



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER

NEWFOUNDLAND AND LABRADOR

Report A-2014-009

August 11, 2014

Newfoundland and Labrador English School District (formerly Nova Central School District)

Summary:

The Applicant made an access request to Nova Central School District (“NCSD”) for records containing reference to himself. NCSD provided him with responsive records, and withheld some information claiming the exceptions to access in sections 20 (policy advice and recommendations), 21 (legal advice) and 30 (personal information). The Applicant requested that this Office review the severing of some records, the withholding of others and of other decisions made by NCSD. During the course of informal resolution NCSD disclosed some further information to the Applicant. The Commissioner in his Report determined that the search conducted by NCSD was reasonable and complete; that NCSD had taken all reasonable steps to determine authorship of a handwritten document at issue; that certain documents were properly withheld from the Applicant in accordance with the litigation privilege exception; and that there was no evidence before him to support a disclosure to the Attorney-General.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, sections 21 and 56(4).

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act* (“the *ATIPPA*” or “the *Act*”) the Applicant on November 30, 2011 submitted an access to information request to the Nova Central School District (“NCSD”) seeking disclosure of records as follows:

All documents, e-mails and correspondence making reference to [the Applicant] that are in the possession of the NCSD...the Nova Central School District.

- [2] On February 15, 2012 NCSD released to the Applicant approximately 1,200 pages of records. Access to some records, or to some information in other records, was refused in accordance with three *ATIPPA* exceptions to disclosure: section 20 (policy advice and recommendations), section 21 (legal advice) and section 30 (personal information).

- [3] In a Request for Review received by this Office on February 20, 2012 the Applicant asked that this Office review the severing decisions of NCSD.

- [4] During the informal stage of the review, NCSD agreed to release some additional information. Unfortunately it was not possible to resolve the Request for Review informally, and so on September 24, 2013 the parties were notified that it had been referred for formal investigation pursuant to subsection 46(2) of the *ATIPPA*. Submissions were received from the NCSD on October 7, 2013, and from the Applicant on October 15, 2013.

- [5] Subsequent to the receipt of this Request for Review, the Nova Central School District was amalgamated into the province-wide Newfoundland and Labrador English School District. However, for convenience I will continue to refer to the public body in this Report as NCSD, except in the formal recommendation paragraphs at the very end.

II SUBMISSION OF NOVA CENTRAL SCHOOL DISTRICT

- [6] NCSD takes the position that the information search in response to the Applicant’s access request was thorough and comprehensive, and that through consultations with this Office additional

records were released. NCSD believes that the severing decisions it made were appropriate and in accordance with the *Act*, and that it answered additional questions regarding the documentation provided, to the best of its ability.

III SUBMISSION OF THE APPLICANT

- [7] The Applicant takes the position that it is unreasonable to believe that NCSD is not aware of the authorship of one particular document; that certain documents were improperly withheld from him prior to a pending labour arbitration hearing; that the content of certain documents about him is defamatory; and that the Commissioner ought to refer certain information to the Attorney-General pursuant to subsection 56(4) of the *ATIPPA*.

IV DISCUSSION

- [8] During the course of the informal resolution process, NCSD agreed to provide additional information from records that were withheld pursuant to section 21 of the *Act* on the basis that they contained legal advice. Duplicate copies of those records, with the severing corrected, were provided to the Applicant by NCSD. By the time this Request for Review was referred to the formal investigation process, there was no longer any outstanding issue about the severing of the 1200 pages of records that were provided to the Applicant. The Applicant agreed that the exceptions claimed by NCSD for records that he had received had been properly applied.
- [9] The Applicant took the position that there were additional documents being improperly withheld from him by NCSD, pending hearings in an ongoing labour arbitration case in which the Applicant was involved. NCSD's view was that it was legally entitled to do so. In my view, NCSD is correct. Section 21 of the Act permits a public body to withhold information that is subject to solicitor-client privilege. That privilege consists not only of documents containing legal advice, but also of documents that have been created or compiled for the purpose of litigation (which includes labour arbitration proceedings). The arbitration was still ongoing, and the NCSD was entitled to withhold such documents, at least until the litigation is over.

