



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-010

February 18, 2021

Memorial University

Summary:

The Complainant submitted an access to information request to Memorial University respecting an application to disregard a previous request made by the Complainant. The Complainant was granted partial access to the records with redactions made under section 29(1)(a) (policy advice or recommendations), section 30(1)(a) (legal advice), section 39(1) (disclosure harmful to business interests of a third party), section 41(c) (disclosure of House of Assembly service and statutory office records), and section 40(1) (disclosure harmful to personal privacy). During informal resolution efforts, the University agreed to release some of the information withheld under section 29(1)(a) and all of the information previously withheld under section 40(1). The Commissioner concluded that the remaining redactions were properly applied. However, the Commissioner also concluded that the University should have applied section 41(c) in conjunction with section 29(1)(a) in some instances. The Commissioner recommended that the University continue to withhold the remaining redacted material.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, ss. 13, 29, 30, 39, 41, and 40.

Authorities Relied On:

NL OIPC Reports [A-2018-008](#), [A-2020-003](#), [A-2021-001](#)

ON OIPC Order [PO-3300](#)

Air Atonabee Ltd. v. Canada (Minister of Transport) (1989), 27 C.P.R. (3d) 180 (Fed. T.D.).

I BACKGROUND

- [1] The Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015” or the “Act”) to Memorial University (“Memorial”) seeking:

Records pertaining to the initiation, preparation, review and approval of MUN’s application to the Information and Privacy Commission for approval to disregard the access to information request file #015-01-60-20

- [2] Memorial responded by granting partial access to the records but redacting information under section 29(1)(a) (policy advice or recommendations), section 30(1)(a) (legal advice), section 39(1) (disclosure harmful to business interests of a third party), section 41(c) (disclosure of House of Assembly service and statutory office records), and section 40(1) (disclosure harmful to personal privacy).

- [3] The Complainant filed a complaint with this Office, stating:

The Public Body failed to meet its duty to assist by conducting a reasonable search for records responsive to the access to information request file #015-01-61-20. The Public Body also did not properly apply exemptions under S. 29(1)(a) – policy advice or recommendations S. 30(1)(a) – legal advice, S. 39(1) – disclosure harmful to business interests of a third party, S. 41(c) – disclosure of House of Assembly service and statutory office records and S. 40(1) – third party personal information.

The Complainant also further indicated:

The Public Body is requested to locate all records responsive to the access to information request file #015-01-61-20. The OIPC review exemptions under S. 29(1)(a) – policy advice or recommendations, S. 30(1)(a) – legal advice, S. 39 (1) – disclosure harmful to business interests of a third party, S. 41(c) – disclosure of house of assembly service and statutory office records and S. 40(1) – third party personal information.

- [4] As informal resolution was not possible, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

[5] During the formal phase of the investigation, Memorial agreed to release some information withheld under section 29 and all information withheld under section 40.

II PUBLIC BODY'S POSITION

[6] Memorial provided our Office with an initial submission outlining its search for records as well as explanations for the exceptions applied. Memorial provided additional commentary throughout the process. Memorial's positions with respect to the various issues will be expanded upon below.

III APPLICANT'S POSITION

[7] The Complainant believes, for various reasons, that Memorial did not conduct a reasonable search for records. The Complainant also believes that exceptions were applied incorrectly. The Complainant provided our Office with a thorough initial submission, and provided additional commentary throughout the process. The Complainant's positions with respect to the various issues will be expanded upon below.

IV ISSUES

[8] The issues to be addressed in this Report are:

1. Whether the Public Body met its duty to assist under section 13;
2. Whether the Public Body properly applied exceptions under section 29(1)(a);
3. Whether the Public Body properly applied exceptions under section 30(1)(a);
4. Whether the Public Body properly applied exceptions under section 39(1), and
5. Whether the Public Body properly applied exceptions under section 41(c).

V DECISION

The Duty to Assist

[9] Section 13 of *ATIPPA, 2015* requires a public body to respond to an applicant in an open, accurate and complete manner. This duty includes the duty to conduct a reasonable search for records. The Complainant alleges that Memorial failed to locate and release at least four sets of records responsive to the request.

[10] First, the Complainant notes that the released material contains no information on who decided to apply for a disregard and why. He specifically notes that records of any discussions or correspondence occurring within a specific timeframe (11:14am and 2:23pm on a particular day) were neither located nor provided. When asked for more information in relation to the alleged missing records in the above timeframe, the Complainant responded that the ATIPP Coordinator had not been delegated authority to apply to this Office for the disregard which this request is about. The Complainant's position is that records detailing the delegation of authority from the head of public body (that is, the President of Memorial), to the Coordinator, should have been created in the above time period. Further to this, the Complainant alleges that if no such records exist, it follows that the Coordinator had no authority to request, and this Office had no authority to approve, the disregard. While the matter of the delegation of authority is somewhat peripheral to the issues here, we are entirely satisfied that the Coordinator had authority to apply to this Office to disregard. In fact, on page 127 of the records disclosed to the Complainant, the Executive Assistant to the head of public body, advises the Coordinator, with reference to the application to disregard that "The president is agreeable with this approach".

[11] We have also addressed this issue previously. In report A-2018-008 it was stated, at paragraph 44:

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.

[12] The Complainant also assumes that information relating to who applied for a disregard, and why, has not been located. That is incorrect. Most of those details are redacted under section 30 and 41, and, as we will discuss, those exceptions were properly applied.

[13] With respect to the allegations concerning the first set of records, we find the Complainant's position to be without merit.

[14] Second, the Complainant refers to a specific email in the package of records provided to him and indicates that the record was neither located nor provided. When asked to clarify, the applicant indicated that because the record was not provided in native format, it could not be considered located or provided. This Office has previously determined that there is no legislative obligation that records be provided in native format (see report A 2020-003). In this instance, the Complainant indicates that the email could have been forwarded or blind copied to another individual outside of the email chain and he would be unable to see those details in the records provided. We investigated this issue and requested and received further submissions on this topic from Memorial. There is no indication the record in question was forwarded or blind copied to anyone other than the addressees the complainant was able to view.

[15] Third, the Complainant alleges that additional correspondence between the Coordinator and a staff member exists and was neither located nor provided. In part, the Complainant bases this allegation on a reference in an email to "the ATIPP request we discussed" and indicates that this proves prior written communication. It does not. It is equally, if not more, plausible that the word "discussed" refers to a verbal conversation. Additionally, the Complainant notes that the subject line title "wording" proves that the exact wording of the access to information request was sent to the individual by the Coordinator. It does not. The redacted contents of the email are an exchange related to the clarification of details related to the disregard application.

[16] Fourth, the Complainant indicated that Memorial's Chief Information Officer signed the decision letter without being copied on relevant exchanges with this Office, and that the Chief Information Officer was not a recipient of the Commissioner's approval. The Complainant indicates that "it follows that either he relied on hearsay when signing the decision letter or the search for responsive records failed to meet the standard of reasonableness".

[17] For context, the Coordinator was absent when Memorial notified the Complainant that its disregard application had been granted and the Chief Information Officer had assumed her responsibilities. The fact that the Chief Information Officer signed the letter provided to the Complainant has no impact on the reasonableness of the search.

[18] A reasonable search means a search conducted by knowledgeable staff in locations where the records in question might reasonably be located. The standard for assessing a public body's efforts is reasonableness, not perfection. (See, for example, Report A-2021-001). Memorial detailed a thorough search, listed individuals charged with searching for records, demonstrated that those individuals would have known the locations of records, and detailed the repositories of records where responsive records were likely to be located. The search was therefore reasonable.

Policy Advice or Recommendations

[19] The University applied a number of redactions under section 29. The purpose of section 29 is to protect frank and open deliberation of potential decisions and policy options which is opinionative in nature. Section 29 states:

*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;*

[20] In the formal phase of the investigation, and after discussion with Memorial, the University decided to provide the Complainant with some information which was previously redacted.

[21] A number of redactions under section 29 remain, and we are satisfied that they were applied correctly. However, a number of redactions under section 29 concern information

which is part of the application (or a draft of the application) to this Office to disregard. We note that section 41 is a mandatory exception which would apply to these records, and should have been applied in addition to section 29.

Legal Advice

[22] Memorial has redacted and severed a number of records in accordance with section 30(1)(a). The section states:

*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;*

[23] The complainant asks this Office to examine all instances where section 30 is applied, but specifically notes that:

It must be noted that legal advice exempted on pp. 121-124 refer to exchanges that took place after submitting the application for a disregard had been made. The reasons for seeking legal advice in those circumstances remain obscure at best.

[24] With regard to the Complainant's allegations about the timing of some of the exchanges, we note that all exchanges occurred prior to the submission of the application to disregard. In any case, there are certainly reasons why legal advice might be discussed or sought following the submission of a request to disregard.

[25] In its initial response to this Office, Memorial provided a detailed description of the records redacted under section 30. This description included dates, the parties to the correspondence, and detailed descriptions of their contents. This description was sufficiently detailed to discharge Memorial's burden of proof, and based on this we are satisfied that section 30 was applied appropriately.

Disclosure harmful to business interests of a third party

[26] Memorial applied one redaction under section 39 (disclosure harmful to business interests of third party). The redacted material included the login information of a third party law firm's teleconferencing account, specifically, the number for a lawyer's "personal room" and "guest dial-in access code".

[27] The Complainant claims that this information had expired by the time Memorial had responded to the access request and there could be no harm to business interests. However, Memorial indicates that these numbers have not changed and were assigned specifically to the University in order to have secure conversations with its lawyer. Memorial indicates that disclosure of the information could enable unauthorized access to privileged conversations.

[28] For Section 39(1) to apply, all three parts of the harms test must be met.

39.(1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

- (i) trade secrets of a third party, or*
- (ii) commercial, financial, labour relations, scientific or technical information of a third party;*

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

- (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
- (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
- (iii) result in undue financial loss or gain to any person, or*
- (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[29] With respect to the first part of the test, the Federal Court of Canada held in *Air Atonabee v. Canada (Minister of Transport)* that “dictionary meanings provide the best guide and that it is sufficient that the information relate or pertain to matter of finance, commerce, scientific or technical matters as those terms are commonly understood.” The teleconferencing login information is provided to facilitate confidential communications with the third party law firm’s clients and to allow it to conduct its business. This information can therefore be defined as commercial information of the law firm.

[30] With respect to the second part of the test, the information was supplied in confidence. An explicit confidentiality statement was included in the email supplying the information to Memorial.

[31] As to the third part of the test, we accept that, in this instance, disclosure of the information could be reasonably expected to result in the harms listed in 39(c)(iii): undue financial loss or gain to any person. Communications between lawyers and their clients are among the most guarded conversations. Compromising the security of the law firm's teleconferencing platform potentially opens its clients to financial loss or harm and the law firm to liability for such losses incurred by its clients. Therefore, harm is not merely possible, but could be reasonably expected. The only purpose that the disclosure of this information could serve is the unauthorized access into a privileged conversation between a lawyer and their client.

Disclosure of House of Assembly Service and Statutory Office Records

[32] The Complainant asked this Office to review the application of section 41(c). Section 41(c) is a mandatory exception intended to protect the investigatory functions of statutory offices. The section 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*
- (a) where its non-disclosure is required for the purpose of avoiding an infringement of the privileges of the House of Assembly or a member of the House of Assembly;*
 - (b) that is advice or a recommendation given to the Speaker or the Clerk of the House of Assembly or the House of Assembly Management Commission that is not required by law to be disclosed or placed in the minutes of the House of Assembly Management Commission; or*
 - (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.*

[33] As outlined in Report A-2018-008, it is the position of this Office that investigatory functions “encompass all of the activities that the Commissioner is authorized or

obliged to carry out under the *ATIPPA, 2015*, that can affect the rights or responsibilities of individuals or public bodies”. This includes the submission of a request to disregard.

[34] While we find all information withheld under section 41 was appropriately redacted, we note that in other instances section 41 should have been applied instead of, or in conjunction with, section 29. As section 29 also applied to the information in question, no information falling under section 41 was released. As the information has been withheld, and we are recommending that it continue to be withheld, it is not necessary for the University to amend its response to the Complainant to also claim section 41. However, given that section 41 is a mandatory exception which public bodies are required to apply, we take this opportunity to highlight the importance of applying this provision of the Act and ensuring this information is properly withheld.

VI RECOMMENDATIONS

[35] I recommend the public body continue to withhold the information in question.

[36] 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.

[37] Dated at St. John’s, in the Province of Newfoundland and Labrador, this 18th day of February 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador