



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2021-033

August 10, 2021

### Memorial University

#### Summary:

The Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”) to Memorial University (“Memorial”) for correspondence relating to COVID-19 pandemic return-to-work plans. Memorial disclosed records but withheld some information on the basis of section 29 (policy advice or recommendations), section 35 (disclosure harmful to the financial or economic interests of a public body), and section 40 (disclosure harmful to personal privacy). The Complainant asked that the redactions be reviewed. The Commissioner concluded that Memorial had correctly applied sections 29 and 40; that the public interest did not outweigh the reason for applying section 29; and that there was no need to deal with section 35. The Commissioner recommended that Memorial continue to withhold the redacted information.

#### Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 9, 29, 35, and 40.

#### Authorities Relied On:

NL OIPC Report [A-2017-001](#); [Guideline on the Public Interest Override](#).

[John Doe v. Ontario \(Finance\)](#), 2014 SCC 36.

## 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”) for correspondence dated between December 2020 to January 2021, between particular offices, about the COVID-19 pandemic return-to-work plans developed at Memorial.
- [2] Several hundred pages of records, including drafts of plans and policies, and emails discussing, debating and recommending changes to those plans and policies, were provided to the Complainant. However, these records were heavily redacted, mainly under section 29 of *ATIPPA, 2015* (policy advice or recommendations). Some of the same information was also redacted under section 35 (disclosure harmful to the financial or economic interests of a public body). Some additional information was redacted under section 40 (disclosure harmful to personal privacy). The Complainant objected to the redactions and 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 takes the position that the exceptions claimed were properly applied.

## III COMPLAINANT’S POSITION

- [5] The Complainant asked our Office to review the redactions to ensure that they complied with the *Act*.
- [6] The Complainant also questioned whether confidentiality around advice and discussions should apply now, considering that the discussions took place in the past.

[7] The Complainant also stated that it is in the public interest to be able to see and evaluate the discussions and decisions that the university chose to make behind closed doors.

#### IV DECISION

[8] The relevant portions of section 29 of *ATIPPA, 2015* read 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;*

*...*

*(3) Subsection (1) does not apply to information in a record that has been in existence for 15 years or more.*

[9] This exception is intended to provide public servants with a “safe space” in which to hold discussions or debates around courses of action and to provide advice or recommendations about policy or procedural matters, without being concerned that their views and opinions will be made public. The extensive jurisprudence on this topic, including court decisions, confirms that the exception covers drafts of documents and the discussions around them. (See *John Doe v. Ontario (Finance)*).

[10] On review of the redactions, we find that Memorial has appropriately applied section 29. The information withheld consists of clear instances of advice, discussion of options, disagreements, debates, and suggested alternatives, all of which are related to successive drafts of what eventually became the return to campus plan issued publicly by Memorial at the end of January.

[11] Section 29 is a discretionary exception, and so Memorial had to exercise its discretion in deciding whether or not to apply it. That exercise of discretion must be done on a reasonable basis. (See Report A-2017-001). Given the uncertainty and intense public discussion about when and how to return to work during the pandemic, and the consequent pressure over how to organize a safe return to work and how to communicate it to the public, it makes sense that Memorial elected not to disclose the different options, proposals and shades of opinion that

went into creating the final plans. It is therefore reasonable that the individuals involved, and their advice and recommendations, have been afforded this degree of confidentiality under section 29.

[12] The Complainant has pointed in particular to an exchange of emails on January 29, 2021, regarding allegations on the social media website Twitter that MUN was re-opening under less than safe working conditions. The emails about that subject are an exchange of views and options about how to respond to the allegations appropriately and effectively. As with the discussions of the draft plans, it was reasonable to redact these discussions under section 29.

[13] The Complainant argued that confidentiality should not apply to advice and discussions now that these events are in the past. However, as noted above, what is intended to be protected is the decision-making process itself, and confidentiality around the discussion of policy options. Public servants must understand that their advice will be confidential in order to give it freely. If policy advice were to be disclosed once a public body has made a decision, then public servants will expect that future policy advice will similarly be disclosed, and that would be an impediment to open and frank discussion. The legislature has already addressed the expiration issue in section 29(3) and set what it considers a reasonable timeframe, by excluding the application of the exception to records that are more than 15 years old. The present case involves records less than a year old. Memorial has reasonably exercised its discretion to withhold them.

[14] The Complainant has also argued that it is in the public interest to be able to evaluate the discussions that took place, and that this principle should take precedence over section 29. This is an issue that is dealt with by *ATIPPA, 2015* in section 9, known as the “public interest override”:

*9 (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.*

*(2) Subsection (1) applies to the following sections:*

...  
(b) section 29 (policy advice or recommendations);  
...

[15] Our Office has issued a Guideline on the application of section 9. The public interest has always been an implied factor for public bodies to consider in exercising their discretion. Section 9, which applies to all discretionary exceptions, codifies the process to be followed, and establishes the threshold for disclosing information even when the exception is found to apply: “...where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception”.

[16] The Guideline sets out factors that support withholding information, factors that support disclosure, and factors that should not be considered. In summary, the purpose of the section 29 exception is well-defined: to protect the full and frank discussion of policy alternatives within public bodies. There is clearly a general public interest in promoting transparency, accountability, and public understanding, and there may also be a particular public interest in informing the debate on the issue in question. Nevertheless, it must be recognized that there is still a need for a safe space in which to formulate and develop policy, as contemplated by the exception. We conclude that it has not been clearly demonstrated in the present case that any public interest outweighs the reason for the exception. Therefore Memorial may continue to withhold the information.

[17] The redactions applying section 40 (disclosures harmful to personal privacy) are personal remarks between individuals that have nothing to do with the topic requested, and so those redactions are appropriate.

[18] The section 35 redactions were all applied, as an alternative, to information that we have found to be properly redacted under section 29, and there is therefore no need to deal with section 35.

## V RECOMMENDATIONS

- [19] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that Memorial University continue to withhold the information redacted from the responsive records.
- [20] 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.
- [21] Dated at St. John's, in the Province of Newfoundland and Labrador, this 10<sup>th</sup> day of August 2021.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador