OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2018-013

June 6, 2018

Memorial University

Summary: The Applicant made an access to information request for a policy document from the University. The University provided the Applicant with an electronic copy of the responsive record. The Applicant alleged that the document appeared to have been altered and demanded to inspect the original. An investigation found no reasonable grounds to suspect alteration of the document. The right to examine a record under section 20(1)(b) is a right to examine an original and applies to a document in electronic format. In such cases, the right to examine can be satisfied by providing the Applicant with an electronic copy. The Commissioner also found no merit to the Applicant's allegations that the University failed to meet the duty to assist.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2, ss 11, 13 and 20; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31, ss. 30 and 60; *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, section 8.

Authorities Relied On: Newfoundland and Labrador OIPC Report A-2018-011; Prince Edward Island OIPC Report Order No. FI-10-008.

File #: 0020-062-18-057

I BACKGROUND

[1] On January 30, 2018, the Applicant made an access to information request to Memorial University to obtain:

> *Delegation of Authority Instrument with respect to decision-making under the ATIPP Act, as per paragraph 8 of MUN Information Request Policy. Possible location: Office of the President.*

[2] This request was made in writing using the ATIPP Office's Access to Information Request Form 1. That document provides applicants an opportunity to state the format in which they wish to receive requested records. The Complainant stated "pdf" in response to this question. PDF or "Portable Document Format" is a common computer file format used to save and transmit documents. PDFs may be generated or copied using an optical scanner.

[3] The University responded on February 28, 2018 via email, attaching its final response letter and the Delegation of Authority Instrument as a five-page PDF document. The Delegation of Authority Instrument itself is a two-page document which outlines the delegation of various responsibilities under *ATIPPA, 2015*.

[4] The Applicant followed-up with the University on March 1, 2018 with a request to "examine the record exercising my rights under section 20(1)b of the *Act*". On March 5, 2018, prior to receiving any response to his follow-up inquiry, the Complainant filed a complaint with this Office seeking "to examine the original of the Delegation of Authority Instrument". Later that same day the University advised the Complainant that it would not permit him to examine the record.

II PUBLIC BODY'S POSITION

[5] The University submits that the Complainant specified that he requested and received the records in PDF. The University also noted that the Delegation of Authority Instrument only exists as a Microsoft Word document and that no paper copy exists.

[6] As to the Complainant's position that he has a right to examine the records, the University provided detailed submissions regarding the interpretation and application of section 20 of the *ATIPPA, 2015*, which can be summarized as follows:

> a. *Section 20 as a whole creates five different scenarios for granting access and section 20(2) applies where the responsive record is in electronic format;*
> b. *Section 20(2) only requires a public body to "produce" a record, provided that the conditions at sections 20(2)(a) and (b) are met and that "produce" does not mean "examine". If section 20(2) was meant to give a right to examine a record, it would have used that term just like section 20(1);*
> c. *Granting an applicant the right, on demand, to examine any responsive record would be tantamount to granting applicants a right of entry and/or inspection on par with that of the Information and Privacy Commissioner;*
> d. *In the present matter, the Complainant is an employee of the University. However, this should not grant them any greater powers than members of the general public;*

[7] Finally, the University submits that its communications with the Complainant have at all times been professional and timely.

III COMPLAINANT'S POSITION

[8] The Complainant submits that he has an absolute right, on request, to examine the original of any record in the custody or control of a public body.

[9] The Complainant also claimed that the University failed to meet its duty to assist under section 13 of the *ATIPPA, 2015*. In particular, he alleged that the University failed to respond to his follow-up inquiries in an "open, accurate and polite manner". In support of this, the Complainant provided several emails between himself and the University, exchanged after he had received the University's final response to his access to information request. He believes that the University's response to his inquiries was unduly late and failed to follow the basic rules of politeness.

IV DECISION

Making a Request

[10] Section 11 of the *ATIPPA, 2015* sets out the required format of an access request, including that applicants are required to provide sufficient detail about the information requested and indicate how they would prefer to access the information. In the present case, the Complainant complied with all requirements of section 11 and specified that he would prefer to receive the record in PDF.

[11] In response to the Complainant's request for the University's Delegation of Authority Instrument, the University provided the Complainant with 2 pages of records in PDF. After receipt the Complainant advised of his wish to examine the original of the record, claiming a right to do so under section 20(1)(b).

[12] Section 20 states:

> *20. (1) Where the head of a public body informs an applicant under section 17 that access to a record or part of a record is granted, he or she shall*
>
> *(a) give the applicant a copy of the record or part of it, where the applicant requested a copy and the record can reasonably be reproduced; or*
>
> *(b) permit the applicant to examine the record or part of it, where the applicant requested to examine a record or where the record cannot be reasonably reproduced.*
>
> *(2) Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where*
>
> *(a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and*
>
> *(b) producing it would not interfere unreasonably with the operations of the public body.*
>
> *(3) Where the requested information is information in electronic form that is, or forms part of, a dataset in the custody or under the control of a public*

> *body, the head of the public body shall produce the information for the applicant in an electronic form that is capable of re-use where*
>
> *(a) it can be produced using the normal computer hardware and software and technical expertise of the public body;*
>
> *(b) producing it would not interfere unreasonably with the operations of the public body; and*
>
> *(c) it is reasonably practicable to do so.*
>
> *(4) Where information that is, or forms part of, a dataset is produced, the head of the public body shall make it available for re-use in accordance with the terms of a licence that may be applicable to the dataset.*
>
> *(5) Where a record exists, but not in the form requested by the applicant, the head of the public body may, in consultation with the applicant, create a record in the form requested where the head is of the opinion that it would be simpler or less costly for the public body to do so.*

[13] Section 20(1)(b) refers to a request to examine a record in the past tense, suggesting that the request to examine should be made prior to the public body providing its final response to an applicant. This strict reading of the *ATIPPA, 2015* would clash with the general duty on a public body to assist an applicant as set out in section 13. The duty to assist encompasses efforts to assist and accommodate an applicant after providing a final response. This would include, for example, ensuring that records provided to an applicant are accessible (see Report A-2018-011 at paragraphs 22 to 23). Similarly, if records received in a requested format were illegible or there were reasonable grounds to question their authenticity, it would be reasonable for an applicant to want to examine those records in person and for a public body to grant that request.

[14] The copy of the Delegation of Authority Instrument the Complainant received appears to have been produced by scanning a paper copy at some point. The University advises that the record is stored on its server as a Microsoft Word document which was created and last modified on January 18, 2010 at 2:22:57 PM. The footer of the copy of the record received by the Complainant similarly contains the date of "18 January 2010". In processing the Complainant's request, the University advises that the Word file was converted into PDF, combined with its final response letter (also in PDF), and sent to the Complainant as a single file.

[15] In his submissions, the Complainant alleged that his request to examine the record is based in part on a reasonable suspicion that the record was altered. In support of this position he presents two apparent irregularities with the record: first, the Delegation of Authority Instrument is not signed and second, the document does not address all provisions of the *ATIPPA, 2015* or its predecessors.

[16] The Delegation of Authority Instrument is a two-page document detailing, in a table format, the delegation of various decision-making duties to staff of the University. A portion of the document is excerpted below:

Duty, power or function of Head	Section Reference	Retained by Head	Delegated to IAPP Coordinator	Delegated to Unit Heads
Duty to create records	10(2)			X
Authority to refuse to confirm or deny the existence of a record	12(2)	X		
Authority to withhold information harmful to personal privacy	30		X	

The Complainant notes that certain provisions under both the *ATIPPA, 2015* and the previous version of the Province's access to information and protection of privacy legislation are missing. These include the authority to withhold House of Assembly service and statutory office records; to refuse disclosure where a request is repetitive; to give written notice of the appeal of a third party; and others. From the section numbers in the above excerpt from the Delegation of Authority Instrument and the January 18, 2010 date on the document, it is clear that the record relates to the former version of the *Act*.

[17] Further, the Complainant alleges that this document should be signed. It is not. However, it does not appear to have been intended to be signed as it does not feature a signature line.

[18] The Complainant raises these features of the document – missing section references and the lack of a signature – as evidence that the Delegation of Authority Instrument has

been altered. He also cites a decision of the Prince Edward Island Information and Privacy Commissioner, Order No., FI-10-008 in support of this position. That Report deals with different circumstances. It addresses the need to review original documents when it is unclear whether the public body has overreached in severing information. Further, those documents had been altered with various handwritten notes, some of which were subject to redactions. The University has not severed any information from the Delegation of Authority Instrument and the decision of the Prince Edward Island Information and Privacy Commissioner is not relevant to the present matter.

[19] The Complainant provided no compelling evidence to suspect alteration of the document. The University satisfactorily explained the present state of the Delegation of Authority Instrument: it is incomplete in places, the University has not yet updated the document to account for changes in the *ATIPPA, 2015*, and the University did not consider it necessary to have the document signed.

[20] The *ATIPPA, 2015* provides applicants access to records in the custody or control of public bodies. Aside from provisions in the *Act* for the correction of an individual's personal information, the legislation does not make any comment on the content of documents, their completeness, or whether they have been validly prepared. That an applicant expected to receive something different, or for documents to be formatted in a certain way, is not, in and of itself, grounds to find that a public body failed to meet its obligations under the *ATIPPA, 2015*.

[21] While there is no merit to the Complainant's allegations that the record has been altered, we must still consider whether section 20 of the *ATIPPA, 2015* nonetheless grants a right to examine an electronic record, as the Complainant requested.

[22] The University submits that the use of "where" to preface all 5 subsections of section 20 indicates that they are to be treated as independent scenarios, and their application is dependent on the circumstances. However it is not clear that section 20(1) – which allows an applicant to examine a record – and section 20(2) – which speaks to a situation where the information is in electronic form – are mutually exclusive. Accordingly, even where the

requested record is in electronic format, section 20(1) – and the right of an applicant to elect to receive a copy or to examine the record – applies.

[23] Further, the Complainant has requested an opportunity to examine the 'original' of the Delegation of Authority Instrument. Given that the two options for the provision of records at section 20(1) are to give a copy of the record or to allow an examination of a record, there is the implication that the latter would involve examining the original. This interpretation is borne out by language in other access to information statutes and the decisions of other Commissioners in Canada.

[24] Section 30 of Ontario's *Freedom of Information and Protection of Privacy Act* is analogous to our section 20 and refers to an applicant being given a copy of a record or an opportunity to examine a record. However, unlike the *ATIPPA, 2015*, there are references in Ontario's legislation which suggest that the examination is to be of the original. Section 60(1)(a) of that same *Act* authorizes the Minister to create regulations "respecting the procedures for access to original records under section 30" indicating an intention that "examine" should mean examining an original of a record. The interpretation of "examine" to mean the examination of the original is further supported by Order No., FI-10-008 of the Prince Edward Island Information and Privacy Commissioner, referenced above, which concludes that "An access request by examination of the record is a request to examine the original record" (at paragraph 27). Prince Edward Island's *Freedom of Information and Protection of Privacy Act* similarly only makes reference to the right of an applicant to ask for a copy of a record or to examine a record with no explicit mention of examining an original.

[25] While we have determined that section 20(1) also applies to electronic records and that the option to examine a record at section 20(1)(b) involves the examination of an original, it does not necessarily follow that examining an original paper record and examining a record created in an electronic format involve the same process. Order No. FI-10-008 dealt with handwritten records and the need to examine the original to determine what had, and had not, been redacted.

[26] Ontario's *Freedom of Information and Protection of Privacy Act* came into force thirty years ago on January 1, 1988 and the first federal access to information law in Canada, the *Access to Information Act*, RSC 1985, c A-1 came into force in 1983. The distinction between receiving a copy of a record or examining the original has existed in Canadian access to information laws since that time. This language refers to an older age of record management, when definitive physical copies of records would be the norm and electronic records the exception. Today, most records are created and exist in electronic form, only being converted to a physical format when required for a specific purpose. The notion of an "original" record, or an in-person examination of same, are incompatible with modern electronic record management. An electronic document can be transmitted to an applicant and the copy they receive will be identical to the "original" document in the custody or control of the public body. An applicant's right to examine an electronic record is therefore fulfilled in practice by providing an electronic copy for examination.

[27] Allowing the complainant, or any other applicant, to examine an electronic record in person at the premises of a public body, on a public body's computer equipment, is not necessary to comply with section 20(1)(b), nor is it necessary to further the purposes of the *ATIPPA, 2015* as set out in section 3. Ensuring that citizens have the information required to participate meaningfully in the democratic process and increasing transparency in government and public bodies can be adequately achieved without granting applicants direct access to a public body's electronic records.

[28] With regard to the application of sections 11, 13 and 20 generally, we conclude as follows:

a. In situations where records which have been received by an applicant are illegible, inaccessible or there are reasonable grounds to doubt their authenticity, an applicant may request to receive them in a different format or to examine them. The duty to assist at section 13 requires public bodies to accommodate such requests;

b. Electronic records are subject to both section 20(2) and the right to examine a record at section 20(1)(b);

c. Where a record exists in some physical format, the right to examine a record at 20(1)(b) includes the right to attend at the premises of a public body to examine the original;

d. Where a record exists in an electronic format, there is no right to conduct an in-person examination; and

e. The right to examine an electronic record provided in section 20(1)(b) may be satisfied by providing an applicant – through electronic means or physical storage media – a copy of the electronic record in its original format.

[29] Applying the above to the present request of the Complainant to examine the original of the Delegation of Authority Instrument, the Complainant, having requested the record in PDF and having not raised any reasonable grounds to doubt its authenticity, may not now request to examine the record under section 20(1)(b). Accordingly, the University has met its obligation to provide access to the requested record. Even where there are grounds for an applicant to subsequently request to examine a record (such as the copy being illegible or inaccessible or there being reasonable grounds to suspect it has been altered or is incomplete), a public body could fulfill its obligation to accommodate the examination of an electronic record by sending an applicant a copy of the electronic record by email or on portable drive or similar.

Duty to Assist

[30] The Complainant also contends that the University failed to meet its duty to assist by refusing to communicate with the Complainant in an open, accurate and polite manner.

[31] Our past reports address the duty to assist as consisting of three components: a duty to conduct a reasonable search, a duty to assist an applicant with making an access to information request and a duty to respond to the applicant in an open, accurate and complete manner. The within complaint engages the third component, that of communication.

[32] The University provided its final response to the Complainant on February 28, 2018. On March 1, 2018, the Complainant followed-up with the University by email requesting to examine the Delegation of Authority Instrument. Receiving no response that same day, the Complainant re-sent his request to examine the record the next morning, Friday, March 2, 2018. On March 5, 2018 (the following Monday) the University responded, stating its position that it had already provided access to the requested record and noting that the University was a party to an ongoing appeal before the Supreme Court of Newfoundland and Labrador involving a similar question of in-person access to a record and that the University was awaiting the outcome of that decision.

[33] The Complainant categorizes this delay as a refusal on the part of the University to communicate with him. He also accuses the University of being impolite in its response. We disagree. The Complainant received a response two business days after making his inquiry. There is nothing inappropriate or untoward contained in the response from the University. The University may not have provided the response the Complainant was hoping to receive, but there is nothing whatsoever in the University's conduct to suggest that it had failed to respond to the Complainant in an open, accurate and complete manner.

V CONCLUSIONS

[34] The University fully discharged its duty to provide access to the requested record.

[35] The University fully discharged its duty to assist the Complainant in all respects.

VI RECOMMENDATIONS

[36] Given my findings above, I recommend that Memorial University continue to refuse to allow the Complainant's personal examination of the record. 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 this Report to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[37] Dated at St. John's, in the Province of Newfoundland and Labrador, this 6th day of June 2018.

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