



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2014-010

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, including hard cover notebooks that he argued should exist, and documents that might be used in an ongoing arbitration hearing. NCSD refused access to the notes on the grounds that they either did not exist or had already been provided in response to an earlier access request, and refused access to the other documents claiming the exception in section 21 (legal advice.) The Commissioner determined that NCSD had conducted a reasonable search for the notebooks and it was reasonable to conclude that they did not exist, and that NCSD had appropriately applied the section 21 exception to the remaining records.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, sections 9 and 21.

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (“the *ATIPPA*” or “the *Act*”) the Applicant on April 3, 2012 submitted an access to information request to the Nova Central School District (“NCSD” or “the Board”) seeking disclosure of records as follows:

- [1] *Notes of [NCSD Employee #1] pursuant to our meeting of Labour Day 2004 recorded in hardcover booklet and all other notes referencing [the Applicant].*
- [2] *Notes of [NCSD employee #2] pursuant to our meetings of August and October 2009 and all other notes referencing [the Applicant].*
- [3] *Notes of [NCSD employee #3] pursuant to all meetings referencing and all other references to [the Applicant].*
- [4] *Notes of [NCSD employee #4] pursuant to all meetings referencing and all other references to [the Applicant].*
- [5] *All documents which have been and may be used by NCSD in arbitration NLTA v. NCSD [Applicant].*

[2] On April 19, 2012 NCSD responded to the access request, refusing access to all of the requested records. For the first four of the Applicant’s requests, which were all for notes of current or former NCSD staff, the Board stated that the records had either already been provided to the Applicant or did not exist. For the fifth group of records, the Board’s response read as follows:

The records which have been used in arbitration NLTA v. NCSD [Applicant] have been provided to you. The records which may be used in future arbitration hearings have either not been identified or are subject to solicitor-client privilege and/or litigation privilege under section 21.

[3] In a Request for Review received by this Office on May 2, 2012 the Applicant asked that this Office review the decisions of the NCSD, asserting that the requested notes of NCSD staff did exist, and that the records relating to the arbitration were being improperly withheld.

[4] A little background is necessary. Around four months previously the Applicant had made an initial access request to NCSD, for documents, e-mails and correspondence relating to himself. Having received a substantial quantity of records, the Applicant had reviewed them and concluded that there ought to be additional records which had not being provided to him. His rationale was

first that, to his knowledge, certain NCS D staff had had a practice of taking meeting notes and so on in hard cover notebooks, and that copies of those notes ought to be available. Second, the Applicant was involved in an ongoing labour arbitration with NCS D and reasoned that records relating to the arbitration ought to be available and responsive, and therefore ought to be provided to him. He therefore submitted a second access to information request for such materials, which is the subject of the present Report.

[5] An investigator from this Office had a series of discussions about the access request with the Applicant and with NCS D. It was not possible to resolve the matter informally, and 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 NCS D on October 7, 2013, and from the Applicant on October 15, 2013.

[6] 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 NCS D, except in the formal recommendation paragraphs at the very end.

II SUBMISSION OF NOVA CENTRAL SCHOOL DISTRICT

[7] NCS D notes that a comprehensive search was conducted in the case of both the Applicant's access requests, and that responsive documents were provided to him. It is NCS D's position that, with the exception of records properly withheld under section 21 of the *Act*, all responsive records have been provided. In particular, in response to this second request a further search was conducted, and NCS D is satisfied that the notebooks referred to do not exist.

III APPLICANT'S SUBMISSION

[8] The Applicant takes the position that he has personally observed the referenced individuals using such notebooks in past years, and it is unreasonable to believe that they do not still exist. It is therefore the Applicant's view that NCS D either is improperly withholding them, or has improperly

destroyed them. The Applicant also argues that other records are being improperly withheld by NCSD on the basis of section 21 of the *Act*, and that those records should be disclosed.

IV DISCUSSION

[9] There are two issues to be resolved in this Report. The first is whether NCSD is reasonable in its conclusion that the requested notebooks do not exist. The second is whether NCSD has properly applied section 21 of the *Act* to some responsive records.

[10] Section 9 of the *ATIPPA* requires the public body to make every reasonable effort to assist an applicant in making a request, and must respond without delay to an applicant in an open, accurate and complete manner. In numerous Reports from this Office, that duty has been held to include the responsibility to conduct a reasonable search for the requested records, and a reasonable search has been described as one conducted by knowledgeable staff, in locations where the records in question might reasonably be located.

[11] Upon receiving the present access request, NCSD conducted further searches in relation to three of the sets of notes requested – those numbered 1, 3 and 4 in the request. The named employee referred to in each of those cases had retired from employment with NCSD, several years before the access request was filed.

[12] NCSD explained that during the time period under consideration, there was no specific policy covering the taking, keeping or destroying of notes and similar records by individual staff members of NCSD:

Hardcover notebooks are used by many staff members in our district and regional offices, to record and manage daily tasks and activities. Individuals manage those notebooks in different ways. For example, some people purge and destroy parts of the notebooks as deemed appropriate. Some people destroy them at the end of the year. Others file them according to month/year and maintain them for a period of time.

When people leave their position with our district, the normal practice is to review such notes and shred/delete or pass on as deemed relevant to the role and responsibilities. In most cases, the hard copy notebooks are reviewed, the relevant information is recorded in appropriate files and the notebooks are shredded.

[13] NCSD advised that as a result of this most recent request, a further search was conducted, in both “Central Files” (the Director’s Office) and in the Human Resources Division. Staff familiar with filing and storage practices checked offices and storerooms, and reported that as far as could be determined there were no hard cover notebooks from Employee #1, #3 or #4 in the possession of NCSD. It noted that these three employees had all retired from employment with NCSD several years previously.

[14] Employee #2 was still employed by NCSD. Notes that had been made by this employee that were responsive to this request had already been provided to the Applicant in response to the initial request, with the exception of information withheld under section 21, that had been prepared for the arbitration hearing. NCSD advised that the only responsive notes compiled by this employee since the earlier request were notes taken during the ongoing arbitration hearing, and that NCSD was similarly withholding those notes pursuant to section 21.

[15] In my view, NCSD has conducted a reasonable search for the requested records, and its conclusion, that notebooks or notes compiled by the three retired employees do not exist, was a reasonable one.

[16] With regard to the request for documents that have been or may be used in the ongoing arbitration, the Applicant took the position that there were additional documents being improperly withheld from him. In my view, NCSD was entitled to do so. The solicitor-client privilege exception in section 21 of the *Act* permits a public body to withhold not only documents containing legal advice, but also 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 continue to withhold such documents, at least until the litigation is over. That includes the notes taken at the hearing itself by Employee #2.

V CONCLUSION

[17] I have concluded that NCSD has taken all reasonable steps to locate records responsive to this request and has provided such records to the Applicant, save for some information appropriately withheld pursuant to section 21 of the *Act*.

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