



**Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Tricia Ralph**

REVIEW REPORT 21-05

April 27, 2021

Department of Community Services

Summary: The applicant sought access to a Child Welfare Services file¹ about his own child. The Department of Community Services (Department) provided the applicant with a package of responsive records. The applicant believed that the package received from the Department was missing four items. The Commissioner finds that the Department conducted an adequate search as required by s. 7(1)(a) of the *Freedom of Information and Protection of Privacy Act* after conducting a second search, identifying the business areas searched, the individuals who conducted the search and providing an explanation for why the records did not exist. However, because the Department's file room was under overhaul for over three years, the Commissioner recommends that the Department complete the file room's overhaul within one year of the date of this review report.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [SNS 1993 c 5](#), ss 6, 7.

Authorities Considered: Nova Scotia: Reports FI-11-76, [2014 CanLII 71241 \(NS FOIPOP\)](#); 16-05, [2016 NSOIPC 5 \(CanLII\)](#); FI-12-77, [2013 CanLII 34083 \(NS FOIPOP\)](#).

Cases Considered: [Donham v. Nova Scotia](#) (*Community Services*) 2012 NSSC 384.

INTRODUCTION:

[1] In 2016, the applicant made a request for information for a Child Welfare Services file held by the Department of Community Services (Department). The Department provided the applicant with a package of responsive records. The applicant believed that the response package was missing four specific items.

¹ Note that Child Welfare Services is also commonly referred to as "Family and Children's Services".

ISSUE:

[2] The issue under review is whether the Department conducted an adequate search as required by s. 7(1)(a) of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*.

DISCUSSION:

Background

[3] In response to his request for access to the Department's file about his own child, the Department provided the applicant with six pages of case recording reports and a copy of a paper file containing handwritten notes, a file audit, a fax cover sheet, a supervisory consultation, a letter and intake forms. The applicant believed that the Department had not conducted a fulsome search as he believed that the responsive package was missing four specific items.

Burden of proof

[4] With respect to the duty to assist set out in s. 7(1), *FOIPOP* is silent as to who bears the burden of proof. Therefore, both parties must each submit arguments and evidence in support of their positions.

Did the Department conduct an adequate search as required by s. 7(1)(a) of *FOIPOP*?

[5] The sole question in this review is whether the Department conducted an adequate search. The requirement to conduct an adequate search arises out of the duty to assist provision in s. 7(1)(a) of *FOIPOP*. Section 7(1)(a) of *FOIPOP* states:

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;

[6] A provision outlining the duty to assist applicants is found in access to information legislation across Canada. Most jurisdictions have review reports canvassing the effort that public bodies must exert to meet this duty when searching for records. The leading case in Nova Scotia is *NS Review Report FI-11-76*.² In that case, former Information and Privacy Commissioner Tully reviewed decisions from across Canada and concluded that where an applicant alleges a failure to conduct an adequate search, the applicant must provide something more than a mere assertion that a document should exist. In discharging this burden, the applicant must provide a reasonable basis for concluding that such records exist³ and sufficient particulars⁴ to identify the record(s). In providing sufficient particulars, the applicant should specify the subject matter of the record sought as precisely as possible and provide sufficient detail such as information relating to the time, place and event whenever possible.⁵ In addition, it would be helpful for the applicant to, when known, provide the actual number of allegedly

² [2014 CanLII 71241 \(NS FOIPOP\)](#).

³ *NS Review Report FI-11-76*, at para 10.

⁴ Section 6(1)(b) of *FOIPOP*.

⁵ *NS Review Report 16-05*, [\(Nova Scotia \(Department of Justice\) \(Re\), 2016 NSOIPC 5 \(CanLII\)\)](#) at para 39.

undisclosed documents, the nature of the documents, when they were created and who created them.⁶

[7] When an applicant discharges their burden, the burden then shifts to the public body to make “every reasonable effort” to locate the requested record(s). The public body’s response should include a description of the business areas and record types searched (e.g., emails, physical files, databases), and identify the individuals who conducted the search (by position type). Also, the public body’s response should include the time taken to conduct the search. If there is an explanation for why a record may not exist, it should be provided.⁷ These principles are further outlined in this Office’s document entitled *Duty to Assist #2: Conducting an Adequate Search*.⁸

[8] A public body must demonstrate how it conducted a reasonable search or provide a reasonable explanation as to why it determined that responsive records do not exist. However, a public body does not need to prove this with absolute certainty. The standard is reasonableness, not perfection.⁹

[9] In this case, the applicant filed a request for review with the Office of the Information and Privacy Commissioner (OIPC) on the basis that he believed an adequate search was not completed. He supplied particulars of the records that he believed were missing. With this information, the Department was asked at the OIPC’s intake stage to conduct a second search and answer a series of routine questions related to the searches conducted. The Department conducted the second search and answered the series of questions. It explained the business areas and record types it searched, identified the individuals who conducted the search by position type and provided the time taken to conduct the search. An additional 15-20 hours was spent searching for the records the applicant claimed should exist. After this search, the Department said that no new records were located, but it did advise that a blank compact disc (CD) labelled with the name of the applicant’s child was included in the paper file.

[10] Overall, the Department noted that it found responsive records to the request and had no reason to doubt the completeness of the searches it had conducted. The Department reviewed the responsive records and remarked that it comprehensively documented its actions on the file requested by the applicant. In addition, the Department explained that while its case notes form the official record of client interactions, those notes capture the critical information that allows Department staff to manage a file but do not necessarily involve a verbatim record. Its experience was that many applicants expect government record-keeping to be more detailed than it is. The Department noted that the responsive records detailed the Department’s interactions with the applicant’s child from beginning to end.

⁶ *Donham v. Nova Scotia (Community Services)* 2012 NSSC 384, at para 19.

⁷ *NS Review Report FI-11-76*, at paras 13-14.

⁸ <https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Search%20Guidelines%20%282019%2002%2025%29.pdf>.

⁹ *NS Review Report FI-12-77*, [2013 CanLII 34083 \(NS FOIPOP\) at page 5](#).

[11] The applicant and the Department also provided representations on the four specific items identified as missing by the applicant. I will describe the items and the parties' representations broadly in an effort to avoid inadvertently identifying the applicant.¹⁰

Item 1:

[12] The first item the applicant believed was missing from the responsive records was a copy of what was sent by the Department to another agency. The reason the applicant believed this record was missing was because the responsive records included a fax cover sheet that stated the Department worker provided this other agency with a copy of its file. The responsive records included only the fax cover sheet and not a copy of what was faxed.

[13] The Department's position was that it was entirely reasonable that the fax sender kept only the fax cover sheet and not a duplicate copy of what was faxed to this other agency.

[14] I agree with the Department regarding Item 1. The fax cover sheet detailed what was faxed. While it might have been best practice to keep a copy of what was faxed for accountability reasons, doing so was not required under *FOIPOP*. Furthermore, the Department conducted two searches (the second one totalling over 15 hours) and explained who conducted the search and what was searched. I am satisfied that this record does not exist.

Item 2:

[15] The second item the applicant believed was missing were records of contact between the Department and a different agency. The reason the applicant believed that Item 2 existed was because in the responsive records he received, there was a record that stated that the Department corresponded with this other agency and noted the other agency's verbal response to the Department's question via a telephone call. The applicant felt that as a matter of due diligence, the Department ought to have received written confirmation of this other agency's response rather than the Department only retaining its written recording of the other agency's verbal response.

[16] In response, the Department said that the notation from the correspondence was contained in the records disclosed to the applicant. It said there would be no reason to record any further documentation than the notes confirming the verbal response provided. Rather, the Department thought it would have been unreasonable and would have introduced unnecessary privacy risks if it had collected the salient information with anything further than a phone call.

[17] Again, I agree with the Department. I take the applicant's point that the responsive records implied that perhaps this other agency ought to have provided a written response to the Department, but the reality is that this record does not appear to exist because the Department's business practices did not require it to be created in the first place. As with Item 1, the Department conducted an additional search knowing the applicant was looking for this specific item.

¹⁰ The items are numbered in the same order as in the OIPC investigator's opinion letter, dated June 9, 2020.

Item 3:

[18] The third item the applicant believed was missing was a CD recording of an interview. In its second search, the Department found a CD labelled with the name of the applicant's child. The CD was blank. The OIPC viewed the original copy of the CD and confirmed it was blank.

[19] The applicant was aware that multiple people were in attendance at this interview and wanted me to ask who else was present at the interview. The applicant also thought that the paper file should have contained paper copies that detailed what questions were asked and what the responses were. In my view, these requests go beyond the level of reasonableness required of the Department. Presumably, only one recording device was used so I do not see how asking who else was there would achieve the goal of finding the CD that was not blank. In terms of the applicant believing that the paper file should have contained paper copies of the questions asked, again this might be considered to be a best practice but there was no evidence that the Department's business practices or policies required this be the case.

[20] The Department's response was that an error must have occurred with the CD, which it said was a reasonable but unfortunate outcome of the use of technology. The Department said it was reasonable that the staff member may not have reviewed the CD to confirm it recorded, particularly since its file closed shortly thereafter.

[21] I am persuaded that some kind of error occurred with the recording of the CD. It is not reasonable to think that the Department's case file contained only a blank copy of the CD and that the original CD that was not blank existed somewhere else, particularly in light of the Department having searched an additional 15-20 hours to find it.

Item 4:

[22] The fourth item that the applicant believed was missing was a letter. The applicant thought that since a letter existed for a different yet similar matter, there should have been one for this file as well.

[23] The Department asserted that this letter did not exist and noted the differences between the two situations referred to by the applicant.

[24] I agree with the Department. The differences between the two situations were significant and indicated that the two situations had different outcomes. This could mean that a letter was not created despite the fact that the applicant believed it had been. The Department already searched and provided its case file. If a letter was sent, it is unlikely that it would not be referenced or contained in the case file.

[25] All of that being said, there was one point raised by the Department that concerned me. At the OIPC's intake stage in 2017, the Department indicated that one of its file rooms at the district office was under a complete overhaul. The Department noted that a search was done in that file room and nothing was found but that if something was found in the future as that work progressed, it would be disclosed to the applicant and the OIPC would be notified. Due to the backlog at the OIPC's office, this review was not assigned to an OIPC investigator until 2020. At that point, the OIPC investigator was told that the file room overhaul was not complete, some

three years later. It is not ideal that this project had not been completed given that so much time had passed. We may never know if responsive records were misplaced in that particular file room but it is important to remember that the standard is reasonableness and not perfection.

FINDINGS & RECOMMENDATIONS:

[26] I find that the Department conducted an adequate search for records as required under the duty to assist provision as set out in s. 7(1)(a) of *FOIPOP*.

[27] I recommend that the Department take no further action with respect to conducting a further search.

[28] I recommend that the Department complete the district office's file room overhaul within one year of the date of this review report.

April 27, 2021

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia