



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

REVIEW REPORT 23-04

March 24, 2023

Department of Community Services

Summary: The applicant asked the Department of Community Services (public body) for records of its involvement with the applicant's family. 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 sufficient 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] The applicant made a request for information to the Department of Community Services (public body) for records of its involvement with the applicant's family. The public body provided the applicant with a package of responsive records (response package). The applicant believed that the response package was missing two categories of records.

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.¹

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

[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*,² and more recently in *NS Review Report 21-05*.³

[5] 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

[6] In a recent Supreme Court of Nova Scotia decision,⁹ 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.¹⁰ These principles are further outlined in the OIPC’s document: *Duty to Assist #2: Conducting an Adequate Search*.¹¹ The test of whether a public body has met its burden is one of reasonableness, not perfection.¹²

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 6(1)(b) of *FOIPOP*.

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.

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

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

¹¹ 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>.

¹² *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.

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 listed two categories of records he believed to be missing from the response package provided to him by the public body. The OIPC shared the list with the public body and requested that the public body conduct another search for those records. The public body conducted another search and found no additional records. The public body provided the applicant with a description of its search efforts and offered explanations for why no further records existed.

[11] The applicant remained unsatisfied with the public body's search efforts.

[12] One of the categories of records the applicant said is missing from the response package he received relates to a meeting the applicant said he and his family had with an employee of the public body. There is no reference to a meeting in the records of the public body and the applicant has not provided anything, other than his say so, to indicate the meeting took place or was scheduled to take place. An applicant's belief that records should exist doesn't mean that they do exist or that a public body failed to conduct an adequate search for records.¹³

[13] For the other category of records, the applicant sought information about a named individual's involvement with the applicant and his family. The records that the applicant received include references to that person's involvement. It appears that the applicant believes there should be more records or more detailed records documenting the person's involvement. In Nova Scotia, there is no legislated duty to document.¹⁴ The OIPC regularly encounters applicants who believe the record keeping practices of public bodies leave something to be desired. While this may be the case, just because an applicant thinks documentation should be more robust, does not mean that the public body did not conduct an adequate search.

¹³ NS Review Report 22-09, *New Glasgow Regional Police (Re)*, [2022 NSOIPC 9 \(CanLII\)](#) at para. 17, citing the Supreme Court of Nova Scotia in *Raymond v. Halifax Regional Municipality*, [2022 NSSC 68 \(CanLII\)](#), at para. 36.

¹⁴ While the OIPC and its counterparts across the country have called for the duty to document to be included in access to information legislation (see March 1, 2016 [Statement of the Information and Privacy Commissioners of Canada on the Duty to Document](#)), there is currently no duty to document in FOIPOP. The failure of a public body to document or to follow policy related to standards for how/what to document is not reviewable by the OIPC.

[14] 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.

FINDING & RECOMMENDATION:

[15] 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*.

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

March 24, 2023

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia