



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

REVIEW REPORT FI-14-29

August 28, 2014

Department of Community Services

Summary

The Applicant made an Application for Access to a Record [“Access Request”] to the Department of Community Services [“Community Services”], under the *Freedom of Information and Protection of Privacy Act* [“Act”], for minutes of a meeting.

Community Services’ response was that a record was not created. That meant that no record was found. The Applicant continues to believe a record does exist. Community Services has been unresponsive to the Review Office’s attempts to gather any information about this Access Request.

The Review Officer finds that Community Services has not conducted an adequate search, has not met its duty to assist, and recommends Community conduct an onsite search for responsive records.

Statute Considered

Freedom of Information and Protection of Privacy Act, section 7(1)(a)

Other Sources

Nova Scotia Review Reports FI-07-60(M), FI-12-77, FI-12-75, FI-14-26, FI-10-41/FI-10-85/FI-10-86/FI-10-87

Background

On February 5, 2014 the Applicant made an Access Request for the minutes of a meeting and the names of the attendees. The meeting was referred to in a record held by the Applicant.

On February 20, 2014 Community Services provided the Applicant with a decision in response to his/her Access Request. The letter indicated “[t]he minutes of the meeting and the names of those who attended the meeting on [date] were not recorded.”

On March 28, 2014 [received April 1, 2014] the Applicant filed a Request for Review ["Review"]. The Applicant took issue with the search that was conducted. The Applicant provided a number of reasons for believing a record does exist ["representations"]; a summary of which is provided below in the discussion.

On April 4, 2014 Community Services was notified of the Review and was provided with the Applicant's representations. Community Services was asked to conduct another search for the responsive record. If the record was found, the matter would have been considered resolved. If no record was found, Community Services was required to provide representations outlining how it conducted its search.

On April 24, 2014 Community Services contacted the Review Office to indicate that an on-site search would occur the following week by the FOIPOP department, at one of the Community Services district offices. Community Services was granted additional time to respond to the Review Office's April 4, 2014 letter in order to facilitate this on-site visit.

Despite repeated efforts, including additional extensions, Community Services has not responded to the Review Office's April 4, 2014 letter.

With advance notice to Community Services, the Review was forwarded to me for formal Review without the benefit of Community Services' representations.

The only information that I have to rely on came from the Applicant. Community Services has been unresponsive to the Review Office's attempts to gather any information in regards to this Access Request.

Issues

The issues I must decide are the following:

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

Discussion

Issue #1: Am I satisfied that Community Services 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 applicants 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 an 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, an applicant may be satisfied. If not, the burden of proof then shifts to an applicant if s/he continues to claim that the search was inadequate after the public body has demonstrated the reasonableness of its efforts. Applicants 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 only information provided by Community Services came in the decision letter; Community Services has provided no representations.

The following is a summary of the information provided by the Applicant in his/her March 28, 2014 representations:

- The meeting did occur;
- Community Services’ staff were in attendance;
- The purpose of the meeting was to discuss the Applicant;
- Two possible attendees were identified;
- Employees are accountable for their time;
- It is not plausible or professional to not retain or reference written records;
- “To attend any organized meeting and not to keep written records is less than professional” and “is totally unbelievable and cannot be true”;
- Based on firsthand knowledge, one of the named employees “is a very avid and conscientious record keeper and note taker.”

I find, by not providing any information on how it conducted its search, Community Services has failed to meet its burden to prove the search was adequate.

Therefore, there is no shift of burden to the Applicant to show that Community Services has not conducted an adequate search for the responsive records in its custody or under its control.

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

As noted above, section 7(1)(a) of the *Act* imposes a duty on Community Services 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, Community Services has not provided the Applicant with any details of the search that was conducted. In cases where a search turns up negative results, a detailed response, as part of the duty to assist the Applicant, should be provided in the decision letter.

In this case, the details could include reference to Community Services policies that either do not require the business of the organization to be recorded, or an acknowledgment that policies requiring documentation were not followed. The details could also include the retention period for that record type [it is possible the records were properly destroyed given the passage of time] and details of the search that was conducted or confirmation that records never existed with an explanation of why [NS Reports FI-12-75 and FI-14-26].

I find that Community Services did not meet its duty to assist the Applicant at the time it issued its decision or during the Review because it did not openly, accurately and completely explain how the search was conducted or the reason why no minutes were recorded of the meeting.

Conclusion

In the absence of information, I am not convinced that a reasonable search was conducted and that every reasonable effort was made by Community Services to identify and locate records responsive to the Applicant’s Access Request.

Furthermore, Community Services’ non-responsiveness to the Review Office is certainly not consistent with the purposes of the *Act* or its duty to assist. As the Review Officer has said many times in the past:

Public bodies must be sensitive to the need to respond in a manner that is, from the time of receiving the Application for Access to a Record and throughout the process until the conclusion of a Request for Review, consistently open, accurate and complete.

[NS Report FI-10-41/FI-10-85/FI-10-86/FI-10-87]

This non-responsiveness shows a lack of respect for the Applicant’s fundamental right to access information guaranteed by the *Act* and shows a disregard for the Review Office as the independent, impartial oversight body that has the statutory authority to review Community Services’ decisions, acts and failures to act under the governing legislation.

The entire access to information process is dependent on public bodies being timely and comprehensive in their responses to applicants, to the Review Officer and to Review Office staff.

Our mutual goal must always be to serve the public in responding to their right to access information to which they are entitled.

Recommendation

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

1. Conduct a new and complete search. The search is to be conducted by the FOIPOP Administrator personally, as previously committed. The search will include the following:
 - Checking with the two individuals that have been named by the Applicant to see if they have any record, in any format;
 - Handwritten notes, even if they did not become formalized minutes would be considered responsive;
 - More than one person may have taken notes, all versions would be responsive;
 - Policies regarding the recording of deliberations, actions and decisions of government (i.e. duty to document).

At the conclusion of the search, Community Services will provide the Applicant with a new open, accurate and complete decision. 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