



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

**Report A-2020-027**

**November 27, 2020**

**Memorial University**

**Summary:**

Memorial University of Newfoundland (“Memorial” or “MUN”) received an access request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”) for records relating to the retention of outside counsel on a particular matter and legal invoices from an outside firm for a particular time period. Memorial provided the Complainant with 28 pages of responsive records, with redactions made under sections 30 (legal advice), 39 (business interests of a third party) and 40 (personal privacy) of *ATIPPA, 2015*. The Complainant made a complaint to this office arguing that Memorial had failed to conduct a reasonable search and that they had misapplied the exceptions. The Commissioner found that there was no evidence that the search conducted by Memorial was unreasonable. With respect to the redactions, those made under section 30 and 40 were justified and that information should continue to be withheld. The redactions under section 39 could not be supported and the Commissioner recommended the release of that information.

**Statutes Cited:**

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

**Authorities Relied On:**

[Maranda v. Richer](#), 2003 SCC 67.

[Newfoundland and Labrador \(Information and Privacy Commissioner\) v. College of the North Atlantic](#), 2013 NLTD(G) 185

[Newfoundland and Labrador Legal Aid Commission \(Re\)](#), 2019 NLSC 17.

Alberta Office of the Information and Privacy Commissioner [Order F2019-17](#) May 7, 2019.

## 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” or “MUN”) for the following records:

*Legal invoices submitted by [law firm] to Memorial University with respect to services, advice and judgment provided by [lawyer name], a partner*  
*Period covered: 2017-01-01 to date*  
*Possible location: Office of the General Counsel, Financial and Administrative Services*

- [2] This request was amended the next day, to include the following:

*1. Legal invoices submitted by [law firm] to Memorial University with respect to services, advice and judgment provided by [lawyer name], a partner, individually or in a team*  
*Period covered: 2017-01-01 to date*  
*Possible location: Office of the General Counsel, Financial and Administrative Services*  
*2. Records pertaining to the selection of [law firm] to represent Memorial University in [legal matter specified by style of cause and court docket number]*  
*Period covered: 2017-09-01 to 2017-10-06*  
*Possible location: Office of the General Counsel, IAP Office*

MUN responded to the request, providing 28 pages of responsive records with redactions under sections 30(1)(a) (Legal advice), 39(1) (Disclosure harmful to business interests of a third party) and 40(1) (Disclosure harmful to personal privacy).

- [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 indicated that all responsive records would be located in the Office of General Counsel as they handle all selection and payment of outside legal counsel. That office was thoroughly searched by a staff member familiar with such records. 28 pages of records responsive to the request were located. Those records were then reviewed, and it was

determined that redactions should be made under sections 30(1)(a), 39(1) and 40(1) of *ATIPPA, 2015*.

### III COMPLAINANT'S POSITION

[5] The Complainant submitted that Memorial failed to meet its duty to assist, particularly that MUN failed to conduct a reasonable search. This is based on the following assertions:

1. The records relating to the retention of the law firm on the named matter were minimal and MUN did not have a lengthy discussion with the law firm prior to its retention on the matter;
2. Failure to provide records in relation to the retention of the lawyer and/or firm on other, earlier, matters; and
3. MUN only searched the Office of General Counsel, and not all the locations listed in the request.

[6] The Complainant submitted that they did not believe that the legal invoices requested would be exempted from disclosure under section 30.

[7] The Complainant also submitted that section 39 had been misapplied with respect to the name and address of the law firm's bank and its Goods and Services Tax (GST) registration number.

[8] Finally, the Complainant submits that the billing time keeper's name (the lawyer in charge of time keeping on a particular file) on the legal invoices was improperly withheld under section 40.

### IV ISSUES

[9] The following issues have been identified through our investigation and review of submissions by the Complainant and Memorial:

1. Did Memorial conduct a reasonable search for records per section 13 of *ATIPPA, 2015*?
2. Did Memorial appropriately apply sections 30(1)(a), 39(1) and 40(1) of *ATIPPA, 2015* in withholding some of the information?

## V DECISION

### Reasonable Search

[10] With respect to the issue of adequacy of search, there is no evidence that Memorial failed to conduct a reasonable search of records. Memorial advised that the Office of General Counsel handles the retention and payment of all outside law firms and that the requested records would all have been located within that office. Managing outside counsel is a typical duty of an organization's in-house counsel and it is perfectly reasonable to believe that records responsive to the Complainant's request would be found within the Office of General Counsel. The search was conducted by a member of the staff of that office who is knowledgeable about how and where such files are stored. They searched both electronic and hard copies given the parameters provided by the Complainant. In fact, as a courtesy to the Complainant, Memorial extended the time frame for the search for legal invoices from the date that the request was received to the date the search was completed. This resulted in the inclusion of an additional record which could have been withheld as it fell outside of the original time frame.

[11] Following the search conducted by Memorial, 28 pages of responsive records were found, which included an email instructing the named law firm to commence work on the named matter as well as several invoices submitted by the named law firm for work completed by the named lawyer. Our assessment is that the search for records was conducted by knowledgeable staff in the place where the responsive records were reasonably likely to be located.

[12] As noted above, the Complainant notes that the records relating to the retention of the law firm are very brief and that this suggests there are missing records. Memorial indicated that it had retained this firm on similar or related matters before, and as such simply

continued the relationship by retaining them on the specific matter indicated by the Complainant in the request. There is nothing suspicious about this decision, and is common practice within the legal community. As such, the fact that no records of this nature were identified during the search is not evidence, on its own, of an inadequate search.

- [13] The Complainant's assertion that if the firm had been previously retained on other matters, then the records related to that previous retention are responsive and therefore should have been provided is incorrect. The Complainant was specific in their request, and asked only for records related to the indicted style of cause, court docket number, and time frame. Any documents (if they exist) relating to the retention of the law firm on other matters, at other times, are not responsive to this request.

### Legal Advice

- [14] Memorial redacted information contained in the legal invoices under section 30(1)(a) of the Act. It claimed that the following information was protected under solicitor-client privilege: lawyers names or initials, time keeping, and descriptions of work completed. The Complainant cites the *Maranda* case from the Supreme Court of Canada as an authority to show that solicitor-client privilege does not always apply to legal invoices, however that decision does not support the Complainant's position regarding the facts of this matter. The Honourable Justice Lebel stated at paragraph 33:

*33. [...]Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls prima facie within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum, which this Court forcefully stated even more recently in McClure, supra, at paras. 4-5.*

- [15] There is a rebuttable presumption that the information contained within a lawyer's bill falls within the category of solicitor-client privileged information. The onus is on the person claiming that solicitor-client privilege does not apply bears the onus to provide evidence of same.

[16] The Complainant did not provide this Office with any evidence which would rebut the presumption that the legal invoices are covered by solicitor-client privilege. In many cases this may be an unfair burden to place on access to information requesters, so in light of our role we have also looked at the circumstances and canvassed relevant case law to see if there is any reason that the presumption should be rebutted in this particular case.

[17] The *Maranda* decision was considered in this jurisdiction in *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic*. That case has very similar facts to the matter at hand: an applicant requested a public body provide them with copies of legal invoices from outside firms relating to ongoing legal matters. The Public Body refused to provide the invoices on the basis of solicitor-client privilege or litigation privilege. The invoices contained “*dates, initials, time spent, description of services, hourly rates, total fees by lawyer and details of disbursements*” (paragraph 18).

[18] The Court went on to apply the decision in *Maranda*, holding that the information contained in legal invoices is presumptively subject to solicitor-client privilege (paragraph 22). The court also pointed out in paragraph 32 that the current status of the litigation may be taken into account. In this matter, as in the *College of the North Atlantic* decision, the litigation is ongoing. Further, at paragraph 39, the court states that the onus is on the applicant to provide any contextual factors that could rebut the presumption. Finally, and arguably most importantly, the final decision of the Court was based on the very factors that are shared between this matter and that case, as set out in paragraphs 41-44:

*[41]The information requested, particularly the amounts spent, both as to amount and as to timing, could be used by a diligent and persistent inquirer armed with the public court record to make inferences about the level of effort by CONA in defending the claim and in dealing with various aspects of the litigation as they arise from time to time. Such level of effort, as reflected by the amounts charged for legal services could reasonably be considered as being based on instructions and communications from the client, in this case CONA.*

*[42] It is at least possible that an assiduous inquirer could infer from the level and timing of expenditures whether CONA has instructed its solicitor to expend efforts in resolving the matter before trial or alternatively, if on the eve of trial, in preparing for trial.*

*[43] Disclosing information on expenditures for legal services during the litigation for which the services were or are being provided poses a serious risk to the confidentiality that must attach to the communications between solicitor and client during those proceedings. The fair conduct of litigation, while it relies on full disclosure of the substantive factual elements of the claim and dispute, also relies on the ongoing ability of the client to discuss confidentially with his or her solicitor matters such as resolution strategy, trial strategy, assessment of the case and the many other issues on which advice may be sought during litigation.*

*[44] There is at least a possibility that disclosure for amounts paid for legal services could, in this context, reveal something of the confidential communications that are essential during litigation. This possibility cannot be negated by any level of redaction. Even aggregating the total amount invoiced for services may allow the diligent inquirer to make inferences about CONA's instructions to its solicitors; the simple expedient of making a similar request every month would lead to a greater possibility of making such inferences.*

[19] The emphasis placed on the ongoing nature of the legal matter, and the associated increased potential for an “*assiduous inquirer*” to make inferences based on the invoices, suggests that in similar cases, as we have here, the presumption is not rebutted based on that factor alone.

[20] This notion that the presumption is not rebutted when legal matters are ongoing, or in fact while appeal periods are still active, was upheld in *Newfoundland and Labrador Legal Aid Commission (Re)*. In that case the court ordered the release of legal invoices related to the retention of outside counsel in Legal Aid related matters. One of the exceptions made was for invoices related to ongoing legal matters and matters where the appeal periods had not yet expired. The Court specifically noted at paragraph 67 that the presumption of solicitor-client privilege was not rebutted where representation was ongoing and had not been finally concluded.

[21] Given that there is a presumption that legal invoices are protected by solicitor-client privilege, and that there is no evidence to support the rebuttal of this presumption, Memorial is entitled to rely on section 30 of *ATIPPA, 2015* to withhold the records.

### Disclosure Harmful to Business Interests of a Third Party

[22] Memorial has refused to release the bank name and address listed on the law firm's legal invoices and the law firm's GST number, citing section 39(1) of *ATIPPA, 2015*.

In order for section 39(1) to apply, all three parts of the harms test must be met. In order to meet that test, the disclosure of information must:

1. Reveal trade secrets, commercial, financial, labour relations, scientific or technical information of a third party;
2. That is supplied to the public body, implicitly or explicitly, in confidence; and
3. The disclosure must result in a reasonable expectation of one of the four harms described in section 39(1)(c).

[23] With respect to the first part of the test, the bank name and address are commercial or financial information of the law firm. They were contained on an invoice provided to a client for the purpose of facilitating the payment of the invoice. However, it is questionable if this could constitute being "supplied in confidence". The final step of the test requires there to be actual clear and convincing evidence of harm. No clear and convincing evidence has been provided regarding how this information could harm the law firm. As the third requirement is not met and Memorial did not provide evidence to establish the second, section 39(1) does not apply to the bank name and address on the invoices.

[24] On the issue of the law firm's GST number, Memorial claimed that it would fall under section 39(2) which states:

*39(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return, gathered for the purpose of determining tax liability or collecting a tax, or royalty information submitted on royalty returns, except where that information is non-identifying aggregate royalty information.*

[25] The GST number contained on the legal invoices does not fit within the exception created by section 39(2). While it may be related to the collection or payment of tax, it was not obtained from a tax return, nor was it gathered for the purpose of determining tax liability. While the



test being applied was different, the Alberta Office of the Information and Privacy Commissioner in Order F2019-17 noted:

*[para 133] The Canada Revenue Agency (CRA) website states that*

*A supplier must include the GST/HST account number on receipts, invoices, contracts, or other business papers it gives out when it supplies taxable goods or services of \$30 or more.[1]*

*[para 134] [...] There is no indication from the CRA website that GST numbers should be protected or considered confidential. [...]*

[26] As such Memorial cannot rely on section 39 to withhold the bank name/address or the GST number contained on the legal invoices.

#### **Disclosure Harmful to Personal Privacy:**

[27] Memorial has refused to release the name of the “billing time keeper” listed on the legal invoices. This is the lawyer in charge of time keeping on a particular file. Memorial has withheld this person’s name under section 40(4)(c), as it relates to their employment. It would therefore presumptively be an unreasonable invasion of the person’s privacy to release this person’s name.

[28] Memorial has turned its mind to the application of section 40(5) with respect to the billing time keeper’s name, and determined that on balance, the circumstances do not support release of the information. We do not find any reason to question this analysis.

[29] As well, as noted above, the names and initials of all lawyers on the legal invoices are protected under solicitor-client privilege, so this particular name can be withheld under that section as well.

## **VI RECOMMENDATIONS**

[30] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend that Memorial University of Newfoundland disclose to the Complainant the bank name and address and the

GST number contained on the legal invoices and to continue to withhold the remaining information.

[31] 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.

[32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 27<sup>th</sup> day of November 2020.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador