



Duty to Assist #2: Conducting an Adequate Search Guidelines for Public Bodies and Municipalities

Office of the Information and Privacy Commissioner for Nova Scotia
February 25, 2019

Notice to Users

This document is intended to provide general information only. It is not intended nor can it be relied upon as legal advice. As an independent agency mandated to oversee compliance with *FOIPOP*, *MGA* and *PHIA* the Office of the Information and Privacy Commissioner for Nova Scotia cannot approve in advance any proposal from a public body or municipality. We must maintain our ability to investigate any complaints and to provide recommendations in response to these complaints. The contents of this document do not fetter or bind this office with respect to any matter, including any complaint investigation or other matter respecting which the Information and Privacy Commissioner for Nova Scotia will keep an open mind. It remains the responsibility of each public body or municipality to ensure that it complies with its responsibilities under the relevant legislation.

INTRODUCTION

This guide is the second in a series of guidelines describing how public bodies and municipalities can satisfy their duty to assist applicants under Nova Scotia's access to information laws. Public bodies and municipalities have a duty to assist applicants. The law requires that they make every reasonable effort to assist applicants and to respond without delay, openly, accurately and completely.

The duty to assist requires a public body/municipality to make every reasonable effort to identify and seek out records responsive to an applicant's access to information request. The duty to respond accurately requires the public body/municipality to ensure it has sufficient information upon which to base its access decision. This is achieved in part by conducting an adequate search for records.

Meeting the duty to assist may result in a more satisfactory experience for all involved and perhaps, result in fewer complaints to this office.

LEGISLATION

Section 7(1)(a) of the *Freedom of Information and Protection of Privacy Act* states:

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.*

Section 467(1)(a) of *Part XX* of the *Municipal Government Act* states:

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.*

PRINCIPLES¹

The following principles should guide public bodies and municipalities in meeting the duty to assist:

- Public bodies' and municipalities' efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. However, it does not impose a standard of perfection. There is a threshold of reasonableness in conducting adequate searches for records.
- A thorough and comprehensive search includes searching all locations, including off-site locations, where records might be found and may include searching for responsive records under their control that may be in the hands of a third party.
- Public bodies and municipalities must make every reasonable effort to search for the record requested, keeping in mind a liberal interpretation of the request, and must inform the applicant of what they have done in a timely fashion.

¹ These principles have been adapted in part from the Office of the Information Commissioner of Canada, *The Duty to Assist: A Comparative Study*, available online at <http://www.oic-ci.gc.ca/eng/rp-pr-ori-ari.aspx>, May 2008. The principles represent best practices from across Canada. We would also like to acknowledge that portions of this guide have been adapted from material prepared by the Office of the Information and Privacy Commissioner for Saskatchewan and the Office of the Information and Privacy Commissioner for Ontario.

- If an applicant alleges a failure to conduct an adequate search, the applicant must provide something more than mere assertion that a document should exist.²
- In order to prove that it has conducted an adequate search, the public body's/municipality's evidence should:
 - describe the business areas and record types searched (for example emails, physical files, databases);
 - identify the individuals who conducted the search (by position type);
 - include the time taken to conduct the search; and
 - explain why a record may not exist where this is a concern.

WHAT IS AN ADEQUATE SEARCH?

An adequate search occurs when an experienced employee who is knowledgeable in the subject matter of the request makes a reasonable effort to locate records related to the request.

A reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances.

HOW TO CONDUCT AN ADEQUATE SEARCH

To meet their obligations to conduct a reasonable search, public bodies and municipalities should consider the following:

1. Preserve the records

On the day an access to information request is received public bodies and municipalities must ensure that they cease any destruction of responsive records. This is true even if the destruction is in accordance with approved retention schedules. Ensure that you communicate immediately to staff that they must preserve all responsive records.

2. Do you need to clarify the request?

The scope of the request will determine the nature of your search. For example, if the request is for a specific email sent on a specific date, it may not be necessary to search your paper records. Contact the applicant if you have any questions or require clarification about the request. Public bodies/municipalities are obligated to help applicants reformulate their requests to sufficiently identify the type of records they are seeking. (For more information about communicating with applicants see the Office of the Information and Privacy Commissioner for Nova Scotia's (OIPC) publication [*Duty to Assist #1: Communication with Applicants.*](#))

3. Who is responsible for overseeing the search?

Assign one person to oversee the search for records. In most cases, this task should be assigned to the information access and privacy administrator or a member of the department. If your office does not have an administrator, select one person to organize and lead the search.

4. Have you identified the right people to conduct the search?

Ensure that staff members who are conducting the search are knowledgeable in the subject matter and in any relevant records storage and filing systems. Provide these staff with any detailed information about the request gathered, including any information needed to ensure a consistent understanding of the scope of the search and the approach to be taken when searching.

² [Nova Scotia Review Report FI-11-76 \(2014 CanLII 71241 \(NS FOIPOP\)\)](#)

5. Do you need to involve any other business areas?

In some cases, it may be necessary to consult with other relevant business areas or records and information management staff. For example, even with subject matter experts conducting the records search, it may be necessary to involve staff familiar with technical aspects of electronic record systems.

6. Have you reviewed files in all formats?

Records can exist in any format. Your search should normally include records in paper and electronic formats such as hand-written notes, emails, attachments to emails and instant messages. If staff conduct business with personal email accounts or instant messaging programs, those accounts and programs must be included in your search. (See the OIPC's publication [*Instant Messaging and Personal Email Accounts*](#) for more information about these types of records.)

7. Have you considered off-site storage and alternative holdings?

Records may have been moved off-site or stored on hard drives or other storage media that are currently not in use. Consult with business areas and information management and technology support staff to identify any off-site storage and filing systems that may also need to be searched. Search all reasonably related record holdings in the public body's/municipality's possession or control (including off site locations and those held by agents, consultants or other contracted service providers).

DOCUMENT THE SEARCH

In the event of an appeal, evidence of the search strategy will be required along with how the search was conducted in the particular circumstances. Public bodies/municipalities must provide sufficient evidence to demonstrate that a reasonable effort has been made to identify and locate all of the responsive records in their custody or control. As such, it is best practice to document every step of the search for records. This helps ensure consistent, thorough searches. The *Sample Search Checklist* found in the Appendix to this document can be a useful tool in documenting the search for responsive records.

Also, if the applicant believes that more records exist than have been identified, she can request a review by the OIPC. In that case, the OIPC will ask the public body/municipality for specific details about the search. This includes, but is not limited to, the following:

- i. What business area(s) were searched?
- ii. What types of records were searched (i.e. emails, physical files, databases)?
- iii. What key words were used in the search?
- iv. Do the relevant staff use personal email accounts/devices/applications ("apps")? If so, were personal email addresses/devices/apps included in your on-site search?
- v. What employee(s) conducted the search (job title/business area)?
- vi. How much time was spent searching by each person and /or business area?
- vii. Were any requested records destroyed in accordance with an approved retention policy? If so, please provide a copy of the policy and the retention paperwork.
- viii. If there is another explanation why records are missing/lost, please provide it.

In cases where the search for responsive records yields negative results, answers to these search questions should be included in the public body's/municipality's decision to the applicant.

QUESTIONS?

This guidance 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.

Phone: 902-424-4684
Toll Free (NS): 1-866-243-1564
TDD/TTY: 1-800-855-0511
Fax: 902-424-8303
Email: oipecns@novascotia.ca

