



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

A-2020-026

November 16, 2020

### Newfoundland and Labrador English School District

**Summary:**

The Newfoundland and Labrador English School District (“NLESD”) received an access request under the *Access to Information and Protection of Privacy Act, 2015*, for the results of a particular teacher’s American Sign Language (“ASL”) proficiency test. NLESD refused to provide the requested record on the basis of sections 32 and 40(1). The Complainant argued that they required the document in order to assess the quality of education being provided by the teacher. The Commissioner found that the NLESD was correct in its application of sections 32 and 40. The Commissioner also considered whether sections 9 or 40(5) would require disclosure despite sections 32 and 40(1), but found that neither could be used to override the exceptions. The Commissioner recommended the record continue to be withheld.

**Statutes Cited:**

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, sections 9, 32, 40(1), 40(4)(f) and 40(5).

**Other Resources:**

NL OIPC Guidance Documents: [Guidelines for Public Interest Override](#)  
[Newfoundland and Labrador Teacher’s Association and Government of Newfoundland and Labrador](#) 2016 - 2020 Collective Agreement, article 14.04

## I BACKGROUND

- [1] The Complainant made an access request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or “*the Act*”) to the Newfoundland and Labrador English School District (“NLESD”) for the results of an American Sign Language (“ASL”) Proficiency Interview for a particular teacher who had been hired by the NLESD as a dedicated Deaf and Hard of Hearing (“DHH”) teacher.
- [2] NLESD refused to provide the Complainant with the requested information citing sections 32, 40(1), and 40(4)(f) of the *Act*.
- [3] The Complainant filed a complaint with our Office. As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

## II PUBLIC BODY’S POSITION

- [4] NLESD’s position is that the results of the ASL proficiency evaluation fall under the exceptions in section 32 and section 40(1), specifically 40(4)(f). They also assert that neither section 9 nor section 40(5) support overriding these exceptions.

## III COMPLAINANT’S POSITION

- [5] The Complainant argues that the record is necessary to evaluate the hiring practices of the NLESD and in turn the quality of education and accommodations provided by the District for DHH students.

## IV ISSUES

- [6] The issues to be determined in this report are:

1. Does section 32 apply?

2. Does section 9 apply to support the release of the records?
3. Does 40(1) in conjunction with 40(4)(f) mean that the records should be withheld, or does the application of s. 40(5) support the release of the records?

## V DECISION

[7] There is an inherent tension in *ATIPPA, 2015* between access rights and privacy rights. In this scenario we must look at the information requested by the complainant and the privacy rights to which the teacher is entitled. When these two competing interests have been considered and balanced against each other, the remainder (if any) is what is available to the complainant in response to their access request. In our analysis, while there is a strong basis for disclosure of information about the delivery of the DHH program overall, granular information such as the text scores of an individual teacher, which is what the access request is focused on, do not trigger a public interest or tip the balance towards disclosure of personal information, and therefore must be withheld. Indeed, the release of this granular information, without full information or other context, could lead to erroneous conclusions about the program overall.

[8] Section 32 and section 40(4)(f) provide protection for very similar information. Section 32 of *ATIPPA, 2015* allows a public body to withhold records relating to confidential evaluations, stating at section 32(a) that:

*32. The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material, provided explicitly or implicitly in confidence, and compiled for the purpose of*

*(a) determining suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body.*

[9] Section 40(4) lists several categories of information which are presumed to be an unreasonable invasion of privacy. Section 40(4)(f) in particular states:

*(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where*  
*(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;*

[10] It is clear that both sections would apply in this matter. The test results are clearly an evaluation as set out in section 40(4(f)). For section 32, the 3 part test is met given the following:

1. The information falls within the definition of personal information as set out by the Act. It is recorded information about an identifiable individual which would include not only their name but information relating to their educational status/history and opinions of a person about the individual.
2. The information was supplied explicitly in confidence, in keeping with the requirements for personnel files, and teacher evaluations in particular, under article 14.04 of the 2016-2020 Teachers Provincial Collective Agreement.
3. The record was created for the purpose of determining suitability, eligibility or qualifications for employment with a public body.

[11] On the basis of this assessment, the NLESD is therefore entitled to withhold the record. However, any application of either section 32 or section 40 is subject to further considerations under section 9 and section 40(5), respectively.

[12] Section 9 of the act allows for the public interest to override a number of exceptions to disclosure, section 32 included. Our guidance document, *"Guidelines for Public Interest Override"*, discusses the application of section 9 and sets out a number of factors to consider, both for and against release. Some of the factors to be considered include the purpose of the exception, the general public interest in transparency, the public interest in the issue, the public interest in the specific information, a suspicion of wrongdoing by the public body, and presenting a full picture of the actions of a public body.

[13] Having carefully considered the relevant factors as set out in our guidance document we have determined that while some of the suggested factors could weigh in favour of releasing the information, the overall balance of the factors cannot support the release of such granular information. The application of section 9 requires that the evidence clearly demonstrate that the public interest in disclosure outweighs the reason for the exception. The Teacher's individual privacy interests cannot be overridden on the basis of public interest, and the protection under

section 32 cannot be overridden by section 9 in this context. The public interest in the general provision of accommodations for DHH students is not served by releasing the detail of one teacher's test score. The very specific nature of the information outweighs any potential value it would have in informing a larger discussion.

[14] With respect to s. 40(4), following a determination that a disclosure of personal information is presumed to be an unreasonable invasion of privacy, it is then necessary to consider if section 40(5) could support the release. In this case the relevant portions of section 40(5) are:

- (5) *In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether*
- (a) *the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;*
  - (c) *the personal information is relevant to a fair determination of the applicant's rights;*
  - (e) *the third party will be exposed unfairly to financial or other harm;*
  - (f) *the personal information has been supplied in confidence;*
  - (h) *the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant;*

[15] As with section 9, while some of the factors could weigh in favour of releasing the requested record, the balance of evidence does not support overriding the protection given to the teacher's personal information provided by section 40(4).

[16] When considering this matter as a whole, the essence of section 32, in particular, in the context of the Act, is to clarify the boundaries of what the access rights are in a fact circumstance such as this. As a matter of principle, the public should be able to have confidence that teachers hired by NLESD meet the minimum professional qualifications. Our understanding of the facts are that NLESD attests that the teacher does meet those standards. However, this right of access is limited in that the applicant does not have a right to know what the specifics of the evaluation are for that teacher in meeting those qualifications. That level of information is the teacher's personal information, and releasing it would be an unreasonable invasion of their privacy. When there is tension between access and privacy, as cited above, this is where section 32 draws a bright line. The question of whether the standards set by NLESD are

satisfactory to provide for the education of deaf or hard of hearing students is clearly a question of public interest, but it is not one that would be effectively addressed by the release of this information.

- [17] It is also worth noting that the Complainant has also filed a complaint against NLESD through the Human Rights Commission about whether appropriate DHH supports have been provided by the Public Body in this particular case. The Human Rights Commission will ensure that any relevant evidence is considered, and it has its own set of disclosure rules, including confidentiality protections.

## VI RECOMMENDATIONS

- [18] Under the authority of s. 47 of the *Access to Information and Protection of Privacy Act, 2015*, I recommend that the Newfoundland and Labrador English School District continue to withhold the records.

- [19] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Newfoundland and Labrador English School District must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

- [20] Dated at St. John's, in the Province of Newfoundland and Labrador, this 16th day of November 2020.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador