



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2017-021

August 15, 2017

### Memorial University

#### Summary:

Memorial University received an access request seeking disclosure of all communication transmitted or received by a named professor which concerned the Applicant as well as all communication the professor had regarding the meetings and operations of the IEEE Communications Society Awards Committee since November 1, 2016 that concerned the Applicant. Memorial University denied access to the information claiming that the records were not in the custody or control of Memorial University therefore they were not available under the *ATIPPA, 2015*. The Applicant was not satisfied with Memorial University's response and filed a complaint with this Office. The Commissioner determined that the records were not in the custody or control of Memorial University and therefore the *ATIPPA, 2015* did not apply to the records.

#### Statutes Cited:

*Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, s.5(1).

#### Authorities Relied On:

[Canada \(Information Commissioner\) v. Canada \(Minister of Defence\)](#) [2011] 2 S.C.R. 306; [Ontario IPC Order MO-2750](#); [University of Alberta v. Alberta \(Information and Privacy Commissioner\)](#) 2012 ABQB 247; [City of Ottawa v. Ontario](#) 2010 ONSC 6835; [Wilfrid Laurier University \(Re\)](#), 2009 CanLII 60394 (ON IPC); [University of Ottawa \(Re\)](#), 2009 CanLII 63942 (ON IPC); [University of Alberta v. Alberta \(Information and Privacy Commissioner\)](#), 2009 ABQB 112 (CanLII).

## I BACKGROUND

- [1] The Applicant made a request to Memorial University (the “University”) under the Access to Information and Protection of Privacy Act, 2015 (the “ATIPPA, 2015” or “Act”) for:

*“All emails and all written correspondence received or transmitted by [a named professor] in the time period November 1, 2016 to the present that names or concerns [the Applicant], identified by name, by title, by implication, and by any other context. All such information that resides on the computers and electronic and paper files of [named professor], her students and her laboratory staff. All such material received or transmitted from and to Fax number [a fax number]. Under the same conditions, all emails and written correspondence, in electronic and paper form concerning the meetings and operations of the IEEE Communications Society Awards Committee since November 1, 2016 to present.”*

- [2] The University indicated in response to this request that the only records in the possession of the professor that meet the search criteria were not University records as they were “received/generated solely in her capacity as a member of the IEEE Communications Awards Committee.” As such, the University indicated that these records “are not in the custody or control of Memorial University and, therefore, are not available under the Access to Information and Protection of Privacy Act.”
- [3] As the complaint could not be resolved informally it was referred to formal investigation under subsection 44(4) of the ATIPPA, 2015.

## II PUBLIC BODY’S POSITION

- [4] The University did not request records from the professor’s students as they are not employees or agents of the University. Also, the professor confirmed that her laboratory staff had no records responsive to the request. As for the records in the professor’s possession, the University indicated that, while these records “reside in files and computing equipment located at and owned by Memorial University”, they are not in the University’s custody or under their control as “physical possession does not determine control.”

[5] The University relied on the two-part test set out in *Canada (Information Commissioner) v. Canada (Minister of Defence)* to determine the question of control:

- (i) *whether the contents of the document relate to a departmental matter; and*
- (ii) *whether the relevant government institution could reasonably expect to obtain a copy of the document upon request.*

[6] The University determined the records did not meet either element of this test as they did not relate to University matters, but instead related entirely to the volunteer work done by the professor; and secondly, the University could not expect to be given such documents merely by requesting them, as they do not fall within the professor's scope of employment.

### III APPLICANT'S POSITION

[7] The Applicant notes that the files reside on the server at the University and therefore should be in the University's custody.

[8] The Applicant also points out that the IEEE provides email accounts to members of the IEEE Communications Society Awards Committee to use for its business, and he alleges that the professor circumvented the access provisions that apply to the IEEE email account by using the University's email system to transact IEEE business.

[9] It is the Applicant's position that the professor's use of the University's email system was not for volunteer or personal use, rather for conducting business related to the IEEE, and that the records should be in the custody or under the control of the University.

### IV DECISION

[10] The issue of custody and control was reviewed in Report A-2014-012. Section 5(1) of the *ATIPPA, 2015* outlines the application of the *ATIPPA, 2015* and reads, in part, as follows:

*5(1) This Act applies to all records in the custody of or under the control of a public body ...*

[11] Section 5(1) sets out an important threshold question. In order for the *ATIPPA, 2015* to apply to records, the records must either be in the custody of **OR** under the control of a public body, it need not be both.

[12] The terms “custody” and “control” are not defined in the *ATIPPA, 2015*, however, these terms have been given a broad and liberal interpretation in keeping with the purposes of access to information legislation. One of the purposes of the *ATIPPA, 2015* is to facilitate democracy through ensuring that citizens have the information required to participate meaningfully in the democratic process, increased transparency in government and public bodies and protecting the privacy of individuals.

[13] It has generally been established that while physical possession of a record is the best evidence of custody, simple possession is not determinative.

[14] In addition to the two-part test set out in *Canada (Information Commissioner) v. Canada (Minister of Defence)* to determine the question of control, a non-exhaustive list of factors in Ontario IPC Order MO-2750 for custody or control has been accepted in other jurisdictions. The unique circumstances of each case determine the relevance, if any, of these factors:

- *Was the record created by an officer or employee of the institution?*
- *What use did the creator intend to make of the record?*
- *Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?*
- *Is the activity in question a “core”, “central” or “basic” function of the institution?*
- *Does the content of the record relate to the institution’s mandate and functions?*
- *Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?*
- *If the institution does have possession of the record, is it more than “bare possession”?*
- *If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?*
- *Does the institution have a right to possession of the record?*

- *Does the institution have the authority to regulate the record's content, use and disposal?*
- *Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?*
- *To what extent has the institution relied upon the record?*
- *How closely is the record integrated with other records held by the institution?*
- *What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?*

[15] After reviewing the cases and evidence provided by the University, the cases relied on by the Applicant, and the factors listed above, I have determined that the records the Applicant has requested are not in the custody or under the control of Memorial University. This determination relies on a constellation of facts and circumstances specific to this file. Determining custody or control involves an in depth analysis of the unique facts of each case.

## VI RECOMMENDATIONS

[16] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the University continue to withhold the records as they are not in the University's custody or control.

[17] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the University 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 within 10 business days of receiving this Report.

[18] Please note that within 10 business days of receiving the decision of the University 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*.

[19] Dated at St. John's, in the Province of Newfoundland and Labrador, this 15<sup>th</sup> day of August 2017.

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

