

November 27, 2020

By Email

The Honourable David B. Osborne, Committee Chair
3rd Floor, Beothuck Building
20 Crosbie Place
St. John's, NL
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admin@nlatippareview.ca

Dear Judge Osborne,

Re: Access to Information and Protection of Privacy Act Statutory Review 2020

Thank you for providing the Newfoundland and Labrador English School District (“the District”) with the opportunity to submit feedback on the five-year review of the Access to Information and Protection of Privacy Act (“the Act”) as required by s.117 of the Act. The District has carefully reviewed the Terms of Reference provided with your letter dated September 29, 2020 and has feedback on some of the terms set out in your review. Please accept the following as the District’s submission:

Public and public body experience in using and administering the ATIPPA, 2015 to access information in the custody or control of public bodies in Newfoundland and Labrador and opportunities for improvement;

NLESD Feedback:

- Consideration should be given to requests for information/records, particularly from law firms, that are part of ongoing judicial or quasi judicial processes, or where information is being sought to advise clients on a potential legal action. While there are provisions which provide protection to records covered by litigation or solicitor-client privilege, this concern relates to the apparent use of the ATIPP process to gain access to documents that would/should otherwise be addressed in the judicial/quasi judicial forum. Essentially, some applicants are using the ATIPP process as a form of discovery of documents for their judicial/quasi judicial matter. This has been used in some complex legal matters, at a significant cost to the District who would have had to engage legal counsel on the request. At times, this information may have already been provided to the applicant in the legal matter or would certainly be provided as part of the legal process.

- There needs to be clarification around the timeframe for which an applicant has anonymity. Some have interpreted the Act so that the applicant's name is no longer protected upon final release of the information requested. Clarification is required as to whether this is the intention of the Act.

Public body response times for access requests and whether the current ATIPPA 2015 requirements for response and administrative times are effective;

NLESD Feedback:

- For the most part there is no issue with completing ATIPP requests in the allotted time. However, consideration should be given to putting limitations on the number of requests per applicant to process within the same time frame.

An examination of exceptions to access as set out in Part II, Division 2 of the Act;

NLESD Feedback:

- Section 33 - Information from a Workplace Investigation
This provision provides for the release of information to parties to a workplace investigation which may give rise to progressive discipline or corrective action by the public body employer. This would essentially capture any workplace investigation involving employees. It gives a complainant and respondent full access to all relevant information created or gathered for the purpose of the investigation.

Firstly, the terms 'complainant' and 'respondent' are not clearly defined. Not all workplace investigations have a 'complainant' and 'respondent'. The term 'respondent' may be used loosely to refer to the employee under investigation. If, for example, an employee simply brings forward a concern in the workplace, that may even relate to a particular employee, they will not necessarily be considered a 'complainant' with broad rights to access information on any subsequent ensuing investigation. These terms are commonly used terms in harassment investigations, however, this provision covers all investigations, not just harassment investigations. Consideration should be given to defining these terms or reworking the entire section to more accurately reflect what the intention is here with respect to who can have access to information from such an investigation.

Secondly, these investigations are covered by the well established principles of Procedural Fairness and Natural Justice which the employer would employ when carrying out such investigations. This would address, among other things, the need to share relevant information with the respondent/employee under investigation during the course of the investigation. Before any discipline or corrective action could be taken against an employee, the employer would have to review all relevant information and allow the employee an opportunity to respond to any and all allegations under investigation. The District has seen an increase in ATIPP requests being made while a workplace investigation is ongoing, oftentimes as soon as an employee is notified that an investigation has been initiated. Release of such information at this early stage, before the employer has the opportunity to assess all the information it has gathered, or may need to gather, and is prepared to put such information to the employee under investigation for a full response, could have a significant impact on the investigation. It could affect the integrity of the investigation and could, potentially, create harm to a complainant or fellow employee. For example, consider a case where an employee under investigation is getting access to information that has been provided



'against' the employee before the employer has the ability to meet with the employee to address all the information/allegations and discuss the importance of things such as confidentiality in an investigation and the issue of potential retribution against 'complainants'. This could have a negative impact on the 'complainant' and the workplace in general. The District understands the importance of providing for full access to information to its employees where there has been a workplace investigation involving that employee. Consideration should be given, however, to limiting the timing of the release so that such information can only be released once the investigation is completed.

Whether the current Cost Schedule set in accordance with subsection 25(6) of ATIPPA, 2015 is effective;

NLESD Feedback:

- The District feels that an application fee should be re-established in order to deter nuisance requests. A fee schedule could be implemented that would allow additional costs to applicants with numerous concurrent requests.

The District looks forward to your expertise in this matter and welcomes all positive changes to the Act. If you have any questions regarding our feedback please contact me at anthonystack@nlesd.ca or by telephone 758-2381.

Sincerely,



Anthony Stack
CEO/Director of Education

