (CanLII) at paragraphs 24 to 27; *Department of Education (Re)*, 2021 NUIPC 22 (CanLII); *Nunavut Housing Corporation (Re)*, 2021 NUIPC 26 (CanLII).

[17] In Ontario, the search required of a public body is described this way: "A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request": *Municipality of Chatham-Kent (Re)*, 2019 CanLII 108986 (ON IPC) at paragraph 15; *Health Professions Appeal and Review Board (Re)*, 2018 CanLII 74224 (ON IPC) at paragraph 11.

[18] A similar but more detailed explanation is given by an adjudicator for the Alberta Information and Privacy Commissioner in *University of Lethbridge (Re)*, 2016 CanLII 92076 (AB OIPC). The adjudicator in University of Lethbridge quotes from an earlier Order listing the kinds of evidence that a public body should put forward to show it made reasonable efforts in its search:

> • The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
>
> • The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
>
> • The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
>
> • Who did the search
>
> • Why the Public Body believes no more responsive records exist than what has been found or produced

[19] I adopt this explanation of the ATIPPA search requirement, along with the stipulation from the Ontario cases that the search should be conducted by "an experienced employee knowledgeable in the subject matter of the request".

[20] There is a threshold question in every "diligent search" case, and that is whether there is some basis for believing that the record exists at all: *Nunavut Housing Corporation (Re)*, 2021 NUIPC 26 (CanLII) at paragraph 64; *Review Report 17-118 (Re)*, 2017 NUIPC 5 (CanLII), citing Order P2010-10 of the Alberta Information and Privacy Commissioner; *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraph 19.

[21] The purpose of the "some basis" test is "to prevent the public body expending time and effort on searches based only on an applicant's subjective belief that a document must exist or should exist or might exist": *Department of Health (Re)*, 2021 NUIPC 20 (CanLII) at paragraph 19.

Analysis

[22] I start by noting that the Applicant's request for records is hard to understand. It is reproduced in the Facts section above.

[23] The request consists of one continuous sentence of about 120 words, with subordinate clauses, acronyms, qualifiers, and lists. It is easy for a reader to get lost in the maze. I know that I did. I suspect that is also what happened at Justice. I say this not to be critical of the Applicant or their counsel, but to suggest to all applicants and their counsel that simpler language in ATIPP requests might lead to quicker, more complete disclosure.

Surveillance video for January 21, 2020

[24] When the Applicant asked for the surveillance videos for a specific night – namely January 21, 2020 – they were surprised to be told that the video was not available because it had been overwritten. They asked me to review whether Justice had a legal obligation to preserve the videos. For the reasons that follow, I conclude there was no such obligation.

[25] The Applicant requested the videos two and a half years after the night in question. They were told, in Justice's response, that the facility's hard-drives could hold two years of data. That was actually incorrect. I am advised by senior management of Correctional Services, and I accept, that the capacity of the hard-drives varies from facility to facility, and that the capacity of the hard-drive at the facility where the Applicant was incarcerated was about four months. In any event, by the time the Applicant requested the videos, they were long gone.

[26] I can find no positive legal obligation for Justice to hold surveillance videos for any particular period. There is no obligation in the ATIPPA itself, in the *Corrections Act*, or in the *Archives Act*. The Records Retention and Disposal Authority (RDA) for the Corrections Division is silent about surveillance videos. Most security records can, according to the RDA, be destroyed after two years.

[27] But, objects the Applicant, the facility knew there had been a critical incident on the night in question. (As an aside, I note that the critical incident in which the Applicant is interested occurred on January 23, 2020, not January 21, 2020, but that fact has no bearing on my analysis.)

[28] There were multiple incident reports filed by corrections staff who were on duty on the night of the critical incident. Those incident reports are in the disclosure package sent by Justice to the Applicant. The incident was serious enough for the RCMP to have been called. In the circumstances, says the Applicant, the videos should have been preserved.

[29] Even though there is strong evidence of a critical incident having occurred, that is not enough for me to find a positive legal obligation under the AITPPA to preserve the videos. The ATIPPA is the only authority I have. It does not contain any such obligation, nor do I see where or how I could read it in. If there is a legislative gap, it will have to be addressed by the Legislative Assembly.

[30] In any event, there is a factual difficulty with the Applicant's argument. The critical incident occurred in one of the inmate dorms, where there is no security camera. There was a surveillance camera covering the common area leading to the dorms, but the dorms themselves are not covered by a camera.

[31] This observation is supported by an entry in the facility log on the day following the critical incident. The log entries are also in the disclosure package. The log quotes the RCMP as saying that, if the investigation was going to move forward, the Applicant would have to give a statement because there was "no video and no witnesses" for the critical incident. Based on this contemporaneous evidence, it is unlikely there ever was a relevant video.

[32] The Applicant says that it would still have been helpful to have videos from the facility in order to provide contextual or indirect evidence.

[33] This case does raise a legitimate policy issue about surveillance videos in Nunavut's correctional facilities. In my view, the existence or otherwise of surveillance videos (which are "records" for purposes of the ATIPPA) should not depend on a factor as random as a particular facility's hard-drive capacity. There is also no set policy about preservation, storage, and disposal of videos that need to be kept as evidence. Although it would not have changed the outcome in the present case, I recommend that the Corrections Division consider developing a policy on video surveillance to address these and other issues.

Diligent search

[34] The remaining issue is whether Justice conducted a diligent search for records. For the reasons that follow, I find it did not.

[35] As I have noted above, the request for records was difficult to understand. In my view, the Applicant was really asking for "All records about me". The Applicant then added some examples. When put that way, it is easier to see where Justice's search for responsive records has fallen short.

[36] Justice's disclosure consists of 782 pages. That seems like a large disclosure, but it is probably not unusual for a corrections file. Incarceration, by its nature, is heavily documented. The 782 pages of disclosure includes the following categories of documents:

a. running records/logs (420 pages),

b. inmate disposition forms (186 pages),

c. incident reports (106 pages),

d. inmate requests (30 pages), and

e. intake-related forms (29 pages),

plus a handful of miscellaneous other records.

[37] The Applicant says that, in addition to the disclosed records, there should be the following records somewhere in Corrections' files: notes and reports from the facility's nurse; complaints filed by the Applicant against facility staff; and investigation reports (internal and external) related to assaults on the Applicant while at the facility and the quality of the care received by the Applicant following those assaults.

[38] I note that, in the ATIPP request, "nursing notes" are specifically mentioned. There are no nursing records in the disclosure package.

[39] In the Law section above, I noted that there must be "some basis" for concluding that allegedly missing records exist. I am satisfied that the Applicant has met that standard. I have reviewed the 782-page disclosure package and, based on the internal evidence in these documents, there is "some basis" for concluding that there are additional records that have not yet been disclosed.

[40] Justice has provided to me a record of their search. It is thin. It consists of an email chain running from June 14 to July 20, 2022. Except for the initial email on June 14, the email conversation takes place on July 19 and 20, 2022.

[41] The initial email from the ATIPP Coordinator to staff in the Corrections Division simply quotes, in full, the ATIPP request. Normally that would be a good practice, but (as discussed above) in this case the ATIPP request is particularly difficult to understand. Different Corrections staff responded to different portions of the request, but nobody seems to have taken responsibility for the request as a whole.

[42] For example, in an email on July 19, a Corrections staff member suggests that the ATIPP Coordinator should contact "nursing for the medical records".

There is no indication that was done. That is one of the pieces that the Applicant now says is missing.

[43] I will close by emphasizing that the Applicant's request, when correctly understood, is for "All records about me". The other items mentioned in the request are examples of responsive records. Responding to the examples is not sufficient to respond to the request as a whole.

Conclusion

[44] There is no positive legal obligation on Justice to keep the surveillance videos for longer than they did. In any event, there probably never was a directly relevant video for the critical incident in which the Applicant was interested.

[45] Justice did not conduct a diligent search for the requested records.

Recommendations

[46] I recommend that Justice re-open its search for responsive records, with particular reference to my comments in paragraphs 34 to 43 of this Review Report.

[47] I recommend that Justice consider developing a policy on surveillance videos in correctional facilities, which will cover (among other things) the matters discussed in paragraph 33 of this Review Report.

[48] I recommend that Justice consider updating the Records Retention and Disposition Authority for Nunavut's correctional facilities, RDA 2005-10, to cover surveillance videos.

Graham Steele
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