



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

**REVIEW REPORT 23-02**

**February 15, 2023**

**South Shore Regional Centre for Education**

**Summary:** The applicant asked the South Shore Regional Centre for Education (public body) for records about an investigation into allegations that he had made. The public body provided the applicant with a package of responsive records. The applicant believed that the package was missing records and asked the Office of the Information and Privacy Commissioner to review the public body's search efforts. The Commissioner finds that the applicant has not provided evidence that additional records exist and so concludes that the public body has conducted an adequate search as required by s. 7(1)(a) of the *Freedom of Information and Protection of Privacy Act*. She recommends the public body take no further action in response to the applicant's access to information request.

**INTRODUCTION:**

[1] On June 16, 2017, the applicant made a request for information to the South Shore Regional Centre for Education (public body) asking for records relating to an investigation into allegations he made in December 2007. The public body provided the applicant with a package of responsive records (response package). The applicant believed that the response package was missing two specific records and two categories of records. The applicant also posed a question to the public body.

**ISSUE:**

[2] Did the public body meet its duty to assist the applicant by conducting an adequate search, as required by s. 7(1)(a) of the *Freedom of Information and Protection of Privacy Act* (FOIPOP)?

## DISCUSSION:

### Burden of proof

[3] With respect to the duty to assist set out in s. 7, *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.<sup>1</sup>

[4] The Office of the Information and Privacy Commissioner (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*,<sup>2</sup> and more recently in *NS Review Report 21-05*.<sup>3</sup>

[5] The burden first rests with the applicant, who must provide something more than an assertion that records exist.<sup>4</sup> In discharging this burden, the applicant must provide a reasonable basis for concluding that such records exist<sup>5</sup> and sufficient particulars<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

[6] In a recent Supreme Court of Nova Scotia decision,<sup>9</sup> Justice Gatchalian explained that in order to meet their burden, the applicant cannot merely believe that a record exists or assert that it does. Rather, the applicant must provide some evidence to show that the public body has the record in its custody or under its control.

[7] When an applicant discharges their burden, the burden then shifts to the public body to make “every reasonable effort” to locate the requested records. 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.<sup>10</sup> These principles are further outlined in the OIPC’s document: *Duty to Assist #2: Conducting an Adequate*

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

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

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

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

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

<sup>6</sup> Section 6(1)(b) of *FOIPOP*.

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

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

<sup>9</sup> *Goldie v. Kings (County)*, [2022 NSSC 343](#), at para. 23.

<sup>10</sup> *NS Review Report FI-11-76, Nova Scotia (Community Services) (Re)*, [2014 CanLII 71241 \(NS FOIPOP\)](#), at paras. 13-14.

*Search*.<sup>11</sup> The test of whether a public body has met its burden is one of reasonableness, not perfection.<sup>12</sup>

**Did the public body meet its duty to assist the applicant by conducting an adequate search, as required by s. 7(1)(a) of FOIPOP?**

[8] For the reasons set out below, I find that the applicant has not met his burden to show that the public body has the requested records in its custody or under its control. Therefore, I also find the public body has met its duty to assist the applicant by conducting an adequate search for the responsive records.

[9] The requirement to conduct an adequate search arises out of the duty to assist provision in s. 7(1)(a) of FOIPOP, which 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;

[10] In his request for review, the applicant identified four items he believed to be missing from the response package provided by the public body. The OIPC shared the list with the public body and requested that it conduct another search for those records. Two of the items were located and provided to the applicant. The public body provided a description of its search efforts for items that were not located.

[11] The OIPC shared the public body's search response with the applicant. The applicant identified concerns with the search terms used by the public body to conduct its search. The public body conducted another search using the additional search terms. No further records were located.

[12] The applicant continued to believe that the records existed and should have been located in the public body's searches. He also expressed concerns with the investigation conducted by the OIPC. The applicant provided multiple documents as his proof that the searches were not adequate because those documents were not also included in either of the response packages. I have carefully reviewed the applicant's evidence and I am not satisfied that it proves the records were in the custody or control of the public body. The scope of the access request was from December 2007 onward, and specific to an investigation. One of the documents the applicant submitted as evidence was created prior to December 2007. The other two documents the applicant submitted as evidence were within the timeframe of the access request but are not what I would characterize as concerning the investigation into the applicant's allegations. One of the documents the applicant submitted as evidence does reference an investigation, but it is one that

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<sup>11</sup> NS OIPC, *Duty to Assist #2: Conducting an Adequate Search* (February 2019), online: <<https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Search%20Guidelines%20%282019%2002%2025%29.pdf>>.

<sup>12</sup> *NS Review Report FI-12-77, Department of Community Services (Re)*, [2013 CanLII 34083 \(NS FOIPOP\)](#) at p. 5. This principle was more recently cited in *NS Review Report 21-05, Department of Community Services (Re)*, [2021 NSOIPC 5 \(CanLII\)](#). It was also recently affirmed by the Supreme Court of Nova Scotia in *Raymond v. Halifax Regional Municipality*, [2022 NSSC 68 \(CanLII\)](#), at para. 27.

was done by a different public body, so not within the scope of the access request. None of these documents provide evidence to show that the public body has the records the applicant believes to be missing in its custody or under its control. As such, I find that the applicant has not met his burden to show that the public body has the records in its custody or under its control. Therefore, I also find the public body has met its duty to assist the applicant by conducting an adequate search for the responsive records.

[13] During the course of this review, the applicant also alleged multiple conflicts of interest related to how the searches were conducted. Because I have found that the applicant has not met his burden, these allegations do not form part of this review.

#### **FINDING & RECOMMENDATION:**

[14] I find that the applicant has not proven records exist and that the public body has conducted an adequate search for records as required under the duty to assist provision set out in s. 7(1)(a) of *FOIPOP*.

[15] I recommend that the public body take no further action in response to the applicant's access to information request.

February 15, 2023

Tricia Ralph  
Information and Privacy Commissioner for Nova Scotia