OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

# Report A-2020-015

## August 31, 2020

## Memorial University of Newfoundland

**Summary:** The Complainant made two access requests to Memorial University of Newfoundland for records which were provided, but with information withheld under sections 29 (advice and recommendations), 30 (solicitor-client privilege), 38 (disclosures harmful to labour relations) and 40 (disclosures harmful to personal privacy). The Complainant challenged those redactions, and additionally argued that some information should be provided on the basis that it was relevant to a workplace investigation under section 33.

The Commissioner found that Memorial had properly applied section 30; that no information was required to be disclosed under section 33; that some personal information was properly withheld under section 40; that other information was the personal information of the Complainant under section 2(u) (opinion of another person about the Complainant) and therefore must be disclosed; that section 29 applied to justify withholding some information; and that it was not necessary to discuss section 38. The Commissioner also found that Memorial had not failed to fulfil its duty to assist the applicant under section 13 of the *Act.*

**Statutes Cited:** *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, sections 2(u), 13, 29, 30, 33, 38 and 40.

**Authorities Relied On:** NL OIPC Report *A-2019-018*, *A-2020-008*; *Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53.*

**Other Resources** OIPC NL Guidance Documents: Section 33 – Information from a Workplace Investigation; Section 29 – Policy Advice and Recommendations; Memorial University of Newfoundland: Procedure for Resolution of a Formal Respectful Workplace Complaint.

*File # 0020-062-20-076, 0020-062-20-077*

## I BACKGROUND

[1] On a previous occasion the Complainant made a request to Memorial University of Newfoundland ("Memorial") for records under the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015"* or *"*the *Act"*) which ultimately resulted in the issuance of Report A-2019-018. In that report, this Office recommended Memorial release a number of previously withheld documents. The Complainant alleged that Memorial did not fully implement the recommendations of that Report and failed to release some documents.

[2] The Complainant therefore made two further access requests to Memorial. The records responsive to the first request consist of four e-mails between named individuals on specific dates. All four were provided to the Complainant, but three of them were subject to redactions. The responsive records at issue relating to the second request consist of a letter that was provided to the Complainant, but with handwritten marginal notes redacted.

[3] The Complainant was not satisfied that the redactions had been correctly applied, and filed complaints with this Office. As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*. The Complainant requested that because of the nature of the requests they be dealt with together by this Office. They are therefore the subject of a single Report.

## II PUBLIC BODY'S POSITION

[4] With respect to the first access request, Memorial claims that section 30 (solicitor-client privilege) applies to certain information redacted from one e-mail, which Memorial asserts is the substance of a discussion of legal advice between Memorial's ATIPP office and counsel.

[5] Also with respect to the first access request, Memorial claims that information contained in another record is a statement about the Complainant, made by the other party to a workplace grievance about the Complainant. The statement is the other party's opinion of the Complainant, and since it is the other party's personal information, must be withheld under section 40 of the *Act*.

[6] With respect to the second access request, Memorial claims that the hand-written notes were made by the Director of Faculty Relations, and are analysis and considerations to be taken into account in formulating advice. They are therefore to be withheld under section 29 of the *Act.*

[7] Memorial also claims that the information in the handwritten notes may be withheld from disclosure because it is labour relations information within the meaning of section 38 of the *Act*.

[8] Memorial submits that section 33 does not apply to the handwritten notes, because any workplace investigation was complete before the notes were created.

## III COMPLAINANT'S POSITION

[9] With respect to the first access request, the Complainant states that the information withheld by Memorial on the basis of section 40 of the *Act* is relevant to a workplace investigation. The Complainant states that in a recent Report, A-2019-018, the Commissioner has emphasized that the disclosure provisions of section 33 of the *Act* outweigh section 40, and therefore the information must be disclosed.

[10] Also with respect to the first access request, the Complainant states that section 30 was improperly applied to a portion of an e-mail. He argues that the writer, Memorial's Access and Privacy Advisor, is not a lawyer, and therefore the e-mail was not a communication between a solicitor and the client.

[11] With respect to the second access request, the Complainant states that Memorial, in its search for records, failed to locate and disclose a covering letter that the Complainant had written and provided. Therefore Memorial failed in its duty to conduct a reasonable search.

[12] Also with respect to the second request, the Complainant submits that information withheld by Memorial on the basis of section 29 is in fact subject to section 33. As the

mandatory disclosure provision of section 33 outweighs the section 29 exception, the information should be disclosed.

[13] Also with respect to the second request, the Complainant submits that there is no evidence to support the characterization of the handwritten notes made by the Director of Faculty Relations as labour relations information. Therefore section 38 does not apply to that information.

## IV ISSUES

[14] With respect to the first complaint, involving the first access request:

1. Did Memorial properly withhold records under section 30(1) (solicitor-client privilege)?
2. Did Memorial properly withhold records under section 40 (unreasonable invasion of personal privacy)?
3. Does section 33 (workplace investigations) apply to the records withheld under section 40?

[15] With respect to the second complaint, involving the second access request:

4. Did Memorial fail to discharge its duty to assist in not conducting an adequate search and providing the covering letter?
5. Does section 33 (workplace investigations) apply to the records withheld under sections 29 and 38?
6. Did Memorial properly withhold the notes of the Director of Faculty Relations under section 29(1)(a) (policy advice)?
7. Did Memorial properly withhold the notes of the Director of Faculty Relations under section 38 (labour relations)?

## V DECISION

### 1. Section 30(1) Solicitor-Client Privilege

[16] The relevant portion of section 30(1) of *ATIPPA, 2015* reads as follows:

> *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;*

[17] The document containing the redacted information from the first request was provided to this Office, but the redacted passage, for which the section 30 exception was claimed, remained redacted. Memorial cited *Privacy Commissioner of Alberta v. University of Alberta* as authority for its right to withhold from this Office information subject to solicitor-client privilege. Instead, Memorial provided a description of the record and an explanation of the rationale for withholding the redacted information.

[18] Our Office recently dealt with this question in Report A-2020-008, which also involved Memorial University, in the following way:

> [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.*

[19] The information redacted under section 30 in the present case appears as one paragraph in an e-mail between Memorial's ATIPP coordinator and Memorial's Associate Vice-President (Academic). Memorial states that it contains the substance of an earlier privileged discussion, between Memorial's ATIPP office and legal counsel, in which legal advice was sought and received. Memorial has provided our Office a clear description of the redacted passage. In addition, Memorial provided a detailed explanation of the background to the e-mail and the writer's reason for including the legal advice in it.

[20] Solicitor-client privilege applies not only to an original communication in which legal advice was sought and received, but also to subsequent internal communications, between employees, relaying that legal advice. As with the case discussed in Report A-2020-008, the contextual and descriptive information provided by Memorial is sufficient to persuade us, in the present case, that the section 30 exception has been correctly applied. Therefore Memorial is entitled to continue to withhold the information.

2. Section 40 (Unreasonable Invasion of Personal Privacy)
3. Section 33 (Information from a Workplace Investigation)

[21] The information redacted under section 40 in the first request consists of statements in an e-mail written by the other party to a workplace grievance about the Complainant. The Complainant argues that this information relates to a workplace investigation within the meaning of section 33, and therefore it must be released.

[22] Section 33 reads as follows:

> *33. (1) For the purpose of this section*
>
> > *(a) "harassment" means comments or conduct which are abusive, offensive, demeaning or vexatious that are known, or ought reasonably to be known, to be unwelcome and which may be intended or unintended;*
> >
> > *(b) "party" means a complainant, respondent or a witness who provided a statement to an investigator conducting a workplace investigation; and*
> >
> > *(c) "workplace investigation" means an investigation related to*
> >
> > > *(i) the conduct of an employee in the workplace,*
> > >
> > > *(ii) harassment, or*
> > >
> > > *(iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public which may give rise to progressive discipline or corrective action by the public body employer.*
>
> *(2) The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.*
>
> *(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).*
>
> *(4) Notwithstanding subsection (3), where a party referred to in that subsection is a witness in a workplace investigation, the head of a public body shall disclose only the information referred to in subsection (2) which relates to the witness' statements provided in the course of the investigation.*

[23] Section 33(3) provides for the mandatory disclosure of information relevant to a workplace investigation to a party to the investigation. As explained in the Guidance from this Office on section 33, information that might otherwise be withheld under section 40, or under any other exception to disclosure, is to be released where it is relevant to the investigation:

> *…section 33(2) provides for a mandatory disclosure of relevant information to complainants and respondents, and other exceptions (including section 40 – disclosure harmful to personal privacy) should not be applied when releasing information to parties under this section.*

[24] In the present case the passage withheld under section 40 appears in an e-mail dated September 28, 2018 in which an individual advises a colleague of an incident which formed part of the basis for a subsequent workplace investigation. Memorial has withheld a portion of the e-mail, claiming that it does not relate to the subsequent workplace investigation, and therefore is not subject to disclosure under section 33.

[25] The e-mail was written on Sept. 28, 2018. On October 28, 2018 the author of the e-mail filed a formal harassment complaint with the university, which initiated and was the basis for the workplace investigation. That formal complaint does not contain the statements redacted by Memorial from the e-mail at issue here. There is no evidence that this e-mail was provided to the harassment investigator. Upon review, we have concluded that the redacted passage contains no factual information or additional allegations which would be relevant to the workplace investigation. Although the statements relate to the Complainant, we are unable to find that they are relevant to the workplace investigation.

[26] This disposes of the right of access under section 33. However that does not end the matter. The redacted passage consists of the writer's opinions about the Complainant. Under the definition of personal information in section 2(u) of the *Act,* it is therefore the Complainant's personal information. The relevant part of section 2(u) reads:

> *(u) "personal information" means recorded information about an identifiable individual, including*
>
> *(viii) the opinions of a person about the individual, and*

> *(ix) the individual's personal views or opinions, except where they are about someone else;*

[27] In accordance with section 2(u)(viii) that is the Complainant's personal information, since it is the opinion of a person about him. In accordance with section 2(u)(ix) it is also deemed not to be the writer's personal information, because it is the writer's opinion about someone else.

[28] Under section 40(2)(a) a disclosure of personal information is not an unreasonable invasion of privacy where the applicant is the individual to whom the information relates. Therefore that portion of the information redacted from the e-mail dated September 28, 2018 that constitutes the writer's opinion about the Complainant should be provided to the Complainant.

[29] Memorial claims in its submissions that this redaction was already approved by this Office in Report A-2019-018. We disagree with Memorial's conclusion about that Report. Although the responsive records in the two files were similar, they were not the same, and the application of section 40 in the present case is unaffected by any previous recommendation.

## 4. The Duty to Assist

[30] Section 13 of the *Act* 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.*

[31] The Complainant alleged that Memorial failed its duty to assist on the second request by failing to locate a covering letter he had provided in relation to the workplace investigation. Memorial states that it did not understand the request as seeking the cover letter, as it related primarily to the notes of the Director of Faculty Relations. Based on the wording of the request, it was not clear that this letter was responsive. In addition, Memorial has established that it had already provided this record to the Complainant in September 2018. We cannot conclude that Memorial failed its duty to assist by not providing a record it had previously provided.

## 5. Section 33 (Information from a Workplace Investigation)

[32] Section 33 of the Act was reproduced above. The Complainant cites section 33(3) as support for his contention that, regarding the second request, the handwritten notes of the Director of Faculty Relations should be disclosed, since the Complainant is "an applicant who is a party to a workplace investigation" and therefore is entitled to "all relevant information created or gathered for the purpose of a workplace investigation". As stated above, it is the position of our Office that if section 33 applies to information, then other exceptions to access cannot be applied to that information so as to withhold it.

[33] The notes in question were written by the Director of Faculty Relations on a copy of the applicant's submissions in response to the workplace investigation. Memorial states that the investigation in question was conducted in accordance with the University's Procedure for Resolution of a Formal Respectful Workplace Complaint. Under the process set out in that procedure, the investigation was completed when the investigator's report had been submitted and provided to the parties, and the parties had provided the University with their responses to the report. Memorial submits that anything done after that point was not a part of the investigation, but rather was part of a separate decision-making process related to disciplinary action.

[34] Memorial argues that the notes were created by the Director of Faculty Relations for the purpose of providing the Provost with advice regarding possible discipline, who relied on them in making a decision.

[35] We conclude that this interpretation of the stages set out in the University's Procedure is harmonious with the language of section 33 of the *Act,* which defines a workplace investigation as an investigation which "*…may give rise to progressive discipline or corrective action by the public body employer"* – that is, the investigation and the consequential disciplinary action are separate processes. We agree, therefore, that the notes made by the Director were not created for the purpose of the workplace investigation, since that had been completed. Therefore section 33 does not apply to the handwritten notes, and so the

Complainant is not entitled to a copy of the letter including the handwritten notes on that basis.

6. Section 29(1)(a) (policy advice)
7. Section 38 (labour relations)

[36] Given our conclusion in the paragraph above, it is necessary to decide whether the provisions of sections 29 or 38 apply.

[37] Section 29 states that:

> *29. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
>
> > *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;*

Our Office has on many occasions interpreted the meaning of the terms "advice" or "recommendations" (see OIPC Guidance Section 29 – Policy Advice and Recommendations). On review, we conclude that the handwritten notes fall into this category of information. Therefore Memorial is entitled to withhold the notes.

[38] Given that the writer of the notes is the Director of Faculty Relations, and that it is possible that any discipline imposed by Memorial could result in a grievance by the individual's bargaining agent, it is possible that the notes could also be withheld on the basis of section 38 (labour relations advice). However, as we have already determined that the notes may be withheld under section 29, it is not necessary to decide this question.

Format of Requested Records

[39] The Complainant has requested that unredacted records be provided to him in "native format." There is no explicit right to information in "native" format. Section 11(1)(c) provides that an applicant may request a record in a certain format, but sections 17(1)(b) and 20(1) and (2) place some discretion in the hands of the public body. Essentially this is a "duty to assist" issue – if a certain format is requested by an applicant, and this can reasonably be

accomplished without undue cost or effort, then it should be done. That is best left to the judgment of the public body in the present case.

## VI RECOMMENDATIONS

[40] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend that Memorial University of Newfoundland disclose to the Complainant the information redacted from the e-mail dated September 28, 2018, and continue to withhold the remaining information.

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

[42] Dated at St. John's, in the Province of Newfoundland and Labrador, this 31st day of August, 2020.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador