



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

REVIEW REPORT 24-02

January 17, 2024

Department of Justice

Summary: The applicant requested a Halifax Regional Police workplace audit (audit) and budgetary records associated with the audit (budgetary records) from the Department of Justice (public body). The public body provided an audit-related document that the applicant said was not the correct one they were seeking. In terms of the requested budgetary records, the public body did not say that no records had been found but did not provide any budgetary records. The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the public body's search efforts. After receipt from the applicant of sufficient information to demonstrate that an additional search was warranted, the OIPC requested that the public body conduct an additional search. The public body failed to do so. The Commissioner finds that the public body has not conducted an adequate search as required under the duty to assist provision set out in s. 7(1)(a) of the *Freedom of Information and Protection of Privacy Act*. She recommends that the public body conduct a new search incorporating the new information provided by the applicant.

INTRODUCTION:

[1] In June 2023, the applicant requested both a Halifax Regional Police (HRP) workplace audit (audit) and budgetary records associated with the audit (budgetary records) from the Department of Justice (public body). In July 2023, the public body responded to the applicant by saying the applicant was entitled to one record and to provide this record to the applicant. The responsive record related to an audit, but the applicant said this was not the correct audit they were seeking. The public body did not explain that no budgetary records had been found. It did not provide any budgetary records to the applicant.

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) conduct a review of the public body's search efforts to determine whether those efforts satisfied the public body's duty to assist requirements in s. 7(1)(a) of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*.

ISSUE:

[3] 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*?

DISCUSSION:

Burden of proof

[4] 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

[5] 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

[6] 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

[7] In *Goldie v. Kings (County)*,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 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.

[8] 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

¹ *NS Review Report FI-11-76, Nova Scotia (Community Services) (Re)*, [2014 CanLII 71241 \(NS FOIPOP\)](#), at para. 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. 13-14.

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.

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 however the search "...must be thorough and comprehensive."¹³

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*?

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

[10] 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 shall

(a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely;

[11] The applicant has been trying to locate the HRP audit and budgetary records for quite some time. The applicant originally requested these records from the HRP, since the audit in question occurred there. The HRP told the applicant that the requested records were in the custody of the public body and so the applicant requested them from the public body. Correspondence between the HRP and the public body demonstrates that the public body told the HRP that it had responsive audit records in its custody and asked the HRP to direct the applicant to the public body. The applicant subsequently requested both audit *and* budgetary records from the public body.

[12] The public body then responded to the applicant by saying that the applicant was entitled to one record and provided this record to the applicant. The responsive record relates to an audit, but the applicant said this was not the correct audit they were seeking. The public body did not explain to the applicant that no budgetary records had been found. If no records are found in response to a request, the public body must tell the applicant.¹⁴ In any event, no budgetary records were provided to the applicant.

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 \(CanLII\)](#), 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.

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

¹⁴ Section 7(2)(b) of *FOIPOP*.

[13] To support their assertion 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 HRP staff around the time it took place. The applicant also provided a copy of an email written by an HRP employee that discussed monies being allocated, reallocated or cancelled to address the issue relevant to the applicant's request.

[14] The public body had told the HRP that it did have the audit records. The HRP told the applicant this. In my view, this confusion and the new evidence was enough to discharge the applicant's burden of providing sufficient evidence to warrant a new search. As such, the burden shifted to the public body to make every reasonable effort to locate the requested records, recognizing that the standard is not perfection.

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

[16] In response, the public body failed to conduct a new search.

[17] The public body said:

“... The Department of Justice met their duty to assist the Applicant and provided the requested record that was under our custody and control. These were the only records Justice had that were responsive to the scope of the request. The applicant had provided a Decision Letter they'd received from Halifax Regional Police on June 19, 2023, which stated that “the information you are requesting is in the custody of Department of Justice”. While this was true of the Audit Report which was provided to the applicant, HRP is incorrect in recommending that Justice held records responsive to the rest of the scope.”

[18] Regarding the request for budgetary records, the public body said it does not have custody or control of those records. It said it is not responsible for costs associated with the audit because that is the responsibility of the HRP. It said that it did its due diligence in looking for the budgetary records because those monies would have come from the HRP's budget and so the public body would not have record of them.

[19] At the time the public body responded to the applicant's request, it did not have the new information supplied by the applicant that could have improved its search efforts. Despite being provided with additional details which would have better informed its search for records (particularly with regard to the audit), the public body failed to conduct a new search for records and failed to provide an explanation of how its search was conducted.¹⁵ While the public body provided an explanation of why budgetary records would not exist, it still failed to conduct a new

¹⁵ *NS Review Report FI-11-76, Nova Scotia (Community Services) (Re)*, [2014 CanLII 71241 \(NS FOIPOP\)](#), at para. 14.

search for records. Even when a public body believes records do not exist, it must still conduct a search for responsive records.¹⁶

[20] For all these reasons, I am unable to make a finding that the public body made a reasonable effort to search for the requested records. As such, I find that the public body did not meet its duty to assist the applicant under s. 7(1)(a) of *FOIPOP*.

FINDING & RECOMMENDATION:

[21] I find that the public body did not conduct an adequate search for records as required under the duty to assist provision set out in s. 7(1)(a) of *FOIPOP*.

[22] I recommend that within 45 days of the date of this review report, the public body conduct a new search for both audit and budgetary records incorporating in its search the new information provided by the applicant and inform the applicant of the outcome including the following:

- a. If no additional records are found, I recommend that the public body advise the applicant of this and provide them with details about how the public body 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 public body issue the applicant a new decision in compliance with s. 7(2) of *FOIPOP* and provide them with any records for which access is granted.

January 17, 2024

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

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¹⁶ *SK Review Report 180-2019, Saskatchewan (Housing Corporation) (Re)*, [2014 CanLII 3092 \(SK IPC\)](#), at para 22.