



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2013-005

March 12, 2013

Eastern School District

Summary:

The Applicant applied to the Eastern School District (the “District”) under the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) for access to the minutes of meetings of the Eastern School Board of Trustees held *in camera*. The District denied access to the requested records claiming they were exempted from disclosure by sections 6 and 19 of the *ATIPPA* and section 62(2) of the *Schools Act, 1997*, which the District stated took precedence over the *ATIPPA* according to the *Access to Information Regulations* under the *ATIPPA*. The Commissioner concluded that the District had properly denied access in accordance section 62(2) of the *Schools Act, 1997* as the records the Applicant was seeking were minutes of closed meetings. The Commissioner recommended that the District re-evaluate its handling of access requests to ensure it is fully compliant with the *ATIPPA* as there were sections of the *ATIPPA* that the District had not fully complied with when responding to the Applicant’s access request.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, sections 6, 19; *Access to Information Regulations* under the *Access to Information and Protection of Privacy Act*, O.C. 2007-014, as amended, section 5(s); *Schools Act, 1997*, S.N.L. 1997, c. S-12.2, as amended, section 62(2).

Authorities Cited:

Concise Oxford English Dictionary 10th Edition, Revised, New York: Oxford University Press (2002).

I BACKGROUND

- [1] On December 8, 2011 the Applicant made a request, via email, to the Eastern School District (the “District”) seeking disclosure of records as follows (the “First Request”):

I am interested in learning more about the work of the committees of the Eastern School Board of Trustees. Last night at the Eastern School Board of Trustees Meeting, the reports of from [sic] committees such as committee minutes, etc. were not shown to the public when discussion was commencing. To deepen my understanding of the workings of the Eastern School Board of Trustees, I was wondering if I could obtain the minutes from the following committees:

- *Executive*
- *Finance & Properties*
- *Programs*

- [2] Although received informally, via email, the District treated the First Request as an access to information request under the *Access to Information and Protection of Privacy Act* (“ATIPPA” or the “Act”).

- [3] The District responded to the First Request on January 24, 2012 indicating that they would not be releasing the requested information. In denying the Applicant access to the requested records, the District relied on sections 6(1) and 19(1) of the *ATIPPA* and section 62(2) of the *Schools Act, 1997* (the “*Schools Act*”). The District referenced the fact that section 62(2) of the *Schools Act* takes precedence over the *ATIPPA* according to the *Access to Information Regulations* (the “*Regulations*”) under the *ATIPPA*.

- [4] On or about February 3, 2012 the Applicant made a second request to the District seeking the disclosure of records as follows (the “Second Request”):

...Access to as much of the Eastern School Board of Trustees’ minutes of meetings held in-camera since January 2011, as possible.

- [5] It is important to note that the exact wording and the exact date of the Second Request is unknown as neither the District nor the Applicant kept a copy of the access request form. The Applicant advised that the Second Request was submitted to the District on an access request form, however, since there was confusion regarding whether the First Request was treated as a formal

access request, the Applicant ended up advising the District that the Second Request was redundant. The Second Request was similar to the First Request, however, the Applicant was requesting different records.

[6] The District responded to the Second Request on February 20, 2012 via email as follows:

With respect to your request, it falls under the same legislations as your previous request. We are not required to release these minutes...

[7] The response provided by the District was not satisfactory to the Applicant and on March 12, 2012 this Office received a Request for Review from the Applicant in relation to the Second Request.

[8] In keeping with our usual practice upon receipt of a Request for Review, an Analyst from this Office forwarded correspondence to the District informing them that the matter was under review and requesting information concerning the access requests. The District's response to the First and Second Requests for access were both deemed to be relevant to this review, and therefore information relating to the District's handling of both requests was sought by this Office.

[9] Attempts to resolve this Request for Review by informal resolution were not successful, and by letters dated July 30, 2012 both the Applicant and the District were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*.

II EASTERN SCHOOL DISTRICT'S SUBMISSION

[10] The District provided its submission in correspondence dated August 14, 2012. The District's position is that the requested records were properly withheld under section 62(2) of the *Schools Act* which, according to the *Regulations* takes precedence over the *ATIPPA*. The District advised that discussions had taken place with the Applicant and that the logic behind section 62(2) of the *Schools Act* was explained to the Applicant. The District further advised that a meeting was arranged between the Applicant, the CEO and the Board Chair of the District to discuss the refusal of the requested records as well as how the Board operates and the approval process for Board minutes.

The District stated that the Applicant was provided with contact information of the person at the District who handles the access requests and that the Applicant was in constant communication with this person. As well, the District stated that the Applicant was verbally advised that he could appeal the refusal to the Office of the Information and Privacy Commissioner.

