



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

Report A-2020-017

September 4, 2020

## Memorial University of Newfoundland

### Summary:

The Complainant requested records from Memorial University of Newfoundland (“Memorial”) pertaining to the initiation of a workplace investigation into the Complainant’s conduct and the appointment of the investigator. Memorial withheld the majority of records pursuant to sections 30 (solicitor-client privilege) and 41 (House of Assembly and statutory office records). The Complainant filed a complaint with this Office, alleging that Memorial had inappropriately applied the exceptions to disclosure and had failed in its duty to assist under section 13 of the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”). The Commissioner found that Memorial had appropriately applied section 30 of *ATIPPA, 2015* and that Memorial had fulfilled its duty to assist the Complainant. However, the Commissioner also found that some of the records withheld under section 41 were relevant to the workplace investigation against the Complainant. The Commissioner therefore recommended that Memorial release those records to the Complainant.

### Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#),  
S.N.L. 2015, c. A-1.2, sections 9, 13, 30, 33 and 41.

### Authorities Relied On:

NL OIPC [Report A-2020-008](#); [Report A-2020-001](#)

### Other Resources:

[Section 33: Information from a Workplace Investigation](#); OIPC-NL Guidance Document, 2016; [Guidelines for Public Interest Override](#); OIPC-NL Guidance Document, 2016.

## I BACKGROUND

- [1] The Complainant made an access request under *the Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015” or “Act”) to Memorial University of Newfoundland (“Memorial”) for the following records in their native format:

*Records pertaining to the initiation of investigation of [the Complainant’s] conduct on December 4, 2019 and to appointment of the investigator. Possible location: the Office of the Provost and Vice-President (Academic), the Office of Faculty Relations and the IAP Office. Period covered: September 4, 2019 – December 10, 2019 inclusive.*

- [2] Memorial responded to the request by granting access to some records, withholding the remainder of the records pursuant to sections 30(1)(a) (solicitor-client privilege) and (41)(c) (House of Assembly and statutory office records) of *ATIPPA, 2015*. 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*.

## II PUBLIC BODY’S POSITION

- [4] Memorial located ninety-one pages of responsive records, many of which were withheld pursuant to sections 30 and 41 of *ATIPPA, 2015*.
- [5] Memorial states that the records withheld pursuant to section 30 are communications between external counsel, internal counsel, and representatives of Memorial, the client. Memorial advises that the communications contain solicitations for legal advice by Memorial and legal advice from Memorial’s counsel. Memorial also states that the communications were at all times intended to be confidential.
- [6] Memorial also asserts that the records withheld pursuant to section 41 contain communications between Memorial and the Office of the Information and Privacy Commissioner’s Office (“OIPC”) relating to investigations conducted by the OIPC. As the OIPC

is a statutory office under the House of Assembly, Memorial states that section 41 was appropriately applied.

- [7] Although the Complainant argued that the public interest overrides the solicitor-client exception, it is Memorial's position that section 9 does not apply to the solicitor-client records in this situation. Memorial argues that the solicitor-client exception allows for a full and frank conversation with counsel for the purposes of ascertaining legal advice and the override does not warrant the disclosure of the records.

### III COMPLAINANT'S POSITION

#### Solicitor-Client Records

- [8] It is the Complainant's position that Memorial did not appropriately apply section 30 to the records. The Complainant states that Memorial applied the exception to records where no solicitor was involved; therefore, the records are not subject to solicitor-client privilege.

#### Statutory Office Privilege

- [9] The Complainant states that section 41(c) is incorrectly applied to the records because Memorial is not a statutory body as defined by the *House of Assembly Accountability, Integrity and Administration Act*. The Complainant also states that the records do not pertain to the investigatory functions of the OIPC. The Complainant makes this assertion because he states that the subject of the investigation into his conduct is not an OIPC matter. The Complainant also advises that Memorial had previously included correspondence from the OIPC in the Notice of Investigation, and therefore, to withhold them now would be "inconsistent and invalid".

#### Public Interest

- [10] The Complainant also states in his submissions that he is prepared to argue that the public interest override in section 9 applies to the withheld records. He notes that his own private interests as an employee, as well as involvement of the Memorial University of Newfoundland

Faculty Association (MUNFA) very early in the investigation, serves as “evidence of public concern regarding the issue.”

### **Duty to Assist**

[11] The Complainant notes that Memorial failed in its duty to assist in two ways – by failing to conduct a reasonable search and by failing to communicate with him in an open and honest manner.

[12] Regarding the reasonableness of search, the Complainant alleges that, of the 91 records located, only 7 of the records were not previously in his possession. He also states that, because he had not been provided with the header information (date, addressee, subject line) of the records, which the Complainant called metadata, he cannot assess the reasonableness of the search conducted by Memorial.

[13] The Complainant doubts the reasonableness of the search as he is aware of at least one record that was not provided to him. Further, he feels there should have been more records located regarding communication between the OIPC and Memorial.

[14] Next, the Complainant alleges that Memorial failed in its duty to assist him in his request by failing to communicate in an open and honest manner. He points to the fact that Memorial provided him with two separate reasons for requiring an extension to fulfill his request: that Memorial was spending a significant amount of time on his requests and that Memorial needed to conduct consultations on the records before providing a response. The Complainant feels these reasons were not substantiated.

## **IV DECISION**

### **Section 13 – Duty to Assist**

#### *Reasonableness of Search*

[15] The Complainant states that Memorial failed in its duty to assist him. The Complainant’s primary position that a reasonable search was not conducted is because he is in possession

of some records that were not provided, and other records between the OIPC and Memorial ought to have been located and disclosed. He also notes that without the metadata of the records redacted, he is unable to assess the reasonableness of the search for records.

[16] The Complainant's argument erroneously assumes that the records previously in his possession were not located. When advised about the investigation into his conduct, the Complainant was provided with some of the records as part of the Notice of Investigation. When he did not receive these records unredacted from Memorial, the Complainant presumed that they had not been located. The Complainant failed to recognize the possibility that documents were indeed located by Memorial during the search and that they were withheld under section 41(c).

[17] The next issue to be addressed is the Complainant's stance that he must be provided with metadata of the records so that he can determine the reasonableness of Memorial's search. While Applicants are entitled to file a complaint to this Office when they feel the Public Body has failed to conduct a reasonable search, the Complainant here submitted that he must be convinced of the reasonableness of the search. However, this Office finds that Memorial did indeed conduct a reasonable search for records.

#### *Communicating with the Applicant in an Open and Honest Manner*

[18] The Complainant's primary issue is that Memorial provided him with two separate reasons for requiring an extension to fulfill his request. These explanations were that Memorial was spending a significant amount of time on his requests and also that Memorial needed to conduct consultations on the records before providing a response.

[19] Memorial's explanations about why they sought an extension from the OIPC are valid and reasonable explanations: the Information Access and Privacy (IAP) Office needed to consult on matters related to the Complainant's request and they were spending quite a significant amount of time on his requests and complaints. These explanations are not mutually exclusive. Together, they provide a fuller understanding of Memorial's need for extra time to

fulfill the request. Furthermore, the OIPC accepted Memorial's position when it approved an extension to fulfill the Complainant's request.

[20] Lastly, the Complainant also takes issue with how Memorial conducted its conversations with him. This Office finds no merit to these assertions. Memorial had been engaged in an email thread with the Complainant seeking that Memorial justify its need for an extension. This correspondence consisted of seven emails between the Complainant and the IAP Office at Memorial in less than a 24-hour period. Memorial is obligated under section 13 to make "every reasonable effort" to assist an applicant, but it is not obligated to continue to respond to emails beyond a reasonable point of utility. When an application for a time extension is submitted to the Commissioner's office, an assessment of the justification for such an extension is conducted and a decision is made to grant the extension or not. In accordance with section 42(8)(b), a decision respecting an extension of time is not subject to a complaint under the Act. While public bodies are required under section 23(6) to provide the reason for the extension to an applicant, efforts to do so need not exceed what would be reasonable in the circumstances.

[21] This action taken by Memorial does not constitute a failure on Memorial's behalf to communicate with the Complainant in an open, accurate and complete manner. Memorial attempted to provide the Complainant with the answers he sought. That the Complainant was not satisfied does not constitute a failure to communicate on Memorial's part.

[22] Given the above, this Office does not find that Memorial failed in its duty to assist the Complainant.

#### *Section 9 – Public Interest Override*

[23] The Complainant states that there is a public interest in the disclosure of the records, stating that his own interests and the involvement of MUNFA demonstrates concern over Memorial's actions.

[24] The OIPC's Guidance for Public Interest Override provides the following:

*Suspicion of wrongdoing by public body – Disclosure must serve the wider public interest rather than the private interests of the applicant and the suspicion must be more than a mere allegation. There must be a plausible basis for the suspicion. This can be assessed by considering whether one or more of the following are applicable:*

- (a) facts suggest the basis of the actions are unclear or open to question;*
- (b) there has been an independent investigation;*
- (c) the content of the information may refute the suspicion or may be a 'smoking gun', both of which favour disclosure;*
- (d) evidence of public concern regarding the issue;*
- (e) there is a public interest in disproving suspicions in that release would restore confidence in the public body. Note - the Office of the Information and Privacy Commissioner (OIPC) cannot assess wrongdoing, it can only assess whether there is public interest in releasing the information.*

[25] The Complainant does not put forth a substantial or convincing argument as to why the public interest override applies in this situation, only that he has an interest in the records. The OIPC Guideline specifically states "if the interest of the applicant in obtaining the information is a private interest, the public interest override will not apply." The involvement of MUNFA in the investigation into the Complainant's conduct does not lend credence to the argument that this is a public interest, only that the Complainant had grieved the situation.

[26] Neither of these facts demonstrate that there is a public interest in the disclosure of the records. As recently determined in Report A-2020-008.

*[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.*

[27] This Office finds that the public interest override does not apply to these records.

*Workplace Investigation*

[28] Section 33 states:

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.*

[29] The Complainant noted to Memorial and to this Office that, as a party to a workplace investigation under section 33(3), he ought to receive all relevant information in order to know the case to be met against him.



[30] As outlined in Report A-2020-001:

*Section 33(3) of ATIPPA, 2015 is a mandatory disclosure provision requiring the head of a public body to disclose to an Applicant who is a party to a workplace investigation all relevant information created or gathered for the purpose of a workplace investigation. Information which might otherwise be exempt from disclosure under other provisions of ATIPPA, 2015 may therefore be subject to mandatory disclosure if created or gathered during a workplace investigation and relevant to the investigation.*

[31] In short, relevant information collected or gathered for a workplace investigation will override other exceptions to access under *ATIPPA, 2015*.

#### *Solicitor-Client Information*

[32] Next, in order to assess the applicability of section 33 to these records, it must be determined whether the records were created or gathered for the purpose of and are relevant to the workplace investigation.

[33] The Complainant takes the position that no solicitors were involved with the communications contained within these records; therefore, solicitor-client privilege cannot exempt them from disclosure.

[34] The Complainant's assumptions are not correct. Memorial provided this Office with an in-depth description of the records, which includes the parties involved in the communications, dates of the correspondence, the topic of discussion, and that the information amounted to legal advice provided by Memorial's counsel and requests for legal advice.

[35] Our Office recently dealt with the question of our Office's review of records over which a public body claims a section 30 exception 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.*

In this case we have been similarly satisfied that Memorial's descriptions of the records satisfies its burden of proof.

[36] Based on this information, this Office concludes that the information has been appropriately withheld under section 30(1)(a).

[37] The records were created several weeks prior to the instigation of the investigation. They were not provided to the investigator tasked with conducting the investigation. Consistent with our findings in Report A-2020-001, therefore, this information is not subject to section 33:

*[24] The OIPC reviewed the information to determine whether the information would otherwise be considered legal advice under section 30 of ATIPPA, 2015. We accept that there is a small section of the information that is subject to solicitor-client privilege contained within these records. However, this information was not gathered or created for the purposes of a workplace investigation and therefore is not captured by section 33.*

[38] This Office finds that the information withheld subject to section 30 is not required to be disclosed pursuant to section 33.

#### *Statutory Office Privilege*

[39] The Complainant states that Memorial is not a statutory body; therefore Memorial cannot apply section 41(c) to the records. He further states that records were not related to the OIPC's investigatory functions.

[40] Having reviewed the records, this Office can confirm that the records are indeed related to the investigatory functions of the OIPC. While the Complainant is correct that Memorial is not a statutory body, the OIPC is. The exception operates regardless of whether the records are in the control or custody of a statutory office or another public body. These records contain communications between Memorial and this Office relating to the investigation of a complaint file.

[41] Section 41 states:

*41. The Speaker of the House of Assembly, the officer responsible for a statutory office, or the head of a public body shall refuse to disclose to an applicant information*

...

*(c) in the case of a statutory office as defined in the House of Assembly Accountability, Integrity and Administration Act, records connected with the investigatory functions of the statutory office.*

[42] As noted previously in our Report A-2018-008, the purpose of section 41 is to protect the integrity and confidentiality of a statutory office's investigatory activities and it is intentionally broad, requiring a public body to withhold records in their entirety.

[43] Both section 33 and 41 are mandatory exemptions under *ATIPPA, 2015*. While section 33 is a mandatory disclosure provision where a party makes a request for access, section 41 is a mandatory exception to the right of access.

[44] As noted in OIPC Guidance of Section 33:

*It is essential to determine the status of the applicant with respect to the investigation, as 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.***

[45] In this Office's interpretation of section 33, all relevant information created and gathered for the purpose of the workplace investigation is to be disclosed to a party of a workplace investigation, including when the provision conflicts with another exception under *ATIPPA, 2015*.

[46] It is necessary then to determine what information from the records withheld under section 41(c) was gathered or created for the purpose of the investigation into the Complainant's conduct and was relevant to that investigation.

[47] Memorial withheld 26 pages of records pursuant to section 41(c). Many of these records are duplicate email threads sent between the OIPC and Memorial pursuant to an earlier

investigation. Memorial advised this Office during the current investigation that some of these records were provided to the Complainant when he was notified of the Memorial investigation into the Complainant's conduct. Therefore these records necessarily contain relevant information to that investigation. As such, this Office finds that some information in these records ought to have been provided to the Complainant.

[48] However, there are also records withheld by Memorial under section 41(c) which were not provided to the Investigator by Memorial. An assessment of these records indicate they were not relevant to the Memorial investigation and are solely related to the investigatory function of the OIPC. As they do not fall within the scope of the workplace investigation, this Office finds that these records were appropriately withheld by Memorial.

## V RECOMMENDATIONS

[49] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that Memorial University continue to withhold the information that it had originally withheld pursuant to section 30(1)(a). I also recommend that Memorial disclose to the Complainant information in the records previously withheld pursuant to section 41(c) which I have highlighted in a list provided to the Memorial with this Report.

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

[51] Dated at St. John's, in the Province of Newfoundland and Labrador, this 4<sup>th</sup> day of September 2020.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador