



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2016-004

March 31, 2016

### Memorial University of Newfoundland

**Summary:**

The Applicant made two access to information requests to Memorial University of Newfoundland. The first request included a list of all items purchased from a Third Party (commonly referred to as a usage report) for the calendar year 2013 which was used in the preparation of tender TFS-020-014 for office supplies. The second request was for a list of all items purchased from the same Third Party (a usage report) for the calendar year 2014. Memorial intended to release the records, however, a Third Party objected to the information being disclosed and filed two Requests for Review with this Office. The records could only be withheld on the basis of section 27 (business interests of a third party) and the Commissioner found that the burden of proof had not been met by the Third Party and recommended release of the information.

**Statutes Cited:**

*Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as amended, s. 27, s.64.

**Authorities Cited:**

*Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52; *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University*, Gary Kachanoski, 2014 NLTD(G)107. Newfoundland and Labrador OIPC Reports A-2014-013, A-2014-008, A-2013-009, A-2013-008.

## I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) the Applicant submitted an access to information request dated September 25, 2014 to Memorial University of Newfoundland (“*Memorial*” or the “*University*”) seeking disclosure of records as follows:

- 1) *A list, in Excel spreadsheet format, of all items purchased from [named Third Party] (commonly referred to as a usage report) for calendar year 2013 which was used in the preparation of tender TFS-020-014 for office supplies.*
- 2) *The total amount of the monthly electronic invoices submitted by [named Third Party] to Memorial University for purchases from January 1, 2013 to December 31, 2013.*
- 3) *A list of MUN employees who have authorization to purchase office supplies [sic] by accessing an online ordering site to place orders. We request the employee name, department, e-mail address and phone number.*

[2] This Applicant submitted a second access to information request dated January 9, 2015 to Memorial seeking disclosure of records as follows:

- 1) *A list, in Excel spreadsheet format, of all items purchased from [named Third Party] (commonly referred to as a usage report) for calendar year 2014.*

[3] The second and third items of the first access request are not at issue in this Report as it is my opinion that Memorial responded adequately to the Applicant. Memorial had advised the Applicant that it had decided to disclose the remaining records from the first access request (item one) and the records responsive to the second access request, however, since these records involved third party information, it was required to notify the affected third parties in accordance with section 28 of the *ATIPPA*. The Third Party objected to the disclosure of the records in both access requests and filed Requests for Review with this Office, one on November 25, 2014 in relation to the first access request, and the second on March 30, 2015 in relation to the second access request, asking that this Office review Memorial’s decision to disclose the information to the Applicant.

- [4] Both these Requests for Review were held in abeyance by this Office as the Third Party had appealed a decision by the Supreme Court of Newfoundland and Labrador Trial Division (General) (“Trial Division”), involving the same type of records (usage reports), to the Supreme Court of Newfoundland and Labrador Court of Appeal (“Court of Appeal”). The Court of Appeal provided its decision in *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52 dated October 30, 2015.
- [5] Attempts to resolve these Requests for Review by informal resolution were not successful, and by letters dated March 3, 2016, the Applicant, Memorial and the Third Party were advised that the Requests for Review had been referred for formal investigation pursuant to subsection 46(2) of the *ATIPPA*. As part of the formal investigation process, all parties were given the opportunity to provide written submissions to this Office in accordance with section 47.
- [6] The Applicant did not provide a submission but relied on the Court of Appeal decision as determinative of the issues in this matter. Neither Memorial nor the Third Party provided submissions.

## II DISCUSSION

- [7] I must point out that both of these access to information requests were made prior to the most recent version of the *Access to Information and Protection of Privacy Act, 2015* coming into force on June 1, 2015, therefore I am relying on the sections of the *ATIPPA* that were in force at the time these access requests were made.
- [8] The Third Party filed Requests for Review with this Office requesting a review of Memorial’s decision to disclose the records responsive to the Applicant’s access requests, namely the usage reports. The records can only be withheld if the records meet the requirements of section 27 of the *ATIPPA*. Section 27 reads as follows:

27. (1) *The head of a public body shall refuse to disclose to an applicant information that would reveal*

- (a) *trade secrets of a third party;*
- (b) *commercial, financial, labour relations, scientific or technical information of a third party, that is supplied, implicitly or explicitly, in confidence and is treated consistently as confidential information by the third party; or*
- (c) *commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to*
  - (i) *harm the competitive position of a third party or interfere with the negotiating position of the third party,*
  - (ii) *result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
  - (iii) *result in significant financial loss or gain to any person or organization, or*
  - (iv) *reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[9] The wording of section 27 means that the section can be applied to withhold information when any one of (a), (b) or (c) above are applicable. I have reviewed section 27 at length in previous reports (Reports A-2013-008, A-2013-009, A-2014-013) and therefore it is unnecessary for the purposes of this Report to review section 27 in great detail. Report A-2013-009 is significant as it involved the same parties as in the present case, the same type of records (usage reports) and ultimately resulted in a Trial Division decision in *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski*, 2014 NLTD(G)107 and a Court of Appeal decision in *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52.

[10] It is my opinion that the issue in these Requests for Review, namely the applicability of section 27 of the *ATIPPA* to usage reports, has already been determined by the Trial Division and Court of Appeal decisions in the above cases. As such, a review of the Trial Division decision and the Court of Appeal decision will provide an overview of the application of section 27 to the usage reports.

[11] The records at issue in the Trial Division decision in *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski* were described at paragraph 7 as follows:

*[7] The third request forms the subject matter of this Appeal. The Second Intervenor requested on August 28, 2012:*

- (a) “A list of contract items purchased from Staples for the period from July 1st, 2011 to June 30th, 2012 to include the product number, item description, quantity purchased, unit of measure, price charged, and total extended value per item; and*
- (b) A list of non contract office supply items purchased from Staples for the period from July 1st, 2011 to June 30th, 2012 to include the product number item description, quantity purchased, unit of measure, price charged, and total extended value per item.” (Emphasis mine)\*[1]*

[12] Justice Whalen, as he then was, highlighted the purpose of the ATIPPA, which is especially important when the records involve the expenditures of public bodies. Paragraph 21 is as follows:

*[21] This said, the over-arching purpose of the Act is set out in s. 3. It is necessary to recognize in any analysis that the purpose of the Act is to make public bodies more accountable by giving the public a right of access to records while “specifying limited exceptions to the right of access” (s. 3 (1)(c)). Any party carrying on business with a public body must be aware of this playing field. The public is to be given access to records of the public body with limited exceptions. While not restricted to the expenditures of public funds, the principle of being accountable to the public applies, in my view, with even greater focus when involving the use of the public’s money.*

[13] The burden of proof under section 64(2) of the ATIPPA requires that the Third Party prove the Applicant has no right of access to the records. The Third Party must demonstrate that section 27 of the ATIPPA applies to the records in order to justify withholding the records from the Applicant. Justice Whalen commented on the burden of proof at paragraph 46 as follows:

*[46] The burden of proof of probable harm is on the party resisting disclosure. To satisfy this evidentiary requirement, there must be convincing evidence that release of the Usage Reports will cause probable harm. The*

*evidence of the Applicant is vague and speculative and insufficient in my view to establish on of [sic] a balance of probabilities, that reasonable expectation of probable harm to the competitive position of the Applicant or significant financial loss would result from the release of the Usage Report, resulting therefore in damage to business interests of the Applicant.*

[14] Justice Whalen considered section 27(1)(b) and determined that the usage reports were commercial, financial or technical information “supplied” by Staples to Memorial. Justice Whalen further determined that the usage reports were secondary information that were not part of the negotiated contract which made them eligible for exemption from disclosure, however, Justice Whalen found that the information was not confidential and therefore not exempt from disclosure. At paragraph 38 Justice Whalen stated that “[n]either the content, purpose, nor circumstance in which the information was compiled or communicated would support the argument that the information was confidential in nature.”

[15] In examining sections 27(1)(c)(i) and 27(1)(c)(iii) Justice Whalen determined that neither section applied to exempt the information from disclosure as the evidence provided was vague and speculative and insufficient to establish on a balance of probabilities a reasonable expectation of probably harm to the competitive position or that a significant financial loss would result from the release of the usage reports. Justice Whalen provided a detailed explanation at paragraphs 48-51 as follows:

*[48] It may well be that the now release of the Usage Reports, pieced together with the other information already available, may disclose, in part, the bidding strategy of the Applicant, but that does not go far enough. Without evidence, the Court is invited to conclude that knowledge by the Second Intervenor and others of the Usage Reports would “harm” the competitive position of the Applicant or result in significant financial loss in the local and national markets. I find this position exaggerated and based on conjecture, and insufficient to ground the exemptions claimed.*

*[49] It must first be recognized that the fundamental purpose of the Act is to make public bodies accountable, that a person who makes a request for a record has a right of access and the burden is on the party claiming protection under one of the exemptions to satisfy the Court why the information should not be disclosed.*

*[50] The Applicant argued that the Usage Reports would allow their competitors to understand their exact price point on products sold. It would*

be my view that this information with regard to the contract items would be readily available from within the already disclosed bid information and various published catalogues of the Applicant combined with the Second Intervenor's knowledge of the usage reports of 2010. Having reviewed the Requested Information, I am not convinced that the actual list of contract items purchased during the first year of the subject contract period, the "product number, description (of product purchased), unit of measure, quantity, price (per item) and total sales", provides any further information that would allow the Applicant's competitors to understand their bidding strategy.

[51] When consideration is given to the evidentiary standard set out in the jurisprudence, I find the Applicant's evidence not sufficiently detailed or convincing to substantiate either that its competitive position will be harmed or that the release of Requested Information will cause It [sic] significant financial loss. The Applicant's evidence falls more into the category of mere possibility and speculation. The Applicant clearly wishes to protect the turf that it has enjoyed for 30 years and it continues to enjoy the benefits of having the contract to provide office supplies to MUN.

[16] Justice Whalen concluded that the disclosure of the usage reports is in step with the fundamental purpose of the ATIPPA to hold the public body accountable and directed that the information be disclosed. Justice Whalen's decision in *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University*, Gary Kachanoski was appealed, and the Court of Appeal provided a decision in *Corporate Express Canada Inc. v. Memorial University of Newfoundland* affirming Justice Whalen's orders.

[17] In reviewing Justice Whalen's decision, the Court of Appeal commented with respect to section 27(1)(b) at paragraphs 36-39 as follows:

[36] There are two usage reports. One contains specific descriptions, including product numbers, of items purchased in accordance with the specific descriptions of products set out in the tender bid, along with the quantities purchased and the prices paid (the contract usage report). The other report contains a list of items MUN could purchase from any office supplies supplier, along with descriptions and prices, but which MUN purchased from Staples (the non-contract usage report).

[37] The information in the contract usage report is arguably different from the information in the non-contract usage report in that it involves items supplied to MUN pursuant to the tender. However, it is not information that

formed part of the tender bid; it is after-the-fact information respecting how many of the items that were part of the tender bid were actually used by MUN and what MUN actually paid for those items. In actual fact, this is MUN's information, which it possessed and could have disclosed without the involvement of Staples. Staples only compiled and supplied it because MUN did not have an efficient system in place to track usage. Hence, the contract provision that the winning bidder, in this case Staples, would do so. The prices MUN paid for the specific products set out in the tender might have been Staples' confidential information when Staples bid on the tender, but once MUN actually purchased and paid for the items the information became MUN's. Accordingly, the information in the contract usage reports identifying the quantities and prices of specific items MUN purchased and paid for is not Staples' information, and I cannot see how its disclosure would reveal any of Staples' information which Staples had supplied in confidence and treated confidentially.

[38] The same reasoning applies to MUN's purchases of the non-contract items detailed in the non-contract usage report. Moreover, the prices of the non-contract items came from published catalogues available to businesses or entities purchasing office supplies to which a standard discount was applied. These purchases were open commercial transactions in respect of which the pricing for specifically described office supplies identified by product numbers was in the public domain (Merck Frosst at paragraph 146). Disclosing this information is simply disclosing what MUN, as a public institution, paid for non-contract office supplies it purchased on an as-required basis. Accordingly, the non-contract information is not and never was Staples' information and its disclosure cannot be said to reveal Staples' information which it had supplied to MUN in confidence and treated consistently as confidential.

[39] In summary, I am of the view that the Judge did not err in finding that the requested information was not exempt from disclosure. I add only that whether the usage reports were "supplied [by Staples to MUN] explicitly or implicitly in confidence" remains an open question in my mind due to the nature and character of the information and the fact that Staples had a contractual obligation to provide it to MUN. This point was not argued on appeal and it is unnecessary to decide it given the above conclusion.