[10] There was one particular record provided to the Applicant that consisted of a page of handwritten notes, primarily about the Applicant, with no indication of authorship. During the course of the informal resolution process, NCSD made inquiries of a number of current staff, and concluded that the handwriting was not the handwriting of any of them. There was some speculation that it might be the handwriting of a particular former staff person, now retired. During the informal resolution process, the Applicant also asked for and received information about where this particular record had been found, and who had access to it. However, he maintains that NCSD ought to have done more to determine who the author was.

[11] I do not agree. NCSD was not in a position to do more to determine authorship of the record. NCSD has no authority to require that retired former employees respond to questions such as this. I therefore find that NCSD took all reasonable steps to determine authorship of the record.

[12] The Applicant takes the position that statements about him contained in certain records in the custody of NCSD are defamatory, and that those statements were improperly procured by NCSD. First, I am not in a position to determine whether or not allegations that statements are defamatory are correct. That determination does not fall within my jurisdiction, but would have to be made by a court. Second, the allegation by the Applicant, that senior NCSD staff “directed” other staff to write those statements, is unsupported by any evidence before me. Furthermore, the mandate of this Office is to provide an independent review of decisions made by public bodies in response to access requests. It does not extend to adjudicating, or even commenting on, other legal differences between applicants and public bodies that do not directly relate to the statutory review process.

[13] I mention this issue only because the Applicant has further taken the position that I should invoke the provisions of subsection 56(4) of the *ATIPPA*, which provides that:

(4) The commissioner may disclose to the Attorney-General information relating to the commission of an offence under this or another Act of the province or of Canada, where the commissioner has reason to believe that an offence has been committed.

[14] Subsection 56(4) is an extraordinary remedy, and if I were to exercise the discretion to disclose information to the Attorney-General under that provision it would only be in the clearest, most conclusive and most exceptional of cases, in which evidence that an offence had been committed

was placed before me. Our Office has a core function under the *ATIPPA*, which is to review the access to information decisions and privacy practices of public bodies, in response to requests and complaints, in order to help ensure compliance with the *Act*. We conduct access and privacy investigations to support that core function. We have no mandate to go beyond our core function to conduct investigations into alleged criminal misconduct.

[15] Even in the rare case where I were to make such a disclosure to the Attorney-General pursuant to subsection 56(4), this Office would likely neither confirm or deny that fact, and it would likely be for the Attorney-General to determine who should be informed. In the present case, however, I have no hesitation in saying that there is no evidence before me that could reasonably support a disclosure to the Attorney-General, and that I have no intention of doing so.

[16] During the informal resolution process the Applicant reached the conclusion that additional records might exist that had not been provided to him, and made a separate access request to NCSD for those records. That request was dealt with in a separate Request for Review, and will be the subject of a separate Report.

V CONCLUSION

[17] I have concluded that NCSD has taken all reasonable steps at its disposal to determine authorship of the handwritten document at issue; that certain documents were properly withheld from the Applicant in accordance with the litigation privilege exception; and that there is no evidence before me to support a disclosure to the Attorney-General.

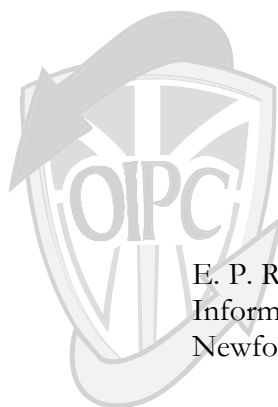
VI RECOMMENDATIONS

[18] In view of the conclusions I have reached above, there is no need for me to make any recommendations to the Newfoundland and Labrador English School District (successor to the Nova Central School District) under section 49(1)(a) of the *ATIPPA*.

[19] Although I have made no recommendations, under the authority of section 50 of the *ATIPPA*, I direct the head of the Newfoundland and Labrador English School District to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the Newfoundland and Labrador English School District with respect to this Report.

[20] In addition, in accordance with subsection 49(2) of the *ATIPPA*, I hereby notify the Applicant of the right to appeal the decision of the Newfoundland and Labrador English School District to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60. The Applicant must file any appeal within 30 days after receiving the decision of the Newfoundland and Labrador English School District referenced above.

[21] Dated at St. John's, in the Province of Newfoundland and Labrador, this 11th day of August 2014.



E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador