



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2021-036

September 20, 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 access to a number of records. The University granted partial access with redactions made under section 29(1)(a) (policy advice or recommendations), section 30 (legal advice), and section 40 (disclosure harmful to personal privacy). The Complainant objected to these redactions and also alleged that the University did not meet its duty to assist under section 13. During informal resolution efforts, the University agreed to release some of the information withheld under section 29 and section 40. The Commissioner concluded that some of the remaining redactions, with the exception of certain of the applications of section 29 and one application of section 40, 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, sections 13, 29, 30, and 40.

Authorities Relied On:

NL OIPC Report [A-2021-017](#).

[Oleynik v. Memorial University of Newfoundland and Labrador](#), 2021 NLSC 52.

I BACKGROUND

[1] 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:

1. *Records that ‘came out’ (in the words of external legal counsel for MUN at the hearing of March 5, 2021) of the email exchange between [named individual #1] of MUN’s Department of Sociology and [named individual #2], the then administrative head of MUN’s Department of Sociology, that took place on September 28, 2018 between 2:59PM and 3:41PM.*
2. *Information about measures undertaken to prevent destruction of records responsive to access to information request file number 015-01-60-20, as per Order of Noel J. filed on April 12, 2021 in court docket 2020 01G 4952, including any email exchanges pertaining to this Order*

[2] Memorial responded to the request and provided the Complainant with 59 pages of responsive records. Redactions were made under sections 29, 30, and 40 of *ATIPPA, 2015*.

[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 provided a detailed accounting of the search undertaken to locate the requested records and believes that it has fulfilled its duty to conduct a reasonable search as required under section 13 of the *Act*.

[5] With regard to the first part of the request and redactions made under section 40, Memorial relies on the decision of the Honourable Justice Noel in *Oleynik v. Memorial University of Newfoundland and Labrador, 2021 NLSC 52*. That matter involves a direct appeal of Memorial’s response to a previous access to information request, relating to the same set of circumstances and similar records. In that matter, Justice Noel found that section 40 had been appropriately applied and that the records should not be disclosed unless further action were to be taken by the author or recipient of the record. Further, Memorial notes that

the issue has already been determined by the courts and is currently the subject of an appeal by the Complainant and asked that this Office disregard the complaint on this issue.

- [6] Memorial notes that the second part also relates to a matter currently before the courts. In particular, it relates to a separate access to information request made by the Complainant to Memorial. Memorial sought from this Office, and obtained, approval to disregard that request. The Complainant then appealed that decision to the Supreme Court of Newfoundland and Labrador. Memorial agreed to a consent order for the preservation of the requested records. The current request is in relation to Memorial's compliance with that consent order. Memorial submits that this request is an attempt by the Complainant to audit Memorial's compliance with the consent order, despite Justice Noel's comment that external counsel's confirmation that the records had been preserved was "as good as gold". Many of the records responsive to this request have been withheld pursuant to section 29 and section 30.
- [7] During our investigation, Memorial agreed to release most of the information which it had redacted under section 29 but continued to apply it to some of the information. Memorial argued that in those instances the redactions relate to either advice sought by, or given to, its employees in relation to the options for fulfilling the access to information request.
- [8] Memorial declined to provide this Office with the records redacted pursuant to section 30. Instead, Memorial provided the redacted version it had disclosed to the Complainant. As an alternative to providing the unredacted records, Memorial provided a description of the records and an explanation for why it believed the exception applied.
- [9] The section 40 redactions in the second part of the request relate mainly to personal phone numbers, email addresses, and reference to staff vacations or other absences. One instance relates to a comment made by an employee regarding their technical understanding of a matter related to the access to information request. Memorial argues that this is an appropriate redaction as it is a frank and personal comment and as such should be protected, particularly in light of what Memorial believes is the Complainant's history of scrutinizing seemingly innocuous details.

III COMPLAINANT'S POSITION

[10] The Complainant submits that they are unable to determine if a reasonable search was conducted due to the redactions applied to the responsive records.

[11] They also contend that the existence of records responsive to the first part of the request is evidence that the author or recipient of the record has acted upon the information contained in it. Additionally the Complainant assumes that their personal information and information regarding a colleague is contained in the records responsive to the first part of the access to information request.

[12] The Complainant takes issue with the exemptions claimed by Memorial in general, particularly those that are discretionary.

[13] Finally, the Complainant believes that by acting as both general counsel and ATIPP Coordinator, the Coordinator is in a conflict of interest.

IV ISSUES

1. Has Memorial fulfilled its duty to assist under section 13?
2. Has Memorial properly applied section 29?
3. Has Memorial properly applied section 30?
4. Has Memorial properly applied section 40?

V DECISION

[14] The searches relating to both parts of this request were performed by staff knowledgeable about the records and the ATIPP process. Our assessment is that there was a reasonable search.

Part 1

[15] These records relate to a discussion regarding a colleague's options for making a complaint under Memorial's Respectful Workplace Policy. The records do not identify the respondent to the potential complaint. Related records were subject to other complaints to this Office (Report A-2021-017) and ongoing court matters. With respect to court file number 2020 01G 1408, which was a direct appeal of a response by Memorial to another access to information request, on April 14, 2021 Justice Noel ruled that the redactions of those records were appropriately applied. At paragraph 31 of his decision, he stated:

I find the information pertains to a course of action in furtherance of the thoughts or views of [named individual] and the Colleague. It is information that the Colleague and [named individual] intended to be confidential, and thus there is an expectation and right of privacy to it. The violation that would ensue is the harm that section 40(1) is intended to guard against.

[16] Justice Noel did state, at paragraph 34:

If the Colleague follows through in processing of the information and acts upon her thoughts and views, then [the Appellant's] right of access may subsequently be engaged.

[17] MUN notes that no action has been taken, and that the records in the within matter arise from the exact same circumstances as those records ruled on by Justice Noel and as such, the records must continue to be withheld. Furthermore, the Complainant is now raising the same issue with the Court of Appeal.

[18] Finally, while section 9 of *ATIPPA, 2015* does not apply to section 40, the public interest can be engaged under section 40(5). However, in this case there is no evidence that would support the release of the records based on the public interest.

Part 2

[19] Following Memorial's release of additional records, there are a limited number of records which remain redacted pursuant to section 29. These records relate to discussions between various Memorial employees and outside counsel on options for fulfilling the access to

information request, as well as an analysis of the reasons for an approval to disregard part of the request which was granted by this Office.

[20] The relevant portions of section 29 of ATIPPA, 2015 are 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;

[21] 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. I find that some of these redactions qualify under section 29, but several do not, as they merely reference procedural matters rather than any discussion of policy options.

[22] The relevant portion of section 30 of ATIPPA, 2015 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] As noted above, Memorial declined to provide the records redacted under section 30. However, it did provide a description of the records and an explanation as to why section 30 applied. In this particular case, the description and explanation are sufficient to determine that the exception was appropriately applied.

[24] As both section 29 and section 30 are discretionary exceptions, any exercise of that discretion must be assessed based on the application of section 9. In this case, on a balance of factors, the public interest does not override the purpose of the exceptions.

[25] As with the redactions under section 29, over the course of the investigation, Memorial agreed to release some of the records responsive to the second part of the request which had been redacted under section 40. Most of the remaining redactions relate to personal phone numbers, personal emails and references to employee leave to which section 40 clearly

applies. One outstanding passage which Memorial continues to redact under section 40 relates to an employee's comment about their understanding of a technical matter. This does not, in our view, constitute personal information.

VI RECOMMENDATIONS

[26] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that Memorial University continue to withhold the information redacted from the responsive records with the exception of the following redactions:

I. Redactions under section 29 on pages 21, 22, and 31.

II. Redaction under section 40 with respect to the employee's technical knowledge on page 31.

[27] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of Memorial 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.

[28] Dated at St. John's, in the Province of Newfoundland and Labrador, this 20th day of September 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador