



**Nova Scotia Freedom of Information  
and Protection of Privacy  
Report of Review Officer  
Carmen Stuart**

**REVIEW REPORT FI-12-75**

**August 19, 2014**

**Department of Justice**

**Summary**

The Applicant made an Application for Access to a Record [“Access Request”] to the Department of Justice [“Justice”], under the *Freedom of Information and Protection of Privacy Act* [“Act”], for prison records from the 1940s.

No records were found. The Applicant continues to seek answers about the location of the records.

The Review Officer finds that Justice has conducted an adequate search, has met its duty to assist, and recommends Justice confirm that no records can be located.

**Statutes Considered**

*Freedom of Information and Protection of Privacy Act, section 7*

**Other Sources**

*Nova Scotia Review Reports FI-07-60(M), FI-12-77, FI-12-106; and Donham v. Nova Scotia (Community Services), 2012 NSSC 384*

**Background**

The Applicant initially contacted the Halifax Regional Municipality Archives [“HRM Archives”] seeking personal information found in records related to the Rockhead City Prison in Halifax [“Rockhead”] from the early 1940s.

HRM Archives found that there was a gap in its holdings, for the timeframe sought, for unknown reasons. HRM Archives suggested that the records possibly had been transferred to the provincial authority responsible for operating correctional centres at the time. It was suggested that the Applicant file an Access Request with Justice; however HRM Archives noted “it is a long shot that they would have records from the 1940s.”

On July 31, 2012 the Applicant made an Access Request for any Rockhead records relating to him/her in the custody or under the control of Justice.

On August 9, 2012 Justice issued its decision to the Applicant indicating it was unable to locate any records related to the Access Request.

On August 16, 2012 while acknowledging that Justice was very helpful in trying to locate some information, the Applicant filed a Request for Review [“Review”] because it was unclear from Justice’s decision letter if no records related to Rockhead could be found for that time period or if only records containing the personal information of the Applicant could not be found. The Applicant noted that “nobody seems to know where these records are.”

The Review Office contacted Justice to find out if other records related to Rockhead could be found and to require an explanation of Justice’s search for the records. On October 1, 2012 Justice provided a detailed and comprehensive description of the relevant history and its efforts to locate any responsive records. A summary is provided below in the discussion.

This information was shared with the Applicant on June 20, 2014. On June 26, 2014, after acknowledging Justice’s “excellent work trying to locate the [records]”, the Applicant requested that the file proceed to formal Review.

## **Issues**

The issues I must decide are the following:

1. Whether Justice has conducted a reasonable search for the responsive records in accordance with section 7 of the *Act*.
2. Whether Justice has met its statutory duty to assist under section 7 of the *Act*.

## **Discussion**

### **Issue #1: Am I satisfied that Justice has conducted a reasonable search?**

One of the primary purposes of the *Act* gives applicants a right of access to all records that are in the custody or under the control of a public body. The duty to assist the Applicant requires the public body’s response to an Access Request to be open, accurate and complete.

Where a public body fails to locate, or include in its decision, all or part of the records that the Applicant believes should have been considered responsive to the Access Request, the issue is “search”. In these Reviews, the Review Officer examines whether or not the public body has conducted a reasonable search for the responsive records [*NS Report FI-07-60(M)*].

In past Review Reports, the Review Officer outlined who has the burden of proof and when in search Reviews. A public body has the initial onus to demonstrate that the search was reasonable and to provide evidence in support of that claim. Once the public body has met its burden of proof and the information from the public body is shared, the Applicant may be satisfied. If not, the burden of proof then shifts to the Applicant if s/he continues to claim that the search was inadequate after the public body has demonstrated the reasonableness of its efforts. The Applicant must then provide some evidence showing that the records, or portion of the records, s/he seeks exist. The test for search is one of reasonableness, not perfection [*NS Report FI-12-77*].

The following is a summary of the information provided by Justice in its October 1, 2012 representations:

- A history of the various transfers of records, including between three different prisons;
- The records registries searched;
- The searching abilities of the systems;
- No documentation on any files prior to 1973 at the current correctional facility;
- Researchers have never seen a reference to Rockhead in any files at the current correctional facility;
- The retention schedules – formal and informal;
- Research conducted for other possible locations of the records, attachments were provided;
- Suggestions for the Applicant to aid searching elsewhere.

In the June 26, 2014 representations, the Applicant commented that the records have virtually vanished and may have been purposefully destroyed to cover up evidence. These are not issues to be decided in this Review. The only issue that I am mandated to examine is whether or not Justice has conducted a reasonable search of the records that are in its custody or under its control.

Applicants must provide some evidence showing that the public body has the records in its custody or under its control; broad sweeping assertions or mere speculation will not suffice [*NS Report FI-12-106* and *Donham v. Nova Scotia (Community Services)*, 2012 NSSC 384].

It remains unclear if Justice ever had the responsive records in its custody or under its control and if so, the records would have been destroyed long ago.

The Applicant has offered no evidence to show that Justice does have, or should have, custody or control of these records.

I find that the Applicant has failed to meet his/her burden to prove Justice's search was inadequate.

The *Act* does not contemplate public bodies doing an intense “scavenger hunt” of other public bodies who may have the records, sought at an applicant's behest. It is up to an applicant to make separate Access Requests to each public body that they believe have the records they seek [NS Report FI-12-106].

I find that on the balance of probabilities, Justice has conducted an adequate search for the responsive records.

## **ISSUE #2: Am I satisfied that Justice has met its duty to assist the Applicant?**

As noted above, section 7(1)(a) of the *Act* imposes a duty on Justice to assist applicants, as follows:

*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**...*

**[Emphasis added]**

In most cases, applicants will not have a detailed knowledge of the types and description of records that the public body has in its custody or control. Reasonable steps need to be taken to address this knowledge imbalance. “If there is no duty to assist, the right of access may be more illusory than real” [NS Report FI-12-77]. In this case, during the Review, Justice provided the Applicant with a detailed description of the history of the transfer of records, details of its retention of inmate records and details of the search that was conducted. In cases such as this, where a search turns up negative results, this type of detailed response would be appropriate, as part of the duty to assist the Applicant, to be provided in the decision letter.

I find that Justice did not meet its duty to assist the Applicant at the time it issued its decision because it did not openly, accurately and completely explain how it conducted its search. However, I find Justice has now met its duty to the Applicant.

## **Conclusion**

After examining the information provided by both parties and the information that is publicly available, on the balance of probabilities, I am more convinced by the arguments and evidence provided by Justice that a reasonable search was conducted. I am satisfied every reasonable effort was made by Justice to identify and locate records responsive to the Applicant's Access Request.

Understandably the Applicant has questions as to what happened to the records. It may remain a mystery as to what actually happened to the inmate registries and reports from the early 1940s; however I am satisfied that Justice has conducted an adequate search of its holdings for these records.

The Applicant has been given a number of possible avenues to pursue and I encourage him/her to not give up searching for these records. They may exist somewhere else or turn up in archival holdings in the future - according to its website, HRM Archives continually adds to its holdings through transfers of municipal records and donations of community records.

### **Recommendation**

Under the authority of section 39 of the *Act*, I recommend that Justice:

- Confirm that no records can be located. This confirmation letter is to be sent to the Applicant, and copied to the Review Officer, immediately upon acceptance of this recommendation.

Carmen Stuart, CIAPP – M  
Acting Freedom of Information and Protection of Privacy Review Officer for Nova Scotia