



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2010-005

April 28, 2010

Memorial University of Newfoundland

Summary:

The Applicant applied to Memorial University (“Memorial”) under the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) for access to a group of e-mails in which the Applicant was referenced, sent or received by a named member of the university community during a specified time. Memorial provided a number of records to the Applicant. However, it was the Applicant’s view that the original search, for deleted messages in particular, was only partial. The Applicant made a Request for Review to this Office asking that the search be repeated. The Commissioner determined that Memorial had conducted a reasonable search and that it was technically impossible to retrieve the deleted messages. Therefore the Commissioner made no recommendation.

Statutes Cited:

Access to Information and Protection of Privacy Act, SNL 2002, c. A-1.1, as amended, sections 9, 16 and 44.

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2005-006 and A-2010-004.

I BACKGROUND

- [1] The Applicant's original request under the *Access to Information and Protection of Privacy Act* (the "ATIPPA") to Memorial University of Newfoundland ("Memorial") read as follows:

E-mail communications including deleted ones (whose copies were saved on the MUN e-mail back-up server), send and received by [a named individual member of the university community, with e-mail address], in which [the Applicant's name] is mentioned. The period covered: October 15 2007 – 25 April 2008. This request is made in the framework of appealing a decision of SSHRC Selection Committee No 15 in regard to [the Applicant's] application to a research grant on the ground of the misuse of his personal information.

- [2] The Applicant presented his request to the Memorial Information Access and Privacy Protection Coordinator (the "Coordinator") on April 25, 2008. However, he gave instructions to hold the request in abeyance and not to process it pending the outcome of another request. On July 30, 2008 the Applicant asked that his April 25, 2008 request be processed. The Applicant also asked to amend the period covered by the search to October 15, 2007 – July 4, 2008.
- [3] On October 3, 2008 Memorial wrote to the Applicant granting his request and enclosing the records that had been determined to be responsive to his request.
- [4] On October 6, 2008 the Applicant sent a Request for Review to this Office, asking that the search be repeated since it was his view that the original search, for deleted messages in particular, was incomplete. The Applicant stated that if a repeated search was found to be prohibitively costly, then he would ask that it be focused on a shorter time period: April 13-24, 2008. Alternatively, the Applicant stated that if it were found to be technically impossible to retrieve these messages, he would at least like to know whether any messages were deleted during that time period, particularly on April 18, 2008 between 4:00 pm and 8:00 pm.
- [5] In addition, the Applicant made a separate complaint about the extension of time taken by Memorial to respond to his request.

[6] An investigator from my Office was assigned to this matter, and he wrote to the Applicant on April 30, 2009 communicating his findings. The Applicant did not agree to resolve the matter informally and on May 4, 2009 it was referred to the formal investigation process pursuant to subsection 46(2) of the *ATIPPA*. Both Memorial and the Applicant filed written submissions.

II SUBMISSION OF MEMORIAL UNIVERSITY OF NEWFOUNDLAND

[7] Memorial stated that it first asked the individual named in the request to provide responsive records. That individual conducted a search of his own e-mail account and reported that there were no e-mails found that were responsive to the request.

[8] At the same time, the Coordinator contacted the Director of Computing and Communications (“C&C”), the body responsible for operation and maintenance of the University e-mail system, and asked that a server search be conducted. The results of the search were forwarded to the Coordinator, and a review determined that there were 14 records responsive to the request.

[9] Memorial stated that the initial understanding of the Coordinator had been that e-mail messages deleted from individual accounts would remain on the “back-up” server and thus be retrievable. That understanding had been communicated to the Applicant. However, it was subsequently discovered that in fact the system also deletes such messages from the back-up server after 24 hours.

[10] Memorial states that all of this information, including the C&C report on the search, was supplied to the Applicant, and concludes that its search to locate and identify records in response to the Applicant’s request was adequate and reasonable.

III SUBMISSION OF THE APPLICANT

[11] The Applicant stated that the informal investigation had failed to address his concerns. First, he wanted to know the exact reasons for the delay in notifying him about the outcome of his initial request for access to personal information.

[12] Second, the Applicant stated that he wanted to know why he had been misinformed about the parameters of the technically feasible search on the Memorial back-up e-mail server. He stated that he had been assured by the Memorial Coordinator that deleted messages could be retrieved.

IV DISCUSSION

[13] There are two main issues to be decided in this Request for Review:

- (1) whether the original search was adequate and reasonable; and
- (2) whether the Applicant's request to have the search repeated was reasonable.

In addition, I will respond to the Applicant's concerns regarding the extension of time taken by Memorial in responding to his request.

(1) The Adequacy of the Search

[14] Section 9 of the *ATIPPA* 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.

[15] Our Office interprets this requirement as including the duty to complete a reasonably thorough search for records, by an experienced person who is familiar with the records system and storage practices. Only then can a public body respond that the requested records do not exist. (See, for example, the discussions in Report 2005-006 and more recently in Report A-2010-004.)

[16] In order to determine how the search had been done in the present case, an investigator from this Office met with a number of people at Memorial, including the Computing and Communications Department employee who had conducted the server search. It was explained that at Memorial, there are in fact several different e-mail systems in use, and there are several different servers, located in different parts of the campus, that handle e-mail transactions. Each member of the university community has an e-mail account that resides on one of the servers.

[17] The first search conducted by C&C produced only 11 possibly responsive messages. Therefore it was decided to repeat the search with broader criteria, this time including e-mail attachments. The second search turned up 1,876 items. These records were delivered electronically to the Coordinator, and were individually opened and reviewed. Only 14 records were determined to be responsive to the Applicant's request, mainly e-mailed departmental memos that had been sent to the Applicant's e-mail address.

[18] As stated in its submission, Memorial had asked the individual named in the Applicant's request for copies of responsive e-mails. That individual reported that he found no e-mails on his computer that were responsive to the request. He did have some paper records which he considered might be relevant, and which he turned over to the Coordinator for review. All documents that were determined by the Coordinator to be responsive to the request were provided to the Applicant. During the course of this review, those records were also provided to our Office. There is no evidence that there are any other responsive records that have been withheld from the Applicant.

[19] The issue of deleted e-mails is the matter that most concerns the Applicant. As Memorial explained in its submission, the initial understanding of the Coordinator had been that e-mail messages deleted from individual accounts would remain on the "back-up" server and thus be retrievable. That understanding had been communicated to the Applicant. However, it was subsequently discovered that in fact the system also deletes such messages from the back-up server after 24 hours.

[20] The C&C employee who had conducted the server search explained that every night, in the small hours, the contents of each e-mail server's disk drive are copied to a backup tape. This process, which takes several hours, is done not for archival purposes but for disaster recovery in the event that the server crashes. It is a "snapshot" of the contents of the server on that date, and would include all of the e-mail messages, and attachments, in each individual's e-mail account.

[21] When an individual chooses to delete an e-mail message from one of the folders on his or her own computer, it goes to a folder called "deleted items." The contents of that folder are still on the server, along with undeleted messages, and therefore would be captured by the next backup, so the message could still be retrieved at that time. However, after the passage of a set number of hours or

days, deleted messages are purged from the “deleted items” folder. Therefore they will no longer be captured by the next nightly backup. From that moment on there is no way to retrieve such messages. Precisely how long deleted items are retained depends on the particular e-mail program used by the individual.

[22] It is important to note that the backup system in use at Memorial does not consist of separate daily tapes that are kept for a certain period. Rather, the next nightly backup simply inspects the server disk to see what files have changed from the previous day, and records the changes. The new backup over-writes the previous one. Thus, a message deleted from a user’s inbox (or any other folder location) will not appear in that location after the next backup. Similarly, a message purged from a user’s “deleted items” folder will be purged from the backup after the next daily pass.

[23] Memorial conducted a search for the requested e-mails which appears to have been professional, competent and thorough. Very few responsive records were returned. Those messages were provided to the Applicant. The search also focused on deleted messages – that is, any relevant messages that had been deleted by the sender or recipient from his own e-mail account, but which might have been captured on the nightly server backup. However, none were found.

[24] It is unfortunate that the Applicant was misinformed about whether a back-up search for deleted e-mails was technically feasible. However, there is no evidence that this was anything other than a genuine misunderstanding on the part of individuals who responded to the Applicant and who were not themselves experts in the functioning of the e-mail system.

(2) The Request to Repeat the Search

[25] Depending on circumstances, it is technically possible that, in some systems, e-mail messages *could* be recovered from backup for longer than twenty-four hours after they were initially deleted from an individual e-mail account. For example, an individual’s account might be set up to retain e-mails in the deleted items folder for a longer period. However, the Applicant was seeking e-mails sent or received between October 15, 2007 and April 25, 2008. By the time his access request was initiated on July 30, 2008 several months had elapsed beyond any existing backup retention period.

[26] The Applicant in his Request for Review asked alternatively that the repeated search be focused on a shorter time period, April 13-24, 2008. However, even if his original access request had been acted upon within a few days after he initially submitted it on April 25, 2008, it is likely that any e-mails deleted during the period of April 13-24, 2008 (for example, on April 18, 2008, the date the Applicant seems to believe might have been important) would no longer be retrievable from the backup tape.

[27] Given that any deleted messages that might have existed were already purged from the system by the time the initial search was carried out in July 2008, it is technically impossible to recover them, and so there would be absolutely no purpose in repeating that search.

[28] In addition, it is not possible to determine from Memorial's server records whether or not messages were deleted from a particular account on a particular date. While some server and backup logs are kept showing numbers of messages in and out, I am advised that those logs are only kept for a two-week period. Deletions are not logged at all.

The Issue of Delay

[29] The Applicant's Request for Review included a complaint that Memorial had asked for a 30-day extension of time, beyond the initial statutory 30 days, to process his request. Normally, time extension complaints are dealt with through informal resolution processes only, pursuant to the limitations imposed by section 44 of the *ATIPPA*. My Office has already written to the Applicant with our findings on the time extension issue. However, the Applicant has raised the issue again in his submission, and so I will briefly summarize my conclusion here.

[30] Memorial received the Applicant's instruction to proceed with his request on July 30, 2008. On August 12, 2008 Memorial wrote to the Applicant advising him that it was necessary to extend the time for response by 30 days, which it was entitled to do under section 16 of the *ATIPPA*, and it hoped to complete the request by September 29, 2008. Memorial's final response was dated October 3, 2008, one day past the actual statutory deadline, which was October 2, 2008.

[31] I have taken into account that this was Memorial's first experience with this type of search. It took the C&C employee several days to set up and carry out the search. From that, almost 2,000 messages were identified as possibly responsive and were provided to the Coordinator. Each item had to be manually opened and reviewed to determine whether it was responsive. Although the response ultimately exceeded the statutory deadline, it was only by one day. In all of the circumstances I conclude that the extension of time was not unreasonable.

V CONCLUSION

[32] It is unfortunate for the Applicant that the search requested could not produce more useful results. However, Memorial conducted what I consider to have been a reasonable and thorough search for the records requested by the Applicant, and gave him what responsive records exist.

[33] I wish to note here that Memorial has a records management policy which provides that official records, as defined by the policy, are to be dealt with in accordance with established procedures, including retention and disposal schedules. There was no evidence in this case that the e-mails sought by the Applicant had ever actually existed. Similarly, if such e-mails had previously existed, there was no evidence that they had been deleted other than in accordance with the records management policy. Had there been such evidence, the investigation conducted by this Office, and this Report, would have encompassed such issues.

VI RECOMMENDATIONS

[34] Given the conclusions I have reached it is not necessary for me to make any recommendation.

[35] Although I have not made a recommendation in this Report, under authority of section 50 of the *ATIPPA* I direct the head of Memorial University of Newfoundland to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of Memorial University of Newfoundland with respect to this Report.

[36] Please note that within 30 days of receiving a decision of Memorial University of Newfoundland 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*.

[37] Dated at St. John's, in the Province of Newfoundland and Labrador, this 27th day of April 2010.

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

