



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

REVIEW REPORT 22-09

March 30, 2022

New Glasgow Regional Police

Summary: The applicant sought access to records he believed were exchanged between the New Glasgow Regional Police (Police) and a municipality, as well as any records pertaining to an investigation that may have occurred as a result of those exchanges. The Police disclosed some records but withheld others because it said they were not about the applicant and so outside the scope of the applicant's request. When the Office of the Information and Privacy Commissioner attempted to review these undisclosed records several years later, the Police discovered that they were now missing. Despite conducting another search, the Police was unable to locate these records. The Commissioner finds that the Police conducted an adequate search as required by s. 467 of the *Municipal Government Act (MGA)*. However, she notes that the Police has inadequate practices to retain records that are subject to review and/or appeal. The Commissioner recommends that the Police review its policies and procedures related to access to information requests and then make the necessary adjustments so that any records related to these requests are retained until all reviews and appeals related to them are exhausted.

INTRODUCTION:

[1] Prior to making the access to information request (access request) that is the subject of this review report, the applicant asked for and received records from a municipality. From those records, the applicant learned that the municipality had contacted the New Glasgow Regional Police (Police) and asked if the applicant's background was known to the Police (the inquiry). The applicant then made an access request to the Police, asking for records relating to the information that had been exchanged between the two organizations and the actions taken by the Police in response to the inquiry it received from the municipality.

[2] The Police initially found no responsive records, but after the applicant filed a review request with the Office of the Information and Privacy Commissioner (OIPC), the Police conducted a second search and two sets of records were found. The first set was a duplicate of what the applicant had already received from the municipality. The reason the Police gave for not providing the applicant with those records originally was that the records were duplicates of what the applicant had received from the municipality and so it mistakenly thought it was not obligated to provide those same records again. The Police identified a second set of records but

did not provide it to the applicant because it said those records were not about the applicant and so did not pertain to the scope of the access request.

[3] These actions did not resolve the matter. The file proceeded to the investigation stage of the review process after waiting almost four years in the OIPC's backlog. During that time, the second set of records that had not been provided disappeared and the Police were unable to find them. As a result, it was not possible to assess if they were truly outside the scope of the access request or whether they were in scope and so should have been provided to the applicant as part of the disclosure package.

ISSUE:

[4] Did the Police meet its duty to assist the applicant by conducting an adequate search as required by s. 467(1)(a) of the *Municipal Government Act*?

DISCUSSION:

Burden of proof

[5] With respect to the duty to assist set out in s. 467, the *Municipal Government Act (MGA)* is silent as to who bears the burden of proof. Therefore, both parties must each submit arguments and evidence in support of their positions.¹

[6] The OIPC has described the efforts that each party should make when the issue under review is whether the public body conducted an adequate search for the records requested in *NS Review Report FI-11-76*² and more recently in *NS Review Report 21-05*.³

[7] The burden first rests with the applicant, who must provide something more than an assertion that records exist.⁴ In discharging this burden, the applicant must provide a reasonable basis for concluding that such records exist⁵ and sufficient particulars⁶ to identify the records. In providing sufficient particulars, the applicant should specify the subject matter of the records sought as precisely as possible and provide sufficient detail such as information relating to the time, place and event whenever possible.⁷ 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.⁸

¹ *NS Review Report FI-11-76, Nova Scotia (Community Services) (Re)*, [2014 CanLII 71241 \(NS FOIPOP\)](#) at para. 10.

² *NS Review Report FI-11-76, Nova Scotia (Community Services) (Re)*, [2014 CanLII 71241 \(NS FOIPOP\)](#).

³ *NS Review Report 21-05, Department of Community Services (Re)*, [2021 NSOIPC 5 \(CanLII\)](#).

⁴ *NS Review Report FI-11-76, Nova Scotia (Community Services) (Re)*, [2014 CanLII 71241 \(NS FOIPOP\)](#), at para. 13.

⁵ *NS Review Report FI-11-76, Nova Scotia (Community Services) (Re)*, [2014 CanLII 71241 \(NS FOIPOP\)](#), at para. 10.

⁶ Section 466(1)(b) of the *MGA*.

⁷ *NS Review Report 16-05, Nova Scotia (Department of Justice) (Re)*, [2016 NSOIPC 5 \(CanLII\)](#) at para. 39.

⁸ *Donham v. Nova Scotia (Community Services)*, [2012 NSSC 384](#), at para. 19.

[8] When an applicant discharges their burden, the burden then shifts to the municipal body to make “every reasonable effort” to locate the requested records. The municipal 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 municipal 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.⁹ These principles are further outlined in the OIPC’s document: [Duty to Assist #2: Conducting an Adequate Search](#). The test of whether a municipal body has met its burden is one of reasonableness, not perfection.¹⁰

Did the Police meet its duty to assist the applicant by conducting an adequate search as required by s. 467(1)(a) of the MGA?

[9] For the reasons set out below, I find that the Police met its duty to assist the applicant by conducting an adequate search for the responsive records.

[10] The requirement to conduct an adequate search arises out of the duty to assist provision in s. 467(1)(a) of the MGA, which states:

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;

[11] Previous OIPC review reports have set out that the standard of assessing a public body’s¹¹ actions is one of reasonableness and not perfection.¹² This was recently reaffirmed in the Supreme Court of Nova Scotia.¹³

[12] In his request for review, the applicant included a series of questions and statements related to what he saw as problematic about the fact that the Police could not find records in response to his request. In summary, he thought it inconceivable that the Police would receive the inquiry it did from the municipality and not take any action or create records that set out its actions.

[13] After initially finding no records in response to the applicant’s access request, the Police conducted a new search at the request of the OIPC. Two sets of records were located. As described above, one set was a duplicate of records the applicant had already received from the municipality. That was the rationale the Police used for not originally providing them to the applicant. At the request of the OIPC, it provided the applicant with a copy of those records. The second set was never provided to the applicant. At the point this file reached the investigation

⁹ NS Review Report FI-11-76, *Nova Scotia (Community Services) (Re)*, [2014 CanLII 71241 \(NS FOIPOP\)](#), at paras. 13-14.

¹⁰ NS Review Report FI-12-77, *Department of Community Services (Re)*, [2021 NSOIPC 5 \(CanLII\)](#) at p. 5.

¹¹ While these previous decisions apply to “public bodies” within the meaning of the *Freedom of Information and Protection of Privacy Act*, the standards set out in them are applicable to “municipal bodies” as defined in the MGA.

¹² See NS Review Report FI-13-52, *Nova Scotia (Community Service) (Re)*, [2014 CanLII 4519 \(NS FOIPOP\)](#). This principle was more recently cited in NS Review Report 21-05, *Department of Community Services (Re)*, [2021 NSOIPC 5 \(CanLII\)](#).

¹³ *Raymond v. Halifax Regional Municipality*, [2022 NSSC 68 \(CanLII\)](#), at para. 27.

stage of the review process at the OIPC, the Police determined that it was no longer able to find or retrieve those records.

[14] The applicant was not satisfied. He raised a number of complaints about the Police that are not reviewable by the OIPC. The applicant also pointed out that the Police's decision letter in response to his access request failed to contain information that is required by s. 467(2) of the *MGA*. This lack of necessary information was addressed during the intake portion of the review process and is considered resolved. Regarding the issue under review, he made the broad statement that "Clearly there are lots of records" but provided no further details or evidence to suggest this is the case.

[15] The applicant's primary argument for why more records, beyond what the Police found in its two searches, should exist was based on how he thought the Police should have handled and responded to the inquiry from the municipality. He felt that because the request was inappropriate and, in his view, violated the law, the Police should have told the municipality this. In his view, these actions that should have been taken would have created more records and so he believed that the Police's search for records was not adequate.

[16] The Police said it did not respond to the municipality's inquiry and took no action in response to it. In other words, the Police never created the records that the applicant thought it should have.

[17] An applicant's belief that records should exist doesn't mean that they do exist or that a municipal body failed to conduct an adequate search for records as required by s. 467(1) of the *MGA*.¹⁴ The Police conducted a second search, answered questions related to its search posed by the OIPC and provided an explanation that the records never existed in the first place.

[18] During the review process, the Police conducted a second search and found two sets of records. Beyond that, I find that the applicant failed to meet his burden to show there were any additional records missing from the results of the Police's searches. Of the two sets of records found during the Police's second search, one was provided to the applicant. The second set of records is discussed below.

[19] As explained above, the Police located a second set of records, a series of tweets, but withheld it from the applicant. The applicant questioned why this second set of records was not disclosed to him and asked the OIPC to review the records to determine if they were in the scope of his access request. The Police addressed this in an October 26, 2016 letter to the applicant: "These tweets were not about you, nor did they pertain to the attachments that [the municipality] sent on May 30th and, therefore, I am not at liberty to disclose those to you." The applicant's position was that the legislation does not require the records to be about him. This raised the question of whether this series of tweets was within the scope of the applicant's access request.

[20] The applicant's access request specifically asked for "all additional information provided to New Glasgow police by [the municipality]...including but not limited to:...another series of

¹⁴ *Raymond v. Halifax Regional Municipality*, [2022 NSSC 68 \(CanLII\)](#), at para. 36.

tweets...” The OIPC informed the Police that it would need to review a copy of the records to assess if they were in scope. However, when the Police went to retrieve the records, it discovered that it could no longer find them. The records were either not retained or had gone missing.

[21] The Police then conducted another search specific to this second set of records (tweets) but was not able to locate anything. During the almost four years that the file sat in the OIPC’s backlog waiting to be assigned to an investigator, there were multiple turnovers in the access to information administrator role with the Police. To the best of my knowledge, the Police did not have rules in place to keep copies of all records that related to this access request until the review was complete. As such, the Police could not disclose the second set of records to the applicant because they were now missing or presumably destroyed.

[22] Aside from a requirement to retain personal information used to make a decision that affects an individual for at least one year, the access to information laws in Nova Scotia do not contain provisions spelling out records management rules for public bodies or municipalities and municipal bodies.¹⁵ Nevertheless, implementing records management rules is best practice. This case highlights how public bodies, municipalities and municipal bodies should have processes in place for records management generally and for managing their access to information regime. The OIPC does not have oversight over records management practices, therefore I can make no finding in this regard.

FINDINGS & RECOMMENDATIONS:

[23] I find that:

1. The Police conducted an adequate search for records as required under the duty to assist provision set out in s. 467(1)(a) of the *MGA*.

[24] I recommend that:

1. Within six months of the date of this review report, the Police review its policies and procedures related to access requests and make the necessary adjustments so that the records related to all access requests are retained until all appeals and/or reviews related to them are exhausted.

March 30, 2022

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File: 16-00229

¹⁵ See s. 483(4) of the *MGA* and s. 24(4) of *FOIPOP*.