



OFFICE OF THE DIRECTOR

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Via Email
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The Honourable David B. Orsborn
Committee Chair
3rd Floor, Beothuck Building
20 Crosbie Place
St. John's, NL A1B 3Y8

Dear Honourable David B. Orsborn,

This is in response to your correspondence to the undersigned on December 3, 2020. Thank you for providing NLESD with an opportunity to respond to the submissions of the OIPC as they relate to our operating legislation, the *Schools Act, 1997*. In summary, the NLESD does not agree with the recommendations of the OIPC that these provisions should be removed from *ATIPPA, 2015*. I will address each of the OIPC's recommendations separately.

OIPC Recommendation 14.1: Remove section 62(2) from Schedule A as it is redundant to section 28(1)(c).

Relevant legislative provisions:

Schools Act, 1997.

61. A meeting of a board is 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.

62. (1) A board and the executive committee of that board shall keep minutes of its proceedings and the minutes shall at all reasonable times be available for inspection by an official of the department designated by the minister, and on request, to members of the public.

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

ATIPPA, 2015

28. (1) The head of a local public body may refuse to disclose to an applicant information that would reveal



(a) a draft of a resolution, by-law or other legal instrument by which the local public body acts;

(b) a draft of a private Bill; or

(c) the substance of deliberations of a meeting of its elected officials or governing body or a committee of its elected officials or governing body, where an Act authorizes the holding of a meeting in the absence of the public.

(2) Subsection (1) does not apply where

(a) the draft of a resolution, by-law or other legal instrument, a private Bill or the subject matter of deliberations has been considered, other than incidentally, in a meeting open to the public; or

(b) the information referred to in subsection (1) is in a record that has been in existence for 15 years or more.

The Commissioner raises concerns firstly with the fact that this provision of the *Schools Act, 1997*, is silent on the subject matter that is appropriate for a privileged meeting. The Board submits that given the vast nature of the decisions that have to be made by the Board in relation to all aspects of the public education system, it would not be possible to provide a complete list of issues that would be appropriate to address in a closed meeting. Nor would it be prudent to have these things enshrined in legislation. The students we serve, and hence the education system itself, is constantly evolving and changing. The issues that have to be addressed by the Board in any given year are diverse and often include deliberations involving highly sensitive personal information in relation to students and employees.

While the *Schools Act, 1997* may not set out the types of issues that may be addressed in closed meetings, the Board By-laws include the following:

1.04 Closed Meetings

Closed Meetings of the Board are held to:

- a) Hold hearings regarding student appeals.
- b) Conduct training, orientation and working sessions of the Board, to assist Trustees in the fulfillment of their responsibilities.
- c) Allow for the consideration and/or disposition of matters of a sensitive nature. The Board may, by a resolution passed in an open meeting, move to a private (closed) meeting of the Board. The following matters shall be considered by the Board in closed meetings:
 - i) The liability of the Board, which in the opinion of the Chair of the Board and the Director may involve legal action.
 - ii) 2) Personnel matters such as employee performance, medical reports or other sensitive staff matters.
 - iii) 3) Reports by the Director or district office staff, which in the opinion of the Chair of the Board and the Director, might be prejudicial to the operation of the schools.
 - iv) 4) Lease or purchase of property.
 - v) 5) Negotiations of salary and wage schedules of employees.

- vi) 6) Suspension, expulsion, exclusion of pupils and re-admission of same.
- vii) 7) Materials and information concerning criminal or civil actions which are not part of a public court record;
- viii) 8) Strategy sessions pertaining to collective bargaining, pending or potential litigation, when an open meeting would affect the bargaining or litigation position of the Board;
- ix) 9) Discussions which would disclose the identity of a bona fide and lawful donor to the district, when the donor has requested anonymity;
- x) 10) Discussions of the content of documents protected by legislation.
- xi) 11) Discussion of potential or actual emergencies or matters of security related to the preservation of the public peace, health, and safety;
- xii) 12) Preliminary discussions of tentative information relating to school attendance zones, personnel needs, or fiscal requirement;
- xiii) 13) Other matters of a sensitive nature as determined by the Board.

As you can see, many of the issues above that would be dealt with at a closed meeting would necessitate discussion of highly sensitive personal information. The most common use of closed Board meetings is to address human resource issues and student issues.

While this list is within the control of the Board to change, the Board is a public entity that is accountable to the public and upholds the principles of transparency and accountability in all its operations. In order to amend its own By-laws, there is a strict process set out in the By-laws, which requires firstly a Notice of Motion to amend to be made at a public Board meeting. Any changes being proposed can then only be made after having been considered at two regular meetings of the Board. These would be open public meetings. There is a process for the public to be able to make representations at a Board meeting. Further, the *Schools Act, 1997* currently requires the Minister of Education to approve the Board's By-laws or any amendments thereto. This certainly provides the necessary safeguards and transparency to the public and would have the effect of limiting what the Board may consider at a closed meeting.

Further, the type of information that may be included in the minutes of closed Board meetings, particularly the highly sensitive personal information of students and/or staff, would require greater protection than is provided for in s.28 of *ATIPPA, 2015*. Firstly, s.28(2) of *ATIPPA, 2015* is discretionary, whereas s.62(2) of the *Schools Act, 1997* is mandatory. Secondly, and most importantly, s.28(2) of *ATIPPA, 2015* states that s.28(1) does not apply where the information is at least 15 years old. There would be no justification for limiting the protection currently provided for information from closed Board meetings under s.62(2) of the *Schools Act, 1997*, by having it subject to s.28(2) of *ATIPPA, 2015*, giving it protection for only 15 years. By contrast, the only reference to a time limit on the protection of personal information under *ATIPPA, 2015* appears in s.71 of the Act, which reads:

Disclosure for archival or historical purposes

71. The Provincial Archives of Newfoundland and Labrador, or the archives of a public body, may disclose personal information for archival or historical purposes where
- (a) the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 40 ;
 - (b) the disclosure is for historical research and is in accordance with section 70 ;
 - (c) the information is about an individual who has been dead for 20 years or more; or

(d) the information is in a record that has been in existence for 50 years or more.

OIPC Recommendation 14.2: Remove the reference to section 12 of the *School's Act, 1997* from Schedule A of *ATIPPA, 2015*.

Relevant legislative provisions:

Schools Act, 1997.

12. (1) A student record shall be maintained for each student in the manner required by a policy directive of the minister.

(2) Except as provided in this section a student record may only be reviewed by

(a) the parent of the student; or

(b) the student, if the student is 19 years of age or older,

to whom that student record pertains.

(3) A parent or student, if the student is 19 years of age or older, shall review the student record at a time and with a person designated by the board and receive an explanation and interpretation of information in the student record from that person.

(4) A parent or student, if the student is 19 years of age or older, who is of the opinion that the student record contains inaccurate or incomplete information may request the principal to review the matter.

(5) A student record may be used by the principal and teachers of a school and by board employees to assist in the instruction of the student to whom that student record pertains.

(6) Without the written permission of the parent of a student, or the student if the student is 19 years of age or older,

(a) a student record shall not be admissible in evidence in a trial, inquiry, examination, hearing or other proceeding except to prove the establishment, maintenance, retention or transfer of that student record; and

(b) a person shall not be required to give evidence respecting the content of the student record in a trial, inquiry, examination, hearing or other proceeding.

(7) Notwithstanding subsections (1) to (6), a principal may use a student record to prepare information or a report

(a) required under this Act; and

(b) when requested in writing by a parent, or where a student is 19 years of age or older, the student or former student, for

- (i) an educational institution, or
- (ii) an application for employment.

(8) This section shall not prevent the use of a report based upon a student record by the principal of a school attended by that student, or the board, for the purpose of a disciplinary proceeding commenced by the principal respecting the conduct of that student or a prosecution of an offence under this Act.

(9) An action shall not lie against a person who contributes test results, evaluations or other information to a student record where he or she acted in good faith within the scope of his or her duties.

First and foremost, the District does not agree with the Commissioner's assessment of s.12 of the *School's Act, 1997* and the manner in which it is interpreted in relation to *ATIPPA, 2015*. The Commissioner focuses on firstly, the analysis of whether there is a conflict between the two pieces of legislation. This is, in fact, not required. Section 7(1) of *ATIPPA, 2015* deals with the issue of conflict between *ATIPPA, 2015* and other pieces of legislation. Section 7(2) however, sets out specific legislative provisions, listed in Schedule A, that prevail over *ATIPPA, 2015* where those legislative provisions provide, prohibit, or restrict access to a record. There is no requirement that those provisions conflict with *ATIPPA, 2015*. In fact, in both cases referenced by the Commissioner where reports were released by the Commissioner in response to complaints from parents seeking information from the District, the Commissioner's report acknowledges that the District made the correct decision, and in fact, would have been the same outcome had the request been assessed solely under *ATIPPA, 2015*. This statement was explicitly made in the Commissioner's Report A- 2018-010 where it was stated:

As referenced earlier, the issue of which legislation governs does not need to be conclusively determined here. If the *ATIPPA, 2015* prevails, section 40 of *ATIPPA, 2015*, which lists mandatory exemptions for personal information, must be applied. The personal information of the other students in the file of the Complainant's child and the personal information in the files of the other students, falls within section 40, and is all exempt, as its disclosure would constitute an unreasonable invasion of their personal privacy. Having considered section 40 as a whole, including all considerations that may militate in favour of disclosure (including circumstances affecting a person's health or safety; or whether the personal information is relevant to a fair determination of the Complainant's rights), the case for disclosure is insufficient to require the unreasonable invasion of personal privacy that such disclosure would represent.

The other report referenced by the Commissioner, Report A-2019-008, involved a parent seeking disclosure of personal information about his own daughter. This was a good example of a situation that arises not infrequently in the District, having to address issues that arise out of the family law context. Which parent has a right to access information about a student? Does the custodial parent have to be notified? Do they have to consent? What if the parent seeking the information is estranged from the child? Will release of this information be harmful to the child or the other parent? With over 63,000 students in the school system, these are issues that the District has to deal with on a regular basis. In doing so, the District relies on the provisions of all relevant legislation including the *Schools Act, 1997*, the *Children's Law Act*, any custody/access orders or agreements in place, as well as the provisions under *ATIPPA, 2015* where required to justify a withholding of information. Again, in this more recent case, the

Commissioner agreed with the decision of the District to withhold the information requested. There is no evidence from either of these cases that exemption of s.12 of the *Schools Act, 1997* from *ATIPPA, 2015* caused any issues with respect to assessing these requests for information.

It is important to note that what was being challenged in each of these cases was the District's refusal to release confidential information on a minor student. The *Schools Act, 1997* provides optimal protection to this information. It provides access only to the student's parents, and even then, with a view to protecting the personal privacy of a student even from his/her parent. There is a clear, simple process for a parent to obtain the student record, or any information therein, from their school. The District cannot speak to what policies/practices are in place in other jurisdictions with respect to what they include as part of a student record, who has access to them, or what issues may have been identified that resulted in the legislative provisions and privacy decisions as referenced by the Commissioner. What we can say is that there is no evidence that parents under the District have experienced issues with respect to getting the appropriate access to their child's school records, including copies of documents, despite the fact this is not specifically set out in the *Schools Act, 1997*.

While we recognize that the *Schools Act, 1997* is dated, it is important to note that this legislation is also currently under review. The District has made submissions on several issues as part of that review, including the definition of a 'parent' to better align with the legal rights of an individual to access educational information under the applicable family law legislation and jurisprudence. The District has also put forth recommendations on the collection of personal information as a result of that gap in the legislation being flagged by the OIPC in the past. Further, the Department of Education has advised it is working on a new policy/process for Student Records, in keeping with the changes in the way information is collected and maintained (for example electronic information is becoming more common).

It is important to recognize the uniqueness of information that forms a student record. All of the information in such a record is personal information, and often highly sensitive personal, including medical information, that the *Schools Act, 1997* and the District strives to provide the utmost protection for. The *Schools Act, 1997* even contains provisions restricting the use of this information in court proceedings. This is a further recognition of the sensitive nature of this information and the importance of safeguarding it from disclosure, and safeguarding its use for the purposes for which it was intended, to provide educational programming to students in a safe and caring environment. This type of information is deserving of its own legislative protections and analysis rather than being a part of the general provisions of *ATIPPA, 2015*. Further, there is very little protection provided for minors under *ATIPPA, 2015*, in particular where a parent is the one requesting the information. *ATIPPA, 2015* contains only a general provision which reads as follows:

Exercising rights of another person

108. A right or power of an individual given in this Act may be exercised

...

(d) by the parent or guardian of a minor where, in the opinion of the head of the public body concerned, the exercise of the right or power by the parent or guardian would not constitute an unreasonable invasion of the minor's privacy; or

...

While the District recognizes that the *Schools Act, 1997* needs improvements in many areas including the collection, use and disclosure of student information, it would be premature at best to simply remove the exemption of s.12 from *ATIPPA, 2015* while the *Schools Act, 1997* is under review. Any concerns with respect to the treatment of such information would be best addressed under that review process. The District undertakes to review the submissions made to the Department of Education on the *Schools Act, 1997* and determine whether further submissions should be made respecting the concerns raised by the Commissioner in his submissions to your office. We have been advised by the Department of Education that further consultations are to be expected in any event before the new Act is finalized. We understand the OIPC will be involved in such consultations.

Sincerely,



ANTHONY STACK
CEO/Director

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