



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-008

July 10, 2020

Memorial University of Newfoundland

Summary:

The Complainant requested records from Memorial University of Newfoundland (“Memorial”) relating to the production of certain e-mail messages. Memorial withheld some records on the basis of section 30 (solicitor-client privilege), section 39 (business interests of a third party) and section 40 (personal privacy). The Complainant filed a complaint with this Office, alleging that Memorial had wrongly applied the exceptions to disclosure and had failed in its duty to conduct a reasonable search for records and to respond to the Complainant in an open, accurate and complete manner under section 13 of the Act. The Commissioner found that Memorial had properly applied the section 30 exception to the records; that it was not necessary to assess the application of sections 39 and 40; and that Memorial had fulfilled its duty under section 13 of the Act. The Commissioner therefore recommended that Memorial continue to withhold the records.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, sections 9, 13, 30, 39 and 40.

Authorities Relied On:

NL OIPC Reports [A-2016-009](#); [A-2018-008](#); [A-2018-013](#).
[Newfoundland and Labrador \(Information and Privacy Commissioner\) v. Eastern Regional Integrated Health Authority](#), 2015 NLTD(G) 183.
[Alberta \(Information and Privacy Commissioner\) v. University of Calgary](#), 2016 SCC 53.
[Newfoundland and Labrador \(Information and Privacy Commissioner\) v. College of the North Atlantic](#), 2013 NLTD(G)185.

I BACKGROUND

- [1] The Complainant made an access request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or “the Act”) to Memorial University of Newfoundland (“Memorial”) for information related to several e-mail messages that he had previously received. The request was for records relating to the production of those e-mails (that is, records relating to any operations such as saving, retrieving or transmitting, that were performed in relation to those e-mails).
- [2] Memorial responded to the access request granting the request in part, and stating that access to the remaining responsive records was denied on the basis of section 30(1)(a) (solicitor-client privilege), section 40(1) (disclosure harmful to personal privacy) and section 39(1) (disclosure harmful to the business interests of a third party). The Complainant filed a complaint with this Office.
- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*. Submissions were received from both parties, and have all been carefully considered.

II PUBLIC BODY’S POSITION

- [4] Memorial states that because the earlier e-mail messages, to which the requested records relate, were between its Information Access and Privacy Office (“IAP Office”) and external legal counsel, the only records responsive to the request are in the IAP Office, not elsewhere in the University’s information systems.
- [5] Memorial states that all of the responsive records were transmitted and received through external legal counsel’s secure file-sharing software, were all related to ongoing litigation, and are subject to solicitor-client privilege, under section 30 of the Act.

[6] Memorial also states that some information in the responsive records is actually about the secure file-sharing software, and is withheld on the basis that its disclosure would harm the business interests of external legal counsel under section 39 of the Act.

[7] Memorial also states that some information in the requested records is personal information, the disclosure of which would be an unreasonable invasion of privacy under section 40 of the Act.

III COMPLAINANT'S POSITION

[8] The Complainant states that Memorial failed to meet its duty under section 13 of the Act to assist the applicant, by failing to conduct a reasonable search for records, and by failing to respond to the request in an open, accurate and complete manner.

[9] The Complainant states that Memorial incorrectly withheld information under sections 30, 39 and 40 of the Act.

[10] The Complainant also states that the public interest override in section 9 of the Act should apply to the records withheld under section 30, so as to permit their disclosure. The Complainant states that there is a "suspicion of wrongdoing" by Memorial, that the metadata of some e-mails had anomalies, appearing that they may have been altered, and that there is a public interest in determining if this is so.

IV DECISION

Solicitor-Client Privilege

[11] Memorial has relied mainly on section 30(1)(a) of the Act to justify withholding the records at issue, claiming solicitor-client privilege, litigation privilege, or both. Section 30(1)(a) reads:

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

[12] A good explanation of both forms of privilege is contained in the decision of Justice Orsborn in *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority*, which was extensively quoted and followed in Report A-2016-009 from this Office. In brief, solicitor-client privilege (sometimes referred to as legal advice privilege) is defined in this formulation:

- i) *a communication between a solicitor, acting in his or her professional capacity, and the client;*
- ii) *the communication must entail the seeking or giving of legal advice, and*
- iii) *the communication must be intended to be confidential.*

That privilege allows records to be protected from disclosure in accordance with section 30 of *ATIPPA, 2015*. In any given circumstance, the determination of the scope of the privilege must be informed by both the particular context and the rationale for the privilege.

[13] Litigation privilege is different. Its purpose is to protect from disclosure, for a limited time, records that have been prepared for the dominant purpose of litigation. The litigation must have been in existence or reasonably contemplated at the time the records were prepared.

[14] In the present case, the records that are responsive to the request and have been withheld, are themselves e-mail messages between Memorial's outside legal counsel and individuals in the Memorial Information Access and Privacy Office. Memorial, stating that those messages are subject to solicitor-client privilege, has declined to provide copies to this Office, citing the decision of the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. University of Calgary*.

[15] This Office takes the position that *ATIPPA, 2015* is sufficiently different from the legislation in the *Calgary* decision that the decision does not apply to the production of records to the Commissioner under this Act. That issue will ultimately be decided by the courts. In the meantime, in the present case Memorial has provided a list of the records describing each, with submissions explaining why Memorial believes the section 30 exception applies.

[16] In this particular case, the contextual and descriptive information provided by Memorial is sufficient to persuade us that the section 30 exception has been correctly applied. We have concluded that these records are subject to solicitor-client privilege, litigation privilege, or

both. Ultimately the public body bears the burden of proof in refusing to provide a record to an access to information applicant, in accordance with section 43(1). In our opinion the information provided to this Office about the records is sufficient to discharge that burden; however in other cases it may be necessary for us to review the records themselves in order to reach that conclusion.

[17] The Complainant argues that there is no evidence that the communications were intended to be confidential. However, the evidence provided to this Office on the confidentiality of these communications, as well as all of the other aspects of the section 30 test, has satisfied us.

[18] The Complainant argues that even if some of the content of the records is privileged, there still ought to be a portion that may be disclosed. Sometimes that may be the case, but the context is always important. The courts have stated that where there is an assiduous inquirer involved in litigation with the public body, even apparently innocuous information such as dates, or names of counsel retained, can reveal information that is useful to the opposing party and therefore that information is covered by litigation privilege. (See *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic*). That is the case here, and we are satisfied that Memorial is justified in withholding these records in their entirety.

Public Interest Override

[19] The Complainant has argued that section 9 of the *ATIPPA, 2015*, known as the “public interest override” applies to these records. Section 9 provides that where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception, the information should be disclosed. The Complainant states that there is a “suspicion of wrongdoing” by Memorial, that the metadata of some e-mails had anomalies, appearing that they may have been altered, and that there is a public interest in determining if this is so.

[20] The evidence provided to this Office by the Complainant to support the Complainant’s allegation of wrongdoing is not persuasive or sufficient to ground any allegation of wrongdoing, and certainly does not “clearly demonstrate” that there is a public interest of any sort that would outweigh solicitor-client or litigation privilege. Therefore we conclude that section 9 does not apply.

Business Interest of a Third Party; Personal Privacy

[21] Memorial additionally claimed the exceptions in section 39 (disclosures harmful to the business interest of a third party) and section 40 (disclosure harmful to personal privacy) to withhold some of the information that was also withheld on the basis of section 30. Given that we have already concluded that section 30 was properly applied, we do not need to separately deal with these additional exceptions.

The Duty to Assist

[22] The Complainant alleges that Memorial has failed in its duty, under section 13 of the Act, to assist him as an applicant. That section provides:

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.

[23] The Complainant first argues that Memorial did not conduct a reasonable search for records, because it did not search the University's IT Services. It appears that the Complainant's grounds for this allegation consist purely of assumptions, and we are satisfied, on the basis of evidence provided by Memorial, that these assumptions are incorrect. Memorial's search was conducted by a knowledgeable person who searched in the locations where responsive records were reasonably likely to be found. We conclude that a reasonable search was conducted.

[24] We are further satisfied that the response to the Complainant was open, accurate and complete. The Complainant states that Memorial's response falls short because it contains no list of records. However, a public body may be justified in not providing an applicant with a list or description of records in certain cases, including where solicitor-client privilege is claimed, as doing so may reveal the content.

[25] The Complainant also states that Memorial has provided no explanation of its redactions. It is true that the explanation provided in Memorial's final response is limited. However, we must recognize that with some exceptions, including solicitor-client privilege, it is may be

difficult in some circumstances to provide fuller explanation without revealing the content of the record. This is one such situation.

[26] The Complainant in his submission has restated the statutory duty to assist as if it read “...in an open, accurate and polite manner”, and then alleged that individuals in the Memorial IAP Office violated the statutory duty by being rude and unprofessional in addressing his request. Having reviewed the correspondence we cannot find that any of those individuals dealt with the Complainant in a rude or unprofessional manner, certainly not so such an extreme extent as to violate the statutory duty to assist the applicant.

The Authority to Make Submissions

[27] The Complainant argues that this Office should not accept submissions made in this matter by Memorial’s Access and Privacy Advisor, alleging that the individual has not been empowered by the Head of the public body to make submissions to this Office. The Complainant proffers a Delegation of Authority document, which he argues is conclusive on this issue, and claims that this Office “confirmed the validity” of the document in Report A-2018-013.

[28] This is a misrepresentation of that Report. The Delegation of Authority document was the subject of an access request, and the subject of some discussion in that Report, but its validity as a source of empowerment of individuals employed by Memorial to act on Memorial’s behalf certainly was not confirmed in that Report. Furthermore, in Report A-2018-008, it was stated:

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.

[29] For all of the foregoing reasons we conclude that Memorial has fulfilled its duty under section 13 of the Act to assist the Complainant, has conducted a reasonable search for records responsive to the request, and has responded to the Complainant in an open,

accurate and complete manner. We further conclude that Memorial has properly applied the exception in section 30 of the Act to withhold the records at issue.

V RECOMMENDATIONS

[30] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that Memorial University of Newfoundland continue to withhold the records at issue in this complaint.

[31] 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.

[32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 10th day of July, 2020.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador