



REPORT
Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-07-54(M)

Report Release Date: March 13, 2009

Public Body: Town of Parrsboro

Issues: Whether the Town of Parrsboro's ["Town"] failure to provide access to the Record requested by the Applicant was appropriate because the Record had been destroyed and could not be produced from the Town's database using its existing software system. In particular:

1. Did the Town conduct an adequate search for the responsive Record in accordance with its duty to assist?
2. Was the information included in the disclosure decision open, accurate and complete?
3. Can the Town re-create a record using its normal computer hardware and software and technical expertise in accordance with s. 468(3) of the *Municipal Government Act* ["MGA"]?
4. If the Record was destroyed, is there any way for the Town to satisfy the Applicant's Application for Access to a Record?

Summary: An Applicant requested a Review of the Town's failure to provide access to the Record requested by the Applicant. The Town submitted that the Record could not be produced because it had been destroyed and could not be produced from the Town's database using its existing software system.

The Applicant's believed that the Record did exist and that if it did not, the Town ought to be able to reproduce the Record from its existing software. The Applicant also brought forth issues surrounding a previous Request for Review which were not considered in this Review.

The Town submitted that the Applicant's request was for draft documents that had been destroyed and could not be reproduced as

its existing software was incapable of retrieving the requested Record.

The Review Officer found that the Record did exist but was destroyed by the Town; that the Town is unable [not unwilling] to create this Record using its normal computer hardware and software and technical expertise; the Town is not required to create this Record under s. 468(3) of the *Act*; and what an applicant requested in former or subsequent Applications for Access to a Record to the same public body is not relevant to the current issues raised by the Form 1 and Form 7 in any particular Request for Review.

Recommendations:

It is recommended that:

1. The Town could provide applicants in future decisions with greater details on why a particular record does not exist and the search parameters used, so that they have a better understanding of how the search was conducted and the reason why a record does not exist.
2. With a view to being more open and transparent for its citizens and to be able to meet its duty to assist, the Town should consider using the capacity in its existing software to retain budget information for a greater time period;
3. The Town review its Document Destruction Bylaw and/or policies to be more in line with the Records Management section of the Local Government Resource Handbook;
4. If it chooses not to upgrade its Document Destruction Bylaw, the Town should be cautious and consider when the Bylaw needs to be followed and in particular preparing an Affidavit for Council and a resolution of Council thereafter.

Key Words:

affidavit, budget, bylaw, Department of Justice, document destruction, duty to assist, financial statements, independent oversight, meditation, municipal officer, record, records management, resolution, search, sophisticated applicant.

Statutes Considered:

Municipal Government Act, ss. 463(1); 462; 465; 34; 464; 467(1); 468.

Case Authorities Cited:

ON Order MO-2334; FI-05-65; FI-04-29(M).

Other Cited:

Town of Parrsboro Destruction of Documents By-law; Local Government Resource Handbook by Service Nova Scotia and Municipal Relations, October 2000, Section 2.2 Records Management.

REVIEW REPORT FI-07-50(M)

BACKGROUND

In a Form 1, Application for Access to a Record dated July 11, 2007, the Applicant requested access to the following information from the Town of Parrsboro ["Town"]:

1. *A copy of the minutes of the town council meeting where the town's 2006-07 budget was approved along with the record from that, or previous meetings, of the most detailed budget information the town's mayor and councillors had seen prior to approving the 2006-07 budget.*
2. *A copy of the minutes of the town council meeting where the town's 2007-08 budget was approved along with the record from that, or previous meetings, of the most detailed budget information the town's mayor and councillors had seen prior to approving the 2007-08 budget.*
3. *A representative copy of any financial update that the mayor and council had received during the 2006-07 fiscal year, either in their capacity as mayor and council or as the town's Finance Committee. (I do not need copies of all the financial updates, just any one which contains the budget information your auditor referenced in his response to my question at the Town of Parrsboro's June 26, 2007 Council Meeting).*

By letter dated August 10, 2007, the Town responded to the Applicant as follows:

Enclosed is all the information you requested in your letter dated July 11, 2007 with the exception of two items.

Item 1 requested a financial update the mayor and council received during 2006/07 fiscal year. This information is not available. I have enclosed a copy of this report for July 2007. [Income Statement, as of July 31, 2007].

Item 2 the detailed budget for 2006/07 is not available. I have enclosed the information for 2007/08. [Budget 2007/08]

On September 10, 2007, the Applicant filed a Form 7 requesting a Review of the Town's decision, specifically for the failure to provide the requested information. A letter accompanied the Form 7 from the Applicant, details of which are discussed in the Applicant's Submission below.

By letter dated March 13, 2008, the Review Office sought clarification from the Applicant as to which items were outstanding, to which the Applicant responded by email on March 26, 2008. Details of the response will be discussed in the Applicant's Submission below.

The Applicant received the Minutes requested in point #1 of the Form 1 and both items listed in point #2, therefore they do not form part of this Review.

By letter dated April 30, 2008, the Review Office sought clarification of the Town's search procedures from the Town's FOIPOP Administrator [also the Chief Administrative Officer ["CAO"] for the Town]. On May 16, 2008, the FOIPOP Administrator responded by telephone and indicated he would not be responding to our questions in writing. In order to assist, the Review Office confirmed his answers to our questions in an email the same day. The Town was asked to reply by May 23, 2008, to confirm the email adequately reflected the Town's answers to the outstanding questions. By email dated May 22, 2008, the Town responded that they had reviewed the emailed report with the responses to the questions and believed it was correct. Details of the Town's representations are discussed in the Public Body's Submission below.

On August 12, 2008, the Review Office shared the responses provided by the Town with the Applicant. In response to that letter, the Applicant made further representations by letter to the Review Office dated August 18, 2008. Details of those representations will be discussed in the Applicant's Submission below.

At the Applicant's request, Mediation was not attempted.

Within the last year, the Applicant has had another Review Request at this Office. That Review was investigated and the file was closed as the Applicant chose not to proceed to formal Review. The Review Officer has not considered that file in this Review. The only issues in this Review are those related to the Application for Access to a Record in the Form 1 filed with the Town and the Request for Review matters raised in the Form 7 in this Review.

RECORD UNDER REVIEW

The Record at issue in this Review is comprised of two documents. The first is a copy of the most detailed budget information that the Town's Mayor and Councillors had seen prior to approving the 2006-07 budget. The second is a representative copy of any financial update that the Mayor and Town Council had received during the 2006-07 fiscal year.

APPLICANT'S SUBMISSION

On September 10, 2007, the Applicant made the following representations, which accompanied the Form 7 that was filed with the Review Officer:

1. With respect to the first item requested that was not provided, the Applicant submitted:

A copy of the minutes from the town's Budget Committee was sent (a copy of the first page of those minutes is attached) which specifically states "The Clerk circulated copies of the draft budget for fiscal 2006/07..." and yet the Town CAO has replied to my request saying that document was 'not available' to me and provided no other

explanation. According to the minutes, this budget was circulated to six people who all receive remuneration from the Town of Parrsboro and yet the town seems to be saying that there are no copies of that budget (1). This would run counter to what the town's auditor told me in answer to a question at a Town Council meeting on Tuesday June 26, 2007 when he said a copy of that budget would be in the town's files.

Footnote:

(1) This budget would have been the record of what the town had approved as its 2006/07 fiscal budget and, consequently, is an important document to be reviewed by the town's auditor to confirm budget information for the town's annual audited statements.

2. With respect to the second and only other item that the Town did not provide in response to the Applicant's Application for Access to a Record, the Applicant submitted:

Again the Town CAO simply stated "this information was not available". He did enclose a copy of a 14 page income statement for the town's fiscal period as of July 31, 2007 to represent a copy of a financial update that the mayor and council would have received for the 2007-08 fiscal year. There are two aspects of this particular refusal to provide the information requested that I think are important.

1. *At the Town Council meeting of June 26, 2007 the town's auditor specifically said the mayor and council would have had regular financial updates throughout the 2006/07 fiscal period that would be in town files, and;*
2. *The Income Statement that the Town CAO did send was a document which, earlier this year, I was told by [FOIPOP Review Office Staff] the town's financial software could not produce (2).*

Footnote:

(2) I had explained to [FOIPOP Review Office Staff], during the course of an FOIPOP review of an earlier Freedom of Information request to the Town of Parrsboro, that an income statement, which the town should be able to provide from its accounting software, would include detailed budget information for the year. I understand [FOIPOP Review Office Staff] asked the Town CAO about this when visiting the town offices and was told the town's software would not produce such a report and yet, a few months later, they send one along for the next fiscal year.

On August 18, 2008, the Applicant provided a further submission to the Review Office. The Applicant was responding to the answers that had been provided by the Town to questions asked by the Review Office. The Review Office asked the Applicant if, based on the answers provided from the Town, s/he was satisfied that the Record did not exist [see the Public Body's

Submission section, May 22, 2008 for the actual answers that were provided]. The Applicant's submission included the following:

1. The explanations provided by the Town did not make sense;
2. His/her concerns were not satisfied regarding the issue of the existence of the requested documents.

In response to the Town's submission that all documents at issue have been destroyed and no longer exist, the Applicant further submitted:

1. With respect to the Town's position that once the audit for 2006/07 has been completed all draft copies are destroyed, the Applicant states that the Town's annual audit would not have taken place until after their fiscal year ended on March 31, 2007;
2. The response, the Applicant submitted, contradicts a response from the Town on another Application for Access to a Record on January 2, 2007, which response indicated that other than the short summary budget the Town sent in response to an Application for Access to a Record for a detailed budget, the only other document was a "Year to Date detailed document" that is "approximately 240 +/- pages long and is printed on continuous computer paper and for a number of reasons it is not separated";
3. The Applicant states that:

It does not make sense that the Town of Parrsboro, or any other municipality, would destroy the only record of the budget that was duly approved by Town Council so soon after the completion of its fiscal year. This would be a very important document and it is hard to imagine that any accountant responsible for auditing the town's finances would regard its destruction as an example of "well maintained" accounting records. This would also mean that, should the mayor or any councillor (who as a group form the Town's finance committee) would want to compare detailed budgets for different years, budgets that they actually were required to pass, they could not compare those budgets accept [sic] by examining two different "240 +/- page" documents.
[Emphasis in the original]

4. The Applicant indicates that in July 2006, in a different Application for Access to a Record, s/he requested information from the Town about their detailed budget for 2006-07. The Applicant did not receive any record until October 31, 2006, and then received only a Statement of Estimates that the Town gives to the province that only had ten lines of detail for a \$1.695 million dollar budget;
5. The Applicant repeats several examples of correspondence from a previous Review Request;
6. The Applicant goes on to make several other observations with respect to the response from the Town, including:
 - a. The Auditor is quoted as having said, "The accounting records are well maintained with timely reports to Council." The Applicant queries how the Auditor could make this observation if all the "timely" reports are destroyed as soon as Council has considered them;

- b. The Applicant questions whether the Town really does not allow the Mayor and Councillors to keep copies of financial reports and if that is true, why this is the case; and whether those responsible for passing the budget are not responsible enough to retain the information;
 - c. In a more recent Application for Access to a Record for the financial updates given to Council for 2007-08, the Applicant received a printout detailed budget, the exact same type of document referred to in his/her previous Application for Access to a Record in November 2006.
7. In response to the Town's response that its computer equipment is unable to back date queries for financial information, the Applicant argues:

It is impossible to believe that the Town of Parrsboro had a new computerized accounting system in July 2007 that it did not have several months earlier because the town now says "The Town of Parrsboro's computer equipment is unable to back date queries for financial information." Any new computerized accounting system capable of keeping the accounts for a \$1 million + organization would have that capability so it would seem impossible to believe the Town had upgraded between January 2007 and July 2007. The Town of Parrsboro does say that their computer equipment "can only process queries up to the current date – i.e. you cannot run a report today for financial data for only March and April – the data would have to be for March until today's date." Therefore it would seem that the Town of Parrsboro's computer equipment could have run a report in January of 2007 that would have contained data from March 2006 to the current date and which would have answered my request at the time.

8. The Applicant indicated that the Review Office had advised him in April 2007, during the previous Review, "if applicable, the Review Office can recommend that the Town create a record from a machine readable record using its normal hardware, software and technical expertise if creating such a record would not unreasonably interfere with the operations of the Town." The Applicant indicates that s/he was under the assumption the Review Office had asked the Town to do so and was told that the Town's computer equipment could not run off such reports. The Applicant argues that it appears from the report s/he received in July 2007 that such reports were being printed regularly for Council but then destroyed thereafter.

At this stage in the Review Report it is very important to point out that a great deal of what is discussed by the Applicant in the representations summarized above relate to other former or subsequent Applications for Access to a Record and Requests for Review. The Review Office has explained to the Applicant that each Application for Access to a Record and/or Review is a separate entity and that what goes on in one cannot be assumed to be relevant particularly where the Applications for Access to a Record themselves are for different records, regardless of the fact that it involves the same public body. In addition, at one stage, the Applicant asked the Town a number of questions in order to get information. This is not the purpose of the *Act*; it is not a means to have questions answered but rather it is a means to obtain access to a "record" as defined by the *Act*, which may or may not contain the information sought.

