Nova Scotia Freedom of Information

and Protection of Privacy

Report of Review Officer

Catherine Tully

REVIEW REPORT FI-11-76

October 17, 2014

Department of Community Services

Summary: The Applicant sought access to a Community Services child protection file regarding his completion of two courses. Community Services was unable to locate a physical protection file but provided the Applicant with case notes from its case management system. The Review Officer found that Community Services met its duty to assist the Applicant when it conducted a second search, identified the business area searched and individuals who conducted the search, and provided some explanation for why the record did not exist. The Review Officer also found Community Services' offer to meet with the Applicant about its process consistent with the duty to assist and recommended that Community Services take no further action in this matter.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* (NS), s. 7(1)(a); *Access to Information Act*, s. 4(2.1); *Freedom of Information and Protection of Privacy Act* (BC), s. 6(1); *Freedom of Information and Protection of Privacy Act* (Manitoba), s. 9; *Freedom of Information and Protection of Privacy Act* (Alberta), s. 10(1).

Authorities Considered: Order 00-32, 2000 CanLII 14397 (BC IPC); Order PO-3386, 2014 CanLII 50833 (ON IPC); Interim Order MO-2581, 2010 CanLII 76935 (ON IPC);

Cases Considered: *Donham v. Nova Scotia (Community Services)* 2012 NSSC 384

INTRODUCTION:

[1] On March 28, 2011 the Applicant made an application for all information in his name in a child protection file held by the Department of Community Services (the "Department"). The Applicant was particularly interested in receiving copies of any records confirming that he had completed counselling or anger management training some time in/around 1994.

[2] On June 7, 2011, the Department provided the Applicant with a copy of case notes from the Department's case management system. The notes provided were from the winter and spring of 1994. The Department advised the Applicant it was unable to locate the physical protection file the Department said contained the records responsive to the Applicant's request. The Applicant remains convinced that the Department has in its possession copies of the requested records.

ISSUE:

[3] The only issue in this matter is whether or not the public body met its duty to assist the Applicant by conducting an adequate search for records as required by s. 7(1)(a) of the *Freedom of Information and Protection of Privacy Act* ("*Act*").

DISCUSSION:

Background

[4] The Applicant states that he recalls completing two courses and it is on that basis he believes the Department must have evidence of their completion. He has provided no evidence that any such records were ever created, nor any evidence to suggest such records were provided to the Department.

[5] The case notes provided by the Department indicate that a file was opened on March 1, 1994 in relation to an incident and closed on June 30, 1994. The case notes confirm the Applicant was active in some counselling and they also appear to indicate that at least some notes from one counselling session were provided to the Department. However, the final note in relation to this incident dated June 30, 1994 makes clear the counselling was ongoing at the time the file was closed.

[6] In the course of informal resolution discussions with this office, the Department agreed to conduct a second search for the requested records. A second search was conducted by the Records Services Group and by the District Office. Both District Managers were contacted by the Manager of Information Services & FOIPOP for the Department ("the Manager") but the second search failed to produce any further responsive records. The Manager noted that the case notes provided to the Applicant included a notation dated January 15, 1997 indicating the physical file could not be found at that time.

Duty to Assist Applicants

[7] Section 7(1)(a) of the *Act* states:

> *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.*

[8] The duty to assist applicants is a duty found in access legislation across Canada.[1] In British Columbia adequate search requires the following effort:

> *Although the Act does not impose a standard of perfection, a public body's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. In an inquiry such as this, the public body's evidence should candidly describe all the potential sources of records, identify those it searched and identify any sources that it did not check (with reasons for not doing so). It should also indicate how the searches were done and how much time its staff spent searching for the records. The question here is whether the Ministry has discharged its s. 6(1) search obligations in light of this.*[2]

[9] An Order from the Office of the Information and Privacy Commissioner of Ontario summarized the relevant considerations as follows:

> *[20] Important factors in assessing the reasonableness of the search will be whether the appellant provided sufficient identifying information to assist the institution in its search and has provided a reasonable basis for concluding that such records exist.*
>
> *[21] The Act does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. To be responsive, a record must be "reasonably related" to the request.*
>
> *[22] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.*
>
> *[23] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.*[3]

[10] Applicants also bear some responsibility when alleging that a search is inadequate. An adjudicator with the Ontario Office of the Information and Privacy Commissioner described the approach taken by that office to the applicant's (requester's) obligation.

> *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.*

---

[1] *Access to Information Act*, s. 4(2.1); *Freedom of Information and Protection of Privacy Act* (BC), s. 6(1); *Freedom of Information and Protection of Privacy Act* (Manitoba), s. 9; *Freedom of Information and Protection of Privacy Act* (Alberta), s. 10(1).
[2] Order 00-32, 2000 CanLII 14397 (BC IPC), p. 5.
[3] Order PO-3386, 2014 CanLII 50833 (ON IPC), p. 4.

> *Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has conducted a reasonable search to identify any records that are responsive to the request. The Act does not require the institution to prove with absolute certainty that the records do not exist. However, in order to properly discharge its obligations under the Act, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].*
>
> *A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].*[4]

[11] In *Donham v. Nova Scotia (Community Services)* 2012 NSSC 384 the Nova Scotia Supreme Court recently considered the meaning of s. 7 of the *Act* for the first time. Bourgeois J. states:

> *[18] [T]he Appellant has made general and sweeping suggestions that the Department undertook a shoddy search. Nothing in Ms. Boutilier's evidence suggests that this is the case. The Appellant asserts he has documents which were not disclosed. These were not, however, either put into evidence, or described in such a fashion that this Court could give the Appellant's argument any weight. Similarly, the documents have not been identified for the Respondents.*
>
> *[19] The Court would have benefited from understanding the actual number of allegedly undisclosed documents, the nature of the document when it was created, who created it, and the subject matter…Unfortunately the Appellant chose not to give the Court that information.*

[12] Section 45 of the *Act*, which sets out the burden of proof, is silent respecting s. 7(1) of the *Act*. Therefore, the parties must each submit argument and evidence in support of their positions.

[13] What is clear from decisions across these Canadian jurisdictions is that where an applicant alleges a failure to conduct an adequate search the applicant must provide something more than mere assertion that a document should exist.

[14] In response, the public body must make "every reasonable effort" to locate the requested record. The public body's evidence should include a description of the business areas and record types searched (for example emails, physical files, databases), should identify the individuals who conducted the search (by position type), and should usually include the time taken to conduct the search. If there is an explanation for why a record may not exist, it should be provided.

[4] Interim Order MO-2581 2010 CanLII 76935 (ON IPC), pages 4-5.

[15] In this case, the Applicant initially asserted that he had completed courses for anger management and other courses and so evidence should exist that the courses had been completed. The records provided by the public body include notes made in 1994 by case workers that the Applicant was considering attending anger management courses and had attended some counselling sessions. The case notes provided indicate the Department's case worker referred the Applicant to several counselling sessions. In addition, the Department's own initial search determined that the physical protection file was missing. Therefore, it was reasonable to conclude some record may exist confirming the Applicant's attendance at these counselling courses. The likely location, if the records exist, would be in the physical protection file.

[16] As a result, this office requested that a second search be conducted and the Department agreed. In conducting a second search for the records the Department identified the business area searched and the individuals who conducted the search. They also provided some explanation for why the record did not exist – based on the case note from January 1997 it appears the physical file has been missing since that time. Finally the Department offered to have an individual from the District Office meet with the Applicant to explain the process that took place during the child protection matter and to review the documentation provided to him in response to his access request. The Applicant declined to meet with the Department and remained unsatisfied with the search efforts of the Department.

FINDING & RECOMMENDATION:

[17] I find that in conducting a second search for records the Department met its duty to assist this Applicant by conducting an adequate search for records as required under s. 7(1) of the *Act*. I note further that the Department's offer to have a meeting with the Applicant was also consistent with its duty to assist the Applicant.

[18] I recommend that the Department take no further action in this matter.

Catherine Tully
Freedom of Information and Protection of Privacy Review Officer for Nova Scotia