



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-017

April 7, 2021

Memorial University

Summary:

The Complainant submitted an access to information request to Memorial University seeking a number of records. The Complainant was granted partial access to the records with redactions made under section 29(1)(a) (policy advice or recommendations) and section 40(1) (disclosure harmful to personal privacy). The Complainant objected to these redactions and also alleged that the University did not meet its section 13 duty to assist. During informal resolution efforts, the University agreed to release some of the information withheld under section 29(1)(a) and section 40(1). The Commissioner concluded that, with the exception of redactions to one email, section 40(1) had been applied properly. The Commissioner also concluded that the University had fulfilled its duty to assist the Complainant under section 13.

Statutes Cited:

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

Management of Information Act, SNL 2005, c M-1.01.

Authorities Relied On:

NL OIPC Reports [A-2016-019](#), [A-2019-018](#), [A-2019-026](#), and [A-2020-015](#).

I BACKGROUND

- [1] The Complainant made an access to information request to Memorial University (“Memorial”) comprised of six parts. Upon receipt of the request, Memorial sought authorization to disregard parts two through six of the request, on the grounds that the applicant had already been provided with the responsive records. This Office authorized Memorial to disregard parts two and three of the request, while requiring Memorial to process the remaining items. Memorial advised that some, but not all, records responsive to part four and six had been previously provided. Accordingly, this Office advised Memorial to process the records not provided. However, Memorial had not realized that it had in fact provided all records to the Complainant. As a result, Memorial provided the Complainant records which it had previously provided. These records were subject to previous complaints to this Office, resulting in recommendations from this Office, and subsequent appeals to the Supreme Court of Newfoundland and Labrador, which to date remain unresolved.
- [2] Memorial responded by providing partial access to the records but redacting information under sections 29(1)(a) (policy advice and recommendations) and 40(1) (disclosure harmful to personal privacy).
- [3] The Complainant filed a complaint with this Office, alleging that Memorial had failed in its duty to assist and had not appropriately applied exceptions.
- [4] As informal resolution was not possible, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [5] Memorial provided our Office with an initial submission outlining its search for records as well as explanations for the exceptions applied. Memorial’s positions with respect to the various issues will be expanded upon below.

III APPLICANT'S POSITION

- [6] The Complainant alleges that Memorial failed in upholding its duty to assist in all respects, and believes that exceptions were applied incorrectly. The Complainant's positions with respect to the various issues will be expanded upon below.

IV DECISION

Duty to Assist

- [7] The Complainant alleges that Memorial failed to conduct a reasonable search, failed to assist in the early stages of making a request, and failed to respond in an open, accurate, and complete manner.

Duty to Assist: Part 1

- [8] The Complainant notes that some records located in the Office of the General Counsel were located by an employee who was not a party to correspondence within those records. However, we have found that in all instances, records were located by knowledgeable employees.
- [9] The Complainant had requested correspondence relating to the retention of external legal counsel for a particular matter. The Complainant noted that the related correspondence appears to be incomplete and does not include correspondence that he believes should exist. Specifically, the Complainant indicates that it would have been unreasonable to retain a lawyer without additional correspondence. With regard to records related to the lawyer's retention, we have dealt with the identical issue in report A-2020-027 (see paragraph 12). As in that instance, Memorial had a previous relationship with the firm and continued the relationship by retaining them in this matter. The nature of the relationship between Memorial and the firm was such that a formal retention letter was not required for each matter. In this case, the firm was retained through a phone call and a follow-up email, and this email was provided to the Complainant. There is nothing suspicious about how the firm was retained nor any evidence that additional records would or should exist.

[10] The Complainant takes issue with records being retained in paper format and contends that the *Management of Information Act* prohibits records created in an electronic format from being retained in paper copy. It does not. Further, there is no evidence that the retention of records in paper format affected the search in this instance.

[11] The Complainant alleges that information which Memorial indicates was previously provided, was not previously provided. In particular, he alleges that Memorial's statement that an email sent on September 28, 2018 at 3:41 was already provided "has absolutely no merit". This is not correct. We have confirmed that Memorial's response to a previous access to information request by the Complainant included this record. Moreover, the Complainant previously included the record in his notice of appeal in an ongoing court matter. Notwithstanding this evidence that the record had previously been provided, this Office is satisfied that the Complainant received the record in question as part of Memorial's response to this request.

Duty to Assist: Part 4

[12] Responsive to part four of the request is an email with 14 attachments. In its application to disregard, Memorial erroneously indicated that 13 of the attachments were previously provided but that the 14th attachment was not. In fact, the 14th attachment was also previously provided to the Complainant, and was again provided in response to this request. Notwithstanding, the Complainant takes issue with the fact that attachments 1 through 13 were considered previously provided because report A-2019-018, dealing with these records, found deficiencies in Memorial's search and recommended measures to address those deficiencies. While that is the case, it does not change the fact that the 13 attachments were previously provided. The Complainant makes additional arguments relating to the records in the 13 attachments. As these records have already been provided to the Complainant, examined by this Office in a previous investigation, and are not components of this request, this Office will not address them.

Duty to Assist: Part 5

[13] Part five of the request sought a particular email. Memorial realized that no such email existed, but it had previously located a similar record which had been sent on the same date and time and featured many (but not all) of the same parties as the record identified by the Complainant. This email had also been provided in response to a previous request. In response to the present request, Memorial responded that it had “no responsive records” as the record, as described by the Complainant, does not exist. However, Memorial directed the Complainant to the similar record provided in a previous response. The Complainant notes that Memorial should have first clarified the issue with him and that by failing to do so it failed in its duty to assist. The opposite is true. Memorial was correct in its response of “no responsive records” and met its duty to assist in advising the Complainant that the similar record had previously been provided and where it could be located.

[14] The Complainant indicates that by failing to address follow-up questions relating to the request, Memorial refused to meet its duty to respond in an open, complete, and accurate manner. Having reviewed these questions and responses, we conclude that the University provided reasonable and timely responses to the Complainant’s questions.

[15] Memorial thoroughly detailed its search in its submissions to this Office. It demonstrated that the search was conducted by individuals knowledgeable of the records at issue, that all known repositories of records were searched, and that all relevant individuals were consulted. It is notable that the records at issue were subject to multiple requests, multiple complaints, and multiple appeals, and therefore staff responsible for searching both in the Information Access and Privacy Office and the Office of the General Counsel were intimately familiar with the records at issue. It is the conclusion of this Office that the duty to assist was fulfilled in all respects.

Section 29 – Policy Advice or Recommendations

[16] There were several instances where Memorial applied section 29(1)(a). In the course of our investigation, Memorial amended its position and no longer relies on this exception.

Accordingly, it agreed to release information previously severed, except in one case where the information had been severed under both section 29(1)(a) and section 40(1). This information will be discussed below.

Section 40 – Personal Privacy

[17] Several redactions were made under section 40(1). A few are unique to this report, but a number have been subject to other requests, complaints, and appeals.

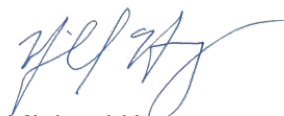
[18] In a number of instances, the business emails of an external lawyer and legal assistant were redacted. After discussion, and reference to previous reports dealing with business contact information (see Reports A-2016-019 and A-2019-026), Memorial decided to disclose the information to the Complainant prior to the release of the report.

[19] On pages 16 through 19, a number of redactions under Section 40 are present. The information, and redactions, are identical to those in a previous request which is presently before the Supreme Court of Newfoundland and Labrador. This Office previously upheld the majority of those redactions. However, we previously recommended in Report A-2020-015 the release of redacted information contained in an email written on September 28, 2018 at 2:59 PM. With respect to that redaction, while a more favorable approach would be to await a decision from the Court, given we are bound by statutory timelines we do not have that luxury and must again recommend release.

[20] The Complainant has requested that this Office consider the offence provision of the Act and suggests that prosecution should occur. There is absolutely no basis for this Office to believe that Memorial or the employees charged with dealing with a difficult series of requests have acted in any way but appropriately and dutifully. Memorial has dealt with these requests and the Complainant in a manner which is nothing but commendable.

V RECOMMENDATIONS

- [21] I recommend Memorial release the information redacted under section 40 contained in the email of September 28, 2018, at 2:59 PM. For additional clarity, a highlighted copy of the email will be provided to Memorial as an attachment.
- [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 7th day of April 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador