OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2018-008

April 12, 2018

Memorial University

Summary: Memorial University obtained approval from the OIPC to disregard a number of the Complainant's access to information requests. The Complainant then made two access requests to Memorial for information relating to its applications to disregard. Memorial granted access to that information in part, withholding some records relying on sections 29 (policy advice or recommendations), 30 (legal advice), 40 (disclosure harmful to personal privacy) and 41 (disclosure of House of Assembly service and statutory office records). The Complainant filed two complaints with our Office. The Commissioner concluded that Memorial fulfilled its duty to assist under section 13 of the *Act* by conducting a reasonable search for records, and that Memorial had properly applied exceptions under the *Act*. The Commissioner recommended that Memorial continue to withhold the information.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, sections 9, 13, 21, 23, 29, 30, 40, 41, 95, 97, 110.

Authorities Relied On: *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3; *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic*, 2013 (NL SCTD).

Other Resources: OIPC NL *Practice Bulletin on Reasonable Search*, March 2017.

File #'s: 0020-062-18-054, 0020-062-18-056

I BACKGROUND

[1] The Complainant made a number of requests in 2017 to Memorial University ("Memorial" or "MUN") under the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015*" or "the *Act*"). Memorial applied to and received approval from the OIPC under section 21 of the *ATIPPA, 2015* to disregard some of those requests (MUN files 015-01-20-2017, 015-01-21-2017 and 015-01-22-2017).

[2] After receiving notification of Memorial's decision to disregard those requests, the Complainant made an access request to Memorial on December 13, 2017 (MUN file 015-01-23-17) seeking:

> *"All documents pertaining to the initiation, preparation and internal approval of MUN's application to disregard access to information requests file Nos 015-01-20-17, 015-01-21-17 and 015-01-22-17, including the application itself and the fees charged/payed for its preparation."*

[3] Memorial responded on January 12, 2018 granting the request in part, while withholding some records on the basis of sections 29 (policy advice or recommendations), 30 (legal advice), 40 (disclosure harmful to personal privacy) and 41 (disclosure of House of Assembly service and statutory office records). Memorial also advised that there were no records found concerning fees charged or paid.

[4] The Complainant was not satisfied with the response and on January 15, 2018 filed a complaint with this Office ("the first complaint").

[5] On December 19, 2017 the Complainant made two additional access to information requests to Memorial (MUN files 015-01-24-17 and 015-01-25-17). Memorial applied to and received approval from the OIPC under section 21 of the *ATIPPA, 2015* to disregard those requests

[6] After receiving notification of Memorial's decision to disregard those requests, the Complainant made an access request to Memorial on December 28, 2017 (MUN file 015-01-26-17) seeking:

> *"1. All documents pertaining to the initiation, preparation and internal approval of the application to disregard access to information requests file Nos 015-01-24-17 and 015-01-25-17, including the application itself and the fees charged/payed for the relevant consultations.*
>
> *2. Documents pertaining to the changes in MUN policies on information requests (http://www.mun.ca/policy/site/policy.php?id=190) and on procedure for receiving an information request (http://www.mun.ca/policy/site/procedure.php?id=341) that allow using an on-line access to information request form (htpps://www.mun.ca/iap/access/) instead of a standard form ("Form 1").*

[7] Memorial responded to the second request on January 23, 2018, granting the request in part, while withholding some records on the basis of section 41 (disclosure of House of Assembly service and statutory office records) and advising that there were no records found concerning fees charged or paid. Memorial also advised that there were no records responsive to the second part of the request since there had been no change in policy.

[8] The Complainant was not satisfied with the response and on January 25, 2018 filed a complaint with this Office ("the second complaint") with a focus on part 1 of the second access request (above). The Complainant did not raise any issue regarding part 2 of that request.

[9] Neither of the complaints could be resolved informally. While investigated separately, after their referral to formal investigation under subsection 44(4) of the *Act* we decided to address both complaints in a single report. That decision was taken in light of the fact that the same Complainant and Public Body are involved in both, and because the background and issues are substantially similar.

II PUBLIC BODY'S POSITION

[10] Memorial, in its response to each complaint, provided a complete list of the redactions it applied to the records in question and its rationale for each of them. Memorial argued that the redactions were appropriate and complied with the *Act*.

[11] Memorial also provided a detailed explanation of how it conducted the required record searches. It took the position it conducted the searches carefully and completely.

III COMPLAINANT'S POSITION

[12] The same issues were raised on both complaints: first, that Memorial failed to conduct a thorough search, and second, that Memorial improperly applied the statutory exceptions to access.

[13] The Complainant made a number of additional submissions in support of his complaints that are discussed later in this Report.

IV DECISION

Reasonable Search

[14] As we have stated many times in reports and in our *Practice Bulletin on Reasonable Search*, the issue is whether the search conducted by the public body was reasonable – that is, whether it was conducted by a knowledgeable person, in locations where the responsive records were likely to be found.

[15] Accordingly, in relation to each complaint we requested from Memorial a detailed account of its search for records, including:

(1) the specific steps taken by the University to identify and locate responsive records;

(2) the scope of the search conducted, including a list of all areas searched (i.e. physical sites, program areas, specific databases, off-site storage areas, etc.);

(3) the steps taken to identify and locate all possible repositories of records relevant to the access request (i.e. keyword searches, records retention and disposition schedules, etc.);

(4) the name of the person who conducted the search, and that person's knowledge and experience with respect to the records;

(5) whether the search was reviewed by the ATIPP coordinator;

(6) why the University believes no further responsive records exist; and

(7) any other information they thought appropriate to provide regarding the issue of reasonableness of search.

[16] Memorial provided detailed responses to our questions. Having reviewed the access requests, the responses to the requests, the responses to the complaints, and the arguments of the Complainant, for the reasons that follow, we are satisfied that the search was reasonable.

[17] The Complainant raised a number of specific points about the thoroughness of the search. For example, he asserted that a number of categories of records should exist, but were not provided, including:

- certain previous requests,
- instructions to the Sociology Department secretary as to how to locate records,
- estimates of the time required,
- records of fees paid for preparation of the application,
- records of some personal or phone conversations, or
- records of "interviews" referred to in correspondence.

We conclude that the records not provided by Memorial either simply did not exist, or were not relevant to the applications to disregard. Mere speculation that certain records might exist, or assertions that certain records ought to exist, without more, are not sufficient to characterize a search as unreasonable.

[18] The Complainant pointed out that the responsive records did not include "instruments of delegation" of the powers of the head of a public body under section 110(2) of the *ATIPPA, 2015.* As they are not relevant to the application to disregard, they are not responsive records for the purpose of this review.

<u>First Complaint</u>

[19] The Complainant supplied our Office with a number of e-mails that he had in his possession, that he asserted were responsive but not included in the records disclosed to him by Memorial. However, the required threshold for a search is reasonableness, not

perfection or certainty. Some of those records were not responsive to the access request. Rather, they were examples of routine documentation provided by public bodies to the provincial ATIPP Office for statistical purposes after the completion of access requests. They had nothing to do with the substance of the Complainant's access request, which was for records pertaining to the initiation, preparation or approval of Memorial's application for approval to disregard.

[20] Other records provided to our Office in support of this argument were e-mails that might be responsive. However, they are copies of records already disclosed to the Complainant. In the present case, the search conducted by Memorial, though not perfect, was reasonable.

[21] The Complainant provided us with invoices dated December 14, 2017 and January 11, 2018 from a law firm to Memorial, which he had received in response to another access request. The invoices were redacted by Memorial under section 30 of the *ATIPPA, 2015* (legal advice) so that the only information remaining was the subject line (which referred to the Complainant), a list of dates, presumably on which work had been done, and a total dollar figure. The descriptions of the work, and the fee for each item, were redacted. The Complainant asserted that some of the dates relate to his access request 015-01-23-17 (regarding the first application to disregard) and that the invoices prove that there are actually records responsive to his request for "fees charged/payed for its preparation" while Memorial says they are no responsive records.

[22] First, it is impossible to tell from the redacted invoices the work undertaken by the law firm at any particular time. The redactions themselves are appropriate under section 30. More importantly, the invoices did not exist as records in MUN's custody or control until after the Complainant submitted the relevant access request on December 13, 2018. They were therefore not responsive to the request.

[23] In order to avoid disclosing any information possibly covered by solicitor-client privilege, I will not comment in further detail except to say that I am satisfied that there were no fees paid for preparation of the applications, which was what the Complainant requested.

[24] The December 14 invoice, while chronologically within the period of time covered by the second request, was not in fact responsive, because the second request asked for records relating to "consultations" involving the second application to disregard. The University Access and Privacy Advisor has confirmed that there were no consultations with anyone, including outside lawyers, for the second application - she simply prepared it herself using the same format as the first one.

Second Complaint

[25] The Complainant maintained that there should have been records of communication between the University Access and Privacy Advisor and the individual holding both positions of Provost and Vice-President (Academic) regarding the approval of the application for approval to disregard the access requests. However, Memorial explained that the University Access and Privacy Advisor sent communications to both the Provost/Vice-President (Academic) and the Vice-President (Administration and Finance) seeking approval to proceed with the second application to disregard. The only response received, granting approval, was from the Vice-President (Administration and Finance). No response was received from the Provost/Vice-President (Academic). Those communications were provided to the Complainant. The Public Body advised of the various locations that it searched for responsive records, and given that the responsive records would have been generated over a two-day period and the limited number of individuals involved, we conclude that the public body conducted a reasonable search for records.

Exceptions to Access

[26] Our Office reviewed all of the redactions in the responsive records provided to the Complainant by Memorial. Those redactions relied upon the exceptions to disclosure in sections 29, 30, 40 and 41 of the *ATIPPA, 2015* in the first complaint, and section 41 in the second complaint. For the reasons that follow, I am satisfied that the exceptions applied.

Section 40

[27] The Complainant made no objection to redactions of personal information under section 40 (disclosure harmful to personal privacy).

Section 30

[28] Section 30 (legal advice) states:

> *30.(1) The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is subject to solicitor and client privilege or litigation privilege of a public body; or*
> *(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.*
>
> *(2) The head of a public body shall refuse to disclose to an applicant information that is subject to solicitor and client privilege or litigation privilege of a person other than a public body.*

[29] The rule defining records that are subject to solicitor-client privilege states that they must be communications between a solicitor and client, seeking and obtaining legal advice.[1] The information withheld by Memorial under section 30 consisted precisely of such communications, and was legitimately withheld.

Section 29

[30] The relevant portions of section 29 (policy advice or recommendations) provide:

> *29. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;*
> *(b) the contents of a formal research report or audit report that in the opinion of the head of the public body is incomplete and in respect of which a request or order for completion has been*

[1] See *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic*, 2013 (NL SCTD).

> *made by the head within 65 business days of delivery of the report; or*
>
> *(c) draft legislation or regulations.*
>
> *(2) The head of a public body shall not refuse to disclose under subsection (1)*
>
> *. . .*
>
> *(m) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.*

[31] Memorial applied section 29 to a number of record types. One type was communications to other members of the University community explicitly asking for such advice, and the responses to such queries. Another type was communications setting out a range of policy options. A third type consisted of communications providing draft wording of documents for the consideration of others, and comments on those draft documents.

[32] The jurisprudence on the policy advice and recommendations exception is extensive and consistent across jurisdictions.[2] It is clear that all of the above types of records fall within the definition of policy advice or recommendations, and so may be withheld. I therefore conclude that Memorial correctly applied section 29.

[33] In his submissions the Complainant argued that section 29(2)(m) applies to prevent Memorial from withholding records related to actions involving a conflict of interest policy. However, I conclude that Memorial in that instance was exercising neither a discretionary power nor an adjudicative function affecting the rights of the Complainant, and so the provision does not apply.

Section 9

[34] The Complainant argued in his submissions that this is a case in which the provisions of section 9 of the *Act* (the public interest override), should be invoked to require disclosure of the information for which section 29 was claimed. Section 9 reads, in part, as follows:

[2] See *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3

> *9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.*
>
> *(2) Subsection (1) applies to the following sections:*
>
> *. . .*
>
> *(b) section 29 (policy advice or recommendations);*
> *(c) subsection 30 (1) (legal advice);*
>
> *. . .*

[35] As stated in our Office's *Guideline on the Public Interest Override*, there is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. Since the purpose of the *ATIPPA, 2015* is to promote democracy we consider the public interest in disclosure where the *Act* makes it relevant to the application of exceptions. However, it is important to determine whether there is a specific public interest in accordance with section 9 in disclosing the information in dispute. As noted in our *Guideline*, "… if the interest of the applicant in obtaining the information is a private interest, the public interest override will not apply."

[36] There is no apparent public interest in making this information public. The Complainant's interest is in his own access requests and in the applications to disregard his earlier requests. These interests are not public interests. Absent a clear demonstration that the public interest in disclosure outweighs the reason for the exception, I conclude that section 9 does not apply.

Section 41

[37] The Complainant raised a number of issues about the application of section 41 of the *ATIPPA, 2015*:

> *41. The Speaker of the House of Assembly, the officer responsible for a statutory office, or the head of a public body shall refuse to disclose to an applicant information*
>
> *(a) where its non-disclosure is required for the purpose of avoiding an infringement of the privileges of the House of Assembly or a member of the House of Assembly;*

> *(b) that is advice or a recommendation given to the Speaker or the Clerk of the House of Assembly or the House of Assembly Management Commission that is not required by law to be disclosed or placed in the minutes of the House of Assembly Management Commission; or*
>
> *(c) in the case of a statutory office as defined in the House of Assembly Accountability, Integrity and Administration Act, records connected with the investigatory functions of the statutory office.*

[38] Memorial relied upon section 41(c) to withhold correspondence between Memorial and our Office on the subject of Memorial's applications under section 21 to disregard three previous requests by the Complainant in the first case, and two in the second case. Section 41(c) is a mandatory exception: it provides that the head of a public body must refuse to disclose, among other things, records connected to the investigatory functions of a statutory office. As it relates to this Office, the purpose of this provision is to protect the integrity and confidentiality of the OIPC's investigatory activities. Therefore, it is quite broad, and it applies to entire records, not just to certain information contained in records.

[39] In the present case, the Complainant argued that Memorial is not a statutory office as described in section 41(c), and therefore has no authority to apply that provision. However, the opening words of the section clearly extend the obligation to the head of a public body such as Memorial, as well as the Speaker and the statutory officers themselves.

[40] The Complainant also argued that none of the documents excepted or redacted under section 41 actually pertain to the investigative functions of the statutory office, as it is his opinion that the responsive records pertain only to the initiation, preparation and internal approval of the applications to disregard his access requests. This argument fails to recognize that the records withheld under section 41 were the applications themselves, records submitted to our Office in support of the applications to disregard, or correspondence to and from our Office about the applications, which were an integral part of our investigation.

[41] The Complainant further argued, "the OIPC has no capacity to conduct investigations pertaining to Public Bodies' applications for approvals to disregard access to information requests." It appears to be the Complainant's position that investigations by our Office are limited to complaints following responses to access requests.

[42] That assertion is without merit. The investigatory functions of this Office encompass all of the activities that the Commissioner is authorized or obliged to carry out under the *ATIPPA, 2015*, that can affect the rights or responsibilities of individuals or public bodies. This is clearly stated in section 95, particularly subsections (1) and (3). Furthermore, section 97(2) provides that the Commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the *Public Inquiries Act, 2006*.

[43] An application by a public body under section 21 to disregard an access request is an exceptional remedy, as it essentially eliminates an applicant's right of access to information absent a Court overturning the decision to disregard. Our Office must therefore carefully assess the circumstances and reasons for the request in every case. It is clear that such an assessment constitutes an investigation within the meaning of section 95 of the *Act*, and in the present case, the withheld records are connected with the investigatory functions of this Office.

[44] In his complaints, the Complainant argues that our Office should not accept representations from Memorial's Access and Privacy Advisor, on the ground that she has not shown that she has been delegated the authority to make such representations by the head of the public body. Our Office will normally assume the designation and delegation of functions under section 110(2) of the *ATIPPA, 2015*. As the Act does not prescribe any form of delegation that is an internal matter for each public body to decide.

[45] In his submissions the Complainant argued that Memorial is applying section 41 in a selective and capricious manner, because certain records, including correspondence with this Office, were provided to the Court as part of a Record in a court proceeding. We are not a party to the Court proceeding and it is irrelevant in any event, as section 41 applies to

records disclosed in response to access requests under Part II of the *ATIPPA, 2015*. Records produced in court proceedings are outside of the scope of the *ATIPPA, 2015*.

[46] In summary, I conclude that Memorial fulfilled its duty to assist under section 13 of the *Act* by conducting a reasonable search for records, and has properly applied exceptions under the *Act* to withhold the redacted information from the Complainant.

V RECOMMENDATIONS

[47] Under the authority of section 47 of the *Access to Information and Protection of Privacy Act*, I recommend that Memorial University continue to withhold the information that it had originally withheld from the Complainant in its responses to both complaints.

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

[49] Dated at St. John's, in the Province of Newfoundland and Labrador, this 12th day of April 2018.

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