[18] The Court of Appeal also reviewed Justice Whalen's decision with respect to section 27(1)(c)(i) and 27(1)(c)(iii) and concluded at paragraphs 42-44 as follows:

[42] Justice Cromwell addressed the issue of harm to a resisting party's competitive position in Merck Frosst, saying that "[a] third party claiming [exemption under this kind of provision] must show that the risk of harm is considerably above a mere possibility, although not having to establish on



the balance of probabilities that the harm will in fact occur” (at paragraph 199.) The test has also been stated to require “a clear cause and effect relationship between the disclosure and the alleged harm, that the harm must be more than trivial or inconsequential, that the likelihood of harm must be genuine and conceivable, and that detailed and convincing evidence that shows that results ... [are] more than merely possible or speculative”. (Commissioner’s Report, Appellant’s Appeal Book, Part I, Tab 3 at para. 15 citing Saskatchewan Report 2005-003.)

[43] The most that can be said about the impact disclosure of the usage reports would have, is that Dicks may be in an improved position to compete for the next office supplies tender contract that MUN offers, and that this could possibly affect whether Staples would be awarded the next tender contract. I agree with the Judge that this is speculation, and that there was no evidence as to how such a speculative result could reasonably be expected to harm Staples’ competitive position or result in significant financial loss to it. While it can be reasonably inferred that disclosure of the requested information could have some effect on the advantageous competitive position that Staples has been enjoying, it does not follow that, in the absence of other evidence, Staples’ competitive position would be harmed or that Staples would suffer significant financial loss as a result. One prospective bidder’s loss of exclusive knowledge of MUN’s contract and non-contract usage of office supplies in a previous time period, without more, does not translate to a risk of harm considerably above a mere possibility, or a real risk of financial loss. More specifically, disclosure of MUN’s usage information simply puts prospective bidders on a more equal footing. This is how it should be, for it ultimately makes MUN, as a public institution, more accountable in its expenditure of public monies. Accordingly, to the extent that disclosure of the requested information would expose the bidding strategy of Staples, exposure of Staples’ bidding strategy, without more, is not evidence from which harm to Staples’ competitive position and significant financial loss to it can be reasonably inferred.

[44] Additionally, Staples has not pointed to any evidence that the Judge failed to consider, or indeed any evidence that could be said to show that Staples’ competitive position would be harmed or that it would be caused significant financial loss. I agree with the Judge that some empirical, statistical, and or financial evidence would generally be required to substantiate Staples’ arguments in these regards and that no such evidence was adduced. Accordingly, the Judge cannot be said to have erred in concluding that Staples did not establish that disclosure of the requested information would cause Staples significant financial loss, or harm its competitive position.

[19] I have quoted at length from the Court of Appeal decision above as it outlines the detailed review which was given to the Trial Division decision as well as adding further comments regarding the applicability of section 27 to the usage reports. With two levels of Court decisions, this matter, in my opinion, has been clearly decided.

### III CONCLUSION

[20] In these Requests for Review, the Third Party did not provide any evidence to establish that section 27 applied to exempt the records from disclosure and as such failed to meet the burden of proof in section 64(2) of the *ATIPPA*.

[21] Given that the records at issue in these Requests for Review are usage reports and given the Trial Division decision in *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski* and the Court of Appeal decision in *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, I am not surprised the Third Party had no proof to offer as these Court decisions have already determined the issue of the applicability of section 27 to usage reports. Based on these Court decisions I had anticipated that the Third Party would have resolved these Requests for Review informally. However, as the Third Party was not willing to engage this Office on these files, it was necessary to provide this Report outlining the Courts' decisions on this matter.

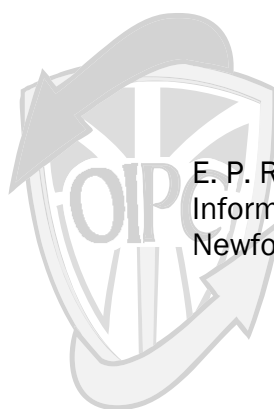
### IV RECOMMENDATIONS

[22] Under the authority of section 49(1) of the *ATIPPA*, I recommend that Memorial release to the Applicant the records responsive to item one in the first access request and the records responsive to the second access request, namely the usage reports for the calendar years 2013 and 2014.

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

[24] Please note that within 30 days of receiving the decision of Memorial under section 50, the Applicant or the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal to the Trial Division as set out in the *ATIPPA*.**

[25] Dated at St. John's, in the Province of Newfoundland and Labrador, this 31<sup>st</sup> day of March 2016.



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