III APPLICANT'S SUBMISSION

- [11] No additional written submissions were received from the Applicant. Therefore the investigation and this Report have been completed based on correspondence previously received from the Applicant. The Applicant had previously outlined his position as follows:

I believe that the response from the Eastern School District is inadequate, as meetings from committees of the Eastern School Board of Trustees consist of decisions made by the committee itself and only recommendations for action are brought forward to the full Board of Trustees for approval. These committees discuss information that is vital to understanding the decision-making of the Eastern School District that is in the public interest and should be provided to the public, on request, in order for independent review to occur by citizens. It is necessary that the public is able to be educated about the work of the elected trustees that occurs during in-camera meetings to the fullest extent possible.

- [12] The Applicant's sentiment, although more relevant to the First Request in referencing the committees of the Board of Trustees is also applicable to the Second Request. The Applicant is seeking accountability and transparency from the District with regard to matters discussed during closed meetings.

IV DISCUSSION

- [13] The issue to be decided in this Review is whether the records to which access has been denied are excepted from disclosure. Section 73 of the *ATIPPA* allows the Lieutenant-Governor in Council the power to make certain regulations. Specifically section 73(q) allows for regulations designating a provision of an Act or regulation to prevail over the *ATIPPA* or a regulation made under the *ATIPPA*.

[14] This provision is relevant since section 5(s) of the *Regulations* allows section 62(2) of the *Schools Act* to prevail over the *ATIPPA*. Section 5(s) of the *Regulations* provides as follows:

5. For the purpose of subsection 6(2) of the Act, the following provisions shall prevail notwithstanding another provision of the Act or a regulation made under the Act:

(s) section 12 and subsection 62(2) of the Schools Act, 1997

[15] Section 62(2) of the *Schools Act* deals with minutes of closed meetings and it states as follows:

62(2) Notwithstanding subsection (1), the minutes of a closed meeting shall not be made available to the public.

[16] The District also referenced section 6(1) of the *ATIPPA* in their response to the Applicant for denying access to the requested records. However, I believe it was their intention to reference section 6(2) of the *ATIPPA* as well and therefore I have referenced both sections below:

6. (1) Where there is a conflict between this Act or a regulation made under this Act and another Act or regulation enacted before or after the coming into force of this Act, this Act or the regulation made under it shall prevail.

(2) Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in the regulations made under section 73, that provision shall prevail over this Act or a regulation made under it.

[17] It is clear from the wording of section 5(s) of the *Regulations* that section 62(2) of the *Schools Act* takes precedence over the *ATIPPA*. If the records the Applicant is seeking are minutes of a closed meeting then the District has properly withheld those records under the *ATIPPA*.

[18] The Second Request was for minutes of meetings of the Eastern School Board of Trustees held *in camera* since January 2011. The *Concise Oxford English Dictionary* 10th Edition, Revised (New York: Oxford University Press, 2002) defines *in camera* as “in private, in particular taking place in the private chambers of a judge, with the press and public excluded.” Based on this definition, it is clear that the Applicant was seeking the minutes of private or closed sessions of the District’s Board of Trustees in the Second Request.

[19] The District had provided this Office with a copy of the Eastern School District By-Laws Governing Operations (the “By-Laws”) as well as the agendas for the Eastern School Board Meetings. The minutes of the Eastern School Board Meetings were available on the District’s website. The minutes that are available on the District’s website are the minutes for the meetings which are open to the public, however, the agendas provided as well as the minutes indicate when there was an adjournment to a closed meeting.

[20] The following sections of the By-Laws are relevant in assessing this Request for Review.

Section 3 – Closed Session of the Board

3.1 The Board may, by resolution passed in the public session, refer any matter to a committee for consideration and/or disposition in private (closed) session provided that such resolution stipulates the reason for such referral.

3.2 The following matters shall be considered by the Board in closed meetings:

- (a) The liability of the Board which in the opinion of the Chairperson of the Board and the CEO/Director may involve legal action.*
- (b) Personnel matters such as employee performance, medical reports or sensitive staff matters.*
- (c) Reports by the CEO/Director or district office staff, which in the opinion of the Chairperson of the Board and the CEO/Director, might be prejudicial to the operation of the schools.*
- (d) Lease or purchase of property.*
- (e) Negotiations of salary and wage schedules of employees.*
- (f) Suspension, expulsion, exclusion of pupils and re-admission of same (confidential record of which shall be kept in the Office of the CEO/Director).*
- (g) Materials and information concerning criminal or civil actions which are not part of a public court record;*
- (h) Strategy sessions pertaining to collective bargaining, pending or potential litigation, when an open meeting would affect the bargaining or litigation position of the Board;*
- (i) Discussions which would disclose the identity of a bona fide and lawful donor to the district, when the donor has requested anonymity;*
- (j) Discussions of the content of documents protected by the Access to Information and Protection of Privacy Act;*

- (k) *Training and orientation sessions conducted to assist members of the board in the fulfillment of their responsibilities;*
- (l) *Discussion of potential or actual emergencies or matters of security related to the preservation of the public peace, health and safety;*
- (m) *Preliminary discussions of tentative information relating to school attendance zones, personnel needs, or fiscal requirement.*
- (n) *Other matters as determined by the Board.*

3.3 Minutes of closed sessions will be limited to decisions only and approved in closed sessions.

Section 6 – Public Participation

6.01 Consistent with The Schools Act, 1997, Section 61, all meetings of the Board will be open to the public unless it is declared by vote of the trustees to be a closed meeting from which members of the public shall be excluded.

Section 9 – Communications

9.02 Section 8.01 notwithstanding, copies of the minutes of closed meetings will be provided at meeting only and shall not be available to the general public. Minutes of Agenda items deemed by a committee to be subject to discussions in a closed session of the Board will similarly be provided at a closed session of the Board only and shall not be available to the general public.

[21] Based on the above sections of the By-Laws, I am satisfied that minutes of closed meetings are not available to the public. Furthermore, based on the wording of section 5(s) of the *Regulations* and section 6(2) of the *ATIPPA* I am satisfied that section 62(2) of the *Schools Act* takes precedence, thereby preventing the District from releasing the requested records. I must note that section 62(2) of the *Schools Act* is a mandatory provision, therefore the District has no discretion to consider releasing minutes of closed meetings.

[22] In the District's response to the Applicant it mentioned section 19 of the *ATIPPA* as a reason for withholding the requested records. I do not need to comment on this section of the *ATIPPA* since it is overridden by section 62(2) of the *Schools Act*. Had section 19 applied in this situation, the District would have at least had the discretion to release minutes of closed meetings should it have wished to do so.

V CONCLUSION

[23] I have concluded that the District properly applied section 5(s) of the *Regulations*, resulting in section 62(2) of the *Schools Act* taking precedence over the *ATIPPA*. Since the requested records were minutes of closed meetings the District was obligated to withhold such records from the Applicant.

[24] While it is my conclusion that the District properly applied the *ATIPPA* and that there was an obligation on the District to withhold the requested records, I must comment on the District's handling of the two access requests from the Applicant.

[25] Upon advising the Applicant that they would not be releasing the requested records in relation to the First Request, the District did offer to arrange a meeting between the Applicant and the CEO and/or Chair of the Board should the Applicant wish to discuss the matter further. This meeting did take place and I wish to acknowledge with approval the District's efforts to assist the Applicant.

[26] While there was considerable email correspondence between the District and the Applicant regarding the two access requests and I do believe that the District was attempting to respond to the Applicant's requests and questions, I would still advise the District to review its handling of these requests. An informal request, whether by e-mail or other means, can be handled expeditiously and informally when it is clear that the information can be released in full. When an access request is received informally via e-mail or otherwise, and it is apparent that some of the information may have to be withheld under the *ATIPPA*, it is important for the public body to request that the Applicant submit an access request form and follow the process prescribed by the *ATIPPA*. This will help streamline the process, especially where there are multiple access requests, and it also ensures that an Applicant is aware of his or her rights under the *ATIPPA*, while holding the public body accountable for a timely response.

[27] Due to confusion on the part of the Applicant regarding whether the First Request was treated as a formal request, he ultimately advised the District that the Second Request was redundant. Based on this, the District returned the Second Request to the Applicant. The Second Request did request similar information as the First Request, however, it was not redundant and should have been

considered as a separate access request. The District did respond to the Second Request after the Applicant asked if the Second Request was rejected for the same reasons as the First Request. Confusion regarding the access requests resulted in the District not keeping a hard copy of the Second Request. Had the District been complying with the *ATIPPA* procedurally, this confusion could have been avoided.

[28] I also must point out that the District responded to the First Request outside of the 30 days as prescribed in section 11 of the *ATIPPA*. The District advised that it was closed over the Christmas break from December 22, 2011 to January 3, 2012 and while I understand that offices do close for Christmas, I believe that there still was sufficient time to respond to the First Request within the legislated timeframe.

[29] The District also advised the Applicant verbally that he could appeal its decision to the Office of the Information and Privacy Commissioner. Section 12 of the *ATIPPA* requires that the public body provide a written response to the Applicant which includes advising the Applicant that they may appeal a refusal to the Supreme Court of Newfoundland and Labrador, Trial Division or ask for a review of a refusal by the Commissioner as well as advise the Applicant of the applicable time limits and how to pursue an appeal or review. The District did not comply with section 12(1)(c)(iii) of the *ATIPPA*.

VI RECOMMENDATIONS

[30] Under the authority of section 49(1) of the *ATIPA*, I recommend that the Eastern School District re-evaluate its handling of access requests in order to ensure it is fully compliant with the *ATIPPA*.

[31] Under the authority of section 50 of the *ATIPPA* I direct the head of the Eastern School District to write to this Office and to the Applicant within 15 days of receiving this Report to indicate the final decision of the Eastern School District with respect to this Report.

[32] Please note that within 30 days of receiving the decision of the Eastern School District under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*.

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 12th day of March, 2013.

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

