



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

REVIEW REPORT FI-14-26

August 21, 2014

Nova Scotia Environment

Summary

The Applicant made an Application for Access to a Record [“Access Request”] to the Nova Scotia Environment [“Environment”], under the *Freedom of Information and Protection of Privacy Act* [“Act”], for specific testing results.

No records were found. Environment says that the tests were never conducted and therefore the record does not exist. The Applicant continues to believe that it is inconceivable that the tests were not done.

The Review Officer finds that Environment has conducted an adequate search, has not met its duty to assist, and recommends Environment provide a detailed confirmation explaining that no records exist and why.

Statute 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-12-75

Background

On February 6, 2014 the Applicant made an Access Request for hydraulic fracturing wastewater holding pond, lagoon and containment structure test results. The specific results requested were for the Gross Alpha and Beta Radiation Counts [“GAB counts”] at the Debert site. The Applicant provided various pieces of information to assist Environment to locate the responsive records, including the people who were the likely holders of the record.

On March 6, 2014 Environment provided the Applicant with a decision in response to his/her Access Request. The decision stated “Nova Scotia Environment has conducted a search and has been unable to locate any records that respond to your application.”

On March 15, 2014 the Applicant filed a Request for Review [“Review”]. The Applicant took issue with the search that was conducted. The Applicant provided his/her reasoning for believing the records exist [“representations”]. The Applicant’s arguments focused on the fact that test results are available for another site – Kennetcook, which the Applicant has a copy of, and that “it is simply inconceivable and beyond belief that a competent Department of Environment in Nova Scotia has not been the recipient of these basic laboratory values” for the Debert site.

On March 21, 2014 Environment was notified of the Review and was provided with the Applicant’s representations. Environment was asked to conduct another search for responsive records. If records were found, the matter would have been considered resolved. If no records were found, Environment was required to provide representations outlining how it conducted its search.

No records were located and representations were provided on March 31, 2014. Environment’s representations indicated that no such tests were ever conducted as they were deemed unnecessary for the location identified. The representations were provided to the Applicant on April 1, 2014 for response.

On April 17 and April 24, 2014 the Applicant provided a response which included additional evidence to support his/her position. The representations were provided to Environment on April 25, 2014. Environment provided additional information in response to the specific questions posed by the Review Office based on its previous representations and the evidence provided by the Applicant.

Despite both parties fully participating in the process, an informal resolution was not successful. Therefore the file was forwarded to me to conduct the formal Review.

Upon review of the entire file, I provided Environment with my simplified understanding of the reason it provided for why the record that the Applicant seeks does not exist. Environment confirmed the following summary to be correct:

- The water that is at the Debert site came from the Kennetcook site;
- While the water was at the Kennetcook site it received the GAB count testing;
- GAB counts is the first level of testing;
- If GAB counts are high, a second level of testing is conducted;
- The GAB counts at Kennetcook indicated that the second level of testing was necessary;
- The water was transferred from the Kennetcook site to the Debert site;

- Because it was already known that the GAB counts at Kennetcook indicated that the second level of testing was necessary, this test did not need to be repeated after the water arrived at the Debert site;
- The second level tests were conducted at the Debert site;
- The GAB counts for Kennetcook would therefore apply to the Debert site.

This information was verbally provided to the Applicant on August 19, 2014 by me. The Applicant was not satisfied with this explanation and continues to believe that it is inconceivable that GAB count testing was not done at the Debert site after the water was transferred. Therefore, I am required to carry on with the Review and issue this Review Report.

Issues

The issues I must decide are the following:

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

Discussion

Issue #1: Am I satisfied that Environment 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*].

In addition to providing confirmation to the above summary explaining records do not exist, Environment provided this office with all of the internal communications between staff detailing

which offices and people were contacted about any responsive records. This includes the areas and one of the individuals specifically identified by the Applicant. All responses reported that no such records exist.

I am more convinced by the arguments and evidence provided by Environment explaining why the records do not exist and the search that was conducted for responsive records than by the Applicant's position on why Environment should have the records.

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

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

The *Act* does not provide the Review Officer with a mandate to investigate or provide comment on whether or not a public body conducted its business appropriately. In this case it is not for the Review Officer to decide if Environment should have conducted the testing. The Applicant has acknowledged this.

Issue #2: Am I satisfied that Environment has met its duty to assist the Applicant?

As noted above, the *Act* imposes a duty on Environment 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 under its 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, while Environment did provide the Applicant with a description of the search that was conducted once the matter came to Review, it never clearly told the Applicant that the records do not exist or explained why. In cases such as this, where a search turns up negative results, a detailed response would be appropriate in the decision letter, as part of the duty to assist the Applicant [*NS Report FI-12-75*].

I find that Environment did not meet its duty to assist the Applicant because it has not openly, accurately and completely explained why the records do not exist either at the time of the decision letter or during the Review process.

Conclusion

After examining the information provided by both parties, on the balance of probabilities, I am more convinced by the arguments and evidence provided by Environment that a reasonable search was conducted and the records do not exist. I am satisfied every reasonable effort was made by Environment to identify and locate records responsive to the Applicant's Access Request.

Recommendation

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

- Confirm with the Applicant that no record exists. In order to correct its failure to assist the Applicant, Environment's confirmation letter must openly, accurately and completely explain the reason why no record exists [at the least it should confirm my summary of facts on pages 2 and 3 of this Review Report]. The letter is to be sent to the Applicant, and copied to the Review Officer, within 30 days of acceptance of this recommendation.

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