



## REPORT OF FINDINGS

*Right to Information and Protection of Privacy Act*

Matter No: 2017-4244-AP-2301

August 21, 2018

## I BACKGROUND

1. This Report of the Commissioner's Findings is made pursuant to s. 73(1)(a) of the *Right to Information and Protection of Privacy Act*<sup>1</sup>.
2. On September 26, 2017, the Applicant filed a request with the Anglophone South School District ("the District") for access to all documents in the possession of the District concerning the past, current and potential future state of affairs of information relating to his employment with the District as a school teacher, as follows:
  - a) All records with respect to [the Applicant's] employment during the period of June 30, 2016 to the present date [date of the Request], including all performance reviews from 2001 to the date of the Request;
  - b) All documents related to meetings conducted between the Applicant and [five staff members at the school where the Applicant is employed];
  - c) All documents related to the provision of law classes and assignment of teachers to those classes at [name of school] for the school years 2016-2017 and 2017-2018;
  - d) All documents related to the provision photography classes and assignment of teachers to those classes at [name of school] for the school years 2016-2017 and 2017-2018;
  - e) All documents related to the provision broad based technology 9 and 10 classes and assignment of teachers to those classes at [name of school] for the school years 2016-2017 and 2017-2018;
  - f) All documents related to the provision media studies 120 classes and assignment of teachers to those classes at [name of school] for the school years 2016-2017 and 2017-2018;
  - g) All documents and notes received from parents or students and made to [four staff members at the school where the Applicant is employed] between June 30, 2016 and the present date [date of the Request]; and,
  - h) All documents relating to [the Applicant's] leave of absence resulting from is [injury] between February 2, 2016 to the present date [date of the Request].
3. The District responded to the Request on October 27, 2017 by stating that it was granting access to notes, e-mail correspondence and documents relating to the Applicant's employment with the District, in which certain redactions were made pursuant to s. 21(1) of the *Act*, being that disclosure of some information would be deemed to be an unreasonable invasion of a third party's privacy.
4. The Applicant was not satisfied with the District's response, and therefore, filed a complaint with our Office on December 13, 2017. Pursuant to s. 68(1) of the *Act*, the Office of the Integrity Commissioner conducted an investigation into this complaint matter.

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<sup>1</sup> S.N.B., c. R-10.6 (the "Act")

## II INFORMAL INVESTIGATION

5. This complaint was assigned to one of my Legal Counsel, to whom I have delegated the authority to attempt to informally resolve the complaint, pursuant to s. 68(2) of the *Act*. In doing so, she obtained a copy of the records deemed to be relevant to the Request by the District. The records consisted of six packages of records, divided by the school staff members named at items b) and g) of the Applicant's Request.
6. The first step of her informal investigation was to determine whether she was satisfied that the District had searched for and located all records relevant to the Applicant's Request. As such, she asked the District whether it had also performed a search of its own internal records at its offices for records relating to the Request. The District indicated that it had only asked the school staff members named in the Request to perform a search for records.
7. Subsequently, my Legal Counsel directed the District to perform another search of its records for items relating to the Request and to send her any additional records they found. The District did do so, and returned only a few additional records, relating only to item h) of the Request. Furthermore, upon review of the relevant records, my Legal Counsel noted that the District had not provided for her review any of the documents that were attached to emails disclosed to the Applicant. As such, the District was directed to find those documents and to provide them for her review. To date, these records have not been provided for our review.
8. Of the records disclosed to the Applicant, some of them contained redactions pursuant to s. 21(1) of the *Act*. Having been able to review the unredacted copies of these records, my Legal Counsel provided preliminary findings to the District on May 30, 2018, by indicating where the redactions were proper, and where they were not, and by inviting the District to provide comments as to whether it agreed with her findings, no later than by June 13, 2018. The District requested additional time to provide comments, which my Legal Counsel granted for an extra month, to July 13, 2018; however, to date, the District has not provided any response to the preliminary findings.
9. In light of the above, my Legal Counsel was not able to informally resolve this complaint as she could not be satisfied that a full and adequate search for all records relevant to the Request had been performed, and that she had not received comments on her preliminary findings regarding the redactions made to certain information.
10. As a result, this matter was remitted to me for my formal investigation and disposition. I have reviewed the matter and now present my findings.

### III ANALYSIS AND FINDINGS

11. I agree with my Legal Counsel that there are two matters at issue in this Complaint: the search for relevant records, and redactions made to information under s. 21(1). For ease of reference, I will present my findings by addressing each item of the Applicant's Request in relation to any search issues and/or any redactions made to the records disclosed to the Applicant.
12. As a starting point, I find that some of the District's redactions were excessive. For starters, the District could not redact all email headers indicating the sender, recipient, date and subject matter of the emails. Secondly, the District could not redact any information contained in emails or other documents that the Applicant sent or received as the information would already be known to the Applicant and therefore, disclosure would not be deemed to be an unreasonable invasion of the third party's privacy. A recommendation to this effect will issue.
- *Item a): All records with respect to the Applicant's employment during the period of June 30, 2016 to the date of the Request, including all performance reviews from 2001 to the date of the Request; and,*
  - *Item h): All documents relating to the Applicant's leave of absence resulting from is [injury] between February 2, 2016 to the present date.*
13. It is my view that these records pertain to records found in the Applicant's personnel file regarding his employment with the District as a teacher; however, it appears from my review of the records that very little information was disclosed to the Applicant regarding these records.
14. With regards to item a), the only information disclosed to the Applicant consists of four Probationary Teacher Performance Reports from 2003 to 2006, which were disclosed in full. When asked as to why no additional records were found regarding this item, the District only responded by stating that mandatory teacher performance reviews were only implemented in September 2017, and therefore there would be no records relevant to the Applicant's Request on this item as he requested access to the records up until the date of his Request, being September 26, 2017.
15. While I question as to how these can be the only records pertaining to the Applicant's performance, and that no other performance evaluations of any sort were conducted for a period of 10 years, this was only one aspect of the Applicant's Request in item a). The first part dealt with any records relating to the Applicant's employment; however, no explanations were provided by the District as to why no records were identified as relevant regarding this aspect of the Request, especially since the District is the Applicant's employer.

16. Furthermore, while not a specific item of the Applicant's Request, the Applicant nevertheless indicated in his Complaint that he did not receive any records pertaining to a harassment complaint he had made. On this point, the District stated that any records relating to the dismissal of his harassment complaint would have been found in the records disclosed in full to the Applicant (being in email records produced by the school staff members identified at items a) and g) of the Request), and that the District does not have any records relating to an official harassment complaint filed by the Applicant.
17. Finally, the District redacted an entire email between a school staff member and the NBTFENB dated June 19, 2017. When asked why it redacted the information under s. 21(1), it indicated that it was because NBTFENB is a third party. While NBTFENB is considered a third party for purposes of the Act, this does not automatically mean that the entire email exchange can be protected under s. 21. Having reviewed the email message, I do not find that it contains any third party personal information, apart from the name of the NBTFENB employee. The remaining information consists of this employee providing guidance to a school staff member, as part of her duties at NBTFENB, and not in her personal capacity. Therefore, the information cannot be protected under s. 21 of the Act.
18. If the information was provided to the school staff member as she was seeking advice relating to the Applicant's employment situation, however, the information could perhaps fall under the ambit of s. 26(1)(a) of the Act as advice, opinions or recommendations. We asked the District to confirm whether this was in fact the case; however, we never received comments from the District on this issue. Furthermore, given that this exception is discretionary in nature, the District should have provided us with the factors upon which it relied to decide to refuse access to the information. As we have not been provided with these factors, nor with confirmation about the nature of the information contained in the email, I find that the information cannot be protected under s. 26(1)(a) of the Act.
19. Considering the above, I am not satisfied that the District does not have any records pertaining to the Applicant's employment, including any other performance evaluations, for the requested period. A recommendation that the District conduct another search of its records regarding item a) will issue.
20. With regards to item h) of the Request, a few records were found and disclosed to the Applicant. When the District conducted a search of its own records in relation to the Request, it did find a few additional records relating to this item. Having reviewed the additional records, I find that they should be disclosed in full to the Applicant and such a recommendation will issue.
21. As the few records that were disclosed to the Applicant regarding items a) and h) did not contain any redactions, I need not address s. 21 regarding these items.

- *Item b): All documents related to meetings conducted between the Applicant and [five staff members at the school where the Applicant is employed]*

22. The Applicant did receive access to some records relating to this item; however, he believes there should be additional records. In particular, the Applicant notes in his Complaint that various handwritten notes were taken during his meetings with these staff members; however, only handwritten notes taken by one staff member were disclosed to the Applicant, without redactions. When asked whether it had any records relating to this item, the District responded that it had met with the Applicant in May and June 2016, but had not taken any notes during the meeting.

23. Given the contrary statements between the Applicant and the District, I am unable to determine with certainty that all records relevant to this item were searched for and located. As such, a recommendation on this point will issue. I need not address the use of s. 21(1) in relation to this item of the Request, as no redactions were made to the records disclosed to the Applicant.

- *All documents related to the provision of law classes (item c)), photography classes (item d), broad based technology 9 and 10 classes (item e)), and media studies 120 classes (item f)) and assignment of teachers to those classes at [name of school] for the school years 2016-2017 and 2017-2018;*

24. No specific records regarding items c) to f) were disclosed to the Applicant, as the District explained that no such records exist, for the reason that courses are student-driven and teachers are assigned to teach courses based on the best one to teach the subject matter. According to the District, a teacher is a teacher, and therefore they do not have any designated license to teach certain courses. Assignments are at the discretion of the school's administration. Given these explanations, I am satisfied that no specific records exist regarding these items of the Request. That being said, however, I believe these explanations should have been provided to the Applicant in the District's Response.

25. I note, however, that the Applicant did receive access to records related to different courses he was assigned to teach, which did not contain any redactions. As such, no findings regarding the use of s. 21 are necessary regarding these items of the Request.

- *Item g): All documents and notes received from parents or students and made to [four staff members at the school where the Applicant is employed] between June 30, 2016 and the date of the Request.*

26. Some of these records were disclosed to the Applicant, and this is where most of the redactions were made pursuant to s. 21(1). Having reviewed the redacted information, I find that the following information should not have been redacted. The names of students (or their initials) can be protected

under s. 21(1), unless the Applicant is already aware of their names in the context in which they appear. Furthermore, any information that consist of the views or opinions expressed by individuals about the Applicant cannot be redacted under s. 21(1), as these views and opinions consists of the Applicant's personal information, and not the third parties' personal information.

27. As per s. 7(2) of the *Act*, an applicant is entitled to request and receive his or her own personal information, subject to the exception provisions of the *Act*, and where the applicant's own personal information can reasonably be severed from the remainder of the record where information can be protected (i.e. the students' names and comments not about the Applicant, in this case), the Applicant is entitled to receive access to his own personal information. Therefore, the record in which students are specifically making comments about the Applicant, the information can be severed from the record disclosed to the Applicant, unless disclosing this information could nevertheless lead to identify the individuals making the comments, or where the remaining information to be disclosed to the Applicant would be rendered meaningless. If an entire record is to remain protected as the Applicant's information is not reasonably severable from the rest of the record, the District ought to nevertheless provide explanations to the Applicant as to the general nature of the record (i.e. general nature of complaints made by students or other individuals.)

## V RECOMMENDATIONS

28. In light of my findings above, I am issuing the following recommendations to the Anglophone South School District:
- a) pursuant to s. 64.1(1)(h) of the *Act*,
    - (i) that the Anglophone South School District conduct another search of its own internal records, as well as the records that would be in the custody of the school where the Applicant is employed, for all items of the Request; and,
    - (ii) that it issue a properly constituted response to the Applicant containing any additional records found by the Anglophone South School District relating to the Request, and where no additional records were found, that it provide the Applicant with explanations as to how it conducted its search and reasons why the records do not exist, where applicable; and,
  - b) pursuant to s. 73(1)(a)(i)(A) of the *Act*,
    - (i) That the Anglophone South School District disclose the information that was originally redacted from the records disclosed to the Applicant that I find could not be protected under s. 21(1) or s. 26(1) of the *Act*.

29. As set out in s. 74(2) of the *Act*, the Anglophone South School District is to notify the Applicant of its decision with respect to this recommendation. If the Anglophone South School District decides to accept the recommendation, s. 74(3) requires the Anglophone South School District to comply or make the decision it deems appropriate within 20 business days of receipt of this Report. If the Anglophone South School District decides not to accept the recommendation or fails to notify the Applicant of its decision, the Applicant will have right to appeal the matter to the Court of Queen's Bench in accordance with section 75 of the *Act*.

This Report issued in Fredericton, New Brunswick this 21<sup>st</sup> day of August 2018.

original signed by  
The Hon. Alexandre Deschênes, Q.C.  
Integrity Commissioner of New Brunswick