



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

REVIEW REPORT FI-12-77

Report Release Date: June 6, 2013

Public Body: Strait Regional School Board

Issues:

1. Whether the Strait Regional School Board ["School Board"] conducted a reasonable search for the responsive Record?
2. Whether the School Board met its duty to assist under s. 7 of the *Freedom of Information and Protection of Privacy Act* ["Act"] by making every reasonable effort to assist the Applicant and to respond without delay openly, accurately and completely?

Record at Issue: At no time are the contents of a Record disclosed or the Record released to an applicant, third party or any other person by the Review Officer or her delegated staff. The Record is not part of the Review other than with respect to the issues of search and duty to assist.

Summary: The Applicant submitted an Application for Access to a Record [Form 1] under the *Act* for all records pertaining to a family member dating back to 2007 and 2008 concerning information exchanged between two public bodies: one medical and one child protection. On his/her Form 1, the Applicant provided the specific names of the possible authors or recipients of the correspondence exchanged: three individuals at the medical public body and four individuals at child protection. The Review Officer found that the School Board had not conducted a reasonable search for the responsive Record and had failed to meet its statutory duty to assist the Applicant under s. 7 of the *Act*.

Recommendation: I recommend the School Board perform its duty to the Applicant under s. 7 of the *Act* by searching again for records responsive to the Applicant's Application for Access to a Record, which is to be completed within 10 days of accepting the Recommendation, and the results are then to be delivered to the Applicant and to me

immediately (directly and concurrently) within 30 days of this Report pursuant to s. 40 of the *Act*, and including: any records found as a result with necessary severing; a detailed description of the efforts undertaken in conducting the search; and an Index of Records of any and all files (the 3 known files and any additional files found as a result of this comprehensive search).

Keywords: broad and liberal interpretation, burden, custody or control, duty to assist, literal reading, records index, onus, scope, search.

Statutes considered: *Freedom of Information and Protection of Privacy Act s. 2, 7.*

Case Authorities Cited: *ON Order MO-2334, BC Order 00-32, SK Report 2004-003, ON Order PO-2650, FI-07-58(M).*

Others Cited: *Saskatchewan Helpful Tips Guide [www.sask.foipop.ca].*

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Background:

This Review Report deals only with the Applicant's Application for Access to a Record. It will not deal with any allegation of a breach of confidentiality or privacy that may have been raised by the Applicant. I would encourage public bodies to do the same in all cases: separate out its decision making processes with respect to access applications and privacy complaints including in keeping the correspondence separate.

The Applicant submitted an Application for Access to a Record [Form 1] under the *Act* for all records pertaining to a named individual dating back to 2007 and 2008 concerning information exchanged between two public bodies: one medical and one child protection. The Applicant provided the specific names of the possible authors or recipients of the correspondence exchanged: three individuals at the medical public body and four individuals at the child protection public body.

On August 8, 2012, the School Board made a decision in response to the Applicant's Application for Access to a Record, which read, in part, as follows:

We have located no records responsive to your application. Therefore, it is my understanding, pursuant to clause 7(2)(b) of the Freedom of Information and Protection of Privacy Act that the Strait Regional School Board does not have control or custody of the records which would respond to your application.

On August 31, 2012, the Review Office received a Request for Review [Form 7] from the Applicant. The Request which read, in part, as follows:

I recommend SRSB [School Board] to provide my requested information. I have in my possession evidence of a letter [medical professional] from the [department of medical public body] sent to the [child protection public body] directed to [named individual in Form 1] in reference to [a named individual]. I also have other documents as my evidence in my possession which I will not provide for this review until this matter goes to formal review stage with Dulcie McCallum.

On the Form 7 the Applicant indicated s/he had documents in his/her possession that were evidence there were additional records. The Applicant described one of the documents both by its author and recipient. When this information was shared with the School Board, a search was conducted and the document was found.

On October 2, 2012, the Review Office requested that the School Board conduct a second search for any Record that would be responsive to the Form 1 and provide a disclosure decision to the Applicant. The correspondence to the School Board made a second request in the event no Record was found. The School Board was asked to provide a Representation detailing how the search was conducted, laying out nine categories of questions to be addressed. In addition,

because the School Board's access decision appeared to misunderstand what custody or control of a Record means and what the distinction between custody or control and being able to locate a Record is, the Review Office sought clarification by asking five specific questions to assist in sorting out the distinction.

On October 17, 2012, the School Board responded to the questions posed by the Review Office. The following highlights the School Board's response:

1. All records were considered.
2. The search was defined to those records in the request which were in the custody or control of the School Board which was defined as those stored physically or electronically at the education centre where the School Board is located.
3. As a result of the Review Office letter a second search was conducted which included files housed at another location and two responsive records were located in the file. One was withheld pending a third party consultation.
4. The FOIPOP Administrator did not conduct the search but delegated it to the Principal of the education centre.
5. The FOIPOP Administrator indicated she had a familiarity with the records involving these parties and had previously searched two types of student records: confidential and Cumulative [CUME]. The file in the other location has since been transferred to the education centre by the Principal.
6. The School Board indicated that it did not have any record regarding the named family member other than the confidential and CUME files that are stored at the education centre. But the School Board went on to state: *except* a non-active file with the Coordinator of Student Services. The FOIPOP Administrator stated she reviewed these files for the purpose of the request.
7. The School Board indicated that there were no other Records authored by another organization that were in their custody or control that were responsive to this Form 1.
8. The School Board stated that it appeared the Applicant believed that some records generated by another public body were provided to the School Board by the other public body. The School Board stated that it did not have any other responsive records that were authored by the child protection public body other than copies that had been previously provided to it by the Applicant.

The FOIPOP Administrator provided a copy of two email bulletins sent to two of the individuals named in the Application for Access to a Record notifying them of the details of the Applicant's access request. The notice appears to misrepresent the Application for Access to a Record. The FOIPOP Administrator, in error, states she has received a request for access for information related to two named individuals. The Application for Access to a Record only names one individual.

On October 26, 2012 the School Board wrote the Applicant advising the correspondence was with respect to his/her Request for Review and also its response to the Review Office's questions. The letter advised that a number of documents had been located that related to the access request. The letter indicated that the documents were not contained in the one of the two categories of files previously searched: the confidential file. The School Board made a

disclosure decision and provided the Applicant with copies of seven responsive records totalling 11 pages. On review of these records, it is clear that all are responsive to the Form 1. This subsequent decision and disclosure made two things clear: first the initial search had been restricted to the on-site location of the School Board and second the School Board actually had three categories of records, not two: confidential, CUME and the non-active file with the Coordinator of Students Services.

Discussion of Issue #1 – Whether the School Board conducted a reasonable search for the responsive Record?

The burden rests with the public body to demonstrate the search was reasonable in the circumstances and the onus is on them to provide evidence in support. Thereafter, if the Applicant continues to claim the search has not been complete or adequate, the onus shifts to the Applicant and gives him/her the opportunity to produce evidence that additional responsive Records may exist that have not been produced by the public body.

The test of whether a public body has met its burden is one of reasonableness not perfection. The Ontario Information and Privacy Commissioner has expressed it this way:

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 [other Orders listed]. 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]

I agree. It is not sufficient for a public body to simply make a declaration that a reasonable search for responsive records has been conducted in response to the question of whether the search was reasonable. What is meant by a “reasonable”? I would define reasonable effort as follows:

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 potential sources of records, identify those it searched and identify any sources that it did not check (with reasons for not doing so).
[BC Order 00-32]

Access to Information is a statutory right [s. 2 of the Act]. The legislative scheme correctly places the onus on the public body with respect to searching for records. This takes into account the knowledge imbalance that exists between applicants and public bodies.

I am mindful that most citizens will not have a detailed knowledge of the types and descriptions of records that a government institution maintains. A requirement for government institutions to take reasonable steps to search for responsive records is an important feature to address the knowledge imbalance between the institution and the applicant. If there is no duty to assist, the right of access may be more illusory than real. [SK Report 2004–003]

On the Form 7 the Applicant indicated s/he had documents in his/her possession that were evidence there were additional records. The Applicant described one of the documents both by its author and recipient and when this information was shared with the School Board, a search was conducted and the document was found. The School Board claimed the document was beyond the scope of the access request. The basis for this claim was that the document was on letterhead different from the name given by the Applicant on the Form 1 yet the author of the document located was one of the seven individuals listed by the Applicant on his/her Form 1.

In a letter dated October 2, 2012, the Review Office provided the School Board with a list of the standard search questions, which can be summarized as follows:

- *Were records in any form or format considered (i.e. electronic, paper, and other)?*
- *Is the original access request very broad and could include information developed over a wide open time period? If so, how did you define the search?*
- *How did you search for the records in the public body's possession?*
- *Did you search yourself?*
- *Did you delegate others to do the search? If so, how can you be sure that the search was comprehensive?*
- *Did you send out an email to other units, etc?*
- *Could records also exist that are responsive to this access request that are not in your possession, but in your control?*
- *Did agents, consultants or other contracted services have any role in the project the access request is referencing?*
- *If yes, are these records included in the package provided to the [Review Office]? [Saskatchewan Helpful Tips Guide]*

The School Board responded to the questions in a detailed Representation. Thereafter, the School Board did a new search, identified additional documents responsive to the access request, and made a decision and disclosure to the Applicant.

It is clear that the School Board restricted the locations of where it looked for the Records and seems to have misunderstood what it means to have “custody or control”. To have custody or control of a record does not mean it has to be in the same building where the public body ordinarily does its business. Off-site Records storage and other possible locales for school related records must be given consideration when responding to an access request.

While delegating the search to the Principal may be appropriate given her familiarity with school records, it may not be sufficient to meet the parameters of the scope. That is for the FOIPOP Administrator to decide. In this case, initially only two categories of school records were

identified: confidential and CUME. During the Review, a third category was identified: a non-active file with the Coordinator of Student Services. The Form 1 defines the scope of the search not who conducts the search.

All of the documents located during the Review including the one matching the description provided by the Applicant should have been identified as responsive records by the School Board during its initial search. Regardless of where the documents were located, a reasonable search would have identified the records that were eventually located.

The School Board's Representations discuss its prior involvement and knowledge of the files with respect to how it conducted the search in this access request. This is an error as each Application for Access to a Record must be dealt with on its own merits. This Form 1 is a unique access request and is defined by the specific wording that outlines the nature of the request. Whether or not any person has made previous access requests or whether the School Boards had previous access requests for the same documents is irrelevant. Any prior involvement with parties or records and the results of those applications should not be considered when approaching the search in response to a new Form 1.

The Applicant continued to maintain s/he had other documents that should have been identified during the search. The Applicant had put a commitment in writing on his/her Form 7 that these documents would be provided to the Review Officer during the formal Review stage. These were never provided and a description was not provided. I am, therefore, unable to make a Finding if the Applicant was in possession of additional physical evidence that more responsive Records exist. The Applicant was, however, able to describe one document and the School Board located it.

In this case, I find the School Board did not satisfy its burden to demonstrate that it had conducted a reasonable search. Therefore, the onus did not shift to the Applicant to refute the School Board's claim that the search was reasonable. It is important to note that Applicant, like Public Bodies, should not wait until the file moves to me at formal Review to provide their evidence. It is most appropriate to provide evidence early in the process. This can bring about an informal resolution in some Reviews and can assist, like it did in this case, the Review Office to provide direction to Public Bodies who are being asked to conduct additional searches.

In response to the standard search questions, the School Board located 11 more pages. I find there is sufficient evidence before me to find that the School Board did not conduct a "reasonable" search for responsive records. While the School Board made an effort during the Review process to conduct subsequent searches for the responsive records, I am not convinced these efforts militate against the need for me to recommend to the School Board that it continue to search for more responsive records.

Discussion of Issue #2 – Whether the School Board met its duty to assist under s. 7 of the Act by making every reasonable effort to assist the Applicant and to respond without delay openly, accurately and completely?

Individuals have a right of access to information and in Nova Scotia a person can exercise that right by making an Application for Access to a Record under the *Act*. Public bodies have an obligation to applicants to comply with the statutory duty to assist. Section 7 provides 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]

When inquiring into whether or not a public body has met its statutory duty to assist, one of the considerations is whether or not the public body has taken all reasonable steps to ensure it understands what an applicant is requesting. When it becomes apparent that the record an applicant is requesting differs from how a public body interprets the access request, scope comes into question. When scope is at issue, the following inquiry will assist in a Review:

Did the Public Body contact the Applicant for additional clarification of the request?

If so, please provide details including a summary of any further information the Applicant provided.

If the Public Body did not contact the Applicant to clarify the request, did it:

(a) choose to respond literally to the request?
(b) choose to define the scope of the request unilaterally?

If so, did the Public Body outline the limits of the scope of the request to the Applicant? If yes, for what reasons was the scope of the request defined this way? When and how did the Public Body inform the Applicant of this decision? Did the Public Body explain to the Applicant why it was narrowing the scope of the request?
[Relied in part on ON Order PO-2650]

The School Board's initial decision was to advise the Applicant that there were no responsive Records to his/her request. At the beginning of the Review, the Applicant described a document and the School board found it. Then, when certain issues were clarified and questions posed to the School Board by the Review Office, a considerable number of documents were found that were responsive to the request. It is clear that the scope of the request was significantly limited by the restrictive interpretation given to the access request by the School Board.

Pursuant to s. 7 of the *Act* it is incumbent on public bodies to communicate with applicants to ensure the access request is fully understood. In past because of its failure to clarify the request with the Applicant, the School Board defined the scope unilaterally and chose to respond literally. The right of access in s. 2 of the *Act* means public bodies are to do exactly the opposite – give a broad and liberal interpretation to the Form 1. The narrow interpretation included

failing to accurately identify one of the public bodies [medical] despite the fact that it adjusted the identity of the second public body [child protection]. How medical services are organized in Nova Scotia is common knowledge and it ought to have been readily apparent that the particular department identified by the Applicant fell under the auspicious of one health authority. This could have been clarified by discussing with the Applicant or with a minimal amount of research.

Regardless of whether the scope was clarified with the Applicant, the School Board ought to have been able to discern the scope of the request given the fact that the Applicant had provided the names of the individuals of both public bodies who were potential authors and/or recipients of the information sought, all of whom have a relationship with one of the named public bodies.

All the documents found by the School Board during the Review were provided to the Review Office. On review of these documents, I find they all clearly fall within the scope of the Applicant's Application for Access to a Record.

This case presents a perfect example of where it would be appropriate for a public body to prepare a Records Index. Some applicants are confused by the idea that correspondence they have submitted or copied to a public body are not provided as a part of the Record. Not everyone is in a position [financially or logistically] to be able to retain paper or electronic copies of information sent to a public body. One solution that I have recommended in the past is for public bodies to provide a detailed index of the **Record** including all items in the Record regardless of whether the Applicant was the author or the person who gave the public body the document. While s/he may not be entitled to receive copies of these as part of any disclosure, providing the Applicant with a Records Index enables him/her to know what the School Board has in its entirety that is responsive. This way the Applicant will understand what the entire **Record** consists of and avoids the optics that the School Board is shielding information [FI-07-58(M)]. The Records Index can assist the Applicant in deciding what documents, if any, are of interest for future access requests and helping to make those focussed and meaningful.

Findings:

1. I find there is sufficient evidence that the School Board did not satisfy its burden to demonstrate that it had conducted a reasonable search for responsive records, the particulars of which include:
 - a. By failing to identify the 12 pages of the Record located during the Review during its initial search;
 - b. By misinterpreting what the statute means by custody or control;
 - c. By failing to search all records in the custody or control of the School Board including active, non-active, archived, on-site and off-site; and
 - d. By failing to process this access request for the specific Record based solely on its own merits without considering other matters.
2. The School Board failed in its duty to assist the Applicant including:

- a. by giving the Application for Access to a Record a restrictive reading in a manner inconsistent with the Applicant's right to access;
- a. by failing to give the Application for Access to a Record a broad and liberal interpretation thereby inappropriately restricting the scope of the request.
- b. by failing to clarify its interpretation of the Applicant's Application for Access to a Record by contacting the Applicant [by telephone or in writing] for additional clarification of the request;
- c. by failing to contact the Applicant or confirm through simple research the appropriate/official name for medical public body including noting the names of the individuals listed by the Applicant in his/her request before conducting its search; and
- d. by failing to provide a Records Index of the complete responsive Record.

Recommendation:

Section 40 of the *Act* requires that the School Board make and communicate its decision whether or not to follow my Recommendation within 30 days of receiving this Report. This response from the School Board will be posted on my website.

I recommend the School Board perform its duty to the Applicant under s. 7 of the *Act* by searching again for records responsive to the Applicant's Application for Access to a Record, which is to be completed within 10 days of accepting the Recommendation, and the results are then to be delivered to the Applicant and to me immediately (directly and concurrently) within 30 days of this Report pursuant to s. 40 of the *Act*, and including: any records found as a result with necessary severing; a detailed description of the efforts undertaken in conducting the search; and an Index of Records of any and all files (the 3 known files and any additional files found as a result of this comprehensive search).

Respectfully submitted,

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