

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Donham v. Nova Scotia (Community Services), 2012 NSSC 384

**Date:** 20121105

**Docket:** Syd. 402559

**Registry:** Sydney

**Between:**

Parker Donham

Appellant

v.

The Minister of Community Services for Nova Scotia and  
The Minister of Justice for Nova Scotia

Respondents

**Judge:** The Honourable Justice Cindy A. Bourgeois

**Heard:** November 1, 2012, in Sydney, Nova Scotia

**Date of Decision:** November 5, 2012

**Counsel:** Parker Donham, in person  
Terrence Potter, for the Respondents

**By the Court:**

## **INTRODUCTION**

[1] The matter before the Court arises within the context of an appeal to the Supreme Court pursuant to the provisions of the **Freedom of Information and Protection of Privacy Act**, S.N.S. 1993, c. 5 ("FOIPOP"). The Appellant, Parker Donham, made five separate requests to the Department of Community Services ("the Department"), the primary Respondent herein, seeking various documents and information relating to specified subjects. The Appellant was not satisfied with the material received, and filed an appeal directly to this Court.

[2] The Appellant alleges the Department failed to undertake a proper search as required under the legislation, and further takes issue with the redactions contained in the material that was provided.

[3] Following the filing of the Amended Appeal on July 27, 2012, the parties as part of the require Motion for Directions, undertook appearances with Justice S. J. MacDonald. In the course of providing directions as to the efficient management of the appeal, it was determined that the parties would argue the appeal in two

stages. Firstly, the Court would address whether or not the Department should be ordered to undertake a more thorough review of its records in relation to the five original requests. After that was determined, the appropriateness of the redactions in the originally disclosed information as well as those that may be found in any subsequently ordered search would be considered.

[4] This decision pertains to the first inquiry. Additionally, it was agreed by the parties that a motion brought by the Appellant seeking disclosure of the Department's information retention schedules would be heard at the same time. Through the course of the evidence, and given the acknowledgement made by the Respondents that any documents which may exist in its care and control would not, as yet, have been destroyed in accordance with either schedule, the Appellant indicated this Court was no longer being requested to order disclosure of the actual retention schedules. Accordingly, this decision will address only whether a subsequent search should be ordered.

[5] The Appellant filed an affidavit affirmed on October 8, 2012. He was not cross-examined, nor did he present any further evidence at the hearing.

[6] The Respondents filed an affidavit of Jennifer Boutilier, sworn September 25, 2012. She was cross-examined by the Appellant.

## **THE LAW**

[7] The Court was presented with no court authorities from this Province by either party. My review of the case law suggests that the remedy being sought, a more thorough search being undertaken, is not one which is typically the nature of a FOIPOP appeal in this Court. Although the Court has frequently been called upon to decide whether redactions or refusals to provide identified documents are appropriate, I was not made aware of any situation where the Court has been asked to comment upon the sufficiency of the search itself.

[8] The overall purpose and intent of the FOIPOP legislation has been considered by this Province's Court of Appeal. In **O'Connor v. Nova Scotia**, 2001 NSCA 132, Saunders, J.A. comments as follows:

40 Thus, it seems clear to me that the Legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exception, to disclose all government information so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard.

41 The FOIPOP Act ought to be interpreted liberally so as to give clear expression to the Legislature's intention that such positive obligations would enure to the benefit of good government and its citizens.

...

56 Thus the FOIPOP Act in Nova Scotia is the only statute in Canada declaring as its purpose an obligation both to ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to "necessary exemptions that are limited and specific".

57 I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation; ensure fairness in government decision making; and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives.

58 And so before turning to an analysis of s. 13, its meaning and its application to this case, I think it important to bear in mind these features that make our Act unique.

[9] Several provisions contained in the legislation are also worthy of note. The right to public access is contained in section 5(1), which provides:

5(1) A person has a right of access to any record in the custody or under the control of a public body upon complying with Section 6.

[10] A "public body" is defined in s. 3(1)(j) as including a "government department". The duty of a public body which receives a request for information is found in Section 7(1) which provides:

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; and

(b) either

(i) consider the request and give written notice to the applicant of the head's decision with respect to the request in accordance with subsection (2), or

(ii) transfer the request to another public body in accordance with Section 10.

[11] Regarding the potential transfer of an information request from one public body to another, Section 10 provides:

10(1) Within ten days after a request for access to a record is received by a public body, or such longer period as the Review Officer may determine, the head of the public body may transfer the request and, if necessary, the record to another public body if

(a) the record was produced by or for the other public body;

(b) the record is in the custody or under the control of the other public body.

(2) Where a request is transferred pursuant to subsection (1),

(a) the head of the public body who transferred the request shall notify the applicant of the transfer; and

(b) the head of the public body to which the request is transferred shall respond to the applicant in accordance with this Act not later than thirty days after the request is received by that public body unless this time limit is extended pursuant to Section 9.

## **THE POSITIONS ADVANCED**

[12] The Appellant asserts that the Department failed to meet its obligation under s. 7(1) of the Act, asserting that "every reasonable effort" was not taken to find the requested information, and it was not undertaken in an accurate or complete fashion.

[13] Ms. Boutilier's evidence outlined the efforts she and her predecessor undertook to respond to the Appellant's five requests. She asserts that a Broadcast memorandum was sent as per the usual course to those individuals in the Department who may have the type of information being sought. The memorandums sent contained the actual wording employed by the Appellant in his requests. Ms. Boutilier testified she did not follow-up with any of the individuals to whom the request was sent once they either indicated they did not have information, or sent what they had, to inquire as to the adequacy of their searches.

For example, although the requests asked for copies of email communications, Ms. Boutilier did not follow-up with individuals to confirm they had actually checked their GroupWise email accounts. She assumed those who received the Broadcast memorandum would have attempted to comply with it.

[14] The Court is aware that numerous documents were found, retrieved, copied and provided to the Appellant, with certain redactions, in response to the Broadcast memorandums being circulated.

[15] The Appellant is concerned however, in relation to the request specifically relating to an audit conducted by Deloitte, identified as request COM-12-87.

Although the audit report itself was disclosed, the Department assert it was unable to find any invoices, or other documentation as to the funds paid to Deloitte. The Appellant submits this is highly unusual, and very unlikely that the Department would have no record of such financial documents. He submits it is a strong indicator the search conducted was not undertaken appropriately. Ms. Boutilier herself expressed some degree of surprise that invoices relating to the payment of Deloitte did not appear as a result of the search. She felt the material was likely at



the Department of Finance, but she had not made any inquiries of, nor transferred the Appellant's request to that Department.

[16] In addition to the above, the Appellant argues the Department's initial searches were not reasonably complete, as they failed to produce documents which should have been in its possession, which he had retrieved from other sources.

The entirety of the evidence in this regard is contained in paragraph 6 of his affidavit which provides:

6. At various times through the spring and summer of 2012, Dr. John Gainer, Chair of the Board of Directors of Talbot House, provided me with copies of letters, email, and reports exchanged between the Board and the Department, some of which are not included in the records supplied by the Department in response to Request No. COM-12-66.

## **DETERMINATION**

[17] I will direct that the Respondents transfer the information request identified as COM-12-87 to the Department of Finance. Such a transfer is clearly contemplated in Section 10. Ms. Boutilier testified it was not done, as she took over the file past the 10 day period noted in the legislation. As Section 10(1) clearly states that time period can be extended should a Review officer deem it appropriate, this Court surely has the same ability. This transfer should be

undertaken immediately, with the hopes that the December dates can be preserved to address any redactions which may arise in any documents which may be found in light of this direction.

[18] As to the Appellant's broader request to have this Court order a second, more thorough search of the Department's own records, this is dismissed. The Appellant has made general and sweeping suggestions that the Department undertook a shoddy search. Nothing in Ms. Boutilier's evidence suggests that this is the case. The Appellant asserts he has documents which were not disclosed. These were not, however, either put into evidence, or described in such a fashion that this Court could give the Appellant's argument any weight. Similarly, the documents have not been identified for the Respondents.

[19] The Court would have benefited from understanding the actual number of allegedly undisclosed documents, the nature of the document, when it was created, who created it, and the subject matter. Perhaps, after looking at such, the Court may have had a concern that some or all of the documents could have fallen within the scope of the requests made by the Appellant, and resultantly questioned why a search failed to uncover them. Unfortunately, the Appellant chose not to give the

Court that information, despite being directed to do so as part of the Motion for directions.

[20] I would ask that Counsel for the Respondents prepare an order outlining the contents of this decision.

J.