



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2021-038

September 27, 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) and section 40 (disclosure harmful to personal privacy). The Complainant objected to these redactions and alleged that the University did not meet its duty to assist under section 13. The Commissioner concluded that with the exception of some of the redactions under section 40, the exceptions 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 9, 13, 29, and 40.

Authorities Relied On:

NL OIPC Report [A-2021-025](#).

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:

Records pertaining to the Academic Unit Planning (AUP) process at the Department of Sociology:

1. *The March 2021 version of the AUP Report (Self-Study Process, Unit Background, Strategic Objective, Undergraduate Program, Graduate Program, Faculty Research and Scholarship, Public Engagement and University Collaboration, Organizational Structure and Unit Resources, Overall Unit Assessment) with all supplementary material*
2. *Survey (poll) of former graduate students (instrument, data gathered)*
3. *List of internal and external assessors (reviewers)*
4. *Any assessment/approval received to date*

- [2] The Complainant provided the following clarification with regards to “all supplementary materials”:

Appendices (course outlines, charts, exhibits) attached to the March version of the AUP report, if any

- [3] In response to Memorial’s request to remove faculty members’ *curricula vitae* from the scope the complainant stated:

If the CVs in question constitute an integral part of the supplementary material, I'd like to have them included, with valid exceptions applied, when appropriate (e.g., the CV are not intended to be shared with third parties, such as assessors/reviewers, and/or placed in public domain).The same applies to my own CV since I have no idea which version is used and in what context

- [4] Memorial responded, providing the Complainant with over 1,000 pages of responsive records, much of which was redacted under sections 29 and 40. The Complainant filed a complaint with this office regarding the redactions applied to the records.

- [5] 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

[6] 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. This includes addressing the Complainant's specific issues concerning two particular documents that were not provided. As well, Memorial communicated to the Complainant that it had no responsive records to parts 3 and 4 of the request as the Academic Unit Planning ("AUP") process was in its early stages and no assessors had yet been appointed.

[7] Memorial submits that the withholding of the AUP records based on section 29 is appropriate as they has not been finalized/published and are currently in draft. It relies on the decision of the Supreme Court of Canada in *John Doe v. Ontario (Finance)* 2014 SCC 36, which states:

The nature of the deliberative process is to draft and redraft advice or recommendations until the writer is sufficiently satisfied that he is prepared to communicate the results to someone else. All of those drafts inform the end result even if the content of any one draft is not included in the final version. Protection from disclosure would be illusory if only a communicated document was protected and not prior drafts.

[8] With respect to the redactions under section 40, Memorial submits that those redactions are necessary to protect the personal information of both staff and students. It believes this is particularly important given the small number of students in the Department of Sociology, in particular students in graduate level programs. Given the position and familiarity of the Complainant with the Department, Memorial believes that releasing any of the information could result in the Complainant identifying students.

III COMPLAINANT'S POSITION

[9] The Complainant submits that they are not able to assess the reasonableness of the search due to the redactions applied to the records. Additionally they note that they had

expected the responsive records to include the Institutional Survey Report Form and the AUP appendices.

[10] With respect to the withholding of the AUP records under section 29 the Complainant believes that this is contrary to Memorial's procedures for academic planning, and that Memorial has a duty to be more transparent. Additionally they argue that as a member of the faculty they have participated in the process in previous years and therefore should be allowed to continue to be involved. Finally, the Complainant believes that the AUP records contain their personal information and thus they should be entitled to receive that information.

[11] Regarding the redaction of the survey results the Complainant argues that sections 29(2)(b) and (c) require the release of the survey results (and any records derived from the survey).

[12] The Complainant believes that section 9 would also support the release of the records redacted under section 29. This is based on the premise that Memorial has a duty to be transparent.

[13] The Complainant submits, with respect to the redactions to the survey results under section 40, that Memorial should not have collected personal information of respondents during the survey and that aggregate data should be provided.

[14] The Complainant objects to the blanket withholding of all of the requested *curricula vitae* under section 40, particularly when some are publically available.

IV ISSUES

[15] The issues identified in this matter are:

I. Has Memorial fulfilled its duty to assist under section 13?

II. Has Memorial properly applied section 29?

III. Has Memorial properly applied section 40?

V DECISION

[16] The Complainant noted two records that they expected to receive but did not: 1) Institutional Survey Request Form, and 2) Appendices for the AUP.

[17] The AUP appendices were included in the responsive records, but were redacted under section 29. With regard to the Institutional Survey Request Form, Memorial noted that the Centre for Institutional Analysis and Planning (“CIAP”) is in charge of that process. CIAP was contacted about this request and confirmed that at the time of the request they did not have any responsive records. Memorial provided further clarification on this issue and noted that the survey did not require a Survey Request Form and thus the Department did not obtain one.

[18] Given that Memorial has addressed the two specific concerns noted by the complainant and has provided evidence that the search was completed by staff knowledgeable about the records and the ATIPP process, our assessment is that the search was reasonable.

[19] With respect to the redaction of the AUP records under section 29, the current version of the AUP records are a draft, with the final version not expected until later in the year. As noted in this Office’s recent report A-2021-025 at paragraph 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 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.

[20] As such, Memorial’s withholding of the AUP records due to them still being in draft form is, in the present matter, appropriate under section 29. Memorial also notes that it did consider the application of section 9 and determined that on the balance of factors the reason

for the exception was not outweighed by the public interest. The Office agrees with this assessment.

[21] Memorial has withheld the majority of the records relating to the Sociology Department graduate data and the alumni survey based on section 40(4)(c), which states:

40.(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

...

(c) the personal information relates to employment or educational history;

[22] The redactions cover aggregate data where the number of respondents is small, lists of students, and the individual responses to the survey questions.

[23] The redactions to the list of students is appropriate and necessary to protect the personal information of the students.

[24] With respect to the reaction to the graphs and infographics, the aggregate data would not constitute the personal information of an identifiable person and, as such, section 40 does not apply.

[25] The survey noted that, to ensure the privacy of respondents, all responses would be anonymized and all contact information removed. Memorial notes that the small number of respondents and the Complainant's position in the faculty, including as a supervisor of students, could allow the Complainant to identify individual students. This is a particular concern given that students answered questions such as: where they came from, what level of education they have attained, what sector they plan to work in after graduation, and how many courses they completed within the Department. In addition to the questions with a selection of prepopulated answers, some questions allowed the survey respondents to write in their own answers. Those answers include a description of the students' experience with the Department and their suggestions for improvement. The small number of respondents, the Complainant's familiarity with the Department, and details contained in the responses pose a risk of identification of respondents in some instances. However, section 8(2) of *ATIPPA, 2015* requires that the maximum amount of information be provided in response to

an access to information request. As such the redaction of the results in their entirety is not appropriate. Rather, the records must be selectively redacted so that a proper balance between protection of privacy and transparency is reached.

[26] The Complainant argued that section 29(2) would require the release of the records. This may be true if the redactions were made under section 29(1); however Memorial withheld the records under section 40, which is a mandatory exception, and therefor section 29(2) is irrelevant to the analysis.

[27] Memorial also redacted the *curricula vitae* of faculty members based on section 40(4)(c), but advised the Complainant that some of the *curricula vitae* may be available online. The Complainant argued that he should be provided with those *curricula vitae* that were available online. However, Memorial provided the Complainant with a link to access those publically-available *curricula vitae* and we are satisfied that Memorial has responded adequately. For those *curricula vitae* which are not available to the Complainant, we are satisfied that section 40(4)(c) has been properly applied to withhold personal information which relates to employment or educational history. That some *curricula vitae* have been posted online – presumably with the participation or consent of those individuals to whom the personal information relates – does not affect the application of section 40 to those *curricula vitae* which are not online.

VI RECOMMENDATIONS

[28] 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 following exceptions:

- i. The information redacted under section 40 to the graphs and tables:
- ii. The responses to the survey questions with the following survey questions remaining redacted to prevent the identification of the respondents: Q2, Q4, Q6, Q7, Q20, and Q32-35.

[29] 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.

[30] Dated at St. John's, in the Province of Newfoundland and Labrador, this 27th day of September 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador