



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2013-006

April 16, 2013

Memorial University of Newfoundland

Summary:

The Applicant applied to Memorial University of Newfoundland (“Memorial” or the “University”) under the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) for access to records relating to the review of the renewal of a faculty dean at Memorial. Memorial released the responsive records to the Applicant in part with portions severed in accordance with section 20(1)(a) (policy advice or recommendations), section 21(a) (legal advice) and section 30(1) (personal information) of the *ATIPPA*. The Applicant filed a Request for Review with this Office for a review of the exceptions claimed by Memorial and the Commissioner found that Memorial had properly applied the exceptions claimed under the *ATIPPA*. During the Request for Review the meaning and scope of the word “review” in the Applicant’s access request became an issue in determining whether Memorial had conducted a complete search in responding to the Applicant’s access request. The Commissioner found that Memorial’s interpretation of the word “review” was narrow and recommended that Memorial conduct a further search for responsive records to the end date requested by the Applicant in the original access request.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, sections 9, 20, 21, and 30.

Authorities Cited:

Concise Oxford English Dictionary 10th Edition, Revised, New York: Oxford University Press (2002); Newfoundland and Labrador OIPC Report A-2009-011.

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) the Applicant submitted an access to information request on December 15, 2011 to Memorial University of Newfoundland (“Memorial” or the “University”). The request sought disclosure of records as follows:

NO 1

All documents and Materials (Letters including enclosures etc, Memos, E-Mails, Notes etc) regarding the review of [named individual]’s renewal as the dean of faculty of [named faculty] (a) involving members of MUN Administration and any others employed by MUN – in the matter mentioned above and (b) between the Administrators themselves in the matter mentioned above, (c) Office of Citizen Representative and MUN.

Suggested office – V.P. Academic, President, Board of Regents; Time Period: Sept 10, 2009 – Present.

- [2] Memorial confirmed receipt of this request on December 16, 2011 and contacted the Applicant on December 20, 2011 to clarify certain aspects of his request. On January 11, 2012 Memorial provided the Applicant with a fee estimate in relation to his access request. On January 18, 2012, Memorial extended the time for responding to the request in accordance with section 16 the *ATIPPA* and acknowledged that the Applicant had paid the required portion of the fee estimate.
- [3] On February 10, 2012, Memorial informed the Applicant that his access request had been granted in part; certain information was withheld pursuant to section 20(1)(a) (policy advice or recommendations), section 21(a) (legal advice) and section 30(1) (personal information) of the *ATIPPA*. The Applicant paid the outstanding balance of the fee estimate and the records were provided to the Applicant on February 14, 2012.
- [4] On February 17, 2012 this Office received a Request for Review from the Applicant as follows:

I received a number of documents to-day. To my great surprise, I found heavy censorship (pages after pages are blackened) in releasing the information. I can see serious allegations against the person who is seeking the renewal. Memorial being a public body, paid by public funds – cannot have administrators doing such serious violations of Codes of Conduct, Repeated Falsifications etc. We take actions against our own students when the acts are much milder than these.

The public body cannot use Sections 20, 21, and 30 under these situations to shield the actions of [an] administrator.

From the documents released and which can be read – one cannot see if the candidate got the renewal or not?

I believe that the entire process has to be transparent, and no shielding of information should be allowed.

- [5] In keeping with our usual practice, an Analyst from this Office forwarded a copy of the Request for Review to Memorial and requested a copy of the responsive records. The records were received on March 2, 2012 and reviewed by the Analyst. As a result of the informal resolution process, further records were released to the Applicant by Memorial under correspondence dated April 13, 2012.
- [6] During the informal resolution stage of the Request for Review, the Applicant questioned why no records dated subsequent to January 2010 were provided to him, since the access request encompassed the time period of September 10, 2009 to December 16, 2011. Discussions with Memorial revealed the fact that Memorial's interpretation of the word "review" differed from that of the Applicant's. The access request was for records regarding the "review" of a [named individual]'s renewal as the dean of a specific faculty. Memorial advised that there were no responsive records relating to the "review" beyond January 2010 as the Review Committee had provided its report to the Vice-President (Academic) with its recommendation(s) for the renewal of a dean and according to Memorial the review process was complete as of January 2010. The Applicant disagreed with Memorial's interpretation of the word "review".
- [7] Attempts to resolve this Request for Review by informal resolution were not successful, and by letters dated August 28, 2012 both the Applicant and Memorial were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this office in accordance with section 47.

II MEMORIAL'S SUBMISSION

[8] Memorial was asked to provide a submission regarding the application of exceptions to disclosure claimed under the *ATIPPA* as well as the interpretation of the word "review" in the Applicant's access request.

[9] Memorial provided its submission in correspondence dated October 1, 2012. Memorial's position in relation to the application of exceptions to disclosure under the *ATIPPA* was that it had released further information during the informal resolution stage and that all remaining exceptions were properly applied.

[10] With regard to the interpretation of the word "review", Memorial advised that the review of a dean's renewal at Memorial is a defined process under Part 4 of the *Memorial of Newfoundland Policies and Procedures Governing the Appointment, Review, Promotion and Tenure of Academic Administrators* in effect October 26, 2000 ("*Memorial's Policies and Procedures*"), which states as follows:

IV. REVIEW OF DEANS, DIRECTORS OF SCHOOLS, THE UNIVERSITY LIBRARIAN AND THE VICE-PRINCIPAL OF SIR WILFRED GRENFELL COLLEGE

1. *The term "Dean" shall be understood to mean "Dean", "Director", "University Librarian" or "Vice-Principal" as appropriate. In the case of the review of the Vice-Principal of the College, the term Vice-President (Academic) will be understood to mean Principal.*
2. *In the first month of the final year of the initial term of a Dean, the Vice-President (Academic) shall inquire of the incumbent whether he or she wishes to be appointed for a second term.*
3. *Should the Dean signify that he or she wishes to be considered for a second term, the Vice-President (Academic) shall establish a Review Committee and shall fix the date by which the Committee's report shall be rendered.*
4. *The Committee shall consist of not fewer than four nor more than eight persons, half or more of whom shall be elected from the academic unit concerned, except when reviewing the Vice-Principal of Sir Wilfred Grenfell College where the majority shall be elected from the College. The Vice-President (Academic) shall appoint the remainder of the Committee and a Chairperson from among the Committee members.*
5. *The Committee shall establish its own procedures, which shall include a process of consultation with faculty members in the academic unit, and staff attached to the Dean's office. The Committee may also consult with any other persons or bodies it considers appropriate to its*

task. This may include academic administrators of cognate academic units. Normally, this consultation will involve an invitation to make written submissions and opportunities to meet with the Committee. The Committee shall meet with the academic administrator being reviewed after giving at least ten days notice of such a meeting.

6. *If the initial decision of the Committee is not to recommend renewal, the Committee shall inform the person being reviewed of its concerns in writing and offer to meet with the person being reviewed at a mutually agreeable time to allow him or her to speak to these concerns.*
7. *The Committee shall report to the Vice-President (Academic) in writing and shall make one of the following recommendations:*
 - (a) *the incumbent should be renewed for a second term (or, in the case of the University Librarian, a subsequent term);*
 - (b) *a search should be initiated for which the incumbent may be a candidate.*
8. *If the review results in a decision that a search should be initiated, the Review Committee shall be converted to a Search Committee with the proviso that the Vice-President (Academic) may elect to replace the chairperson with himself or herself and the Committee shall proceed according to Clause III.6.*

[11] It is Memorial's position that the "review" of a dean's renewal begins with the formation of a Review Committee and ends with the Review Committee's report. Memorial advised that once the Review Committee has reported to the Vice-President (Academic) with its recommendation(s), the review process is complete. It is Memorial's opinion that the Review Committee submitted its report in January 2010 and that the review process was complete as of January 2010, therefore, no further search for responsive records relating to the "review" was necessary.

III APPLICANT'S SUBMISSION

[12] The Applicant was asked to provide a submission regarding the application of exceptions to disclosure claimed by Memorial under the *ATIPPA* as well as the interpretation of the word "review" in the Applicant's access request.

[13] With regard to the application of exceptions to disclosure under the *ATIPPA*, it is the Applicant's opinion that the exceptions were not properly applied. It is the Applicant's opinion that the process at Memorial is flawed when dealing with recommendations and that there should be complete transparency regarding the recommendations of the Review Committee.

[14] With regard to the interpretation of the word “review” in the Applicant’s access request, it is the Applicant’s opinion that the Board of Regents has the final authority to review and renew a dean. The Applicant stated that the Board of Regents met in May 2010 and that there should therefore be responsive records regarding the review of the renewal of [named individual] past January 2010.

[15] The Applicant emphasized in his submission that it is imperative that the process for renewal of positions within the Administration of Memorial be transparent to the public.

IV DISCUSSION

[16] There are two issues to be decided in this Request for Review, one being whether Memorial properly applied the exceptions under the *ATIPPA* and the second being the interpretation of the word “review”.

[17] Memorial claimed exceptions to disclose under the *ATIPPA* in accordance with sections 20(1)(a), 21(a) and 30(1). These sections are reproduced below for reference.

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

(a) advice or recommendations developed by or for a public body or a minister;

21. The head of a public body may refuse to disclose to an applicant information

(a) that is subject to solicitor and client privilege;

30. (1) The head of a public body shall refuse to disclose personal information to an applicant.

[18] Regarding the issue of the application of exceptions to disclosure under the *ATIPPA*, it is my opinion that all exceptions have been applied correctly. Memorial did release further records to the Applicant during the informal resolution stage of the Request for Review and the remaining exceptions were straightforward and properly applied.

[19] The interpretation of the word “review” will help determine whether a further search for records responsive to the Applicant’s original end date of December 16, 2011 should be conducted. I begin this analysis with the definition of the word “review” as provided in the *Concise Oxford English Dictionary* 10th Edition, Revised (New York: Oxford University Press, 2002). The word “review” has multiple definitions but the definition most relevant to this scenario is “a formal assessment of something with the intention of instituting change if necessary.”

[20] Memorial has claimed that the “review” of a dean is complete once the Review Committee has provided its recommendations to the Vice-President (Academic) and Memorial has supplied Part 4 of *Memorial’s Policies and Procedures* in support of this conclusion. While every organization is entitled to have their own policies and procedures for promoting and reviewing employees, I find it difficult to accept that once the Review Committee’s report has been completed that the entire “review” process of renewing a dean is complete.

[21] The wording of Part 4 of the *Memorial’s Policies and Procedures* does not elaborate as to what occurs after the Vice-President (Academic) receives the report from the Review Committee. Section 7 of Part 4 of *Memorial’s Policies and Procedures* states that the Committee shall *report* to the Vice-President (Academic) and make *recommendations*. The wording of Section 7 indicates that the Vice-President (Academic) would have some authority to review the recommendations of the Review Committee and potentially arrive at a different conclusion than the Review Committee. If that occurred then the “review” for a dean’s renewal would not be complete until some higher authority within the University either accepted or rejected the Review Committee’s recommendations.

[22] I think it is important to comment on the duty to assist as outlined in section 9 of the *ATIPPA* which reads as follows:

9. The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

[23] The duty to assist has been discussed in a number of Reports from this Office. In Report A-2009-011, I summarized the content of the duty to assist as follows:

The duty to assist, then, may be understood as having three separate components. First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a

reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner.

[24] The duty to assist will often require that a public body contact an applicant at the outset of an access request to clarify a request. It will sometimes be appropriate for a public body to enter into additional discussions with an applicant to refine the process and ensure that its response is what the applicant really wants. Such communications between the public body and the applicant are in keeping with the spirit of the *ATIPPA*, and can be extremely valuable.

[25] I wish to highlight that Memorial sought clarification from the Applicant regarding his access request on December 20, 2011. At that time, Memorial could have also taken that opportunity to discuss the interpretation of the word “review”. The Applicant included in his access request a list of suggested offices to be searched. Those offices included the Vice-President (Academic), the President’s office and the Board of Regents. In reviewing the Applicant’s access request it is apparent that he was seeking records from a broad range of offices and individuals.

[26] Once Memorial had conducted its search for responsive records and found that the last records were dated almost two years prior to the Applicant’s requested end date it should have become clear that the Applicant either erred in the end date of his request or intended the request to cover a broader range of records and thus a broader interpretation of what was encompassed within the term “review”. Either way, Memorial could have taken that opportunity to discuss the results with the Applicant to ensure that it was responding to the request in an accurate and complete manner.

[27] Based on the above it is my opinion that Memorial has interpreted the word “review” too narrowly in light of the Applicant’s access request. In keeping with the spirit of the *ATIPPA*, I think it is clear that the Applicant intended a broader interpretation of the word “review”.

V CONCLUSION

[28] I have concluded that Memorial properly applied the exceptions claimed under the *ATIPPA*, namely sections 20(1)(a), 21(a) and 30(1).

[29] With regard to the interpretation of the word “review” in the Applicant’s access request, it is my conclusion that Memorial interpreted the word “review” too narrowly in light of the Applicant’s access request. Memorial could have fulfilled its duty to assist more completely if it had discussed with the Applicant the interpretation of the word “review” and how that word would impact the search for responsive records, noting in particular the timeframe given in the Applicant’s request and the places within the University where he believed records might be located.

VI RECOMMENDATIONS

[30] Under the authority of section 49(1) of the *ATIPPA*, I recommend that Memorial University complete a search for records responsive to the Applicant’s access request to the end date requested by the Applicant, being December 16, 2011. The *ATIPPA* was amended through Bill 29 and the amended *ATIPPA* came into force on June 27, 2012. Due to the fact that the Applicant’s access request was made prior to the amended *ATIPPA*, I wish to be clear that I recommend that the search be completed under the *ATIPPA* that was the governing legislation in force at the time the access request was made.

[31] Under the authority of section 50 of the *ATIPPA* I direct the head of Memorial University to write to this Office and to the Applicant within 15 days of receiving this Report to indicate the final decision of Memorial University with respect to this Report.

[32] Please note that within 30 days of receiving the decision of Memorial University under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*.

[33] Dated at St. John’s, in the Province of Newfoundland and Labrador, this 16th day of April, 2013.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador