



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-032

December 22, 2016

Memorial University of Newfoundland

Summary:

Memorial University (“Memorial”) received an access request seeking disclosure of an agreement between Memorial and a group of oil and gas sector companies for funding for a new building, laboratory space and a research chair in petroleum engineering. While no final agreement was signed, Memorial denied access to the draft agreement based on section 29(1)(a) (policy advice or recommendations), section 35(1)(b), (c), (d), (f), and (g) (disclosure harmful to the financial or economic interests of a public body) and section 39(1) (disclosure harmful to business interests of a third party). The Applicant was not satisfied with Memorial’s response and filed a complaint with this Office. The Commissioner determined that Memorial correctly applied section 35(1)(c), (d), and (f) and recommended that Memorial continue to withhold the draft agreement.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A-1.2, sections 29(1)(a), 35(1)(b), (c), (d), (f), (g) and 39(1).

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) Memorial University (“Memorial” or the “University”) received an access to information request seeking disclosure as follows:

A copy of the Petroleum Engineering Contribution Agreement (through which an industry group comprised of [named company], [named company], [named company], [named company] and [named company] agreed to provide at least \$30 million of funding for the new Core Science Building). This would likely have been signed in late 2014. I would like a copy of the Agreement and an outline of any commitments made by Memorial University in exchange for the funding.

- [2] Memorial responded to the Applicant advising that the University had no records responsive to the access request. The Applicant contacted Memorial’s Information Access and Privacy (“IAP”) Office to discuss the response as his access request was based on information from the Minutes of the Vice-Presidents’ Council meeting and he was surprised there were no records responsive to his access request.

- [3] Memorial advised the Applicant that he would need to submit a new access to information request as there was a draft copy of the Petroleum Engineering Contribution Agreement (the “Draft Agreement”), however, third parties would need to be notified. The Applicant submitted a new access request as follows:

I would like a copy of the draft copy of the Petroleum Engineering Contribution Agreement as discussed in the meeting minutes from the 18 November 2014 Vice-Presidents’ Council meeting.

- [4] Memorial consulted with the third parties it had notified and ultimately denied access to the Draft Agreement based on sections 35(1)(b), (c), (d), (f) and (g) (disclosure harmful to the financial or economic interests of a public body) and 39(1) (disclosure harmful to business interests of a third party) of the *ATIPPA, 2015*. The Applicant was not satisfied with Memorial’s response and filed a complaint with this Office.

- [5] Attempts to resolve the complaint by informal resolution were not successful, and the complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

- [6] Memorial provided a detailed submission to this Office, relying on section 29(1)(a), section 35(1)(b), (c), (d), (f) and (g) and section 39(1) to withhold the Draft Agreement. Memorial advised that the Draft Agreement is a draft, unexecuted agreement between Memorial and five oil and gas sector companies for a project involving \$30 million of funding in support of a new building, laboratory space and a research chair as part of a new program in petroleum engineering. Memorial advised that it considers the Draft Agreement to be confidential and that it has not been shared beyond those necessary for the purpose of negotiations.
- [7] Memorial explained that the Draft Agreement was tabled at a meeting of the University's Vice-Presidents' Council in November 2014, at which time the Council agreed that, subject to further revisions to be reviewed and approved, it would be submitted to the University's Board of Regents for consideration and decision. This did not happen as negotiations were suspended. Memorial advised that no negotiations are taking place currently, however, there are some discussions with the oil and gas companies regarding resuming negotiations for the project.
- [8] Memorial relied on section 29(1)(a) as it believes that the entire Draft Agreement contains information for the new program in petroleum engineering and therefore represents a proposal for a course of action.
- [9] Memorial also relied on section 39(1)(a)(ii), (b) and (c)(i) and (ii) as an exception to disclosure. It is Memorial's opinion that the information contained in the Draft Agreement is commercial, financial and technical information. Memorial argues that the Draft Agreement was supplied in confidence, as it was not an executed contract. It is Memorial's belief that releasing the Draft Agreement would release the parties' confidential negotiating positions

which may harm the companies and cause them to re-evaluate how they engage with stakeholders on future contributions.

[10] The specific details of Memorial's submission regarding section 35 will be discussed below.

III APPLICANT'S POSITION

[11] The Applicant provided a detailed complaint to this Office as well as a detailed submission at the formal investigation stage.

[12] The Applicant expressed his frustration with how Memorial responded to his access request in the sense that he had to make two separate access requests for the information. As well, the Applicant was under the impression that the agreement was defunct, however, Memorial stated in its response that "The record you are seeking is a draft agreement made further to an ongoing negotiation between the parties to the agreement." The Applicant expressed his frustration as it appeared he was being provided different information regarding the status of the agreement.

[13] The Applicant provided further submissions regarding his reasons for wanting to examine the Draft Agreement and addressing Memorial's reliance on the exceptions to disclosure. These will also be addressed below.

IV DECISION

Section 35

[14] The relevant portions of section 35(1) are as follows:

35. (1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;

(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;

(d) information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;

...

(f) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body, or considerations which relate to those negotiations;

(g) information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body; or

[15] In reviewing the Draft Agreement it is clear that this agreement was not finalized as it includes tracked changes showing deletions, changes and comments. The Draft Agreement is formatted as a contract and outlines the tentative contributions from the companies as well as project details and other related information.

[16] It is Memorial's opinion that disclosure of the Draft Agreement would be premature, since negotiations are halted. Attempts are being made to resume negotiations, however, Memorial believes that other universities could use the information contained in the Draft Agreement to offer the same or similar programming and negotiate similar agreements with the same or similar companies which would cause harm to Memorial.

[17] Memorial also explained that the Draft Agreement contains specific details of the new program in petroleum engineering which includes building size, cost per square foot, size of the laboratories, staffing, hiring of faculty, budget, timelines, milestones, development of facilities and acquisition of equipment and instruments. Based on this, it is Memorial's belief that release of this information will disclose plans that have not yet been implemented or made public.

[18] Memorial advises that the Draft Agreement was developed for the purpose of negotiations between Memorial and the five oil and gas companies. The Draft Agreement represents what was agreed to up to a point in time and that had negotiations not been suspended, the information in the Draft Agreement would have been used for further negotiations until a final agreement was reached

[19] It is the Applicant's opinion that any financial, commercial or technical information in the Draft Agreement could be redacted and that the entire agreement should not be withheld. The Applicant also believes that the Draft Agreement does not impact the administration or management of personnel or the public institution itself. The Applicant does not believe that disclosing the Draft Agreement would be premature and lead to concrete damages. It is the Applicant's opinion that by the time partnerships are signed off on, it is often too late for concerned actors to intervene in the public interest. The Applicant believes that sparking a public discussion or debate about responsible use of public funds is not the same as harming the interests of a public body.

[20] I find that Memorial has provided enough evidence to demonstrate that the Draft Agreement fits within sections 35(1)(c), (d), and (f). As I have made a determination under section 35, I will not provide an analysis regarding the applicability, if any, of sections 29 or 39.

Procedural Issues

[21] For procedural reasons, I must briefly comment on section 29(1)(a). This exception to disclosure was not initially relied upon in Memorial's response to the Applicant denying access to the Draft Agreement. As per the "Public Body Guidelines for Preparing for an Access Complaint" issued by this Office, should a public body invoke any additional discretionary exceptions under the *ATTIPPA, 2015*, it must inform the applicant and this Office of its intention to do so within 10 business days of receipt of correspondence from this Office notifying the public body that the applicant has filed a complaint. In this case, Memorial included section 29(1)(a) in its submission to this this Office within the 10 business days but did not notify the Applicant.

[22] As the Applicant was not notified of Memorial's reliance on section 29(1)(a), the Applicant did not provide submissions regarding this exception to disclosure. Public bodies invoking additional discretionary exceptions must notify applicants in order to ensure procedural fairness.

[23] The Applicant raised a concern with having to make two access requests. While there was no executed agreement, surely a discussion could have taken place with the Applicant to determine if he was seeking the Draft Agreement. This process could have been streamlined for the Applicant even taking into account Memorial having to notify third parties. The duty to assist contemplates these inquiries by public bodies when it is clear what an applicant is seeking but is mistaken about its status.

[24] The Applicant also expressed some frustration with the information he was receiving regarding the status of the agreement. It seems that there may have been some inaccurate terms referenced regarding whether the Draft Agreement was subject to an ongoing negotiation or not. I do not believe it was Memorial's intent to mislead the Applicant, as Memorial advised that attempts were being made to resume negotiations, therefore this is where I believe the confusion arose.

Public Interest Override

[25] The Applicant believes that the Draft Agreement should be released as there are ongoing concerns regarding public universities negotiating contracts that are contrary to the public interest. He is also concerned that this has the effect of abridging academic freedom. The Applicant wished to know the terms Memorial had agreed to or proposed in exchange for funding.

[26] The Applicant has provided details of a number of examples where this concern has arisen in other universities and with other programs. The Applicant wanted to examine the agreement to ascertain to what degree, if any, Memorial is addressing concerns surrounding collaborative funding arrangements.

[27] Memorial advised that it is not clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception. In this case the agreement is only a Draft Agreement and Memorial believes that there must be a “safe space” to formulate and develop policy. Memorial does not believe that the public interest is served by disclosing details of negotiations that have been suspended and considering that the provisions in the agreement may change. Memorial stated:

We note that any proposal for a new undergraduate program will be the subject of rigorous discussion, debate, review and approval by many academic bodies at Memorial, including Department Council, Committee on Undergraduate Studies, Faculty Council and Senate, which is the governing body responsible for decisions about academic programming. The university community and the public would have opportunities to weigh the merits of the proposal for a new academic program, facilities, and associated resources should a contribution agreement be successfully negotiated. Ultimately, if it is approved by the Board of Regents, the construction of a new building on campus would also require a review and approval by the provincial government.

[28] I find that Memorial has properly assessed the public interest override provision in this instance. I am not satisfied that it has been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.

V RECOMMENDATIONS

[29] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that Memorial continue to withhold the Draft Agreement.

[30] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of Memorial must give written notice of his or her decision with respect to this recommendation to the Commissioner and to any person who was sent a copy of this Report (in this case the Applicant) within 10 business days of receiving this Report.

[31] Please note that within 10 business days of receiving the decision of Memorial under section 49, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of the *ATIPPA, 2015*.

[32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 22nd day of December, 2016.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador

