



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

REVIEW REPORT 24-01

January 17, 2024

Halifax Regional Police

Summary: The applicant requested workplace audit and budgetary records associated with the audit from the Halifax Regional Police (Police). The Police said that it did not have custody or control of the requested records. The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the Police's search efforts. After receipt of sufficient information from the applicant to demonstrate that an additional search was warranted, the OIPC requested that the Police conduct an additional search. The Police conducted an additional search, but the Commissioner determined that this additional search was incomplete. As such, the Commissioner finds that the Police has not conducted an adequate search as required under the duty to assist provision set out in s. 467(1)(a) of the *Municipal Government Act*. She recommends that the Police conduct a new search that addresses the deficiencies identified by the OIPC.

INTRODUCTION:

[1] In March 2023, the applicant requested workplace audit (audit) and budgetary records associated with the audit (budgetary records) from the Halifax Regional Police (Police). In April 2023, the Police told the applicant that the information requested was not in its custody or control.

[2] In June 2023, the Police advised the applicant that upon further review, the Nova Scotia Government's Department of Justice had the requested records.

[3] The applicant believed that the Police should have the requested records and so asked the Office of the Information and Privacy Commissioner (OIPC) to conduct a review of the Police's search efforts to determine whether those efforts satisfied the Police's duty to assist requirements in s. 467(1)(a) of the *Municipal Government Act (MGA)*.

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 *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 body² conducted an adequate search for the records requested in *NS Review Report FI-11-76*,³ and more recently in *NS Review Report 21-05*.⁴

[7] The burden first rests with the applicant, who must provide something more than an assertion that records exist.⁵ In discharging this burden, the applicant must provide a reasonable basis for concluding that such records exist⁶ and sufficient particulars⁷ 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.⁸ 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.⁹

[8] In *Goldie v. Kings (County)*,¹⁰ 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 had to provide some evidence to show that the Municipality of the County of Kings had the record in its custody or under its control.

[9] 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

¹ *NS Review Report FI-11-76, Nova Scotia (Community Services) (Re)*, [2014 CanLII 71241 \(NS FOIPOP\)](#), at para. 12.

² Note that the requirements are the same for public bodies under the *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5 as those for municipal bodies under the *MGA*.

³ *NS Review Report FI-11-76, Nova Scotia (Community Services) (Re)*, [2014 CanLII 71241 \(NS FOIPOP\)](#).

⁴ *NS Review Report 21-05, Department of Community Services (Re)*, [2021 NSOIPC 5 \(CanLII\)](#).

⁵ *NS Review Report FI-11-76, Nova Scotia (Community Services) (Re)*, [2014 CanLII 71241 \(NS FOIPOP\)](#), at paras. 13-14.

⁶ *NS Review Report FI-11-76, Nova Scotia (Community Services) (Re)*, [2014 CanLII 71241 \(NS FOIPOP\)](#), at para. 10.

⁷ Section 466(1)(b) of the *MGA*.

⁸ *NS Review Report 16-05, Nova Scotia (Department of Justice) (Re)*, [2016 NSOIPC 5 \(CanLII\)](#), at para. 39.

⁹ *Donham v. Nova Scotia (Community Services)*, [2012 NSSC 384](#), at para. 19.

¹⁰ *Goldie v. Kings (County)*, [2022 NSSC 343](#), at para. 23.

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.¹¹ These principles are further outlined in the OIPC's document: *Duty to Assist #2: Conducting an Adequate Search*.¹² The test of whether a public body has met its burden is one of reasonableness, not perfection,¹³ however the search "...must be thorough and comprehensive."¹⁴

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*?

[10] For the reasons set out below, I am unable to make a finding that the Police made a reasonable effort to search for the requested records. As such, I find that the Police did not meet its duty to assist the applicant.

[11] The requirement to conduct an adequate search arises out of the duty to assist provision in s. 467(1)(a) of *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;

[12] In their request for a review of the Police's finding that no records exist, the applicant asserted that the Police should have the requested audit and budgetary records. To support their assertion for concluding that such records exist, the applicant provided an email from an individual who said they were present while part of the audit was being conducted. In their email, this individual also said that the audit was spoken of by many Police staff around the time it took place. The applicant also provided a copy of an email written by a Police employee that discussed monies being allocated, reallocated or cancelled to address the issue relevant to the applicant's request. In my view, this information discharged the applicant's burden of providing sufficient evidence to show that the Police could have the requested records in its custody or control.¹⁵ As such, the burden shifted to the Police to make every reasonable effort to locate the requested records, recognizing that the standard is not perfection.

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

¹² 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>.

¹³ *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 \(CanLII\)](#), at para 8. It was also affirmed by the Supreme Court of Nova Scotia in *Raymond v. Halifax Regional Municipality*, [2022 NSSC 68 \(CanLII\)](#), at para. 27.

¹⁴ *Raymond v. Halifax Regional Municipality*, [2022 NSSC 68 \(CanLII\)](#), at para. 27.

¹⁵ Specific details are not included in this review report to avoid inadvertently identifying the applicant, but the details were provided to the Police.

[13] The OIPC requested that the Police conduct a new search and issue a new decision for any records found. If records were not found, the OIPC requested that the Police answer questions about its search efforts.

[14] In response, the Police conducted an additional search as requested, and again, no records were found. The Police provided the following information to explain how its search efforts were reasonable:

- a. The business areas searched were identified.¹⁶
- b. The types of records searched were electronic storage devices and emails.
- c. Personal email accounts/devices/apps were included in the search.
- d. All email folders, i.e., inbox, sent, draft, deleted, archive, other were searched.
- e. All personal email folders, i.e., inbox, sent, draft, deleted, archive, other were searched.
- f. The key words used in the search were identified.¹⁷
- g. The employee(s) who conducted the search were identified by position type.
- h. The time spent searching by each person and/or business area was unavailable.
- i. No requested records were destroyed.

[15] Although the Police conducted this additional search, it missed including pertinent key words in its search, such as the name of the former Police employee who allegedly conducted the audit and the name of the Police employee who authored the email that was provided to the Police that spoke to monies being allocated, reallocated or cancelled. It also did not locate the email that the applicant provided despite the email being authored by a Police employee. Because the Police failed to include pertinent key words in its search, its search terms were too narrow.¹⁸ The Police also did not search any paper records and did not explain why it did not do so. As a result, in my view, the scope of the search was not sufficient. More detailed information about the deficiencies of the Police's search efforts is detailed in the OIPC's December 11, 2023, opinion document that was provided to all parties.

[16] For all these reasons, I am unable to make a finding that the Police made a reasonable effort to search for the requested records. As such, I find that the Police did not meet its duty to assist the applicant.

FINDING & RECOMMENDATION:

[17] I find that the Police did not conduct an adequate search for records as required under the duty to assist provision set out in s. 467(1)(a) of the *MGA*.

¹⁶ Business areas are not specified in this public review report to avoid inadvertently identifying the applicant but the business areas were provided to the applicant.

¹⁷ Search terms are not specified in this public review report to avoid inadvertently identifying the applicant but the search terms were provided to the applicant.

¹⁸ *AB Review Report F2009-005, Alberta (University of Alberta) (Re)*, [2009 CanLII 101375 \(AB OIPC\)](#), at para. 25.

[18] I recommend that within 45 days of the date of this review report, the Police conduct a new search for both audit and budgetary records addressing all the search effort deficiencies noted in the OIPC's December 11, 2023, opinion document and inform the applicant of the outcome including the following:

- a. If no additional records are found, I recommend that the Police advise the applicant of this including details about how the Police's additional search efforts addressed the deficiencies identified by the OIPC, and how the Police conducted its search including the business areas searched, the types of records searched, the accounts and folders searched, the key words used in the search, the identity of the individuals who conducted the search (by position type), the time taken to conduct the search, whether any records related to the applicant's request were destroyed and any existing explanation for why a record does not exist.
- b. If additional records are found, I recommend the Police issue the applicant a new decision in compliance with s. 467(2) of the *MGA* and provide them with any records for which access is granted.

January 17, 2024

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia