



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

**REVIEW REPORT FI-13-19**

- Report Release Date:** December 2, 2013
- Public Body:** Nova Scotia Public Service Long Term Disability Trust Fund  
[“NSPS LTD”]
- Issues:** The issues the Review Officer must decide are the following:
1. Whether NSPS LTD has met the statutory duty to assist contained in s. 7 of the *FOIPOP Act* in responding to this Applicant’s Applications for Access to a Record.
  2. Whether NSPS LTD has to provide this Applicant with copies of Applicant-generated correspondence.
  3. Whether NSPS LTD is required to create a Record under s. 8 of the *FOIPOP Act* and whether the Applicant has been provided with all responsive Records relating to his/her NSPS LTD file to which s/he is entitled under the *FOIPOP Act*.
  4. Whether this Applicant’s repeated Applications for Access to a Record and Requests for Review about the same information amount to a misuse of the access to information process.
- Recommendations:** The Review Officer made the following Recommendations:
1. That NSPS LTD confirm with the Applicant with a copy to the Review Officer that it has already provided the Applicant with a complete copy of his/her NSPS LTD file to which s/he is entitled under the *FOIPOP Act*.
  2. That unless and until any new Records are added to this Applicant’s NSPS LTD file, NSPS LTD respond to this Applicant’s future Applications for Access to a Record for access his/her NSPS LTD file within 30 days with a copy of this Review Report and its response [Recommendation #1] confirming access to his/her complete NSPS LTD file has been granted and that no new Records have been added to the Applicant’s NSPS LTD file since it was closed. NSPS LTD is not

required to provide this Applicant with copies of correspondence generated by this Applicant.

**Key Words Considered:** Applicant generated correspondence, abuse of process, duty to assist, duty to create a record

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, SNS 1993, c. 5, ss 7, 8.

**Case Authorities Cited:** *NS Reviews FI-05-08, FI-05-39, FI-06-69; BC Order 01-31*

**Others Cited** *2012 FOIPOP Review Officer's Annual Report*

## REVIEW REPORT FI-13-19

### Background

This file was recently transferred to me for the final, formal stage of the Review process. As the Freedom of Information and Protection Review Officer [Review Officer] appointed by statute, I am entrusted with the duty to carefully read and consider all the relevant evidence in the Review, which I have now done.

Over the last nine years, the Applicant has made a large number of Applications for Access to a Record to the Nova Scotia Public Service Long Term Disability Plan Trust Fund ["NSPS LTD"] for what amounts to the same information. Following the decision by the NSPS LTD in some of these applications, the Applicant filed eight access Requests for Review with the Review Officer. The Review Officer investigated these matters and found conclusively that the Applicant had received all Records in the custody of and under the control of NSPS LTD. In other words, this Applicant has received a complete copy of the requested Records to which s/he is entitled under the *Freedom of Information and Protection of Privacy Act* ["FOIPOP Act"].

Two previous Requests for Review filed by this Applicant reached the formal Review stage of the Review process. In Review Report *FI-05-08*, this Applicant had requested *the complete contents of my disability file* from NSPS LTD. In that Report, the then Review Officer found that NSPS LTD in its decision had properly applied the appropriate exemptions to the responsive Records:

*. . . the exemptions are properly cited [by NSPS LTD] in accordance with the FOIPOP Act.*

In a subsequent Request for Review *FI-05-39* filed by the same Applicant, the then Review Officer stated:

*The Applicant has not accepted the assertion that s/he has been provided with all relevant records, which explains his/her second application and second Request for Review. This Office is satisfied that a reasonable search was done.*

*This Office has investigated both of the Applicant's Requests for Review and has concluded that the Applicant will have to follow other avenues to seek a resolution of his/her differences with the LTD Plan.  
[Emphasis Added]*

In that same Report, the then Review Officer made the following Recommendation:

*Until all issues are resolved between the LTD Plan and the Applicant, that every three months the LTD Plan provide the Applicant with copies of any records containing his/her personal information, not previously released, it may have in its custody and control.*

The public body accepted this Recommendation on August 9, 2005.

On November 27, 2012, the Applicant filed his/her most recent access request by filing a five-page Application for Access to a Record under the *FOIPOP Act* to NSPS LTD for access to records contained in his/her NSLTD disability claim file. A big part of the Application letter was devoted to privacy concerns. Privacy is not at issue in this Review.

In response to the Application for Access to a Record, on December 21, 2012, NSPS LTD issued a decision outlining all of the Applicant's Applications for Access to a Record to date since December 1, 2004, including those for which the Applicant filed a Request for Review and where a Review Report was issued.

The Applicant filed a Request for Review dated February 19, 2013 and received February 20, 2013, which requested that the Review Officer review the following:

*The head of the public body failed to respond to me, in accordance with its duty under Section 7 of the Act, within thirty days of its having received my application and the required fee. The head of the public body failed to state whether I am entitled to the record or part of the record, and failed to give me access to any of the requested records.*

The Form 7 went on to request that the Review Officer recommend:

*The head of the public body "create records" in accordance with Section 8 of the Act in response to my request for access to reasons for decisions made by the public body . . .*

## **Issues**

The issues I must decide are the following:

1. Whether NSPS LTD has met the statutory duty to assist contained in s. 7 of the *FOIPOP Act* in responding to this Applicant's Applications for Access to a Record.
2. Whether NSPS LTD has to provide this Applicant with copies of Applicant-generated correspondence.
3. Whether NSPS LTD is required to create a Record under s. 8 of the *FOIPOP Act* and whether the Applicant has been provided with all responsive Records relating to his/her NSPS LTD file to which s/he is entitled under the *FOIPOP Act*.
4. Whether this Applicant's repeated Applications for Access to a Record and Requests for Review about the same information amount to a misuse of the access to information process.

## **Discussion**

### **Issue #1 – Duty to Assist**

Regarding the statutory duty to assist found at s. 7 of the *FOIPOP Act*, NSPS LTD has made the following efforts to assist the Applicant during the processing of the large volume of Applications for Access to Record:

- Provided the Applicant with numerous copies of his/her complete NSPS LTD file to which the Applicant was entitled under the *FOIPOP Act*;
- Searched for additional responsive Records;
- Prepared and shared an Index of Records with the Applicant;
- Allowed the Applicant to examine his/her NSPS LTD file in person; and
- Complied with the Review Officer during numerous Requests for Review regarding the Applicant's ongoing repetitive requests for the same information.

Any Records that would be responsive to Applicant's November 27, 2012 Application for Access to a Record have already been processed during his/her previous Applications to NSPS LTD, in compliance with the Recommendation of the former Review Officer.

I find that NSPS LTD has gone beyond what is expected under the statutory duty to assist contained in s. 7 of the *FOIPOP Act* by responding openly, accurately and completely to this Applicant's continuous Applications for Access to a Record regarding his/her NSPS LTD file.

### **Issue#2 – Applicant-generated Correspondence**

During the course of this Review, NSPS LTD confirmed that the only additional Records in its custody and under its control are Records that are correspondence generated by the Applicant. In Review Report *FI-06-69*, the then Review Officer found:

*Having examined the circumstances surrounding this issue, it is my opinion that the majority of the information requested by the Applicant consists of correspondence sent by the Applicant to the public body and correspondence sent by the public body to the Applicant. In these types of situations, the Review Office assumes that individuals maintain their own copies of correspondence sent to or received from a public body. Therefore, this information will not be addressed in this review.*

The Applicant will not be permitted to create a Record by corresponding with the NSPS LTD about his/her old disability claim Record [a file which appears to have closed in 2005]. In any event, I find that, as any reasonable person, the Applicant would maintain and retain his/her own copies of correspondence to and from NSPS LTD. I also find, therefore, that NSPS LTD is not required to provide copies of Applicant-generated correspondence back to this Applicant in response to this Application for his/her disability Record now or at any time in the future for any subsequent access requests for his/her NSPS LTD file.

### **Issue #3 – Duty to Create a Record**

In his/her Request for Review, the Applicant requested that NSPS LTD create a Record under s. 8 of the *FOIPOP Act* in response to my request for access to reasons for decisions made by the public body. . .

In order for a public body to be under a duty to create a Record, the information used to create the Record ***must already exist in machine-readable format***. During the course of this Review, NSPS LTD confirmed that information responsive to the Applicant's access request, specifically, *reasons for decisions made by [NSPS LTD]* does not exist in machine readable format, which is the specific statutory requirement.

In British Columbia *Order 01-31*, in addressing the public body's duty to create a Record, the Commissioner found:

*... ICBC has no machine-readable records that could be manipulated – using ICBC's normal hardware, software and technical expertise – to generate records that respond to this aspect of the applicant's request. Section 6(2) speaks to an obligation to create records that arises only in the circumstances explicitly set out in that section ... evidence is that it is simply not possible for ICBC to generate responsive records in this way, not least because it has no underlying paper-based records (much less machine-readable records). Section 6(2) does not require ICBC to go any further than it has done. If it cannot create a record as contemplated by that section – and I accept that it cannot in this case – no more need be done.  
[Emphasis added]*

The *FOIPOP Act* only requires a public body to create a Record if it is available in readable format. In the access process the Review Officer cannot require a public body to create a Record the Applicant wishes existed. The remedy to require NSP LTD to create a Record, namely a decision letter with full reasons may lie elsewhere but is not available under the *FOIPOP Act*.

With respect to duty to create a Record I make two findings. First, I find that NSPS LTD is not required to create a Record from information that does not exist in machine-readable format, which is the case here. Second, I find that the Applicant has already been provided with *all responsive Records* relating to her NSPS LTD file to which she is entitled under the *FOIPOP Act*; the Records provided include any Records containing *reasons for decisions made by [NSPS Ltd]*.

#### **Issue #4 – Discretion not to undertake an Investigation in response to a Review Request**

This case presents a perfect example of why the Review Officer requires statutory authority to exercise his/her discretion not to accept a Review Request, which is an amendment that the Review Officer has repeatedly requested of the House of Assembly. Prior to explaining that in more detail I make the following comments with respect to this Applicant and what appears to be his/her tenacious and endless seeking and requesting of [the same] information.

At present the Review Officer is under a legal duty to review access decisions made by public bodies. However, the scope of what the Review Officer can review is restricted to only *decisions made by the public body with respect to access to information*.

On close review of the additional content included in the Applicant's Form 7, it is apparent that the Applicant wants NSPS LTD to reconsider its decisions regarding how and when it awards long term disability benefits, why his/her benefits were started, stopped and ended and whether those disability decisions were fair or reasonable. It is reasonable to assume that there would be an appeal mechanism provided for by statute that would be responsible for reviewing such decisions.

The Applicant has for years tried to cloak that desire for an appeal into the context of his/her request for access to information and an appeal to my office by way of a Request for Review. This s/he cannot do. His/her remedy with respect to the re-consideration of the decision made about his/her long term disability pension may lie elsewhere but most definitely is not within the jurisdiction of the Review Officer. The only issue within the Review Officer's jurisdiction is the Applicant's right of access to records under the *FOIPOP Act*, which has been previously decided and again is in this Report.

It is clear that the Applicant takes issue with the decisions made by NSPS LTD regarding his/her benefits. However, the FOIPOP process is not the appropriate place to resolve those issues. ***It is not the Review Officer's role to investigate or comment on how NSPS LTD conducts its business including how it makes and documents decisions about its clients or the reasons for those decisions.*** The Review Officer has no jurisdiction to investigate the reasonableness or fairness of these decisions. If there is a mandate to do so, it lies elsewhere.

The distinction between ***review of access to information decisions*** and ***review of disabilities pension decisions*** is central to understanding the role of the Review Officer and what she can and cannot do under the *FOIPOP Act*.

I turn now to the issue of why the *FOIPOP Act* should make provision for the Review Officer to exercise her discretion. Since 2004, this Applicant has filed twelve Applications for Access to a Record to NSPS LTD regarding his/her NSPS LTD file and has filed eight access Requests for Review regarding those Applications. Including this Review Report, three Review Reports have been issued as a result of this Applicant's Applications for access to his/her NSPS LTD file.

I find that the constant and repeated Applications for Access to a Record and Requests for Review about the same information have not, between 2004 and 2013, had any desirable results for this Applicant. I find that these repeated Applications and Requests negatively impact resources for both NSPS LTD and the Review Office and amount to a misuse of the access to information process.

In my 2012 Annual Report, I addressed this issue:

*. . . Where an individual tries to clog up the system with a frivolous or vexatious Request for Review, everyone loses. . . While this does not occur very often, when it does, it has a dramatic impact on the work of both the Public Body and the Review Officer because the individual often inundates the respective offices with **multiple requests with little or no merit, simply seeking to annoy and frustrate the system.** This not only wastes resources of the Review Officer but it does so to the detriment of legitimate requests that cannot be processed in a timely fashion because of the backlog the "trouble maker" is causing.  
**[Emphasis added]***

As I do not have the discretion to refuse to accept a Request for Review, this Review Report will serve as Notice to the Applicant that what s/he is doing is a misuse of the access to information process and this will not be allowed to continue.

Given my finding that the Applicant's conduct amounted to an abuse of the access to information process, I make the following observation. The Office of the Review Officer has very limited resources and cannot afford to tolerate a repeat of this misuse of process. Until such time as the legislation is amended to allow the Review Officer not to accept a Request for Review, all future Requests for Review received from the Applicant regarding access to his/her [now closed] NSPS LTD Record will be opened and closed [upon receipt] by another Review Report making reference to this Report.

I remain optimistic that the Applicant will understand this Review Report, respond appropriately and in future respect the work of NSPS LTD and the Review Officer by refraining from filing redundant access requests and Review Requests.

## **Summary of Findings**

### **Duty to Assist**

1. I find that NSPS LTD has gone beyond what is expected under the statutory duty to assist contained in s. 7 of the *FOIPOP Act* by responding openly, accurately and completely to this Applicant's continuous Applications for Access to a Record regarding his/ his/her NSPS LTD file.

### **Applicant-generated Correspondence**

2. I find that, as any reasonable person, the Applicant would maintain and retain his/her own copies of correspondence to and from NSPS LTD.
3. I find that NSPS LTD is not required to provide copies of Applicant-generated correspondence back to this Applicant in response to this Application for his/her disability Record now or at any time in the future for any subsequent access requests for his/her NSPS LTD file.

### **Duty to Create a Record**

4. I find that NSPS LTD is not required to create a Record from information that does not exist in machine-readable format.
5. I find that the Applicant has already been provided with all responsive Records relating to his/her NSPS LTD file to which s/he is entitled under the *FOIPOP Act*; the Records provided include any Records containing reasons for decisions made by NSPS Ltd.

### **Discretion not to undertake an Investigation in response to a Review Request**

6. I find that the constant and repeated Applications for Access to a Record and Requests for Review about the same information have not, between 2004 and 2013, had any desirable results for this Applicant.
7. I find that these repeated Applications and Requests negatively impact resources for both NSPS LTD and the Review Office and amount to a misuse of the access to information process.



## **Recommendations**

1. I recommend that NSPS LTD confirm with the Applicant with a copy to the Review Officer that it has already provided the Applicant with a complete copy of his/her NSPS LTD file to which s/he is entitled under the *FOIPOP Act*; and
2. I recommend that unless and until any new Records are added to this Applicant's NSPS LTD file, NSPS LTD respond to this Applicant's future Applications for Access to a Record for access his/her NSPS LTD file within 30 days with a copy of this Review Report and its response [Recommendation #1] confirming access to his/ his/her complete NSPS LTD file has been granted and that no new Records have been added to the Applicant's NSPS LTD file since it was closed. NSPS LTD is not required to provide this Applicant with copies of correspondence generated by this Applicant.

Respectfully submitted,

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