

Reasonable Search

This Practice Bulletin provides guidance to public bodies in conducting searches for records and outlines the expectations and standards of the Office of the Information and Privacy Commissioner when we receive complaints alleging incomplete responses.

Section 13(1) of the *ATIPPA, 2015* states as follows:

13(1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

In Report A-2009-11, the Commissioner stated:

The duty to assist, then, may be understood as having three separate components.

- First, the public body must assist an applicant in the early stages of making a request.*
- Second, it must conduct a reasonable search for the requested records.*
- Third, it must respond to the applicant in an open, accurate and complete manner.*

As it is difficult to prove a negative, the *ATIPPA, 2015* does not require a public body to prove with absolute certainty that records do not exist. When a complaint is received by the Commissioner, the public body must provide evidence to show that it has made a reasonable effort to identify and locate records responsive to the request. The public body's evidence should include a description of the business areas and record types searched (for example emails, paper files, databases), identify the individuals who conducted the search (by position type), and indicate the time taken to conduct the search. If there is an explanation for why a requested record may not exist, it should be provided.

Where employees other than the Coordinator have been asked to search for or gather records, Coordinators should ensure that these people are aware that all potentially responsive records (including handwritten notes, printed and electronic copies of emails, meeting notes, etc.) must be turned over to the Coordinator for review and redaction. The Coordinator is in the best position to determine what records are responsive; this decision should not be left to individuals who are tasked with conducting searches.

If employees have been asked to complete a search for records, keep a copy of the instructions sent to employees regarding the search. Establish a written policy or practice as to how a search should be carried out and refer employees to that document, or send it along with the search request.



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Where there is a request for personal information (such that the name of the requestor cannot be kept confidential) and there is a history of conflict or strained relations between the person making the request and an employee who is searching for records, we recommend that the Coordinator be present for this search, or preferably personally conduct the search.

Employees should be made aware that it is an offence to mislead or to attempt to mislead, or obstruct someone who is performing duties under sections 115(2)(b) and (c) of the *ATIPPA, 2015*. This includes a person acting as Coordinator or under the direction of the Coordinator, and the head of a public body.

Complainants must establish the existence of a reasonable suspicion that a public body is withholding a record, or has not undertaken an adequate search for a record. Sometimes this takes the form of having possession of or having previously seen a document that was not included with other responsive records, or media reports regarding the record. The Complainant is expected to provide something more than a mere assertion that a document should exist.

Searches must be conducted by knowledgeable staff in locations where the records in question might reasonably be located. OIPC Review will ask:

- steps that were taken to identify and locate records;
- where (paper files, databases, emails, off-site storage locations) you searched;
- types of searches conducted (i.e. keyword search of email or database, manual search of paper files, etc.);
- when the search took place;
- who conducted searches; and
- why the public body believes no records exist.

In its document “IPC Guide to Exemptions for FOIP and LA FOIP”, the Saskatchewan Commissioner’s Office offers detailed guidance on the subject of reasonable search:

The focus of an IPC search review is whether or not the public body conducted a reasonable search.

*A **reasonable search** is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the request.*

The threshold that must be met is one of “reasonableness”. In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable. FOIP and LA FOIP do not require the public body to prove with absolute certainty that records do not exist.

When a public body receives a notification letter from the IPC requesting details of its search efforts, the following can be included in the public body’s submission (non-exhaustive).

Outline the search strategy conducted:

- For personal information requests – explain how the individual is involved with the public body (i.e. client, employee, former employee etc.) and why certain departments/divisions/branches were included in the search.
- For general requests – tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why certain areas were searched and not others.
- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper & electronic) in the departments/divisions/branches included in the search:
 - Describe how records are classified within the records management system. For example, are the records classified by:
 - alphabet
 - year
 - function
 - subject

Consider providing a copy of your organizations record schedule and screen shots of the electronic directory (folders & subfolders).

If the record has been destroyed, provide copies of record schedules and/or destruction certificates.

- Explain how you have considered records stored off-site.
- Explain how records that may be in the possession of a third party but in the public body's control have been searched such as a contractor or information service provider. For more on this, see the OIPC resource, *A Contractor's Guide to Access and Privacy in Saskatchewan* available on our website.
- Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Which folders within the records management system were searched and explain how these folders link back to the subject matter requested?
 - For electronic folders – indicate what key terms were used to search if applicable.
- On what dates did each employee search?
- How long did the search take for each employee?
- What were the results of each employee's search?

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- Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided. For more on this, see the OIPC resource, *Using Affidavits in a Review with the IPC* available on our website.

The above list is meant to be a guide. Providing the above details is not a guarantee that the IPC will find the search conducted was reasonable. Each case will require different search strategies and details depending on the records requested.

The above noted practices eliminate any apprehension of bias and bolster the public body's ability to show that a reasonable search was conducted. However, it is possible to have conducted a reasonable search without locating the record that was the basis for the allegation in the first place. Reasonableness is the standard and the efforts undertaken must be documented so that in the case of a complaint to this Office, a public body can show it has fulfilled its obligations under the *ATIPPA, 2015*.

Records management issues discovered in the process of conducting a search for records should be addressed as soon as possible as inadequate records management practices will not be accepted as a reasonable explanation for failure to locate responsive records.