PUBLIC BODY'S SUBMISSION

On May 22, 2008, the FOIPOP Administrator advised the Review Office that the bolded portions in the following email from the Review Office to the Town accurately reflected its response to the outstanding questions in this Review:

Item 1 on the Applicant's Form 1 Attachment requested, "A copy of the minutes of the town council meeting where the town's 2006-07 budget was approved along with the record from that, or previous meetings, of the most detailed budget information the town's mayor and councillors had seen prior to approving the 2006-07 budget."

The Applicant has received a copy of "the minutes where the town's 2006-07 budget was approved." The Applicant has not received "the most detailed information the town's mayor and councillors had seen prior to approving the 2006-07 budget." Your decision letter to the Applicant states, ". . . the detailed budget for 2006/07 is not available." However, the Budget Committee Meeting Minutes dated June 19, 2006 state, "The Clerk circulated copies of the draft budget for fiscal 2006/2007. . ."

A) This draft budget along with any previous drafts or financial budget information presented relating to the approval of the 2006-07 budget is the information that the Applicant is requesting.

Your response is that draft copies of budgets are superseded and obsolete once a subsequent draft is produced and are therefore destroyed. All persons who are given a copy of draft budgets are not permitted to keep these drafts and return them to you at the end of the meeting. All draft copies for fiscal 2006/2007 have been destroyed by you after the Town's annual audit. Therefore, the documents that the Applicant is seeking in Item A did exist, but no longer exist as they were destroyed by you.

B) The June 20, 2006 Special Council Meeting states, ". . . a motion . . . that the Town Council approve an Operating Budget for the Town of Parrsboro. . . Motion carried." Any documents considered draft budgets along with any previous drafts or financial budget information presented relating to the approval of the 2006-07 budget is the information that the Applicant is requesting.

As per your above response in Item A, these drafts and financial information have been destroyed by you after the Town's annual audit. Therefore, the documents that the Applicant is seeking in Item B did exist, but no longer exist as they were destroyed by you.

C) Through research I have found that the Town of Parrsboro's June 26, 2007 Meeting Minutes contain a management letter read by the town's Auditor, Mr. George Jorgenson which states, "The accounting records are very well maintained with timely reports to Council. . ." Copies of these "timely reports to Council" are the records the Applicant is seeking.

The timely reports to council are given by town office staff who process financial data, not by the Auditor. These reports are given on an as-needed basis as of the current

date. When a new financial update is given, the previous financial updates are destroyed. The new update shows information for the current year to date. The Town of Parrsboro's computer equipment is unable to back date queries for financial information - it can only process queries up to the current date - i.e. you cannot run a report today May 16, 2008 for financial data for only March and April - the data would have to be for March until today's date. Therefore, the documents that the Applicant is seeking in Item C did exist, but no longer exist as they were destroyed by you.

In essence, the Town's response with respect to the first part of the Record is that draft copies of budgets are superseded and obsolete once a subsequent draft is produced and are therefore destroyed. All persons who are given a copy of draft budgets are not permitted to keep these drafts and return them to the CAO at the end of the meeting. All draft copies for fiscal 2006/2007 have been destroyed after the Town's annual audit. Therefore, the documents that the Applicant seeks in Item 1 no longer exist because they were destroyed.

With respect to the second part of the Record, the Town's explanation is that all the timely reports to Council are given by Town office staff that process financial data, not by the Auditor. These reports are given on an as-needed basis as of the current date. When a new financial update is given, the previous financial updates are destroyed. The new update shows information for the current year to date. The Town's computer equipment is able to back date queries for financial information - but only for the current fiscal period - i.e. it can run a report today for financial data for April 1, 2008 to July 31, 2008 - the same data could not be run for the previous fiscal as it was deleted from the software. As outlined above, the software does not permit access to information from previous fiscal periods. There are no copies of the financial updates maintained by the Mayor and the four Councillors. Therefore, the documents that the Applicant seeks no longer exist because they were destroyed and they cannot be re-created as they were deleted.

On December 23, 2008 the Town confirmed its practices with respect to handling draft budget documents that are provided to the Finance Committee, which is the "full Council" and for approval of the Annual Budget, the Town's practice is as follows:

- Committee members are given a draft copy of the budget;
- During a one day meeting, adjustments are made to the draft budget sheets;
- At the end of that meeting the CAO personally collects each draft budget sheet;
- Committee members are not allowed to leave with a copy of the draft budget sheet;
- After the meeting, the CAO makes any necessary adjustments based on the draft budget sheets;
- CAO then destroys all of the draft budget sheets;
- The next day the CAO distributes the only remaining document that is considered the draft budget document, to the Finance Committee;
- The Finance Committee then approves the draft budget document;
- This draft budget document, as it was presented to the Committee, becomes the Approved Budget and is no longer considered to be draft.

This means that the “most detailed budget information” was both the final draft and the approved budget. No other previous drafts exist once the budget is approved.

The Town adopted a Destruction of Documents policy approved October 31, 1973 that is its records management policy, which is detailed in the Discussion section below.

On February 13, 2009, I made a further inquiry of the Town as follows:

- 1. Confirm the Destruction of Documents Bylaw dated October 31, 1973 is still the applicable bylaw for the Town of Parrsboro and has not been replaced.*
- 2. As the Bylaw contemplates the Clerk providing an affidavit setting forth all documents that are to be destroyed, can you provide me with a copy of the affidavit for the destruction of the budget documents that are no longer available that if [had] they not [been] destroyed would have been responsive to the Applicant's Application for Access to a Record?*
- 3. Also as the Bylaw provides for a resolution of Council to cause the destruction of those documents based on the Clerks affidavit, please provide a copy of the minutes of Council meetings that make reference to the resolutions governing the destruction of the budget documents referenced in your affidavit [ie those responsive to the Application for Access to a Record].*
- 4. At the time this Application for Access to a Record was first received on July 11, 2007, as part of your search for the responsive records did you inquire of all council members to ask if, notwithstanding your general practice of read and destroy or read, change, and destroy, any of them had retained their copy?*

As requested, the Town replied on February 20, 2009 as follows:

Further to your email dated February 13th, 2009, the following is the answer to the questions you have requested.

- 1. I confirm that the Destruction of Documents Bylaw dated October 31st, 1973 is the applicable bylaw and has not been replaced.*
- 2. and 3. There was no affidavit completed requesting permission to destroy these documents and therefore, no resolution of Council. It is my understanding the documents I have destroyed do not require the approval of Council. We do retain the documents indicated in the bylaw such as receipts, cheques, invoices, receipts of rates and taxes, assessment information, audited financial statements, statements of estimates sent to the Provincial Government, etc. The items I have destroyed are redundant and not in the categories of records that must be retained.*
- 4. I did ask the Mayor and Council if they had any copies of these records and was advised that they did not.*

DISCUSSION

The *Municipal Government Act*, which governs all aspects of local governments, such as municipalities and towns, contains many Parts. The Part which contains the provisions applicable

to access and privacy matters is Part XX. This Report will be referring to other parts of the *Municipal Government Act* as well. For clarity, when referring to Part XX, this Report will read “the *Act*” and when referring to any other Part or the Act as a whole, will read “the *MGA*”.

Regarding the Records under Review, the *Act* states:

463 (1) This Part applies to all records in the custody or under the control of a municipality.

The purpose of the *Act*, which has a broad and purposeful interpretation, provides:

462 The purpose of this Part is to

(a) ensure that municipalities are fully accountable to the public by

- (i) giving the public a right of access to records,*
- (ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,*
- (iii) specifying limited exceptions to the rights of access,*
- (iv) preventing the unauthorized collection, use or disclosure of personal information by municipalities, and*
- (v) providing for an independent review of decisions made pursuant to this Part;*

(b) provide for the disclosure of all municipal information with necessary exemptions, that are limited and specific, in order to

- (i) facilitate informed public participation in policy formulation,*
- (ii) ensure fairness in government decision-making, and*
- (iii) permit the airing and reconciliation of divergent views; and*

(c) protect the privacy of individuals with respect to personal information about themselves held by municipalities and to provide individuals with a right of access to that information.

[Emphasis added]

The Applicant has a right of access to any record in the custody or under the control of a public body pursuant to s. 465 of the *Act* once a request has been received. Subsection 461(h) of the *Act* defines record as follows:

“record” includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;

The issues in this Review can be summarized as follows:

1. Did the Town conduct an adequate search for the responsive Record in accordance with its duty to assist?
2. Was the information included in the disclosure decision open, accurate and complete?
3. Can the Town re-create a record using its normal computer hardware and software and technical expertise in accordance with s. 468(3) of the *Act*?
4. If the Record was destroyed, is there any way for the Town to satisfy the Applicant's Application for Access to a Record?

The *MGA* enables local governments to adopt policies with respect to the management and destruction of records. Part II of the *MGA* provides as follows:

34 (1) The council may adopt a policy for the management and destruction of records.

(2) Records that are required by an enactment to be kept and minutes, by-laws, policies and resolutions of the council shall not be destroyed.

(3) The council may, by policy, specify further classes of records that are not to be destroyed or that are to be kept for specified time periods.

(4) Where

(a) a municipal record is destroyed; or

*(b) an original municipal record is not produced in court,
and*

(c) the clerk certifies that a reproduction is part of the records of the municipality and is a true reproduction of the original municipal record, a photographic, photostatic or electronic reproduction of the record is admissible in evidence to the same extent as the original municipal record and is, in the absence of proof to the contrary, proof of the record.

[Emphasis added]

The *Act* does not apply to provisions with respect to the destruction of a record if done so in accordance with other legislation or regulation. It provides as follows:

464 This Part does not

(a) limit the information otherwise available by law to a party to litigation, including a civil, criminal or administrative proceeding;

(b) affect the power of any court or tribunal to compel a witness to testify or to compel the production of documents;

(c) prohibit the transfer, storage or destruction of any record in accordance with any other Act of the Legislature or any regulation;

(d) prevent access to records maintained in a public office for the purpose of providing public access to information; or

(e) restrict disclosure of information for the purpose of a prosecution.
[Emphasis added]

The Town has had a Destruction of Documents By-law in place since October 31, 1973. It provides that the Town Council:

may by resolution, cause the destruction of any documents or records after they are no longer required provided that the Clerk submits to the Council his affidavit setting forth each of the documents or records to be destroyed and that he has personally examined each of the documents or records proposed to be destroyed and that there is nothing of value therein.

The By-law goes on to list what it does not authorize the destruction of including “records required to be kept by any statute; records less than five years old; minutes, by-laws or resolutions of Council.”

The municipal officer is required by the *Act* to assist an Applicant. This duty to assist provides:

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; and*
- (b) consider the request and give written notice to the applicant of the decision with respect to the request.*

Section 468 of the *Act* outlines the duties of a responsible officer where access is granted to an Applicant. It provides:

(1) Where an applicant is informed that access will be given, the responsible officer shall

(a) where the applicant has asked for a copy and the record can reasonably be reproduced,

- (i) provide a copy of the record, or part of the record, with the response,*
or
- (ii) give the applicant reasons for delay in providing the record; or*

(b) where the applicant has asked to examine the record or where the record cannot reasonably be reproduced, permit the applicant to examine the record or part of the record.

(2) A responsible officer may give access to a record that is a microfilm, film, sound recording, or information stored by electronic or other technological means by

- (a) permitting the applicant to examine a transcript of the record;*
- (b) providing the applicant with a copy of the transcript of the record;*
- (c) permitting, in the case of a record produced for visual or aural reception, the applicant to view or hear the record or providing the applicant with a copy of it;*
- or*
- (d) permitting, in the case of a record stored by electronic or other technological means, the applicant to access the record or providing the applicant a copy of it.*

(3) A responsible officer shall create a record for an applicant if

- (a) the record can be created from a machine-readable record in the custody or under the control of the municipality using its normal computer hardware and software and technical expertise; and***
- (b) creating the record would not unreasonably interfere with the operations of the municipality.***

[Emphasis added]

The Applicant was provided some information, to which s/he provided a response earlier in the process, which was later amended to more accurately reflect the facts. On January 14, 2009, the Town confirmed the following to be accurate and this is the information that was used for the formal Review:

The response is that the timely reports to council are given by town office staff that process financial data, not by the Auditor. These reports are given on an as-needed basis as of the current date. When a new financial update is given, the previous financial updates are destroyed. The new update shows information for the current year to date. The Town of Parrsboro's computer equipment is able to back date queries for financial information - but only for the current fiscal period - i.e. it can run a report today for financial data for April 1, 2008 to July 31, 2008 - the same data could not be run for the previous fiscal as it was deleted from the software. Therefore, the documents that the Applicant is seeking did exist, but no longer exist as they were destroyed.

The Town has advised that the Record sought in this Review – the financial updates received during the year by the Mayor and Council and a detailed budget for that same year – are not available. The Town advises that after these have been considered by Council they are then destroyed. The Town indicates that the draft copies of the budgets are superseded and obsolete once replaced with the next version and are therefore destroyed. Once Council and the Mayor have worked with the drafts during meetings they are all returned to the CAO at the conclusion of the meeting. Details of the process are outlined in the Public Body's Submission above. The Town has conducted a search a few times with the Mayor and Council and confirms that no drafts of either of these have been retained.

The software creator indicates that the software is capable of retaining the data for past budgets but the Town has chosen not to do this. The Town has been relying on this software since 1984.

When an applicant identifies search as an issue, the Review Officer asks several questions to help determine whether or not an adequate search was conducted by a public body. The key is that the Review Officer must be satisfied that the public body made every reasonable effort to locate the record, thereby fulfilling its duty to assist.

An Order of the Ontario Commissioner lays out what the public body and the applicant are responsible to show when search is the issue:

The Act does not require the City to prove with absolute certainty that further records do not exist. However, the City must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request . . . Furthermore, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist. [ON Order MO-2334]

The Nova Scotia Review Officer recommends for public bodies to look to providing other alternatives to an applicant where the responsive Record does not exist:

A public body that cannot provide the majority of the records requested should be prepared to offer some alternatives to the Applicant. I am convinced that poor record keeping practices are a factor in lack of information available. [FI-05-65]

In *FI-04-29(M)* the Nova Scotia Review Officer confirmed that the *Act* does not address the retention of records, with the exception in relation to personal information. The public body indicated that the requested records were not available, as they had been “purged”. The Review Officer in that case stated:

The Police cannot disclose records it does not have.

The Local Government Resource Handbook by Service Nova Scotia and Municipal Relations, October 2000, Section 2.2 Records Management provides as follows:

In section 34 of the Municipal Government Act, there is a provision for council to adopt a policy regarding the management and destruction of records. (page 1)

In 1997, the Association of Municipal Administrators produced the Records Management Manual, which combines a standard classification system and records retention and disposal schedule for municipal records. This 669 page manual provides a standard for the identification and management of administrative and operational records regardless

of the physical storage format, including executive and legislative records. Accordingly, any municipality considering a records management system should review the AMA Records Management Manual. (page 2)

The [Records Management] policy is not a static document and should be reviewed at least every two years. (page 16)

The Town has not adopted this policy. The Town's Bylaw governing the destruction of documents has been in place for over three decades. The Bylaw process requiring an Affidavit and a resolution of Council was not followed in this case as the Town submits that those requirements for destruction of documents do not apply to drafts.

I am satisfied that the Town has done an adequate search and except for the responsive records already provided, the remainder are no longer available and cannot be produced from the Town's existing computer system.

This case raises an important issue. This Applicant has had a previous Request for Review at this Office involving the same public body. It became clear to me during this formal Review that the Applicant harboured some unresolved issues in relation to the former files. The Applicant appears to be perseverating about the handling of the previous Application for Access to a Record and Review. What I understand to be the history, though I have not reviewed that other Review file in detail as that would be inappropriate, is that the Applicant believed that the Town had been misleading about the existence of the information requested and the Town's explanation had been ostensibly accepted by the Review Office. The bulk of the Applicant's representation to the Review Office in this Review focussed on matters that were only relevant in the former file and were not relevant to this Review. The attempt to rehash old issues is not appropriate and for that reason I am making it patently clear by this statement that those portions of the submission from the Applicant that were trying to reargue issues only relevant to former files, have not been considered in this Review.

My understanding is that the former Review Request involved an Application for Access to a Record for detailed budget documents. During the Investigation stage of the Review, the Applicant agreed to accept "the operating budget for each line/account number for 2006-07 including expenses and revenues." The Review Office's Mediator/Investigator advised the Applicant that the Record identified by the Town appeared to be the responsive Record to the request. The Applicant was advised that s/he had until May 21, 2007 to indicate that s/he remained unsatisfied with the search and wanted the matter to move forward to formal Review. The Applicant chose not to proceed and his/her file was closed. The matters that remained of concern to the Applicant at that time cannot be raised again simply by filing his or her submissions to the Review Officer with details about those matters. The only issues that are within my jurisdiction in this Review are those contained in the current Form 1 and subsequent Form 7. It is important to note that the Applicant in this case is a sophisticated applicant and will understand that the specifics of each of his or her Applications for Access to a Record as laid out in the Form 1s filed with the Town were each substantively different than the other. For example, this sophisticated Applicant will know that requesting a detailed budget is substantively

different than an operating budget, which is different again than a budget audit statement. It is, therefore, not appropriate to compare the Town's response in one instance to the other.

The Applicant must be aware that several issues raised by him/her are *not* within the jurisdiction of the Review Officer:

- a. Whether or not as a matter of policy old versions of budget documents should be retained by the Town.
- b. Whether or not the Bylaw that allows for document destruction is outdated and should be upgraded to reflect today's technology and the recent guidelines and policies from the Department of Service Nova Scotia and Municipal Relations is not reviewable by this Office and is for the Town Council to turn its mind to on the advice of the CAO;
- c. Whether or not the software relied upon by the Town to generate budget documents is adequate is not within the jurisdiction of the Review Office and is an executive decision to be made by the Town Council;
- d. All outstanding issues arising out of his/her earlier Review at this Office. In that case the matter was investigated but by choice of the Applicant the matter did not proceed to formal Review. It is not within the jurisdiction of the Review Officer to comment on or make findings or recommendations in one case based on a Form 1 and Form 7 from another Review file.

Throughout the Review process, the Applicant asked many questions that s/he would have liked answers to from the Town. The Town is not obligated under the *Act* to answer questions, only to provide recorded information. The Review Office can only investigate the existence of recorded information responsive to a request. Information has to be in recorded form to fall within the scope of the *Act*. The Town could have chosen to answer the Applicant's questions and the time for that could have been during Mediation. In this case, the Applicant chose not to attempt Mediation.

Clearly Applications for Access to a Record can put pressure on small municipalities where the responsible municipal officer often has many other responsibilities and pressures. This means that for smaller agencies fulfilling the statutory duty to assist is a very real challenge. Nevertheless this duty is obligatory and must be respected regardless of the nature of the Application for Access to a Record or who an applicant is. Equally important is the need for applicants to be respectful of these pressures and recognize the important role of applicants, identified in many prior Review Reports from this Office over its 15 year history, to be cooperative with public bodies to ensure their requests are clear and concise so the public body can respond appropriately.

We note with interest the Applicant's numerous contacts with the Department of Justice throughout the process regarding this Review. In order to further public understanding of the Review Office, it is important to state that the Review Officer is an independent oversight body that reports to the House of Assembly, not the Department of Justice. Contact with Justice officials has no impact or effect on how Review Requests are processed or decided.

FINDINGS:

1. The Town has a By-law governing the destruction of documents dated October 10, 1973. It requires that an affidavit be sworn by the Clerk “setting forth each of the documents or records to be destroyed and that he has personally examined each of the documents or records proposed to be destroyed and that there is nothing of value therein.”
2. The portion of the Record that is the subject of this Review and would have been responsive to the Application for Access to a Record did exist but was destroyed by the Town.
3. The Town is unable [not unwilling] to create this Record using its normal computer hardware and software and technical expertise.
4. The Form 1 request was for budget details available to the Mayor and Council on a particular day, a “snapshot”. The request was not for a copy of the audited budget statements.
5. The Town is not required to create this Record under s. 468(3) of the *Act* as the way in which the software is set up at the moment, makes it impossible to do so.
6. The documents that were destroyed were financial updates of the budget provided to the Mayor and Council by Town staff and drafts used in preparing the final approved budget.
7. The Town did an adequate search for the Record and except for the responsive Record already provided the remaining Record that may have been responsive is no longer available and cannot be produced from the Town’s existing software system as it is presently configured.
8. What an applicant requested in former or subsequent Applications for Access to a Record to the same public body is not relevant to the current issues raised by the Form 1 and Form 7 in any particular Request for Review.
9. The Applicant is a sophisticated applicant and will appreciate the distinction between different requests – audited budget statement, detailed budget statement, operating budget.
10. It is always helpful for a public body to provide details to an applicant so there is no misunderstanding as to why a record cannot be provided if it is unavailable.

RECOMMENDATIONS:

I recommend the following:

1. The Town could provide applicants in future decisions with greater details on why a particular record does not exist and the search parameters used, so that they have a better understanding of how the search was conducted and the reason why a record does not exist.
2. With a view to being more open and transparent for its citizens and to be able to meet its duty to assist, the Town should consider using the capacity in its existing software to retain budget information for a greater time period;
3. The Town review its Document Destruction Bylaw and/or policies to be more in line with the Records Management section of the Local Government Resource Handbook;

4. If it chooses not to upgrade its Document Destruction Bylaw, the Town should be cautious and consider when the Bylaw needs to be followed and in particular preparing an Affidavit for Council and a resolution of Council thereafter.

Respectfully,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer for Nova Scotia