OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-025

June 3, 2021

Memorial University

Summary: The Complainant submitted a request to Memorial University under the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015*") seeking a number of records. The University granted partial access to the records with redactions made under section 29(1)(a) (policy advice or recommendations), section 30 (legal advice) and section 35 (disclosure harmful to the financial or economic interests of a public body). The Complainant objected, claiming that the records were covered by section 33 (information from a workplace investigation) and ought not to have been redacted and asked that the redactions be reviewed. During informal resolution efforts, the University dropped its reliance on section 35, instead claiming section 31 (law enforcement – disclosing security arrangements for a system), to which the Complainant also objected. In addition, the Complainant argued that the University had failed to meet its duty to assist under section 13 by failing to conduct a reasonable search for records. The Complainant also made preliminary requests that the Commissioner appoint an external investigator to cure an alleged conflict of interest and that the submissions of the parties be exchanged. The Commissioner rejected the preliminary requests; and concluded that the redactions had been properly applied and that the University had conducted a reasonable search for records. The Commissioner recommended that the University continue to withhold the redacted information.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2, sections 3, 13, 29, 30, 31, 33, 56, 96.

File #: 0020-062-21-095

Authorities Relied On: NL OIPC Reports A-2021-019; A-2021-015; A-2021-007; A-2020-020; A-2019-019;
NL OIPC *Guideline for Policy Advice and Recommendations*; *Guidance:* Section 33 - Information from a Workplace Investigation;
NL Department of Justice and Public Safety, *Report of the 2014 Statutory Review, Executive Summary*
Memorial University, *Respectful Workplace Policy*
Canadian HR Reporter, *Following the Progressive Discipline Process*
John Doe v. Ontario (Finance) 2014 SCC 36;
Oleynik v. *Memorial University of Newfoundland and Labrador*, 2021 NLSC 51;

I BACKGROUND

[1] The Complainant made a request to Memorial University ("Memorial") under the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015*" or the "*Act*") for:

> *All records, digital and paper, including information on accesses to my personal file during the material times, pertaining to the President's recommendation to the Board of regents that I be dismissed pursuant to clause 19.17 of the Collective agreement. This request is made under Section 33 of the ATIPPA, 2015.*

[2] Memorial provided responsive records to the Complainant, redacting some information on the basis of section 29 (policy advice or recommendations), section 30 (legal advice) and section 35 (disclosure harmful to the financial or economic interests of a public body).

[3] The Complainant filed a complaint with our Office, asking the OIPC to determine whether section 33 (information from a workplace investigation) applied and, if it did not, to review the redactions.

[4] In its submissions in response to our notification of the complaint, Memorial abandoned its reliance on section 35 and instead claimed section 31(1)(l) (law enforcement – arrangements for the security of a system) with respect to the same redacted information.

[5] Memorial provided our Office with the responsive records, except that Memorial refused to provide complete copies of the records for which section 30 was claimed. Instead, Memorial provided the redacted version it had disclosed to the Complainant. As an alternative to providing the unredacted records, Memorial provided our Office with a detailed description of the records and an explanation for why it believed the exception applied.

[6] During the course of the informal resolution process, a number of additional issues were identified, which will be described and dealt with below. 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

[7] Memorial submits that it properly applied section 29 (advice or recommendations) to the draft wording of letters (including text that was not included in the final, signed letters) as well as communications in which employees provided their advice on the draft letters.

[8] Memorial submits that pursuant to section 30 (legal advice) it has properly redacted emails between Faculty Relations and General Counsel, as well as Memorial's external legal counsel, where drafts of two different letters are circulated for advice from counsel. It is Memorial's position that in these emails Faculty Relations had sought and received legal advice on the wording and approach used in the letters.

[9] Memorial had originally relied on section 35 to withhold certain information, but in its submissions substituted a claim of section 31(1)(l) (law enforcement – arrangements for the security of a system) applicable to the same information. Memorial submitted that the exception does not require proof of an expectation of harm, only that disclosure could be expected to reveal security arrangements, and that the test had been met.

III COMPLAINANT'S POSITION

[10] The Complainant requested that the Commissioner appoint an external investigator to deal with his complaint, on the ground that the Commissioner is an intervenor in a number of *ATIPPA, 2015* appeals in the Supreme Court of Newfoundland and Labrador in which the Complainant is a party, which shows a perceived and real conflict of interest.

[11] The Complainant states that the process used by the Commissioner is non-transparent and non-competitive, and asked that the Commissioner arrange for the submissions of both parties to be exchanged so that each party could view and comment on the submissions of the other.

[12] The Complainant requested that the Commissioner determine whether section 33 (information from a workplace investigation) applies to the records and that, if it does, the

Commissioner recommend that the Complainant be provided with all of the records without redaction.

[13] The Complainant submits that Memorial's application of section 29 is wrong, because the advice given was simply advice to follow an already-devised policy (the applicable collective agreement). In addition, the Complainant argued that Memorial did not properly exercise its discretion in applying section 29, because it did not take into account the need for procedural fairness, the fact that the Complainant's employment was at risk, and the conflict of interest between officials of Memorial and the Complainant.

[14] The Complainant submits that section 30 is a discretionary exception, and that a claim of solicitor-client privilege is rebutted where it is used to conceal unethical or criminal acts. The Complainant asserts that this is the case in the present investigation.

[15] The Complainant submits that Memorial's application of section 31 is wrong, because the information in question consists of expired links, meeting identifiers, and passwords, which therefore cannot reveal security arrangements.

[16] The Complainant submits that Memorial failed to meet its duty to assist the Complainant under section 13 of the *Act,* by failing to conduct a reasonable search for records. The Complainant asserts that because an official of Memorial stated that the Complainant's personal file was reviewed, Memorial's search for records should have found evidence of that review.

IV ISSUES

[17] The issues to be dealt with in this Report may be described as follows:

1. Preliminary request by the Complainant that the Commissioner appoint an external investigator because of an alleged conflict of interest.
2. Preliminary request by the Complainant for exchange of the parties' submissions.
3. Whether section 33 applies to the responsive records.

4. Whether the claimed section 29 exception has been applied correctly.
5. Whether the claimed section 30 exception has been applied correctly.
6. Whether to accept Memorial's late claim of section 31 and, if so, whether the exception has been applied correctly.
7. Whether Memorial has met its duty to assist the applicant under section 13, particularly the duty to conduct a reasonable search.
8. Additional subsidiary issues to be dealt with in the course of this Report, including the relevance of the collective agreement, the exercise of discretion, procedural fairness and the public interest.

V DECISION

First Preliminary Issue – Conflict of Interest

[18] The Complainant asserted that our Office is in a conflict of interest, because the Commissioner has intervened as a party in several *ATIPPA, 2015* appeals to the Supreme Court of Newfoundland and Labrador to which the Complainant is a party.

[19] This Office has a statutory right, under section 56 of the *Act* (procedure on appeal) to intervene as a party in most *ATIPPA, 2015* appeals. As the independent statutory oversight body we often exercise that right of intervention, not in order to support or oppose the interests of any party, but in order to provide assistance to the court and the parties on the interpretation of the *Act.* This is not only consistent with the role of this Office, under section 3 to act as an advocate for access to information and protection of privacy, it is an essential part of that role. Therefore we have rejected the conflict of interest assertion.

Second Preliminary Issue – Exchange of Submissions

[20] The Complainant argued that our complaint investigation process is "non-transparent and non-competitive" and asked to have the parties' submissions exchanged. Our Office may facilitate the exchange of submissions in cases where it is appropriate to do so and the parties have consented to the exchange. However, section 96 of the *Act* explicitly states that parties have no right to be provided with each other's submissions. There are good reasons for this.

[21] First, our Office is not a court, and "open court" principles do not apply. On the contrary, the need often arises during investigations to preserve and protect, so far as possible, both the privacy of complainants and others, and the confidentiality of some details of each party's submissions. For example, the submissions of public bodies typically include copies of the responsive records that have been redacted, together with justifications for the redactions. It could defeat the purpose of exceptions to access if details of the explanation, or even the description of the record in some cases, were to be provided to a complainant. Parties place their trust in the independence, knowledge, experience and integrity of our Office, to conduct a review and to provide an objective assessment of the application of the *Act* without disclosing private or confidential information.

[22] Second, our Office, under *ATIPPA, 2015,* is designed to be a timely first-level review of public body decisions, not a drawn-out court process.[1] We are required to meet statutory time limits in the course of every access complaint investigation. In most cases, the need to control a fair and efficient process dictates that we assess each party's submissions, provide a summary of significant issues to the other party for response, and attempt to mediate, where possible, a resolution of some or all of the issues. If resolution is not possible, our Office must provide a timely report with recommendations to the public body and the complainant. That is the process that we have followed in the present case.

Section 33 – Workplace Investigation

[23] The Complainant asserted in his access request that it was made under section 33 of the *Act* (information from a workplace investigation):

> *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;*

[1] See: *Report of the 2014 Statutory Review, Executive Summary*, p. 43: "The Committee is confident that a straightforward complaints and appeals process, with relatively short time limits, is the most effective way to restore public trust in the administration of the ATIPPA. At the OIPC, this should be carried out in a summary and expeditious manner, with any detailed legal analysis left to the courts."

> *(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.*

If the Complainant was correct in his assertion, then as a party to a workplace investigation he would be entitled, by subsection (3), to all of the records relevant to that investigation, essentially without redaction**.** The only exception to this right would be records covered by solicitor-client or litigation privilege (see Report A-2021-019, and 2021 NLSC 51 (*Oleynik* v. *Memorial University of Newfoundland and Labrador*)).

[24] Our conclusion, however, is that a workplace investigation was not conducted in this case. In a submission during the course of the informal resolution process, the Complainant accepted the conclusion of our Office on the applicability of section 33. However, for completeness, we have chosen to set out here the explanation of how that conclusion was reached.

[25] A workplace investigation is an investigative process leading to a finding on whether or not there was misconduct on the part of an employee in the workplace that may give rise to

progressive discipline or corrective action. Memorial has a number of policies, such as its Respectful Workplace Policy, that set out the detailed procedures to be followed in such investigations. Under those procedures, an investigator is appointed, and the investigation is considered to be complete when a report is conveyed to the parties containing a finding of whether there was misconduct. The act of imposing discipline for such misconduct is, however, a separate process, subsequent to any workplace investigation.

[26] The doctrine of "progressive discipline" has a well-established labour relations jurisprudence applicable to employees subject to collective agreements, such as faculty members at Memorial. The underlying principle is the correction of misconduct, and there are usually escalating penalties for repeated misconduct. However, employers sometimes declare that a new incident of misconduct constitutes a "culminating incident" that, together with previous disciplinary history, can justify immediate termination of employment. [2]

[27] In the most recent case, relating to the present complaint, no workplace investigation was conducted. Rather, the evidence is that Memorial officials made a determination as to how they would proceeded on the basis of culminating incidents and a review of the past disciplinary record.

[28] It is, of course, not part of the role of this Office to assess either the validity of Memorial's investigative policies and procedures, or the appropriateness of its disciplinary decisions. Our only role here is to determine whether the records in question are subject to section 33. We have concluded that no workplace investigation was conducted in this case, and so section 33 does not apply to the records. In consequence, Memorial was correct in treating the present access request as one in which it was appropriate to consider redaction of the record on the basis of other exceptions in the *Act*.

Section 29 – Advice or Recommendations

[29] The Complainant has submitted that Memorial's application of section 29 (advice and recommendations) was incorrect since, in the Complainant's view, the advice given was

[2] See, for example: Canadian HR Reporter, *Following the Progressive Discipline Process*

simply to follow an already-devised policy (the applicable collective agreement). Having reviewed the records to which section 29 was applied, including the redacted information, we disagree.

[30] The relevant portion of section 29 of the *Act* reads as follows:

> *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;*
>
> *(b) the contents of a formal research report or audit report that in the opinion of the head of the public body is incomplete and in respect of which a request or order for completion has been made by the head within 65 business days of delivery of the report; or*
>
> *(c) draft legislation or regulations.*

[31] The purpose of section 29 is to provide public servants with a confidential deliberative process in which to express their views. This can take many forms, including the exchange and discussion of draft documents. This is discussed in a Supreme Court of Canada case cited by both Memorial and the Complainant (*John Doe v. Ontario (Finance*) 2014 SCC 36) and also in our Guidance document on policy advice and recommendations. The Complainant's characterization of the redacted information is factually incorrect. The redactions at issue are not "advice to follow an already-devised policy". Rather, they are either proposed language for portions of a draft document, the final version of which was later sent to the Complainant, or the discussion in emails of alternate language that might be used in those drafts. The case law is clear that early drafts of records or portions of them, or proposals or discussions about draft language, can be protected from disclosure under section 29.

[32] The Complainant also submits that Memorial has not properly exercised its discretion in the process of applying section 29. Our Guidance document also discusses the issue of the exercise of discretion by a public body. While it is not simply a formality, and certainly cannot be done in bad faith or for an improper purpose, we do not consider that the argument advanced by the Complainant justifies claiming that the public body did not properly exercise

its discretion. On the contrary, Memorial's submissions have addressed this issue, and we are satisfied that its discretion was reasonably exercised.

Section 30 – Legal Advice

[33] Memorial has withheld some information from the Complainant under section 30 (legal advice). Following our normal practice, our Office requested copies of all responsive records for review. In its response Memorial has taken the position that the Commissioner is not entitled under *ATIPPA, 2015* to require the production of records to which solicitor-client privilege is claimed to apply.

[34] As we have stated in several Reports, our Office strongly disagrees with that interpretation of the *Act*. Our position is that *ATIPPA, 2015* gives this Office the statutory authority to compel production of all relevant records for review, including those for which solicitor-client privilege is claimed. If a public body does not meet the statutory burden of proving that the exception applies, that will result in a recommendation to disclose the information (See Reports A-2021-007, A-2019-019).

[35] However, this issue is currently before the courts as a result of an application by another public body, and will be decided in due course. Meanwhile, our Office has taken the position that in some cases, if the public body provides a sufficiently detailed description of the records, it may be an alternative basis on which our Office can determine whether or not the section 30 exception has been properly claimed.

[36] In the present case, while Memorial has chosen not to provide to our Office the redacted information that it claims is legal advice, it has however provided, without redaction, a portion of each record that identifies the sender and recipient, the date, and other relevant information. In its submissions, Memorial has also provided to our Office a detailed description of the redacted portion of each record and an explanation of why Memorial believes the redacted information falls under section 30. On reviewing the redacted records, the descriptions, and the submissions, we have concluded that Memorial has in this case met the burden of proof. We are satisfied that the redacted information constitutes legal advice,

in the form of privileged communications between a solicitor and client, about the wording of draft letters. Therefore we find that section 30 properly applies to the redacted information.

[37] The Complainant has raised the possibility of a conflict of interest, or even illegality, on the part of some parties to that correspondence. It is conceivable that, in the proper forum, this could be an issue relevant to a determination of the merits of a disciplinary grievance or a related court action. However, there is no evidence before us to justify making it a factor in the present case in determining whether section 30 was properly applied to the records.

Section 31 – Law Enforcement

[38] Memorial did not initially claim the exception in section 31 in its response to the access request. As noted in previous reports (see, for example, Report A-2020-020), our Office has sometimes refused to consider late-claimed exceptions. That is because exceptions are meant to be claimed by public bodies when responding to an access request. Furthermore, claiming a new exception at a late stage in the complaint process can be prejudicial to the complainant. However, the claim of section 31 was made at the very beginning of our complaint investigation, in Memorial's initial submissions in response to our investigation. It was also made in substitution for another claimed exception, and applied to the same information that was initially withheld. Therefore we have agreed to consider it.

[39] The relevant portion of section 31 is:

> *31.(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to*
>
> *. . .*
>
> *(l) reveal the arrangements for the security of property or a system, including a building, a vehicle, a computer system or a communications system;*
>
> *. . .*

[40] The redacted information consists of secure video conferencing information – web links, meeting identifiers and passwords – in emails. The Complainant states that such information is expired and unusable, and has argued that this Office should retain an independent expert to assess this issue. We have consulted with Memorial's information technology staff, whose explanation, supported by evidence provided to us, we consider to be sufficient. The

information at issue is not always expired and unusable. The risk to Memorial or to users from disclosure of the redacted information may be small, but we are satisfied that it exists. Moreover, regardless of the risk, its disclosure could be reasonably expected to disclose security arrangements for Memorial's secure video conferencing systems and therefore the criteria for applying section 31(1)(l) are met. Given that there appears to be no other legitimate use to anyone for the redacted information, Memorial has made a reasonable argument for the application of the exception, and we conclude that the information may be withheld.

Section 13 – Duty to Assist

[41] In his submissions the Complainant invoked the duty to assist applicants at section 13 of the *Act* and, in particular, the duty to conduct a reasonable search for records. Memorial stated in response to the access request that there was no access by anyone to the Complainant's paper personal file during the period December 1, 2020 to January 13, 2021, and that the only access to the Complainant's electronic personal file was by two Human Resources employees. The Complainant submits that because the collective agreement states that there is to be only one personal file, this must mean either that Memorial officials did not review his file, contrary to their claim, or that they reviewed some other file, contrary to the collective agreement, or that Memorial must not have conducted a reasonable search.

[42] It is possible that Memorial officials may have consulted documents other than a personal file, or consulted no files at all, in carrying out disciplinary actions. It is possible that more than one personal file may actually exist, and that might be a violation of the collective agreement, to be dealt with in another forum. However, it would not in itself be a violation of *ATIPPA, 2015.* The only question for our Office is whether Memorial has satisfied us that it conducted a reasonable search for records responsive to the request, including records of accesses to the Complainant's personal file. Memorial has described the search efforts that it undertook, and nothing in the evidence before us, including the concerns raised by the Complainant, raises a reasonable suspicion that Memorial did not conduct a reasonable search.

Procedural Fairness and the Public Interest

[43] In a number of places throughout his submissions the Complainant refers to the principles of procedural fairness, particularly a person's right to be provided with documents that inform

a decision made about him, and the right to know the case against him that must be met. Those are important principles that are especially applicable in a forum in which disciplinary decisions are under review, such as in a grievance arbitration or a court proceeding contesting a dismissal from employment.

[44] The Complainant, however, has attempted to import some of those principles and issues into a forum in which they do not belong. In an access complaint investigation, the Complainant's disciplinary or employment status are not at issue, and there is no "case against him" for the Complainant to meet. This Office of course has a duty to follow the principles of procedural fairness in carrying out our investigations. This involves receiving the submissions of both sides, considering relevant arguments and determining whether *ATIPPA, 2015* has been properly applied. The only rights of the Complainant at issue here are his right to have his access request processed in a timely way, accurately and completely, to be provided with requested records, subject only to the exceptions contained in the *Act,* and to have his complaint investigated fairly and objectively. In conducting our investigation, the issue is whether the public body has complied with the requirements of *ATIPPA, 2015* in its response to his access request.

[45] The Complainant also invokes the principle of the public interest in disciplinary fairness in support of his arguments. As stated earlier, our Office has a duty to act fairly in carrying out its investigation, and there is clearly an important public interest in our doing so. However, we must act within the limits of our oversight jurisdiction under *ATIPPA, 2015.* There is a public interest in upholding a person's right to procedural fairness in the context of employment rights, including one's right to know the case to be met. However, that public interest is to be considered in an appropriate forum in which it is properly raised.

V CONCLUSIONS

[46] We have concluded that the Complainant's preliminary request for an external investigator, rooted in an allegation of conflict of interest, has no merit, and that his request for the exchange of submissions is not necessary or appropriate. We have concluded that section 33 does not apply to the responsive records, that the exceptions to access in sections

29, 30 and 31 have been properly applied, and that Memorial has fulfilled its duty to assist the Complainant in conducting a reasonable search for records. In addition, we have concluded that the Complainant's arguments about procedural fairness and the public interest are not applicable.

VI RECOMMENDATIONS

[47] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that Memorial University continue to withhold the information redacted from the responsive records in accordance with sections 29, 30 and 31 of the *Act*.

[48] 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.

[49] Dated at St. John's, in the Province of Newfoundland and Labrador, this 3rd day of June 2021.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador