



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-014

August 25, 2020

Memorial University of Newfoundland

Summary:

The Complainant requested from Memorial University of Newfoundland (“Memorial”) sender and recipient copies of emails sent and received by members of an interdepartmental committee (“the Committee”). Memorial provided access to the sender’s copies of the records, but advised the Complainant that the receiver’s copies did not exist. The Complainant filed a complaint with this Office, alleging that Memorial failed to retain the receiver’s copies and failed to locate responsive records; thereby, failed in its duty assist the Complainant. The Complainant also alleged that Memorial may have altered records, contrary to section 115 of *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015”). The Commissioner found that Memorial conducted a reasonable search for records, fulfilling its duty under section 13 of *ATIPPA, 2015*. The Commissioner also found that there was no evidence that Memorial altered records contrary to section 115. The Commissioner therefore recommended that Memorial take no further action.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A-1.2, 13, 115.

Authorities Relied On:

NL OIPC [Report A-2020-003](#)

Other Resources:

Memorial University [Information Management Policy](#); Memorial University’s [Procedure for Secure Disposal of Transitory University Records](#); GNL OCIO [“What Email to Delete or Keep?”](#)

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”). Memorial split the request into two parts during the processing of the request. This Complaint and report deals with the first two items of the request, which sought the following records in their native format:

The Sender’s and Receiver’s copies of the Emails dated April 8 and 10, 2019 from [Ethics Officer] to the Secretariat on Responsible Conduct of Research (SRCR) and copied on [Chair of Committee] (two copies each Email in the custody of [Ethics Officer] and [Chair of Committee]). Possible location: [the Committee].

The Receiver’s copies of the Email dated April 9 and 16, 2019 from [Third Party] to [Ethics Officer] and copied on [Chair of Committee] (two copies for Email for each Email in the custody of [Ethics Officer] and [Chair of Committee]). Possible location: [the Committee].

- [2] Memorial responded to the request by granting access, but advised the Complainant that the copies of the emails sent to the Chair of the Committee were not located as they had been deleted prior to the access request being made. Memorial explained the Chair had not retained the emails because they were already contained in the Committee records by the primary recipient of the emails, the Ethics Officer.
- [3] The Complainant was not satisfied with Memorial’s response and on February 18, 2020 filed a complaint with this Office.
- [4] 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

- [5] It is the Public Body’s position that all responsive records were provided to the Complainant. The Public Body submits that the Complainant wanted different individuals’

copies of the exact same email and that, even if all copies existed, the records would still be the same.

- [6] The Public Body also notes that the Committee's practice of deleting records that are obtained by the Ethics Officer is entirely appropriate and in keeping with records management practices.

III COMPLAINANT'S POSITION

- [7] It is the Complainant's position that Memorial failed in its duty to assist the Applicant by failing to retain or locate all records. The Complaint states that "the [Committee] records are considered as official university records". Such records are "created, received or held as evidence of the University's organization, policies, decisions and operations" (emphasis added). The Complainant states that because the records are not transitory, they "must have been retained and made accessible" in the original format or a format that does not materially change the information. The Complainant also states that Memorial did not inform him of the reasoning that the records could not be located or when they were destroyed.

- [8] The Complainant questioned whether the records were lawfully destroyed, suggesting that the records were destroyed in contravention of *ATIPPA, 2015* because Memorial did not provide the disposal date or authority for doing so. The Complainant suggested that he believes the records were purposefully destroyed when "the Public Body was alerted that I may be seeking access to the four Emails" prior to actually making the request. The Complainant submits that a "reasonable person would consider the four Emails as potentially responsive to an ATIPP request."

- [9] The Complainant also submits that Memorial altered records, contrary to section 115 of *ATIPPA, 2015*. The Complainant questioned the timing of Memorial's consultations with an outside party on an issue, as well as why the Ethics Officer used one email to contact the outside party and another to contact him. The Complainant also provided what appears to be an Excel spreadsheet created by another source to suggest Memorial had changed the date of an email. The Complainant also stated that he believes there are anomalies in the metadata

compared with test data he obtained in order to verify it. He requested that the OIPC engage the services of an IT expert to confirm this thinking.

IV DECISION

Duty to Assist

[10] The Complainant alleged that Memorial failed in its duty to assist him as the Applicant making the request because it failed to locate and release all records responsive to the request. The Complainant also states Memorial provided no explanation for why the records were not able to be located. In its final response to the Complainant, Memorial wrote,

I am pleased to inform you that a decision has been made to provide access to the requested records, which are attached to the email conveying this letter to you. Please be advised, however, [the Chair of the Committee] has not retained those emails and they no longer exist.

[11] Memorial's advised the OIPC in its response to this complaint that it is normal practice for the Ethics Officer to be responsible for the record keeping for the Committee. In this situation, the primary recipient was the Ethics Officer who retained the record for record-keeping purposes. The Chair was only carbon copied on the email, therefore there was no requirement for him to keep a copy of the email.

[12] The Complainant asserts that the copied emails to the Chair of the Committee are official university records, not transitory in nature. Memorial's *Information Management Policy* sets out the difference between official university records and transitory records. Transitory records are defined as:

University Records that are of temporary usefulness having no ongoing value beyond an immediate and minor transaction, as convenience copies, or as draft for subsequent University Records. Transitory University Records may be securely disposed of without a Retention and Disposal Schedule.

[13] Memorial's *Procedure for Secure Disposal of Transitory University Records* states that "a copy of an Official University Record is usually a transitory record."

[14] As a measure of best practice, the Office of the Chief Information Officer with the Government of Newfoundland and Labrador also specifically states “reference emails that you are copied on and are not the main recipient” and “email messages that you are copied (cc) on and not the primary recipient” are emails that can be deleted.

[15] Based in its own policy and good practice generally regarding copies, this Office finds that Memorial did not fail in its duty to assist the Complainant when it did not locate the records as they had been deleted in accordance with University policy.

[16] It is also necessary to address the allegation made by the Complainant that the records were deleted once Memorial became aware that the Complainant might make a request. The emails sought by the Complainant were sent in April 2019. The Complainant did not file an access request for the records until December 2019. Even though the Complainant advises that the Public Body was “alerted” to the fact that he may make an access request at the end of October 2019, there was no requirement for the Chair to have kept the emails and no evidence to support the Complainant’s allegation that the Chair destroyed them with the intent to evade an access request.

Alteration of Records

[17] Upon review, there is no evidence to suggest that the Complainant’s concerns of altered records are more than unsubstantiated suspicions. In considering the Complainant’s submissions, many of the reasons provided are not proof of unlawful or unethical conduct by Memorial, but rather queries posed by the Complainant about why Memorial chose a particular course of action. There is inherently nothing untoward about the actions taken. The Complainant’s questions have reasonable and legitimate answers which have been overlooked by the Complainant in favour of more sinister conjecture.

[18] The Complainant submitted as evidence an Excel spreadsheet which states that one email was sent on a different date than the email suggests. Upon review, this document does not provide information supportive of this position. It appears this document was created to keep a record of emails received by an extra-provincial organization. This document lists one of the emails dated April 16, 2019 as being sent on April 17, 2019. It is unusual that the

Complainant believes that the specific record that he sought (by specifying the date, the sender, and the recipient) and which was provided to him has been altered because of a document created by a third party at a later date. However, the Complainant's request for this specific email referenced April 16, 2019 as the date on the record. That email was located and provided.

[19] In Report A-2020-003, the Office addressed requests for enlisting an expert to review metadata of records. A reasonable suspicion supported by evidence is required to warrant consideration of such a procedure. As then, the evidence provided in this case is insufficient to raise a reasonable suspicion of altered metadata.

[20] As noted above, while we also did not find that Memorial violated its Information Management Policy, it should be noted that not all violations of that policy will constitute violations of *ATIPPA, 2015*. As has been recognized in a number of reports issued by this Office over the years, clear records management policies and procedures are essential tools to ensure that privacy and access to information rights under the *ATIPPA, 2015* can be realized and enjoyed by all. This is supported by provisions in the *ATIPPA, 2015* such as sections 64 and 65 which speak to protection and retention of personal information, as well as section 115 which establishes an offence where a person willfully destroys a record or erases information in a record that is subject to the Act, or alters, falsifies or conceals a record, or directs another person to do so, with the intent to evade a request for access to records. Such allegations must be proven in court to a criminal standard of evidence, i.e., beyond a reasonable doubt. In this case no credible evidence was put forward to trigger serious consideration of such a proceeding.

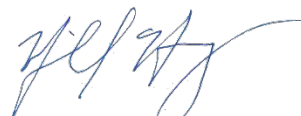
V RECOMMENDATIONS

[21] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that for Memorial University take no further action with regards to this complaint.

[22] 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.

[23] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25th day of August 2020.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador