



Office of the Information and Privacy Commissioner for Nova Scotia

Know Your Rights Missing Records?

Notice to Users

This document is intended to provide general information and it is not intended nor can it be relied upon as legal advice. The contents of this document do not fetter or bind this office with respect to any matter. The Information and Privacy Commissioner for Nova Scotia will keep an open mind if this office receives a review request (appeal) on the subject matter of this document. As an independent agency mandated to oversee compliance with *FOIPOP* and *Part XX* of the *MGA* the Office of the Information and Privacy Commissioner for Nova Scotia (OIPC) cannot investigate in advance any concerns from an applicant related to an access to information request, so if there are concerns with a public body or municipality's decision, the applicant must file a review request for this office to investigate the issue and to provide recommendations in response to those appeals. It remains the responsibility of each public body or municipality to ensure that it complies with its responsibilities under the relevant legislation.

This document outlines the OIPC's general approach to a missing records review. The issues and circumstances of the matter will dictate what is appropriate. The OIPC has discretion to deviate from the steps outlined in this document where appropriate, fair and just to do so. A deviation from the steps does not, for that sole reason, mean that the review is invalid.

INTRODUCTION

Under Nova Scotia's access to information laws, anyone can make an application for access to a record ("access to information request"). This document is part of our series entitled *Know Your Rights* and is intended to help the public understand how to interpret the information they get back from public bodies and municipalities in response to an access to information request.

When you receive a response to an access to information request,¹ you may believe records are missing from that response. This document outlines what to do if you believe records are missing from a response to an access to information request.

Please see our [Glossary: Review Request Terms](#) for help understanding terms in this document and terms that appear frequently during the review process.

LEGISLATION

There are several laws in Nova Scotia that set out the access to information rules. Each law applies to a different type of organization. The *Freedom of Information and Protection of Privacy Act (FOIPOP)* applies to provincial government departments, agencies, universities and regional centres for education (formerly called school boards). *Part XX of the Municipal Government Act (MGA)* applies to municipalities, towns, villages, municipal police forces and libraries. This document only applies to *FOIPOP* and the *MGA*.

Public bodies and municipalities have a duty to assist those who make access to information requests. The duty to assist requires a public body or municipality to make every reasonable effort to respond without delay to the applicant, openly, accurately and completely.²

Although applicants have a right to access information, they also have duties. Applicants are required to specify the subject matter of the records requested with sufficient particulars to enable an individual familiar with the subject matter to identify the records.³ Applicants are also required to pay all prescribed fees.⁴

WHAT TO DO IF YOU BELIEVE RECORDS ARE MISSING

Step 1: Check the scope of your access to information request

Did you ask for the records that you believe are missing? If you did not ask for the missing records in your access to information request, then the public body or municipality does not have to provide them to you. An example of this is when the records you believe are missing are outside the timeframe of your access to information request. If you did not

¹ For information on filing an access to information request, see our publication [How to Make an Effective Access to Information Request](#).

² This is set out in s. 7 of *FOIPOP* and s. 467 of the *MGA*. A copy of the relevant sections of the *Acts* is provided in Appendix 1 to this document.

³ See s. 6 of *FOIPOP* and s. 466 of the *MGA*.

⁴ See our publication [Duty to Assist #4: How to Calculate Fees](#) for more information on fees that may be charged under *FOIPOP* and the *MGA*.

originally ask for the records you believe are missing, you must file a new access to information request with the public body or municipality for the “new” records.

If you still think the records you believe are missing should have been provided, move on to step 2.

Tip #1: You cannot add to your access to information request after the public body or municipality has issued a decision.

Step 2: Call the public body or municipality

Call the public body or municipality where you made your access to information request. Talk to them about the records you believe are missing. They may be able to easily locate and provide you with the records (e.g., an email attachment), or explain why the records were not provided (e.g., they were withheld in full by the public body or municipality).⁵ *FOIPOP* and the *MGA* establish the right of applicants to access records, but they do not require public bodies and municipalities to answer questions.⁶ However, public bodies and municipalities are required to answer applicants’ questions about the decisions they make in response to access to information requests.⁷

Tip #2: Call the public body or municipality to ask about missing records.

Step 3: Appeals to the OIPC and to the Nova Scotia Supreme Court

If you are not satisfied after you speak to the public body or municipality about the records you believe are missing, you may either appeal (request a review) with the Office of the Information and Privacy Commissioner [OIPC] or appeal the decision to the Nova Scotia Supreme Court.

REQUEST FOR REVIEW

If you believe records are missing from the public body or municipality’s response to your access to information request, you may file an appeal (request for review) with the OIPC within 60 days of receiving the response.⁸

⁵ If the missing records were withheld in part or in full by the public body or municipality you may also request a review of the withheld information by the OIPC. Please see our document on [How to Appeal a Decision to the OIPC](#). The OIPC will open a separate review file regarding the withheld records.

⁶ See [Raymond v. Nova Scotia \(Freedom of Information and Privacy Commissioner\)](#), 2017 NSSC 322, para. 59.

⁷ See s. 7(2)(d) of *FOIPOP* and s. 467(2)(d) of the *MGA*.

⁸ You may request a review by filing a [Form 7](#) with the OIPC or by sending a written request to the OIPC. Include a copy of your access to information request and the public body or municipality’s decision with your request for review.

There are two possible stages of this type of review at the OIPC:

1. Investigation
2. Review report

Investigation

When you allege that records are missing from the public body or municipality's response to an access to information request, the only issue the OIPC can review is whether or not the public body or municipality met its duty to assist you by conducting an adequate search for the records as required by s. 7(1)(a) of *FOIPOP* or s. 467(1)(a) of the *MGA*.

The only remedy in reviews where search is at issue is for the Commissioner to recommend that the public body or municipality conduct another search. This is done at the outset of the review process.

With respect to the duty to assist, s. 7 of *FOIPOP* and s. 467 of the *MGA* are silent on who bears the burden of proof. Therefore, both parties must each submit arguments and evidence in support of their positions. The burden first rests with you as the applicant. For the OIPC to request that a public body or municipality conduct a new search for the records you believe are missing, you must provide something more than a mere assertion that the missing records exist. You must provide enough information (sufficient particulars) to assist the public body or municipality in its search and provide a reasonable basis for concluding that such records exist.⁹

Tip #3: Applicants are required to provide information in a review including:

- **specifying the subject matter of the records sought as precisely as possible;**
- **providing sufficient detail such as information relating to the time, place and event whenever possible; and**
- **submitting evidence to prove the identified missing records exist.**

The requirement to provide enough information to identify the records is still present in a review. You must specify the subject matter of the records you are seeking as precisely as possible and provide sufficient detail such as information relating to the time, place and event whenever possible.¹⁰ In addition, it would be helpful for the applicant to, when known, provide the actual number of allegedly undisclosed records, the nature of the records, when they were created and who created them.¹¹ You must also submit evidence in support of your position that records are missing from a public body or municipality's decision in response to your access to information request.¹²

⁹ For detailed information on your burden, see: the Nova Scotia Information and Privacy Commissioner's leading case on the issue of search, NS Review Report [FI-11-76](#) at paras 10 and 13; section 6(1)(b) of *FOIPOP* and s. 466 of the *MGA*; and more recent NS Review Reports [21-05](#) at para. 6 and [23-02](#) at paras. 3-7.

¹⁰ NS Review Report [16-05](#) at para. 39.

¹¹ [Donham v. Nova Scotia \(Community Services\), 2012 NSSC 384](#), at para. 19.

¹² [Goldie v. Kings \(County\), 2022 NSSC 343](#), at para. 23.

When identifying the records you believe are missing, remember the “**Five W’s**”:

- **What** information do you believe is missing? Describe the records you are seeking clearly and precisely. Note that if the records you identify as missing were not included in your access to information request to the public body or municipality, they cannot be added in a review.
- **What** evidence do you have that the records are missing? For example, you may have received an email citing an attachment that wasn’t provided, you may be able to provide a public body or municipal policy that states a certain record should have been created or you have a copy of a news release saying a report was completed. You cannot merely believe that a record exists or assert that it does. You must provide some evidence to show that the public body or municipality has the record in its custody or under its control.¹³
- **Who** do you think has the information? Provide the names or position titles of individuals you think may have responsive records, if known.
- **Where** do you think the information is? Specify the program areas you think may have the records, if known.
- **When** was the information created or what date range are you interested in? Be as specific and focussed as possible. This will help the public body or municipality find the records you are seeking. Note that you cannot add to the date range of your initial access to information request during a review.
- **Why** was the information created? If you know some history behind the creation of the records you seek, it is often helpful to say so. For example, perhaps you know that as a result of an incident on July 1, 2008, a special workplace safety investigation was conducted. Providing this type of information may help the public body or municipality locate the requested records.

For the review process to be timely and fair to all parties, you are required to identify the missing records and provide the rationale and evidence that the records exist at the outset of the review process. Once you have done so, additional missing records cannot be added and/or additional evidence will not be accepted.

You will only have one chance to provide details, so make sure you provide a full response when requested. Your response is referred to as your “representations.”

You have the burden to provide enough information that will allow the OIPC to go forward and require the public body or municipality to conduct a new search for records.¹⁴

Without a reasonable basis to conclude that the records exist, sufficient particulars to identify the missing records and evidence that the records exist, you will not meet the burden of proof and there will be no basis to conclude that the public body or municipality has not conducted an adequate search.

If the investigator’s opinion at the investigation stage of the review process is that the applicant did not meet their burden, this may informally resolve the review. If the review is not informally resolved, the OIPC will request representations from the public body or

¹³ [Goldie v. Kings \(County\), 2022 NSSC 343](#), at para. 23.

¹⁴ NS Review Report [23-02](#), at para. 7.

municipality and the review will move to the Commissioner for a review report to be issued. Information on the review report is found below.

Tip #4: Without a reasonable basis to conclude that the records exist, sufficient particulars to identify the missing records and evidence that the records exist, you will not meet the burden of proof.

When you meet your burden by providing the OIPC with evidence that the identified missing records exist and the necessary information to identify the missing records, the OIPC shares that information with the public body or municipality and requires that it conduct a new search based on what you allege is missing.

If the identified missing records are found, the public body or municipality will be required to make a disclosure decision; that will come to you directly from the public body or municipality and the review file will be closed. If you are not satisfied with the new decision from the public body or municipality, you may request a new review of that new decision with the OIPC within 60 days of its receipt or appeal to the Nova Scotia Supreme Court within 30 days of its receipt.

If the public body or municipality does not find the records identified as missing, the OIPC requires that the public body or municipality explain how it searched for the responsive records.¹⁵ Its response is considered to be its representations. The test for an adequate search is one of reasonableness, not perfection.¹⁶ *FOIPOP* and the *MGA* do not require the public body or municipality to prove with absolute certainty that the records do not exist, only that it conducted a reasonable search for the records.

When the public body or municipality's response to how it conducted the search for records is received, the OIPC will provide you with an opinion, based on the results of the public body or municipality's search results, regarding whether an adequate search was conducted for the identified missing records.

If the investigator's opinion at the investigation stage of the review process is that the public body or municipality conducted an adequate search, this may informally resolve the review. If the review is not informally resolved, it will move to the Commissioner for a review report to be issued. Information on the review report is found below.

Tip #5: The standard is reasonableness, not perfection.

Review report

If a file moves to the Commissioner for a review report to be issued, she will review the complete file and all materials compiled to date. Information contained within the file will likely be referred to and/or quoted in the review report (unless in-camera submissions were approved).

¹⁵ Please see our publication [Duty to Assist #2: Conducting an Adequate Search](#) for more information about public body/municipality obligations when searching for records.

¹⁶ [Raymond v. Halifax Regional Municipality, 2022 NSSC 68](#), para 27.

Unless the Commissioner formally asks for further representations or answers to questions, there will be no additional opportunity for the parties to submit representations.

The Commissioner will issue a report with findings and recommendations. The report may be made public. The Commissioner cannot issue orders to the public body or municipality, nor can she impose sanctions, fines or order compensation. She can only make recommendations to public bodies and municipalities and it is up to them to accept or reject the Commissioner's recommendations.

APPEALS TO THE NOVA SCOTIA SUPREME COURT

Direct appeal

Applicants who submit access to information requests to public bodies or municipalities under *FOIPOP* or the *MGA* can appeal the public body or municipality's decision directly to the Nova Scotia Supreme Court, without requesting a review with the OIPC. This appeal must be made within 30 days of the public body or municipality's decision if there is no third party notified pursuant to s. 22 of *FOIPOP*/s. 482 of the *MGA* or any third party so notified consents to that appeal.

Appeal after review

Where the Commissioner issues a review report with recommendations to the public body or municipality, if you are not satisfied with public body or municipality's decision in response to the recommendations, you may appeal the decision to the Nova Scotia Supreme Court. Any appeal must be made within 30 days after receiving the public body or municipality's decision in response to the recommendations contained in the Commissioner's report.

The Information and Privacy Commissioner is not a party to an appeal.

QUESTIONS?

This document was prepared by the Office of the Information and Privacy Commissioner for Nova Scotia. Whether you are an applicant, a public body or a municipality, we encourage you to contact us if you have any questions about the access to information process in Nova Scotia.

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Appendix 1: Relevant Statutory Provisions

Freedom of Information and Protection of Privacy Act

6(1) A person may obtain access to a record by

- (a) making a request in writing to the public body that has the custody or control of the record;
- (b) specifying the subject-matter of the record requested with sufficient particulars to enable an individual familiar with the subject-matter to identify the record; and
- (c) paying any fees required pursuant to Section 11.

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.

Part XX, Municipal Government Act

466(1) A person may obtain access to a record by

- (a) making a request in writing to the municipality that has the custody or control of the record;
- (b) specifying the subject matter of the record requested with sufficient particulars to enable an individual familiar with the subject matter to identify the record; and
- (c) paying any fees required pursuant to this Part.

467(1) Where a request is made pursuant to this Part for access to a record, the responsible officer shall

- (a) Make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely.