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**DOI ISSUES REVIEW OF AN INVESTIGATION BY CITY DEPARTMENT OF CORRECTION (DOC) AND
DOC VENDOR OF RECORDING AND DISCLOSURE OF ATTORNEY-CLIENT COMMUNICATIONS IN 2021**

Jocelyn E. Strauber, Commissioner of the New York City Department of Investigation (“DOI”), issued a Report today on DOI’s findings regarding an investigation conducted by the City Department of Correction (“DOC”) and Securus Technologies (“Securus”), a DOC vendor, into the recording and disclosure of attorney-client communications that occurred in late 2020 and early 2021. DOI’s examination was prompted by a March 2021 request by then-Mayor Bill de Blasio to examine the improper disclosure of communications between attorneys and their clients who were housed on Rikers Island. Defense attorneys with the Bronx Defenders and Brooklyn Defender Services, two public defenders’ offices, learned of the improper recording and disclosure after reviewing discovery materials provided by prosecutors. DOI determined that Securus’s and DOC’s errors with respect to the recording of attorney-client privileged detainee communications, while significant, did not appear to have been intentional and impacted only a small percentage of privileged communications, approximately 324 of the more than 270,000 numbers on a “Do Not Record” list. DOI found that DOC and Securus each acknowledged the seriousness of the failures and developed speedy and comprehensive solutions to prevent further occurrences. As part of DOI’s examination, DOI analyzed DOC and Securus audit materials and reviewed other relevant materials provided by DOC . A copy of the Report is attached to this release and can also be found at this link: <https://www.nyc.gov/site/doi/newsroom/public-reports.page>

DOI Commissioner Jocelyn E. Strauber said, “Any improper release of privileged data, including phone calls, is a significant concern. The good news here is that DOC and Securus acted promptly to expose and correct the errors that led to the release of privileged phone calls between incarcerated individuals and their attorneys. DOI issued several additional recommendations for reforms that we believe will further strengthen the monitoring and protection of privileged calls made by incarcerated individuals on Rikers Island. I thank the City Department of Correction and Securus for their cooperation in this examination.”

Securus has provided inmate phone system services to DOC since 2014 and its current contract will terminate at the end of 2024, at which point a new competitive bidding process can take place. To address the risk of detainees using the phone system services to engage in criminal activity, detainees’ calls are recorded and subject to DOC and DOI monitoring. DOC provides notice to detainees and outside call recipients that calls are subject to monitoring and recording. Monitoring of privileged communications, such as those between detainees and members of the clergy, medical personnel and attorneys are not permitted and DOC is responsible for identifying attorney phone numbers so Securus can place them on a “Do Not Record” list to prevent recording or monitoring.

In early December 2020, the Bronx Defenders notified DOC that the Bronx District Attorney’s Office had turned over privileged telephone conversations between attorneys and detainees-defendants as part

of pre-trial disclosure. Securus conducted an audit that revealed the telephone numbers identified by Bronx Defenders were not properly placed on the Do Not Record list. Securus immediately sequestered and deleted all recorded calls placed to those numbers. In early February 2021, Brooklyn Defender Services notified DOC that the Kings County District Attorney's Office had discovered a similar breach of DOC policy and procedure, resulting in the recording of attorney-client communications. Securus expanded its audit and found that telephone numbers of the Bronx and Brooklyn defender offices, as well as the Legal Aid Society, were also not on the Do Not Record list.

DOI's investigation determined that in response to these breaches DOC and Securus enacted reforms to ensure proper handling of privileged telephone calls, including:

- Changed the designation of the Do Not Record listed phone numbers to "agency wide" privacy restriction, rather than just facility/site specific, ensuring that calls placed from detainees to those listed phone numbers would not be recorded.
- Strengthened the language of the recorded warning to state explicitly that the call is not "private" (meaning recorded and potentially monitored) and that callers expecting a private call should hang up and follow the facility instructions to register the phone number.
- Securus created a public website where parties can enter a phone number and check whether the number is listed as private.
- Securus implemented a quality-control process to confirm that telephone numbers of parties with whom detainees have privileged communications have been designated as private.
- DOC obtained a list of attorneys registered with the Office of Court Administration and provided those numbers to Securus, which then set those numbers to private, whether or not those attorneys were at that time representing a particular inmate.

DOI's review of hundreds of communications between DOC and Securus revealed that Securus took responsibility, quickly and transparently began to work with DOC to correct the issue, and implemented safeguards to prevent future problems. The errors called into question whether the City should continue to do business with Securus, or seek inmate phone system services elsewhere. DOI does not take a position on whether Securus's contract should be renewed or another provider should be selected as DOC's phone system vendor. Based on DOI's findings, removing Securus is not necessary to ensure that privileged telephone communications are handled legally and appropriately, in light of the changes already made.

DOI issued four recommendations:

- 1: DOC should require by written policy that Securus users immediately notify DOC's Legal Division if any calls are intercepted that are potentially privileged. Users should be trained on an annual basis and required to acknowledge in writing that they have received the training and know how to identify potentially privileged calls.
- 2: DOC should memorialize its protocols to prevent the monitoring and recording of privileged calls in written Departmental Directives, which can be readily accessed.
- 3: DOC should notify public defender organizations and other lawyers on, and those seeking to be added to, the Do Not Record list that attorneys and their agents should not accept conference or third-party calls from incarcerated individuals as these calls will be recorded and potentially monitored.
- 4: Immediately upon discovering that a privileged call has been improperly recorded, DOC Legal should notify DOI, which was not done in this matter.

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New York City
Department of Investigation

Securus Technologies and
Breached Attorney-Client Privileged
Department of Correction
Telephone Calls

Jocelyn Strauber
Commissioner

Whitney Ferguson
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May 2023



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I. Executive Summary

The New York City Department of Correction (“DOC”) is the second largest jail system in the United States, responsible for the safety, care, and custody of pretrial detainees and individuals serving jail sentences of one year or less. DOC provides phone service that enables detainees to maintain contact with family, friends, and other support networks, as well to communicate with their attorneys, so that they can maintain familial and social contacts, and participate fully in their legal defense. While these lines of communication are critical to detainees, the availability of phone service also poses risks to other detainees, staff and the community. Detainees have used the service, intended for rehabilitative purposes and to facilitate the exercise of the constitutionally protected right to counsel, as a tool to engage in criminal activity with co-conspirators both in and out of custody. To address the risk that phone services will be used for illegal activity, DOC and the New York City Department of Investigation (“DOI”) monitor detainees’ calls. DOC provides notice to detainees and outside call recipients that calls are subject to monitoring and recording.¹ Monitoring detainees’ calls enhances DOI’s ability to perform its law enforcement function. Monitoring facilitates the proactive identification of potential sources of contraband and other safety risks within city jails. Securus Technologies (“Securus”), DOC’s inmate phone vendor, provides the hardware and software necessary to monitor and record inmate phone conversations.

Monitoring of privileged communications, such as those between detainees and members of the clergy, medical personnel and attorneys is not permitted. DOC is responsible for alerting Securus to telephone numbers of attorneys so that Securus can place them on a “do not record” (“DNR”) list to prevent recording or monitoring of privileged conversations.

In early December 2020, the Bronx Defenders, a public defender office, notified DOC that the Bronx District Attorney’s Office had turned over privileged telephone conversations of detainee-defendants to Bronx Defenders during pre-trial disclosures. These conversations were recorded in violation of DOC policies and procedures; the numbers should have been placed on the DNR list. When DOC learned of this error, it directed Securus to initiate an investigation into the Bronx Defenders’ claim. Securus conducted an audit, which revealed that the telephone numbers identified by Bronx Defenders were not properly placed on the DNR list. Securus immediately

¹ At the beginning of each Securus call, a recorded message states that the call is “subject to recording and monitoring.” Signs posted in all DOC facilities, in English and Spanish, titled “Inmate Telephone Recording Notice,” state: “Inmate telephone conversations are subject to electronic monitoring and/or recording in accordance with Department policy. An inmate’s use of institutional telephones constitutes consent to this monitoring and/or recording.”

sequestered and subsequently deleted all recorded calls placed to those numbers. DOC also placed those phone numbers on the DNR list. In early February 2021, Brooklyn Defender Services (“BDS”) notified DOC that the Kings County District Attorney’s office had discovered a similar breach of DOC policy and procedure, resulting in the recording of attorney-client communications.² DOC notified Securus, which expanded its audit. Based on the expanded audit, Securus concluded that telephone numbers of the Bronx and Brooklyn borough defender offices, as well as the Legal Aid Society (“LAS”), were also not on the DNR list. DOC notified LAS and the Brooklyn and Bronx borough defender offices that calls between defense attorneys in those offices and DOC detainees had been recorded. These offices notified the press and New York City Council. During a hearing, among other issues, City Councilmembers questioned whether Securus’ contract with DOC should continue.

On March 21, 2021, Mayor de Blasio directed DOI to investigate this matter pursuant to Charter Section 803 and DOI opened an investigation.³ At the time of the referral, DOC and Securus already had investigated the recording of privileged communications, and had shared their findings with the affected defender organizations and the New York City Council Committee on Criminal Justice at the 2021 Preliminary Budget Hearing. Therefore, DOI’s inquiry was more limited and focused on DOC’s and Securus’s investigation into the recording and disclosure of attorney-client communications. Among other steps, DOI analyzed DOC and Securus audit materials, and reviewed relevant DOC employee testimony at the 2021 New York City Council Preliminary Budget Hearing, as well as communications and other information provided by DOC.

DOI determined that Securus’ and DOC’s errors with respect to the recording of attorney-client privileged detainee communications, while significant, do not appear to have been intentional and impacted only a very small percentage of privileged communications. A review of Securus’ audit revealed that there were over 270,000 numbers on the DNR list, and only approximately 324 telephone numbers were subject to improper recording.⁴ DOI found that Securus and DOC acknowledged the seriousness of the failures and developed speedy and comprehensive solutions to prevent further occurrences. Indeed, DOC corrected many of the deficiencies in the handling of detainee telephone calls that DOI identified, without prompting from DOI and before DOI made any recommendations. DOI nevertheless will issue additional guidance, as set out in this report, in order to limit the risk that privileged communications will be recorded in the future.

² Email from Brooke Menschel, Counsel, Brooklyn Defender Services to Laura Mello, Legal Division Senior Counsel/FOIL Officer, Department of Correction (February 4, 2021).

³ New York City Charter (Chapter 34) Department of Investigation § 803(a), provides that “[t]he The Commissioner shall make any investigation directed by the Mayor or the Council.”

⁴ December 30, 2021, Securus expanded audit results.

The City subsequently renewed the Securus contract for the remainder of 2021 through 2023. DOI has determined that DOC made sufficient changes to ensure proper handling of privileged telephone calls. DOI takes no position on whether Securus' contract should be renewed or whether another provider should be selected as DOC's phone system vendor, but based on DOI's findings, removing Securus is not necessary to ensure that privileged telephone communications are handled legally and appropriately, in light of changes made to date and other information discussed herein.

II. Investigative Findings

A. Factual Background

Inmate Telephone Systems

Two companies, Securus and Global Tel Link, provide the majority of inmate phone system ("IPS") services in the United States. Securus serves more than 3,400 public safety agencies, and over 1.2 million incarcerated individuals.⁵ Global Tel Link ("GTL") serves 2,300 facilities and 1.8 million incarcerated individuals.⁶

Securus has provided IPS services to DOC since 2014, following a competitive bidding process. The transition to Securus from DOC's previous IPS service involved the installation of over 1,800 phones and associated hardware.⁷ The original contract involved profit-sharing between Securus and DOC (18.9 % and 81.1%, respectively) based on fees incurred by inmates for telephone use. In 2016, the City Council amended the New York City Administrative Code to allow individuals in DOC custody to make free phone calls,⁸ and as a result, DOC now pays Securus \$3 million per year for services. The initial contract was for a five-year term, and gave DOC five one-year renewal options; DOC has renewed the contract each year since 2019. The Securus contract will terminate at the end of 2024, at which point a new competitive bidding process can take place.

Legal Background – Attorney-Client Privilege

Among the "oldest recognized privileges for confidential communications. . .," the attorney-client privilege "is intended to encourage 'full and frank communication

⁵ Securus website: <https://securustech.net/about-us/index.html>.

⁶ GTL website: <https://www.gtl.net/about-us/>.

⁷ Contract for the installation, configuration and maintenance of an inmate telephone system, Procurement Identification Number 072201315MIS, 2014.

⁸ McKinney's Consolidated Laws of New York, Correction, Article 22, § 623.

between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.”⁹

All detained individuals have a right to counsel and, under New York Law, they may call their attorneys at will and, as with all other calls, free of charge.¹⁰ To ensure that privileged calls with counsel are not monitored and recorded like other detainee telephone calls, DOC established and maintains a DNR list of telephone numbers for detainees’ attorneys that is provided to Securus. Attorneys can add their phone numbers to the DNR list by submitting a request on letterhead to DOC’s Legal Division (“DOC Legal”). The request must include the attorney’s title, Office of Court Administration (“OCA”) registration number, and phone number. After DOC Legal vets the request, it forwards the phone number to DOC’s Information Technology (“DOC IT”) Division. DOC can set the phone numbers to “Do Not Record” with respect to requests for a few numbers. Requests for batches of multiple phone numbers are sent directly to Securus, to be added to the DNR list.¹¹ Once a telephone number is added to the DNR list, communications between inmates and those phone numbers are not recorded or monitored.¹²

Public Disclosure of and New York City Council Response to Improperly Recorded Phone Calls

On December 8, 2020, Bronx Defenders notified DOC Legal that they had received recordings of privileged telephone calls from the Bronx District Attorney’s Office as part of discovery.¹³ DOC IT was notified, and immediately contacted Securus. Securus confirmed that calls to attorneys were in fact recorded, despite their inclusion on the DNR list. At DOC’s request, Securus corrected the error and sequestered the recorded phone calls. Securus initially provided DOC with the following explanation for the error:

Like any multi-facility agency customer, NYC DOC’s list of Private numbers can be configured in one of two ways: A number can be set as Private for all calls originating from all facilities under control of the agency, regardless of physical location of the phone. This is called an

⁹ *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998), quoting *Upjohn Co. v. United States*, [449 U. S. 383](#), 389 (1981).

¹⁰ Section 1. Chapter 1 of title 9 of NYC administrative code: § 9-154 Telephone services to inmates. The City shall provide telephone services to individuals within the custody of the department in City correctional facilities at no cost to the individuals or the receiving parties for domestic telephone calls. The City shall not be authorized to receive or retain any revenue for providing telephone services.

¹¹ DOC Operations Order 10-16 - Inmate Telephone Recording and Monitoring (June 6, 2016).

¹² The Securus platform captures call details, such as the number called and the date, time and length of the call to DNR numbers, but the actual call recordings (content) are not recorded, and cannot be accessed via the Securus platform when the numbers are “privatized” correctly.

¹³ Email from Ilona Coleman, Legal Director, The Bronx Defenders-Criminal Defense Practice, to Heidi Grossman, Deputy Commissioner for Legal Matters, Department of Correction (Dec. 8, 2020).

“Agency” or “Contract” level setting. Alternatively, a number can be set as Private for all calls originating from a single, specific physical location under the agency’s control, but not other physical locations. This is called a “Site” level setting.

Here, it appears that NYC DOC’s request was: Set the [phone numbers provided by the Bronx Defenders] to Private at the Agency level. However, it appears that Securus mistakenly understood the Department’s request to be: Set the Bronx Numbers to Private at the Site level for calls originating from the Bronx Court location.¹⁴

Securus executed on our mistaken understanding of NYC DOC’s request. As a result, calls to the Bronx Numbers originating from Bronx Court were not recorded, but calls to those same numbers from other sites under NYC DOC’s control were recorded.¹⁵

In addition, in early February 2021, BDS notified DOC that BDS received records of privileged communications during pre-trial discovery.¹⁶ DOC asked Securus to expand its review to include Brooklyn and other defender organizations in order to understand the scope of the breach.

In a February 23, 2021 letter to then DOC Commissioner Cynthia Brann, City Council Criminal Justice Committee Chair Keith Powers raised concerns about Securus’ contract with DOC given the attorney-client privilege breach and implored DOC to determine whether other vendors “without this history of constitutional violations can provide the Department with telephone services.”¹⁷

In a Council Budget and Oversight Committee hearing on March 22, 2021, Committee Chair Powers and other Council members questioned DOC on the matter.¹⁸ Deputy Commissioner Heidi Grossman testified that the breach was the result of a “human data input error” on the part of one Securus employee who selected the wrong privacy setting.¹⁹ While Securus initially attributed the recording of the

¹⁴ The “Bronx Court location” refers to the Bronx Criminal Court building.

¹⁵ Email from Joshua Martin, Securus VP/Assistant General Counsel, Securus to Brian Charkowick, then Executive Director of Infrastructure & Operations (Currently Associate Commissioner of DOC’s Information Technology Division), Department of Correction (December 18, 2020).

¹⁶ Menschel, *Supra* note 2.

¹⁷ Letter from Keith Powers, Criminal Justice Committee Chair, New York City Council, to Cynthia Brann, Commissioner, Department of Correction (Feb. 23, 2021). *See Romero v. Securus Techs., Inc.*, 16cv1283JM, 2020 WL 3250599 (S.D. Cal. June 16, 2020); Order Preliminarily Approving Class Action Settlement, *Huff Et.Al. v. Corecivic, Inc., Et Al.*, 2:17cv02320JAR, 2020 WL430212 (D. Kan. January 28, 2020), ECF No. 146; *Austin Lawyers Guild v. Securus Techs., Inc.*, 1:14cv366ly, 2015 WL10818585(W.D. Tex. February 4, 2015).

¹⁸ New York City Council Budget and Oversight Hearings on the Preliminary Budget for Fiscal Year 2022: Hearing before The Committee on Criminal Justice Jointly with Justice System T2021-7198 (2021) (Testimony of Heidi Grossman) [hereinafter NYC Council Budget and Oversight Hearings].

¹⁹*Id.* at 26-27.

Bronx Defenders numbers to an employee's misunderstanding of DOC's request, as explained above,²⁰ after it was discovered that certain BDS calls were recorded, those additional errors were attributed to an employee's selection of the wrong privacy settings. Deputy Commissioner Grossman testified that DOC and Securus recognized the gravity of the issue, and that DOC and Securus acted swiftly to correct the mistake, including retraining personnel.²¹ Deputy Commissioner Grossman elaborated that, at the beginning of the COVID-19 pandemic, many defense attorneys transitioned to work from home and used personal rather than office numbers for calls, which resulted in DOC receiving a large influx of new phone numbers to be added to the DNR list; these newly entered numbers were most significantly impacted by this error.²²

Chair Powers asked Deputy Commissioner Grossman whether there was any guarantee that DOC had not recorded privileged phone calls prior to March 2020. Deputy Commissioner Grossman testified that there was no evidence of any prior unauthorized recording and that she expected that, had there been such recordings, they would have been disclosed by the District Attorneys' Offices to the defender organizations in discovery, and presumably those organizations would have raised the issue.²³

Securus' contract at the time of the incident expired on March 31, 2021. The renewal of the contract was initially delayed due to the company's name change and an amendment to the contract for Securus to provide Video Relay Service ("VRS") to the hearing impaired to comply with the American with Disabilities Act. The contract was initially reduced to a term of nine months (April 1, 2021 to December 31, 2021), but eventually renewed for the full one-year period beginning January 1, 2022. Failure to renew would have resulted in an interruption in service until a new vendor was put in place, which is a lengthy process. Securus agreed to install VRS equipment before there was a signed renewal contract, so that DOC could meet the mid-August 2022 deadline imposed by a DOJ consent decree concerning the Americans with Disabilities Act. Had Securus not done so, DOC would have been out of compliance with the consent decree.

B. Securus Audits of Improperly Recorded Telephone Calls

As noted above, in December 2020, upon learning of the improper recordings, DOC asked Securus to audit the Bronx Defenders' DNR list. In early February 2021, as DOC learned that the issue extended beyond Bronx Defenders, DOC requested

²⁰ See Martin, *Supra* note 15.

²¹ NYC Council Budget and Oversight Hearings, *Supra* note 18 at 27-29.

²² *Id* at 30-31.

²³ *Id* at 29-33.

additional audits from Securus. The audits covered March 2020 (when the COVID-19 pandemic began and cell phone use by attorneys expanded due to remote work arrangements) through February 2021. The audits were completed and the final analysis was presented to various affected parties at the end of 2021.²⁴

Bronx

The audit of DOC/Securus' handling of Bronx Defenders' telephone numbers and calls to clients revealed that 102 telephone calls to 12 unique phone numbers were improperly recorded.

Brooklyn

The audit of BDS telephone numbers revealed more extensive recording of DNR calls — 1,547 distinct phone calls to 105 unique phone numbers on the DNR list were recorded.

Legal Aid Society

The initial LAS audit revealed that 173 phone calls to 21 unique numbers were recorded. LAS reported that in May 2020, they had advised DOC that detainee calls to LAS attorneys were being recorded;²⁵ however, a review of DOC internal communications indicated that DOC did not process a May 8, 2020 LAS request to place certain phone numbers on the DNR list because LAS sent the list directly to DOC IT and Securus, and not to the DOC's Legal Division for vetting. DOC's IT Director ultimately processed the request on May 13, 2020, after the numbers were vetted and authorized.²⁶ In addition, multiple lists of telephone numbers to be placed on the DNR list were sent by different LAS staff members to DOC during that time, and "in the ensuing email exchanges to clarify duplicative submissions, it appears that the reference to a duplicate list was misinterpreted and accordingly a list that LAS submitted on March 10, 2020 was not submitted to Securus."²⁷ Securus expanded the results of this audit to include the missed list, and the audit indicated that there were 1,302 unique calls recorded/accessed, involving 266 detainees and 158 unique telephone numbers (these number include the data reflected in the April 1, 2021 audit).

²⁴ Letters from Vincent Schiraldi, Commissioner, Department of Correction to New York County Defender Services, Neighborhood Defender Service of Harlem, and the Legal Aid Society (December 30, 2021).

²⁵ May 8, 2020 email from Tina Luongo, Attorney-in-Charge, Criminal Defense Practice, LAS to Brian Charkowick, Maureen Danko, Laura Mello and Heidi Grossman/Tweet from Tina Luongo, Attorney-in-Charge, Criminal Defense Practice, <https://twitter.com/TMLuongo/status/1374074483263205376?s=20>.

²⁶ May 8, 2020 and May 13, 2020 emails between DOC IT Director Brian Charkowick and Tina Luongo.

²⁷ Letter from Vincent Schiraldi, Commissioner, Department of Correction to The Legal Aid Society (December 30, 2021).

Other Organizations

Securus erroneously recorded 630 calls from detainees to 20 Neighborhood Defender Service of Harlem phone numbers, and 347 calls to 27 New York County Defender Services phone numbers. Two phone calls to Queens Defenders were recorded. Those recordings were made after Queens Defenders requested the number be added to the DNR list, but before Securus had processed that request. No calls were recorded after Securus processed that request.²⁸

In total, this DNR list issue impacted approximately 322 unique phone numbers and 3,928 calls. At the time of her testimony to the New York City Council, DOC's then General Counsel, Heidi Grossman, noted that there were over 270,000 phone numbers in DOC's DNR list.²⁹

C. DOC's Response

Once DOC learned of the improper recordings on December 8, 2020, it acted quickly to investigate and address the issue.³⁰ Within hours of Bronx Defenders' notifying DOC of the recordings, DOC Legal began making inquiries to DOC IT and Securus. DOC quickly sequestered the recorded calls to prevent further improper access, and instructed Securus to conduct an audit of the Bronx Defender DNR list. Upon being notified of the same issue with the BDS on February 4, 2021, DOC requested a wider review. While the audits were underway, DOC began working with Securus on modifications to prevent future errors.

On March 19, 2021, DOC notified the five New York City District Attorneys' Offices (collectively, "DA Offices") that Securus had recorded attorney-client privileged communications, and therefore DOC may have produced privileged recordings to the DA Offices in response to subpoenas. DOC provided each DA Office with specific names, numbers, and calls that were burned to a CD (DOC's method of producing calls to DA Offices). DOC also produced the reports of the Securus audits to the various defender organizations and to DOI.³¹

²⁸ Letters from Vincent Schiraldi, Commissioner, Department of Correction to New York County Defender Services, Neighborhood Defender Service of Harlem, and the Legal Aid Society (December 30, 2021).

²⁹ NYC Council Budget and Oversight Hearings, *Supra* note 18 at 35-36.

³⁰ DOC did not notify DOI of the issue. Going forward, a notification regarding any future issues pertaining to the recording of privileged information involving Securus or any other IPS provider should be made to DOI, so DOI can take further action as necessary, including making future recommendations.

³¹ DOI investigators have access to Securus and some may have downloaded privileged communications. DOC notified DOI of the specific calls to privileged contacts, and DOI investigators were instructed to dispose of any recordings in their possession, and if DOI had provided the calls to a prosecutor's office, to notify the prosecutor that the communication was privileged, and direct the prosecutor to dispose of it. All DOI investigators complied with these instructions.

III. Remediation Efforts

A. Securus Efforts

To address these issues, and prior to any DOI recommendation, Securus and DOC undertook the changes set out in detail below:

Change Designation

Securus first changed all phone numbers on the DNR list to “agency-wide” privacy restriction, rather than the “facility/site specific” privacy designation. As noted above, this “agency-wide” restriction ensures that calls placed from detainees to those listed phone numbers would not be recorded, regardless of the location from which the listed number was calling or receiving the call.

New Warning

Securus also changed the recorded warning with respect to potential recording. The recorded warning previously stated (to both the caller and the recipient) that the call taking place was “subject to recording and monitoring.” The new warning states: “This call is not private. It will be recorded and may be monitored. If you believe this should be a private call, please hang up and follow facility instructions to register this number as a private number.”

Website verification

Securus created a public website³² where parties can enter a phone number and check whether the number is listed as private. DOC has created a link to this database on its website. This functionality enables detainees and attorneys to confirm whether or not attorney numbers — or other potentially privileged party numbers — have been identified as “private,” meaning that calls to that number will not be recorded.

Quality Control

Securus implemented a quality control process to confirm that the telephone numbers of parties with whom detainees may have privileged communications have been designated as “private.” First, a Securus employee enters the numbers into the database at the agency-wide level only. Upon completion of that entry process, a second employee will randomly check 20% of the numbers input to ensure that they are properly privatized. If no issues are found, Securus will advise DOC Legal that

³² <https://www.aventiv.com/ny-attorney/#>.

the task has been completed. Should Securus find that one of the numbers was not properly privatized, the number would be reentered, and the 20% spot check would be repeated.

B. DOC Efforts

In addition, as an added safeguard, DOC IT obtained a list of phone numbers of attorneys registered with OCA, and provided this list to Securus. Securus set all of those the numbers to private, whether or not those attorneys were at that time representing a particular inmate. Because the list contained hundreds of thousands of phone numbers, it was too large for Securus to perform the 20% spot check.

Website

DOC updated its website to include the link to the Securus verification website and created new instructions for attorneys to request that their phone numbers be listed as private. DOC also created a new email account, DoNotRecord@doc.nyc.gov, to serve as an intake address for numbers to be vetted by DOC Legal.

DOC Quality Assurance

DOC Legal has implemented its own quality assurance process to reinforce Securus' efforts. The current process requires that a member of DOC Legal's subpoena unit conduct a monthly review of DNR requests that DOC has sent to Securus. The designee is required to use the Securus platform to review every tenth request received to determine if the telephone number was properly privatized and if the calls were recorded before or after the attorney requested privatization.

IV. Conclusion

Although the breaches were significant and resulted in the capture of numerous attorney-client privileged conversations, DOI's review of hundreds of communications between DOC and Securus revealed that Securus took responsibility, quickly and transparently began to work with DOC to correct the issue, and implemented safeguards to prevent future problems. Despite Securus' remediation efforts, the error has called into question whether New York City should continue to do business with Securus, or seek IPS services elsewhere.

Changing IPS providers is a lengthy and costly process that would require a new procurement process and removal of over 1,800 phones and related hardware

owned and operated by Securus in DOC facilities.³³ There are only a handful of vendors (including Securus) that can provide features and functionalities required by DOC and local law. While this incident is not the first in which Securus has – or has been alleged to have – improperly recorded privileged communications, other IPS providers, such as GTL, have been sued for alleged recording of attorney-client privileged telephone calls, and GTL has acknowledged instances in which such calls have been recorded.³⁴ Therefore there is no assurance that another vendor would fare better in ensuring privileged calls are not recorded. Furthermore, Securus is in its third one-year renewal, so a new request for proposal for IPS services will be needed in less than two years.

The recordings of privileged communications, while unacceptable, involved a very small percentage of numbers contained in the DNR list: approximately 322 phones numbers out of at least 270,000.³⁵ In response to the error, DOC (particularly DOC Legal and DOC IT) and Securus acted quickly. Working together, they implemented a series of changes and protections that, in DOI's view, were appropriate.

V. Recommendations

DOI agrees with the changes that Securus and DOC have already implemented, specifically the new oral warning provided during phone calls and the new quality control standards.

DOI also makes the following Policy and Procedure Recommendations:

1. DOC staff members from a variety of units (The Investigation Division, Correction Intelligence Bureau, Applicant Investigation Unit, DOC Legal, etc.) use Securus' Secure Call Platform application to monitor, listen to, and copy detainee phone calls. DOC should train all users of the Securus Call Platform to recognize a potentially privileged call — including but not limited to the language used and topics discussed. DOC should require, by written policy, that Securus users

³³ The removal of an IPS provider would result in considerable financial consequences as well as service interruptions while the current provider removed its equipment and the new provider installed theirs.

³⁴ Securus has faced and settled many lawsuits where, like here, privileged communications were improperly recorded. *See Supra* note 17 and accompanying text. Notably, however, GTL- the largest provider of IPS services- has also faced lawsuits for similar issues. *See* Tony Saavedra, *DA asked to investigate Orange County's illegally recorded attorney-client phone calls*, THE ORANGE COUNTY REGISTER (Mar. 12, 2020, 4:47 P.M.), <https://www.oregister.com/2020/03/12/da-asked-to-investigate-orange-countys-illegally-recorded-attorney-client-phone-calls/> (noting GTL acknowledged numerous instances where attorney-client calls were recorded).

³⁵ DOC Deputy Commissioner for Legal Matters Heidi Grossman noted that at the time of the hearing, there were over 270 thousand attorneys on the do not record list. NYC Council Budget and Oversight Hearings, *Supra* note 18 at 35-36.

immediately notify DOC Legal if any calls are intercepted that are potentially privileged. Users should be trained on an annual basis, and required to acknowledge in writing that they have received the training and know how to identify potentially privileged calls.

2. DOC has already established protocols to prevent the monitoring and recording of privileged calls (i.e., the procedures noted above). DOC should memorialize these procedures in a written Departmental Directive, which can be readily accessed.
3. DOC should notify defender organizations and other lawyers on, or seeking to be added to, the DNR list that attorneys and their agents (paralegals or other assistants to the attorneys) should not accept conference or third-party calls from incarcerated individuals (i.e., when an inmate calls a contact and that contact then calls the attorney), as these calls will be recorded and potentially monitored. This will further reduce the risk of inadvertent interception and recording of potentially privileged calls.
4. Immediately upon discovering that a privileged call has been improperly recorded, DOC Legal should notify DOI.