



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

**Report A-2019-032**

**December 20, 2019**

**Memorial University**

**Summary:**

Memorial University (“Memorial”) received an access request for records relating to a written concern expressed under Memorial University’s Conflict of Interest Policy with respect to conflicts of interest in a named Department. Memorial provided records to the Applicant with minimal redactions under section 40 of the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)*. The Complainant alleged that Memorial failed in its duty to assist under section 13 of *ATIPPA, 2015* by failing to conduct a reasonable search for records. The Complainant further stated that Memorial had denied his request to examine a part of a record under subsection 20(1)(b) of *ATIPPA, 2015*. The Complainant further asserted that the estimate of cost provided by Memorial was unduly late in the access request process and he also requested the Commissioner to review and revise the costs charged. The Commissioner determined that Memorial had conducted a reasonable search for records and that the estimate of costs does not need to be revised.

**Statutes Cited:**

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, sections 13, 20, 25, 26, 42 and 47, [Interpretation Act](#), S.N.L. 1990, c. I-19 section 16.

**Authorities Relied On:**

NL OIPC Report A-2018-024.

**Other Resources:**

OIPC NL [Practice Bulletin on Reasonable Search](#).

## I BACKGROUND

- [1] The Applicant made an access to information request to Memorial University (“Memorial”) as follows:

*All records, including emails, pertaining to the written concern expressed under Section 4 (ii) of MUN’s Conflict of Interest Policy with respect to perceived and real conflicts of interests in graduate supervision involving two ASMs of the [named Department].*

*Possible location: the HSS Dean’s Office; the Office of the Provost & Vice President (Academic); the University Conflict of Interest Committee; the administrative heads of the [named Department].*

*Period covered: August 08, 2018 - August 09, 2019.*

*The access to these records is sought under subsection 33(3) of the Access to Information and Protection of Privacy Act, 2015.*

- [2] Memorial asked the Applicant for clarification regarding the two Academic Staff Members (ASMs) referred to in the access request. The Applicant provided Memorial with two names as well as his own as he believed they were parties to the workplace investigation. The Complainant also clarified that there had been only one “written concern expressed under Section 4(ii) of MUN’s *Conflict of Interest Policy* with respect to perceived and real conflicts of interests in graduate supervision” within the timeframe specified in the access request.
- [3] Memorial advised the Applicant in its advisory response that in its assessment section 33 of *ATIPPA, 2015* did not apply. Memorial also advised the Applicant in its advisory letter that it was currently collecting records from the relevant offices that were to be processed and that an analysis of all the records would then be required to determine whether exceptions to disclosure provisions under *ATIPPA, 2015* would apply.
- [4] On September 4, 2019 (day 17 of the access request process) Memorial notified the Applicant that he was required to pay costs for locating records responsive to his access request. The costs were set out in an estimate of costs form.
- [5] The Applicant paid 50 percent of the estimate on September 5, 2019 (day 18 of the access request process) noting in a covering letter that his compliance with the estimate of cost shall

not be considered as an indication of his agreement with Memorial's decision to charge the fees in the circumstances. The Complainant also altered the form accompanying his payment but did not make note of this in the letter. The alteration was to change "I am prepared to pay the cost estimate as quoted above and ask that you proceed with my request [and] I have enclosed a payment of 50% of the estimate for the first half of the work and agree to pay the balance upon completion of the services" to say "I have enclosed a payment of 50% of the estimate for the first half of the work and ask that you proceed with my request."

[6] On September 9, 2019 (day 20 of the access request process) Memorial provided the Applicant with its decision to grant partial access to the records upon receipt of payment of the balance owing from the estimate of costs. The Applicant paid the remaining balance that day.

[7] Memorial released records to the Applicant but withheld some information pursuant to section 40(1) of *ATIPPA, 2015* (disclosure harmful to personal privacy). The Applicant was not satisfied with Memorial's response and filed a complaint with this Office.

[8] The Complainant asserted that Memorial had failed in its duty to assist under section 13 of *ATIPPA, 2015* by not conducting a reasonable search for responsive records. The Complainant also stated that Memorial had denied his request to examine a part of a record under subsection 20(1)(b) of *ATIPPA, 2015*. The Complainant further complained that the estimate of costs provided by Memorial was late in the access request process and wanted the Commissioner to review and revise the costs charged. The Complainant did not include in his complaint a request to review the redactions under section 40 of *ATIPPA, 2015* therefore these redactions are not under review.

[9] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

## II PUBLIC BODY'S POSITION

### Duty to Assist

- [10] Memorial's position is that it conducted a reasonable search for records and fulfilled its duty to assist under *ATIPPA, 2015*.
- [11] Memorial advised that fourteen individuals conducted searches of their email accounts, electronic filing systems, network drives, hard drives, paper files and other applications. Memorial advised that the Information Access and Privacy (IAP) office reviewed all of the searches and material provided and whenever a question arose pertaining to the search or records the IAP followed up.
- [12] Regarding section 33 of *ATIPPA, 2015* and the Complainant's correspondence of August 27, 2019, Memorial provided a response on September 10, 2019. Memorial advised that it was maintaining its position that section 33(3) of *ATIPPA, 2015* did not apply and noted the Complainant's objection. Memorial went on to explain that an "assessment" undertaken by a Unit Head in response to a written concern of a conflict of interest may potentially give rise to a workplace investigation, however, in the present circumstances there was no indication that the Unit Head has advised the members in question that a conflict of interest exists or is likely to exist. Memorial does not agree that the "assessment", which the Complainant stated may have been conducted, is an "investigation" or an investigation to which the Complainant is a "party" within the meaning of section 33(3) of *ATIPPA, 2015*.
- [13] Memorial argued in its submission that a public body's compliance with the duty to assist cannot properly be the subject of a complaint or recommendations in a Commissioner's report under *ATIPPA, 2015*.
- [14] Memorial clearly stated that it was not suggesting that the Commissioner should not make enquiries of a public body about the duty to assist nor are they suggesting that the Commissioner should not bring failures of the duty to assist to the attention of the head of a public body as these powers are clearly established in the legislation.

- [15] Memorial argued that not all actions under *ATIPPA, 2015* can be the subject of a complaint under section 42. Memorial stated that a “complaint” is defined in the *Act* to mean a complaint filed under section 42 and that an access complaint must be in respect to “a decision, act or failure to act” that relates to the request. Memorial cited section 42(8) as an example to show that there are exceptions to the Commissioner’s complaint investigation jurisdiction. In particular, section 42(8) makes it clear that a disregarded request, extension of time, variation of a procedure and an estimate of costs cannot be the subject of a complaint.
- [16] Memorial argued that the duty to assist in section 13 is the only obligation that is characterized as a “duty” under the *Act* and is only referenced in two other sections of *ATIPPA, 2015*: sections 95 and 105.
- [17] Memorial asserted that the only sections of *ATIPPA, 2015* in which a public body is required to notify a requester or third party of their right to complain are sections 17(1)(c)(ii), 18(1)(b)(iii) and 19(5)(c) and 19(6). It argues that had the Legislature intended there to be a right to lodge a complaint for alleged breaches of the duty to assist then the Legislature would have required a public body to provide requesters with notice of their right to do so.
- [18] Further, Memorial argued that section 42 makes provisions for filing a complaint with the Commissioner but it does not contemplate the duty to assist. It must be a complaint respecting “a decision, act or failure to act....that relates to the request”. Memorial argued that there is a distinction between “decision” from “act” and “failure to act” and that the duty to assist cannot be viewed as a “decision” nor can it be viewed as an “act or failure to act” since these clearly refer to actions under the legislation and are time limited (section 42(2)(a)).
- [19] As well, Memorial argued that section 47 does not provide the Commissioner with authority for recommending a further search for records in response to an allegation that a proper search was not conducted and therefore the duty to assist breached. The Commissioner’s recommendations arise from an investigation which arises from a complaint and the necessary implication is that the duty to assist cannot be the subject to a complaint.

## Cost Estimate

[20] Memorial's position is that the Complainant's opportunity to make a complaint about costs has passed and that the OIPC now has no jurisdiction to investigate such a complaint.

[21] Memorial stated that the Complainant had an opportunity to complain about the costs assessed when the cost estimate was issued. The letter provided to the Complainant with the cost estimate advised him of his right to complain to the OIPC pursuant to section 26 of *ATIPPA, 2015*. Memorial states that the process under section 26 of *ATIPPA, 2015* is the sole process for dealing with fee complaints.

[22] Memorial stated:

*Section 26 clearly provides that an applicant may apply to the Commissioner to revise an estimate or a refusal to waive a fee charged. Section 26 requires a public body to give an estimate of the cost before providing the services and the applicant is given 20 business days to then accept the fee estimate, or modify the request, or apply for a waiver, or apply to the Commissioner to revise the estimate. Section 26 gives an applicant a full 20 business days to make a decision as to which of the above options they wish to exercise. That is a substantial period of time, well beyond other statutory time periods prescribed in the legislation ... The longer period of time for an applicant to consider a fee estimate under s.26 and all of their options is **precisely** to give them ample time to make the decision because the legislation does not give them a right to complaint about a fee after they have agreed to pay and have paid.*

[23] Memorial further stated:

*The intent of the legislation is made even more clear in section 42 of the *ATIPPA, 2015*. It is the section that prescribes process and jurisdiction around access complaints to your Office. Paragraph 42(8)(d) is a mandatory section that expressly states: "A complaint **shall** not be filed under this section with respect to (d) an estimate of costs or a decision not to waive a cost under section 26" [emphasis added]. If an applicant agrees to pay the fees and chooses not to seek a waiver or to modify the request or ask the commissioner to revise the estimate or to review a decision not to waive under s.26, then the Act provides no discretionary power for the commissioner to review a fee on a complaint by the applicant.*

[24] Memorial also relied on the Report of the 2014 Statutory Review of the *ATIPPA* at page 209 Volume II:

*That said, the Committee accepts the recommendation of the federal information commissioner that the Commissioner should have decision making power respecting all procedural matters, estimates and waiving of charges. These matters would be dealt with expeditiously by procedures determined by the Commissioner. **They would not follow the same process or timelines as complaints filed with the Commissioner respecting access to records or correction of personal information. For example, they would not be addressed by way of recommendation to the head of the public body. Instead the head of the public body would be required to follow the Commissioner's decision, and these matters would not be the subject of an appeal before the court. [Emphasis added]***

- [25] Memorial advised that the fee assessed was based on search time only, explaining that there was a significant number of people who were required to search for records. Memorial explained the average time it took to conduct the search and advised that paper and electronic records were searched.

### Examination of Record

- [26] Memorial stated that the Complainant emailed the IAP Office on September 10, 2019 requesting to examine three records from the responsive records that were provided. These had been provided to him as a photocopy of the original. These records originated in a notebook. Memorial clarified what the Complainant was seeking and after various communications advised the Complainant on September 27, 2019 that Memorial would make arrangements for him to view the originals in the notebook.
- [27] Memorial stated that the Complainant examined the records on October 10, 2019. The Complainant took numerous photographs of the three pages in the notebook and also compared them with a printed copy of each page that he brought with him.

## III COMPLAINANT'S POSITION

### Duty to Assist

- [28] The Complainant stated that Memorial failed in its duty to assist him pursuant to section 13 of *ATIPPA, 2015* by failing to conduct a reasonable search for records.

[29] The Complainant advised that he believed that there were at least three specific records that should have been located that were not included in the responsive records provided. The Complainant also believes that additional records may exist based on material discussed in the records he received.

[30] The Complainant also alleged that Memorial did not respond in an open, accurate and complete manner since it did not provide any justification for its initial refusal to acknowledge the relevance of section 33 of *ATIPPA, 2015* in the Complainant's access request. The Complainant also stated that Memorial did not respond to his detailed letter of August 27, 2019 regarding section 33.

### **Cost Estimate**

[31] The Complainant submitted that the only reason Memorial charged the fee was to delay the response hoping that he would seek a review of the cost estimate by the OIPC. If the Complainant sought a review by the OIPC, the response from Memorial would have been significantly delayed.

[32] The Complainant stated that the cost estimate was provided two days prior to the statutory deadline for responding to an access request. The Complainant stated that the search for records should have been completed by that point as per section 25(1) of *ATIPPA, 2015*. He also referenced Memorial's advisory letter of August 23, 2019 indicating that they were currently collecting records from the relevant offices to be processed. Based on the lateness of the cost estimate and the fact that records were already being located, the Complainant believes that Memorial charged the fees for "identifying, retrieving, reviewing, severing or redacting a record" as the locating should have been completed by this point, and section 25(1) prohibits public bodies for charging applicants for these activities.

[33] The Complainant submitted that the fees were paid in full as a refusal to pay would have caused a significant delay in accessing the responsive records.



### Examination of Records

- [34] The Complainant stated that he made a request to Memorial to examine the non-digital records that were reproduced on three pages of the responsive records he received.
- [35] Memorial granted the Complainant's request, however, the Complainant submits that he was only afforded the opportunity to examine the records after he made the complaint to this Office.
- [36] The Complainant also stated that Memorial did not use the standard form (4A) which includes a reference to examination of a record therefore it is his conclusion that Memorial never intended to allow him to examine the record.
- [37] The Complainant examined the records on October 10, 2019 and although the examination has been completed, the Complainant submitted that he would not consider this issue as moot for the reasons outlined in his submission.

## IV DECISION

### Duty to Assist

- [38] This Office has considered a public body's duty to assist most recently in Report A-2019-023 and previously in numerous reports, including Report A-2018-024. Report A-2018-024 states:

*[14] The duty to assist is outlined in section 13 of the ATIPPA, 2015 and states:*

*13. (1) 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.*

*(2) The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.*

*[15] Many previous reports address the duty to assist, including Report A-2018-020. The duty to assist requires that public bodies make every reasonable*

*effort to assist an applicant in making a request and provide timely responses to an applicant in an open, accurate and complete manner.*

[16] Report A-2018-020 states the position of this Office with regard to the duty to assist:

*[8] It is a long held position of this Office that the duty to assist has three components, as outlined in Report A-2009-011:*

*[80] ...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.*

*The standard for assessing a public body's efforts is reasonableness, not perfection.*

*[17] Our Practice Bulletin on Reasonable Search outlines that a reasonable search is one conducted by knowledgeable staff in locations where the records in question might reasonably be located.*

[39] The Complainant's position is that Memorial failed in its duty to assist by not conducting a reasonable search. As evidence of this claim, the Complainant shared several documents with this Office that were not located in the search. Further, the Complainant argued that some of the information in the records they did receive indicated the possible existence of more records.

[40] This Office asked Memorial to explain how the original search had been conducted in order to assess whether or not it was reasonable. Memorial explained the search parameters – who conducted the search, where the search was done and areas searched etc. This Office raised some specific questions about the search which Memorial answered to our satisfaction. In response to the “missing” documents, one was located in the responsive records, and the others had not been located. As we have indicated in past Reports, a search can be reasonably conducted even though records that should have been responsive were not located. In this case the search conducted by Memorial was reasonable.

[41] The Complainant also alleges that Memorial did not respond in an open, accurate and complete manner since it did not provide any justification for its initial refusal to acknowledge

the relevance of section 33 of *ATIPPA, 2015*. As set out above, Memorial did reply and provide an explanation on this issue to the Complainant by email on September 10<sup>th</sup>. Also, as full access was granted this argument is moot.

[42] In the course of our investigation, Memorial has also argued that this Office does not have the ability to review complaints on the duty to assist. As stated by Memorial, section 42 makes provisions for filing a complaint respecting “a decision, act or failure to act...that relates to the request”. The duty to assist is a failure to act that relates to a request. It is our view that we do indeed have the jurisdiction to review this issue and to make recommendations. These recommendations can be made under section 47(d) which permits this Office to make recommendations for “other improvements for access to information be made within the public body”. While section 95(2)(h) allows us to “bring to the attention of the head of a public body a failure to fulfil the duty to assist applicants”, this provision is “in addition to” the Commissioner’s powers and duties with respect to complaint investigations. It allows us to bring such matters to the attention of the head of a public body outside of the context of a complaint investigation, but does not limit the Commissioner’s ability to do so, or to make related recommendations, in a Report resulting from a complaint. As noted above, the full scope of a complaint to the Commissioner is outlined in section 42(1). A failure of the duty to assist is a failure to act that relates to the request. On that basis we reject the assertion that our jurisdiction to address and make recommendations in a Report regarding the duty to assist is in any way limited.

### **Cost Estimate**

[43] Sections 25 and 26 of *ATIPPA, 2015* deal with costs than can be charged in relation to an access request and the estimate of costs. These sections are as follows:

*25. (1) The head of a public body shall not charge an applicant for making an application for access to a record or for the services of identifying, retrieving, reviewing, severing or redacting a record.*

*(2) The head of a public body may charge an applicant a modest cost for locating a record only, after*

(a) the first 10 hours of locating the record, where the request is made to a local government ; or

(b) the first 15 hours of locating the record, where the request is made to another public body.

(3) The head of a public body may require an applicant to pay

(a) a modest cost for copying or printing a record, where the record is to be provided in hard copy form;

(b) the actual cost of reproducing or providing a record that cannot be reproduced or printed on conventional equipment then in use by the public body; and

(c) the actual cost of shipping a record using the method chosen by the applicant.

(4) Notwithstanding subsections (2) and (3), the head of the public body shall not charge an applicant a cost for a service in response to a request for access to the personal information of the applicant.

(5) The cost charged for services under this section shall not exceed either

(a) the estimate given to the applicant under section 26 ; or

(b) the actual cost of the services.

(6) The minister responsible for the administration of this Act may set the amount of a cost that may be charged under this section.

26. (1) Where an applicant is to be charged a cost under section 25, the head of the public body shall give the applicant an estimate of the total cost before providing the services.

(2) The applicant has 20 business days from the day the estimate is sent to accept the estimate or modify the request in order to change the amount of the cost, after which time the applicant is considered to have abandoned the request, unless the applicant applies for a waiver of all or part of the costs or applies to the commissioner to revise the estimate.

(3) The head of a public body may, on receipt of an application from an applicant, waive the payment of all or part of the costs payable under section 25 where the head is satisfied that

(a) payment would impose an unreasonable financial hardship on the applicant; or

(b) it would be in the public interest to disclose the record.

*(4) Within the time period of 20 business days referred to in subsection (2), the head of the public body shall inform the applicant in writing as to the head's decision about waiving all or part of the costs and the applicant shall either accept the decision or apply to the commissioner to review the decision.*

*(5) Where an applicant applies to the commissioner to revise an estimate of costs or to review a decision of the head of the public body not to waive all or part of the costs, the time period of 20 business days referred to in subsection (2) is suspended until the application has been considered by the commissioner.*

*(6) Where an estimate is given to an applicant under this section, the time within which the head of the public body is required to respond to the request is suspended until the applicant notifies the head to proceed with the request.*

*(7) On an application to revise an estimate, the commissioner may*

*(a) where the commissioner considers that it is necessary and reasonable to do so in the circumstances, revise the estimate and set the appropriate amount to be charged and a refund, if any; or*

*(b) confirm the decision of the head of the public body.*

*(8) On an application to review the decision of the head of the public body not to waive the payment of all or part of the costs, the commissioner may*

*(a) where the commissioner is satisfied that paragraph (3)(a) or (b) is applicable, waive the payment of the costs or part of the costs in the manner and in the amount that the commissioner considers appropriate; or*

*(b) confirm the decision of the head of the public body.*

*(9) The head of the public body shall comply with a decision of the commissioner under this section.*

*(10) Where an estimate of costs has been provided to an applicant, the head of a public body may require the applicant to pay 50% of the cost before commencing the services, with the remainder to be paid upon completion of the services.*

[44] Memorial asserts that this Office cannot review the issue of costs after the fees have been paid and that the appropriate time to make a complaint regarding a cost estimate is set out under section 26 of *ATIPPA, 2015*.

[45] Memorial also relies on section 42(8)(d) for its position which states:

*42. (8) A complaint shall not be filed under this section with respect to*

*...*

*(d) an estimate of costs or a decision not to waive a cost under section 26.*

[46] There is some ambiguity in the Act regarding this issue. Section 42(8)(d) cited by Memorial addresses an estimate of costs as well as a decision not to waive a cost. Both of these processes are addressed in section 26. In this circumstance the Complainant has alleged that the total amount of the fee is higher than warranted in light of the amount of time that should have been required to locate responsive records. This Office understands the position of Memorial but also notes that at this stage the cost is not an estimate – it is an amount that was charged and paid. Furthermore, a waiver is not at play, which can only be requested for financial hardship or public interest purposes. Section 16 of the *Interpretation Act* provides guidance here:

*16. Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.*

[47] As the oversight body for a rights-based statute, when faced with ambiguity in the Act the right of access must be of primary consideration over the relatively minor inconvenience borne by a public body of having a decision subjected to scrutiny that relates to its response to an access request. The limitations in 42(8)(d) are specific and not sufficiently broad to clearly oust the jurisdiction of the OIPC, and therefore a complaint of this nature falls into the category of a decision, act or failure to act that relates to a request, as set out in section 42(1). This Office finds that because every Act is considered remedial and must be interpreted liberally, bearing in mind the objects of the Act, it must be concluded that *ATIPPA, 2015* contains the necessary jurisdiction for the Commissioner to review and make recommendations on this issue.

[48] The Complainant's position is that Memorial may not have charged for the appropriate services under section 25(1) of *ATIPPA, 2015* and that Memorial was using the estimate of

cost as a delay tactic. The Complainant advised he paid the fees as he did not want to delay his access to the information.

[49] Memorial advised this Office that the fee assessed was based on search time only. They explained the number of people who were required to search for records and they provided evidence of the time spent by each individual. They further explained that both paper and electronic records were searched.

[50] The cost estimate was \$143.73 (which was 5.75 hours above the free 15) but ultimately the Complainant paid \$131.25 as the actual number of hours was slightly lower in the end.

[51] Based on the evidence provided by Memorial this Office finds the cost estimate to have been reasonable. The other arguments raised by the Complainant regarding the timing of the cost estimate are not grounded in any infraction of the law as a public body may provide a cost estimate at any point in the process.

### Examination of Record

[52] The Complaint claimed that Memorial denied his request under section 20(1)(b) of *ATIPPA, 2015* to examine part of the record that was provided in response to his access request. Section 20(1)(b) of *ATIPPA, 2015* 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*

...

*(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.*

[53] Memorial did not deny the Complainant's request to examine the three records, however, it did take some time for Memorial to respond and set up a time for the Complainant to examine the records.

[54] As the examination has been carried out, we believe that this issue has been resolved. The length of time it took for Memorial to provide the examination was perhaps too long, as the examination took place one month after the Complainant had requested to examine the records. However, based on the information provided by Memorial, we do not find any intentional delay in providing the examination.

## V CONCLUSIONS

[55] This Office finds that Memorial fulfilled its duty to assist by conducting a reasonable search.

[56] This Office does not consider it necessary or reasonable to revise the estimate of costs and does not recommend a refund of fees paid.

## VI RECOMMENDATIONS

[57] Under the authority of section 47 of *ATIPPA, 2015*, I find that Memorial has conducted a reasonable search for records and the estimate of costs does not need to be revised. Therefore, I recommend that Memorial maintain its position regarding these matters.

[58] As set out in section 49(1)(b) of *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.

[59] Dated at St. John's, in the Province of Newfoundland and Labrador, this 20<sup>th</sup> day of December 2019.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador