



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2012-008

May 31, 2012

### Memorial University of Newfoundland

#### Summary:

The Applicant applied to Memorial University of Newfoundland (“Memorial” or “Memorial University”) under the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) for access to records relating to the organization of a visit and corresponding meetings between a named individual and Memorial University. The University responded by issuing a time extension and a fee estimate which was eventually reduced and, in turn, paid. Following payment of the fee, Memorial University released the responsive records to the Applicant in part with portions severed in accordance with section 30 (disclosure of personal information) of the *ATIPPA*. The Applicant filed time extension and fee complaints and a Request for Review with this Office. The complaints were resolved informally and are not addressed in this Report. In response to the Request for Review, the Commissioner found that Memorial University had complied with the duty to assist pursuant to section 9 of the *ATIPPA* by performing a reasonable search for the responsive records and responding to the access request in an open, accurate and complete manner. The Commissioner made no recommendations.

#### Statutes Cited:

*Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as amended, s. 9.

## 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 September 28, 2011 to Memorial University of Newfoundland (“Memorial” or the “University”). The request sought disclosure of records as follows:

*Documents pertaining to the visit(s) of [individual’s name and title], to Memorial University of Newfoundland (St. John’s, NL) during past three years (October 1, 2008-October 1, 2011), namely the visit of [specific date]. Their list includes, but is not limited to: official invitation, budget, travel and accommodation documents, exchanges with MUN officials in respect of the organization of this (these) visit(s). The School of Graduate Studies may possess some of the documents responsive to this request. The present request is made under Sections 8 and 30.1(d), (f) and (j) of the ATIPPA. As for Section 30.1(d), the Access to Information Act of Canada authorizes the disclosure of the documents sought. Namely, Section 3.1 of this Acts establishes that ‘information that relates to the general administration of a government institution includes information that relates to expenses paid by the institution for travel, including lodging and hospitality’.*

- [2] Memorial confirmed receipt of this request on September 30, 2011. On October 20, 2011 Memorial provided the Applicant with a fee estimate in relation to the access request which was eventually reduced as the Applicant did not wish to receive a paper copy of the records and, in turn, the required deposit was paid.
- [3] On October 25, 2011, Memorial extended the time for responding to the request in accordance with section 16 of the *ATIPPA*.
- [4] On November 3, 2011 the Applicant reformulated his access request as follows:

*Documents with regard to the organization of [title of identifiable individual] visit(s) such as ‘official invitation, budget travel and accommodation documents, exchanges with MUN officials in respect of the organization of this (these) visit(s)’ including e-mails (see my ATIPP request submitted on September 28, 2011, see its copy attached). It means that posters, information materials targeting the MUN community and the like do not fit this description and, hence, could be excluded from the search. I am particularly interested in*

1. *The agenda of the one-to-one meeting between the Dean of Graduate Studies and the SSHRC that took place on [specific date], as well as in any notes and documents that derive from it.*
2. *The initial notification about [title of identifiable individual] visit.*

[5] On November 30, 2011, Memorial informed the Applicant that his request had been granted in part; certain information was withheld pursuant to section 30 (personal information) of the *ATIPPA*. Memorial released the severed records on December 5, 2011 following receipt of the remaining balance on the fee estimate.

[6] On December 6, 2011 this Office received a Request for Review from the Applicant as follows:

- 1) *No documents prior to March 15, 2009 were found (Appendix A), in spite of my explicit request to receive a copy of the initial notification letter from SSHRC (Appendix D). No documents pertaining to the meeting of October 6, 2009 were provided either (Appendix D).*
- 2) *When responding to a similar request of mine, SSHRC (Social Sciences and Humanities Research Council) did not request any extension (Appendix F). Furthermore, the statutory deadline was missed (Appendix G).*
- 3) *When responding to a similar request of mine SSHRC did not charge any fees (Appendix G) for providing me with copies of a similar number of documents.*

[7] In the section of the Request for Review form entitled: “What Request/Remedy are you Seeking?” the request reads as follows:

- 1) *Fee waiver/ reconsideration.*
- 2) *Search for documents: (i) the initial notification letter from SSHRC and (ii) pertaining to the meeting of December 6, 2009.*

[8] On January 25, 2012 this Office clarified with the Applicant that the reference to “December 6, 2009” was incorrect and the correct date is October 6, 2009.

[9] During the informal resolution process, an investigator from this Office had discussions with Memorial University, reviewed the written response to the Request for Review that had been provided by Memorial University and reviewed the responsive records. On February 7, 2012, at the request of this Office, Memorial University wrote to the Applicant and provided clarification of the responsive records which he had received and an explanation for the non-existence of other records.

[10] The Applicant responded to this letter on February 7, 2012 and indicated that to resolve this matter he would be satisfied to receive confirmation that certain specified records were not responsive to his access request. In response, Memorial provided a written confirmation to the Applicant of the non-responsiveness of certain records and the non-existence of other records. The Applicant remained unsatisfied and requested further confirmations and written affirmations from Memorial University. In a final attempt to resolve this matter informally, this Office facilitated communications between the Applicant and Memorial University on these issues.

[11] Unfortunately, attempts to resolve this Request for Review by informal means were not successful and by letters dated April 9, 2012 the Applicant and Memorial University 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. Formal submissions were received from both parties.

## II MEMORIAL'S SUBMISSION

[12] The University's submission outlined the facts and details surrounding the initial receipt of the Applicant's access request, additional communications with the Applicant, the issuance and payment of the fee estimate and the time extension.

[13] Regarding the obligations placed on it under section 9 of the *ATIPPA*, Memorial University states:

*The standard is one of reasonableness, not perfection. If the public body can prove, on a balance of probabilities, that its process in responding to the request was reasonable in the circumstances, it discharges its responsibilities under the ATIPPA.*

[14] The University then referred to my Report A-2009-011 at paragraphs 80-81:

*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. I will review each of those components in turn.*

*First, I have concluded that the College has not failed in its duty to assist the Applicant in making his request. From the outset, the Applicant was extremely clear and specific about precisely what records he was requesting. This was not a case in which an Applicant was requesting certain information and the College needed to clarify the request in order to determine what records might contain that information. In this case, given the way in which the Applicant worded his request, there was nothing left to clarify. Therefore, there was no need for the College to ask the Applicant for any further details, or to offer assistance in concretizing the request.*

[15] The University submits that the Applicant's initial request was sufficiently clear and concise and Memorial did not require any clarification to conduct its searches and respond to the request.

[16] Memorial states that it consulted with 11 units which it believed may have had records responsive to the request. From those 11 units, 9 units indicated that they had records responsive to the request. Based on estimates provided by these 9 units, a fee estimate was calculated and, eventually paid by the Applicant. Memorial further states that a total of 611 pages of records were located and once these records had been culled for responsiveness and duplicates, a total of 312 pages remained, not including a series of publicly available records to which the Applicant was directed.

[17] Memorial submits that all units in which responsive records may have been located were searched and the searches were carried out by employees with the relevant knowledge and expertise to understand the request, perform the search and locate the records.

[18] The University points out that:

*[...] once the complaint process was initiated, the University answered the questions and concerns of the Applicant in a timely manner. The University consulted with the necessary parties and confirmed, where necessary, the processes involved in the searches performed by particular departments and provided the Applicant with additional explanations on issues that were not clear to him. The University complied with the requests of the Applicant for additional searches for records (after the review process had begun) and even created records in an attempt to satisfy the Applicant's concerns.*

[19] Memorial also commented that once an access request is accepted by a public body and any necessary clarification is obtained, it is on this basis that a public body either conducts its search or, prior to commencing its search, prepares a fee estimate. Consequently, Memorial argues that once a search is commenced or a fee deposit is made – whichever happens first – it is inappropriate for an applicant to attempt to change, modify or expand the request.

[20] In addition, Memorial University submits that: “once an application is accepted and work has begun in order to respond to that request and pursuant to s.68(3) of the ATIPPA, the request cannot be altered in a substantial way.”

### III APPLICANT’S SUBMISSION

[21] The Applicant’s written submission, received in this Office on April 11, 2012, consisted of a four-page letter and an attached exhibit. The letter sets out the Applicant’s position that the key issue for the formal investigation of this Request for Review is:

*[...] whether the Public Bony [sic] complied with Section 9 of the Act (duty to assist) by performing a reasonable search for the responsive records, namely **the records that derive from the above-noted meeting.***

[emphasis in original]

[22] The Applicant states that his access request was specific and was eventually narrowed down. The Applicant further emphasizes this point by attaching the correspondence in which he reformulated his access request.

[23] The main focus of the Applicant’s argument is that Memorial University, in responding to his access request “substituted ‘refer [to]’ for ‘derive [from]’ as a key parameter of the search.” The Applicant’s submission provides the dictionary definition of both “refer [to]” and “derive [from]”. While the Applicant does concede that the two definitions can coincide when “‘refer [to]’ means ‘to have relation or connection’” the Applicant submits that Memorial “employs ‘refer [to]’ as a synonym for ‘to direct attention usually by clear and specific mention’” which the Applicant submits does not keep with the wording of his request and Memorial thereby undermined the meaning of his access request. The Applicant further

submits that the search conducted by Memorial University was neither accurate nor reasonable. The Applicant then supports his position by indicating that correspondence he received from Memorial specifically uses the phrase “referring to”.

[24] Further to this point, the Applicant states that:

*In practical terms it means that a record shall be deemed responsive even if it does not contain explicit references to [a named individual’s] visit to MUN but derives from [a named individual’s] visit.*

[25] The Applicant goes on to provide examples of the types of records he believes would fall into this category, which he submits would be responsive to his request.

[26] Finally, the Applicant takes issue with the manner in which the correspondence from Memorial containing the assurance of the non-existence of certain records was prepared and presented. The Applicant submits that such a statement from Memorial would need to be given as evidence on a solemn oath or by affirmation under the *Canada Evidence Act* R.S.C., 1985, c. C-5 which was not done in this matter.

#### IV DISCUSSION

[27] 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.*

[28] The duty to assist has been discussed in a number of Reports from this Office. Recently in Report A-2009-011, the Commissioner again 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.*

**a) Duty to assist an applicant in the early stages of making a request**

[29] The Applicant requested records relating to the organization of a visit by a certain individual to Memorial including the initial notification of the visit, and also records from a meeting which occurred with that individual including any notes and documents that derived from that meeting.

[30] Memorial has indicated that it did not have any difficulty in understanding the Applicant's access request and it did not require any further clarity to carry out its searches for responsive records. I accept that the request was very clearly, narrowly and concisely worded. A public body, especially one such as Memorial which deals with access to information requests on a regular basis, would likely have no difficulties in determining, searching for and locating the specific records caught by the wording of the Applicant's request.

**b) Duty to conduct a reasonable search for the requested records**

[31] Memorial provided the Applicant with over 300 pages of records from 9 separate departments and offices within Memorial University following its initial search for records. At the Applicant's request, Memorial had a department conduct a follow-up search to ensure that no responsive records were overlooked. No additional records were located.

[32] Furthermore, where records were not located, Memorial provided a reasonable explanation for the non-existence of those records. My review has not resulted in any information that would indicate that responsive records exist that were not captured by the scope of the searches performed by Memorial.

**c) Duty to respond to the Applicant in an open, accurate and complete manner**

[33] The Applicant has indicated that he believes that there are records which are responsive to his access request, in that they "derive" from the meeting specifically referenced in his request, but which have not been provided to him.



[34] The Applicant also further believes that by using the phrase “referring to” in relation to Memorial’s search for these records, Memorial has not openly and accurately responded to his access request and the search conducted by Memorial University was neither accurate nor reasonable. Without delving too far into the difference between the phrases “refer [to]” and “derive [from]” I would like to note that as the Applicant has pointed out the two definitions can coincide.

[35] I do not believe that Memorial’s choice of the phrase “referring to” was meant to undermine the meaning of the Applicant’s access request; nor do I believe it is indicative that an improper or unreasonable search has been conducted by Memorial. In fact, it is my opinion that Memorial likened the two terms and used the terms interchangeably.

[36] The word “derive” can be applied very broadly and a public body only has the obligation to perform a reasonable search for records which it reasonably determines are responsive to the request before it. Public bodies need not attempt to peer endlessly into records in an attempt to identify and capture records which may have a vague and speculative link to a request as this would be an endless task. The appropriate standard for determining the responsiveness of a record is reasonableness balanced against the liberal interpretation which must be given to the right of access.

[37] There may or may not be records which “derive” from the meeting referenced by the Applicant. In conducting its search, Memorial reasonably interpreted the request in such a way that records which contain a reference to the meeting were found to be responsive. If a record has no reference to the meeting it is a difficult task, requiring a certain amount of conjecture, to identify a given record as having derived from a particular meeting, unless there was some objective basis upon which to make the connection.

[38] The Applicant is free to file further requests for any records in the custody or control of Memorial. The *ATIPPA* is a relatively blunt instrument, however, and he will find that it can be very difficult to use it to see into the mind of the creator of a record in order to determine whether a certain thought process may have occurred in order to make a record derive from a certain event. This is especially so if the link to that event is not present either within the record or within the context in which it is found. It is my opinion that Memorial University has searched for and captured all records which could reasonably be deemed responsive to his original request.

[39] The assurances which the Applicant sought from Memorial which he asserts must be made by oath or affirmation under the *Canada Evidence Act* were not requested by this Office as part of its formal investigation. Rather, they were requested by the Applicant during attempts to resolve the matter informally. It is up to the Applicant as to whether he is satisfied to resolve a file informally and I will not pass comment as to what standard of evidence he seeks. My Office will determine any requirements for evidence necessary for me to discharge my duties under the *ATIPPA*, and in this case I did not request any evidence by oath or affirmation.

## V CONCLUSION

[40] I have reviewed the scope of the Applicant's access request and the Request for Review. I have concluded that Memorial University has conducted reasonable and thorough searches for all records which could reasonably be deemed responsive to this access request. Furthermore, Memorial has given the Applicant all of the records in its possession which were located as a result of those searches and has explained why there are no additional or derivative records. An open, accurate and complete response has been provided to the Applicant. Therefore I conclude that Memorial University has not failed in its duty to assist the Applicant.

[41] There are two additional matters on which I wish to comment. First, Memorial University went to lengths trying to resolve this matter informally which were sometimes beyond what was required of them by the *ATIPPA*. This is commendable and entirely consistent with the spirit and intent of the *Act*, and I wish to acknowledge the efforts made by Memorial University.

[42] Second, as Memorial University has pointed out, the additional elements added to the Applicant's request were made some time after the original access request was submitted and the corresponding fee estimate was paid. While Memorial University voluntarily accepted these additional elements and did attempt to provide the Applicant with the information and clarification of the Applicant's remaining issues, it was not necessary for it to do so, nor would it be mandatory for any public body to go to such measures. Instead, once an access request has been submitted and any necessary clarification sought and a fee estimate, if required, is issued, accepted and paid, it is open to the public body to direct an applicant to file a new separate request for any other records

which may then be sought. In saying this, however, a public body should, however, consider the spirit of the *Act* and whether an informal resolution of the matter may be readily attainable.

## VI RECOMMENDATIONS

[43] In view of the conclusions I have reached above, there is no need for me to make any recommendations to Memorial University under paragraph 49(1)(a) of the *ATIPPA*.

[44] Although I have made no recommendations, under the 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 with respect to this Report.

[45] In addition, in accordance with subsection 49(2) of the *ATIPPA*, I hereby notify the Applicant of the right to appeal the decision of Memorial University of Newfoundland to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60. The Applicant must file any appeal within 30 days after receiving a decision of Memorial University referenced above.

[46] Dated at St. John's, in the Province of Newfoundland and Labrador, this 31<sup>st</sup> day of May 2012.

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