



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2020-003

January 31, 2020

### Memorial University of Newfoundland

#### Summary:

Memorial University (“Memorial”) received an access request for records relating to correspondence about a committee at Memorial. Memorial disclosed records to the Complainant with redactions under sections 29, 32 and 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*, alleging that Memorial’s search did not meet the standard of reasonableness. The Complainant also alleged that Memorial refused to provide some of the records in their native format, as he requested under section 20(1)(b) of *ATIPPA, 2015*. The Commissioner determined that Memorial had conducted what seemed to be a reasonable search but based on the specific wording of the request and facts of this case the search was flawed. Memorial corrected this oversight during the course of this investigation, therefore the Commissioner made no new recommendations regarding the provision of records. The Commissioner further determined that the right of access to records does not routinely include a right to access them in their native format under *ATIPPA, 2015*.

#### Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, sections 11, 13 and 20.

#### Authorities Relied On:

NL OIPC Reports [A-2018-013](#), [A-2020-002](#).

## I BACKGROUND

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

1. *The call for volunteers to serve at the HSS Graduate Student Scholarships and Awards Committee during the 2018/19 academic year;*
2. *Responses to the call for volunteers to serve at the HSS Graduate Student Scholarships and Awards Committee during the 2018/19 academic year;*
3. *Records pertaining to the election or appointment of the chair of the 2018/19 HSS Graduate Student Scholarships and Awards Committee;*
4. *Other exchanges between members of the 2018/19 HSS Graduate Students Scholarships and Awards Committee and members of the HSS Dean’s Office*

*Possible location: the HSS Dean’s Office. Period covered: May 01, 2018 – May 01, 2019*

[2] In the email to which the request form was attached, the Complainant wrote, “Please see attached an access to information request pursuant to SS. 11 & 20 of the ATIPP Act. I seek access to records in their native format.”

[3] Memorial acknowledged the receipt of the request and asked the Complainant for clarification regarding a number of issues:

- *Can we please exclude records that you authored or previously received?*
- *In your email attaching your request form, you note you “seek access to records in their native format”. Please clarify this point.*
- *Regarding point 1 of your request seeking the “call for volunteers”, would you kindly confirm you are referring to the email from 7 May 2018 where HSS faculty members were requested to volunteer to serve on the committee?*
- *Regarding point 3 of your request, could you please confirm that you are only seeking records about the election or appointment of the chair of the committee?*
- *Regarding point 4 of your request, are you seeking records solely regarding committee business between members of the identified committee and members of the HSS Dean’s Office?*

[4] The Complainant confirmed that Memorial could exclude records he authored, except where those records made up an integral part of an email thread, but not documents he may

have received as he could not confirm their receipt. He explained the native format meant the format in which a document was originally produced, such as .doc or .docx for MS Word, .eml for Webmail, and paper for some documents. The Complainant could not confirm the date on the “call for volunteers”, stating he had not received it and therefore did not know the date. The Complainant also clarified that the scope of his third point included nominations and expressions of interest to perform the function of the chair of the committee and negotiations with candidates. Lastly, he confirmed that he sought “records pertaining to the said committee business.”

[5] The Complainant then sent Memorial correspondence revising his previous clarification. He advised that neither documents he authored nor those he may have received could be excluded from the search. He further elaborated that native format also included .xls and .xlsx for Excel spreadsheets. He also expanded his meaning of the scope of “committee business” to include “negotiation of conditions under which a particular ASM [academic staff member] was willing to serve on this committee.”

[6] After receiving the Complainant’s clarification, on September 13, 2019 Memorial advised that it had not received any records at that point and therefore could not confirm what native formats were involved:

*[...] However, our redaction software produces all scanned records in PDF format and they are processed and produced in PDF format. Sometimes there may be a spreadsheet or other record type that required redaction, and in those cases we are able to provide the record in that format. If this is the case when the volume of records responsive to a request is small and managing multiple file types does not unduly interfere with our operations, we will provide it as such, if requested.*

[7] In its final response, Memorial granted partial access to the Complainant, withholding some information under section 29(1)(a) (policy advice or recommendations), 32(d) (confidential evaluations) and 40(1) (disclosure harmful to personal privacy). Responding to the Complainant’s request for records in the native format, Memorial wrote:

*Section 11(2)(c) allows an Applicant to indicate how and in what form they would prefer to access a record. In your email attaching your request, you indicated your preference is to receive records in their “native format.” Please*

*note that regrettably we cannot accommodate this request and refer you to the 13 September 2019 email to you on this matter.*

- [8] Memorial provided the Complainant with 39 pages of records, including the call for volunteers, a list of volunteers, as well as emails relating to committee business. Upon receipt of the records from Memorial, the Complainant responded that he wanted two of the records (totaling three pages) reproduced in their native format (.eml) as indicated in his request. He also noted that no records pertaining to the responses to the call or records about the election or appointment of the chair of the committee had been released.
- [9] Memorial advised that it would follow up with the Dean's Office regarding access to the native format of the specified records. Memorial further explained that an adequate search for records was conducted to retrieve responsive records. Memorial also stated that it was possible that records that existed at one point may no longer exist.
- [10] The same day, the Complainant again wrote to Memorial to state that it had overlooked "that the request to examine two records in their native format has been made" and that he was looking forward to the opportunity to do so. He wrote that the reasonableness of the search conducted remained outstanding.
- [11] On October 17, 2019, the Complainant then filed a complaint with this Office, stating that it was his belief that Memorial had failed in its duty to assist under section 13 of *ATIPPA, 2015* because Memorial had not conducted a reasonable search for records. The Complainant also noted that Memorial had failed to provide access to some responsive records in their native format (.eml). The Complainant did not ask the Commissioner to review the redactions.
- [12] After issuing a final response and during the course of this Office's investigation, on November 6, 2019, Memorial provided the Complainant with the two records in electronic format that he had specifically requested in that medium. These records were provided in the format .msg, which is their native format (not .eml as the Complainant believed).

[13] After being asked by this Office to check with other members of the committee for records, Memorial discovered an additional two responsive records which were provided to the Complainant.

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

## II COMPLAINANT'S POSITION

[15] The Complainant states that Memorial failed in its duty to assist pursuant to section 13 of *ATIPPA, 2015*. The Complainant argues that Memorial did not conduct a reasonable search for records responsive to his request, as the responsive records did not include the responses to the call for volunteers, nor did it include records about the election or nomination of the chair of the committee. The Complainant also submits that Memorial did not provide him with the records in their native format nor did it continue to communicate with him after he was provided with the final response letter.

[16] Throughout the investigation, in subsequent submissions to this Office, the Complainant raised several additional issues which are laid out below.

[17] The Complainant maintains that he did not receive a copy of the call for volunteers despite being listed as a recipient, although during one correspondence he stated that it was possible that the email may have been classified as spam mail and deleted. He wished to view the electronic native format in order to review the metadata of the record to verify the authenticity of the record. The Complainant believes that he has evidence that Memorial has altered metadata on other records (provided to him separately from the response to this request); therefore, the Complainant suspects that Memorial can and has altered the metadata of these records as well.

[18] After Memorial released two records in electronic form, the Complainant asked the OIPC to engage the services of an information technology expert to examine the metadata. The

Complainant stated that there were a number of anomalies in the metadata which he states are material to his position that Memorial altered records.

[19] We advised the Complainant that we would not engage the services of an IT expert because his evidence is insufficient to raise a reasonable suspicion of the alteration of the metadata. Furthermore, the Complainant's request was for a copy of the call for volunteers, which was provided to him in electronic format, first in .pdf format and then later in .eml format. It is outside the scope of this Office's mandate to investigate why the Complainant believes he did not receive the email in May 2018.

[20] The Complainant raised the issue that there was a three-month gap between the date on the call for volunteers for the committee and the date that the record listing committee members was provided to the Dean. The Complainant states that the period is unreasonable and suspect, bringing the veracity of the records into question.

[21] We advised the Complainant that he had not provided sufficient evidence to support further investigation of this aspect of the matter. The time period of three months was between May to September, and the committee was not expected to meet until the fall so there is no evidence to suggest other records must exist prior to that time.

[22] The Complainant asked Memorial specifically about the lack of responses to the call for volunteers. Memorial advised that it was possible that records that existed at one point "may no longer exist at this time." He believes that Memorial's explanation means that Memorial violated its own Information Management Policy, as well as the *ATIPPA, 2015*.

[23] With regard to the allegations that Memorial has failed "to properly retain/improperly destroy records in contravention of Memorial's *Information Management Policy*," this Office explained during the investigation that it is tasked with enforcement of the *ATIPPA, 2015* not enforcing compliance with Memorial's internal policy. Secondly, the Complainant has not actually provided sufficient evidence to support an investigation into allegations that Memorial destroyed records either before or after his access to information requests were made.

[24] Finally, the Complainant questions whether Memorial lawfully destroyed records and whether Memorial made false statements to this Office at any point in the investigation. The Complainant suggests that Memorial may have destroyed records, either before or after his access to information request. The Complainant also suggests that Memorial provided false information to this Office during the course of this investigation in relation to Memorial's ability to obtain records from a former employee's account.

[25] We reviewed these allegations of the Complainant before writing this Report and as we found that he had not provided sufficient evidence to support further investigation of this aspect of the matter it has not been included in the issues for this Report.

### III MEMORIAL'S POSITION

[26] Memorial submits that the search for responsive records was reasonable. Memorial states that it sent an opening letter to individuals it knew to have responsive records, including to staff members of the HSS Dean's Office, the Associate Dean who worked together with the committee, as well as the chair of the committee.

[27] Memorial states that it worked with the Associate Dean and two administrative staff members in the Dean's Office "to obtain all responsive records and to follow up for clarification or to obtain other records." Memorial corresponded with the chair of the committee and obtained records of that individual as well.

[28] Memorial advises that one individual spent seven and a half hours searching email and other relevant records, using the name of the committee and the email addresses of committee members as search terms.

[29] Memorial noted that one of its employees which it was thought might have had records had left Memorial's employ. It acknowledged that records may have existed previously that may no longer be accessible or may no longer exist. During this investigation, this Office questioned whether Memorial archived former employees' email accounts or whether

Information Technology Services could access the former employees account. Memorial provided the following response:

1. *Memorial does not maintain an archive of email for current or former employees. Memorial is a large, complex environment and has unique considerations which make having an archive difficult, such as faculty members' records and emails pertaining to their research, teaching, and personal-professional activities, as well as sheer volume of records.*
2. *As the Head of the Department of Humanities and Social Sciences (HSS), the Dean's office only maintains an archive for personnel files of its employees. For instance, records relating to leave and employees' step increases and salary would be kept. These are generally kept for a period of one year.*
3. *The Department of Information Technology Services (ITS) cannot make a decision to access an account of an employee, current, former or otherwise. Such an action would be taken by ITS only with the approval of both the relevant vice-president of the university and the university privacy officer, who then set conditions for such access, established as per the Appropriate Use of Computing Resources policy).*

*Conditions typically include one-time access; only the record necessary for the purpose is retrieved; and the search is conducted by an appropriate ITS employee. The policy is invoked ordinarily to assist administrators of the estate of a deceased employee.*

#### IV ISSUES

[30] Having addressed several of the Complainant's concerns raised through the course of the investigation, and having found that the Complainant lacked sufficient evidence in these particular claims, we turn to the issues which initially comprised this complaint.

1. Did Memorial conduct a reasonable search for Records?
2. Did Memorial fail to comply with section 20(1)(b)?
3. Did Memorial fulfill its duty to assist the Applicant per Section 13 of *ATIPPA, 2015*?



## V DECISION

### 1. Reasonableness of Search

[31] The Complainant took issue with the reasonableness of Memorial's search as it failed to locate and release any records relating to either the responses to the call for volunteers or to the appointment or election of the committee chair.

[32] In relation to the lack of records located about the election or appointment of the chair, this Office spoke to this exact issue in Report A-2019-023. The Commissioner, at paragraphs 20 and 21, wrote:

*[20] The Complainant further alleges records relating to the appointment of the Chair of the HSS Graduate Student Scholarship and Awards Committee were not located or released. The Complainant states that an email between the Chair and the Associate Dean contains the phrase "you know this, of course", which the Complainant says, in the context of the email, is an inference that the Chair was appointed, as opposed to being elected. Therefore, the Complainant asserts there must be correspondence between the Chair and the Associate Dean regarding the appointment of the position. He submits that all exchanges relating to the selection and appointment of the chair are responsive to the request, as they are documents related to the procedure for nominating Committee members. Therefore, the Complainant believes other responsive records exist but were not provided.*

*[21] The reference "you know this of course" is insufficient evidence that another record exists documenting the appointment of the chair.*

[33] The Complainant has not provided further evidence of why he believes additional information exists and the matter was addressed in Report A-2019-023. Therefore, this Office has determined based on the available evidence that Memorial conducted a reasonable search for information about the election or appointment of the committee chair.

[34] We turn now to the lack of records regarding responses to the call for volunteers to serve on the committee. Memorial conducted an initial search for these records but was unable to find them. Part of the reason for this was that the employee to whom these email responses

would have been addressed no longer works at Memorial, and as per Memorial's practices, there is no existing archive of that person's email.

[35] The Complainant was of the opinion that at least 10 emails should exist (five from the sender and five to the recipients). This Office went to Memorial to ask them to see if the five committee members had copies of their own responses.

[36] Two members of the committee were able to provide an email from the former employee thanking them for volunteering. Their responses to the call were included in that email thread. These records were provided to the Complainant during the course of this investigation.

[37] Although the Complainant was provided with the two records, he was not satisfied by this. The Complainant claimed that he was looking for the original version of these records, not emails which made up part of a thread. He then suggested that at least one of the responses came from the former employee. The Complainant also accused Memorial of not being truthful about the fact that the former employee was no longer in their employ. He insisted that the former employee search for further records.

[38] Records provided by Memorial to the Complainant clearly state that the former employee had left Memorial's employ.

[39] Memorial has provided sufficient explanation about how its search was conducted, including length of time spent searching and that it was conducted by knowledgeable staff. However, a key item of the Complainant's request was missed. The wording of the access request itself included a request for "responses to the call for volunteers". When the initial search turned up none of these responses, Memorial should have taken the next step of asking the committee members to search their own email, without requiring prompting from this Office. This finding is based on the specific facts of this case and on the wording of the request. It should not be taken to impose on public bodies any obligations in excess of doing a reasonable search, as we have addressed in the past. It continues to be a requirement that public bodies be attentive to the exact wording of the request when setting the parameters of their search in order for it to be reasonable.

[40] We must also point out that the initial search should have captured these records and likely would have but for the main repository of records (the email of the recipient of these responses) being inaccessible as she was a former employee. Further, when this Office did request the search of the committee members' emails, it was conducted and all responsive records found were provided to the Complainant. Therefore, any unreasonableness of the search has already been rectified.

[41] As an aside, while I accept Memorial's statement that it does not retain an archive of emails of former employees, I was surprised to learn of this policy. In this instance the former employee was an administrative staff person who may have had important email records, the retention of which would normally be part of ensuring good governance in any large organization. It is difficult to comprehend why there would not be a formal process to review the email records of such an employee in order to determine what records should be retained by the University after their departure. A records retention policy that does not address this situation would seem to be lacking from both a governance and a transparency perspective, and it is on the latter basis that I offer this comment.

## 2. Compliance with section 20(1)(b) and Records in their Native Format

[42] Section 11(2)(c) of ATIPPA, 2015 states that "A request shall indicate how and in what form the Complainant would prefer to access the record." This section does not place an obligation on the public body to provide the records in the exact form requested. Section 20(2) states:

*(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 Complainant 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.*

[43] Section 20 also does not create an obligation to provide records in their native format, only in "electronic form". Only section 20(3) is specific about the format indicating that:

*(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 Complainant 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.*

[44] As the records in question here are not part of a dataset, this subsection does not apply. But even it does not speak of native format and contains the caveat if “it is reasonably practicable to do so”. There may be other very narrow circumstances in which the native format of a record is relevant, however nothing of that nature applies here.

[45] Memorial explained within three days of the request being received, on September 13, that they may not be able to comply with his request for records in their native format and why. In spite of this, Memorial was able to provide the records in their native format, .msg during the course of our investigation. Therefore, this Office finds that Memorial provided this even though it was not required by the Act and did not fail in its duty to assist the Complainant in this regard.

### 3. Refusal to Continue to Engage with Complainant After Final Response

[46] The Complainant also alleges “by stopping to communicate with me, the Public Body failed to meet its duty to respond to the Complainant in an open, accurate and complete manner.”

[47] This Office has reviewed the records of correspondence between the Complainant and Memorial. The documents show that the Complainant narrowed his request for records to three pages, and that he asked for an explanation as to why there were no responses to the volunteer call found.

[48] In the view of this Office, the Complainant's final email to Memorial asked no additional questions, merely stated his request for native records. There were no questions about when this might occur or other information that Memorial could provide at the time.

[49] Report A-2020-002, at paragraphs 27 and 28, recently discussed whether public bodies are required to continuing to engage with Complainants after a request had been fulfilled:

*[27] The Complainant also alleged that Memorial did not respond in an open, accurate and complete manner since it did not continue to answer his follow up questions after the records were provided. Memorial answered the Complainant's initial questions which led the Complainant to ask further questions. The Complainant had a related privacy complaint file ongoing with this Office and Memorial had suggested some questions may be answered through that file.*

*[28] The Complainant quoted from Report A-2018-011 as support for the position that the duty to communicate with a requestor does not stop with the release of records. While we encourage public bodies to try and assist Complainants even after records have been provided, not all questions can be answered to the satisfaction of some Complainants.*

## VI RECOMMENDATIONS

[50] Under the authority of section 47 of *ATIPPA, 2015*, I find that while Memorial's initial search for records was flawed, this was remedied during the course of this investigation and all records to which the Complainant is entitled, have been provided by Memorial. Therefore, I recommend that Memorial maintain its position regarding these matters.

[51] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of Memorial 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.

[52] Dated at St. John's, in the Province of Newfoundland and Labrador, this 31<sup>st</sup> day of January 2020.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador