



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2021-039

October 1, 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. Memorial granted partial access with redactions made under section 30(1)(a) (legal advice), section 31 (disclosure harmful to law enforcement), section 39 (disclosure harmful to business interests of a third party), and section 40 (disclosure harmful to personal privacy). The Complainant objected to these redactions and also alleged that Memorial did not meet its duty to assist under section 13. The Commissioner concluded that the exceptions had been applied properly and that Memorial had fulfilled its duty to assist the Complainant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 13, 30, 31 and 39.

Authorities Relied On:

NL OIPC Reports [A-2019-023](#), [A-2021-010](#), [A-2021-025](#), and [A-2021-034](#).

OIPC Practice Bulletin – [Reasonable Search](#)

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:

Records pertaining to

1. *contacts, including preliminary inquiries, with experts in view of producing expert report(s) in the court proceedings 2019 01G 5833, 2019 01G 7928 and 20220 01G 3967;*
 2. *selection of Froese Forensic Partners to produce an expert report for the hearing of July 13- 15, 2021;*
 3. *retention of Froese Forensic Partners, including an agreement and/or letter of instructions;*
 4. *provision of any materials to Froese Forensic Partners, including access to and transfer of the PST files from Ms. Rosemary Thorne’s email account at the MUN Microsoft Exchange server to Froese Forensic Partners. The scope of this item includes the extracted PST files;*
 5. *payment of a retainer or an advance to Froese Forensic Partners.*
- Period covered: April 7, 2021 to date (Items 1 - 4).*
Possible location: Office of the CIO, Office of General Counsel, IAP Office

[2] Memorial provided the Complainant with a package of responsive records. Some of the information contained in these records was redacted under sections 30, 31, 39 and 40 of the Act.

[3] The Complainant was not satisfied with Memorial’s response and filed a complaint with this Office.

[4] 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

[5] Memorial explained that it had applied to our Office under section 21 of ATIPPA, 2015 for approval to disregard the Complainant’s access request on the basis that the information had already been provided to the applicant; that the request was trivial, frivolous, or vexatious; and that the request was made in bad faith.

- [6] In response, our Office approved, in part, Memorial's application to disregard the access to information request, confirming that Memorial could disregard those parts of the access to information request seeking records that had already been provided to the Complainant. This Office denied approval to disregard the remainder of the request for records which had not previously been provided.
- [7] Memorial indicated that records responsive to parts 1, 2, 3, and 5 of the Complainant's request were not within Memorial's custody or control. However, those records would have nonetheless been provided to the Complainant by other parties to the referenced litigation through the disclosure process.
- [8] Memorial further stated that much of the information responsive to part 4 of the request would have also been previously provided to the Complainant as part of the disclosure process. However, Memorial determined that there were additional records beyond what had previously been disclosed. In particular, records regarding cooperation with, and the transfer of material, to the expert, were identified as responsive to the request. The only responsive records located by Memorial pertained to part 4 of the request.
- [9] Memorial provided an accounting of the search undertaken to locate the requested records and Memorial asserted that a thorough search was conducted by offices and employees who would have responsive records and who had knowledge of the subject matter of the request. Additional searches were conducted with no further responsive records identified. Memorial asserts that it has fulfilled its duty to assist by conducting a reasonable search and responding to the Complainant in an open, accurate and complete manner as required under section 13 of the Act.
- [10] Memorial declined to provide this Office with the records redacted pursuant to section 30(1)(a) of *ATIPPA, 2015*. Instead, Memorial provided the redacted version it had disclosed to the Complainant along with a description of the records and an explanation for why it believed the exception applied.

- [11] Memorial relies on the findings of this Office in Report A-2021-025 to support the redactions made under section 31, which is information relating to Webex videoconferencing links and passwords.
- [12] Memorial applied section 39 in one instance to protect technical information of a Third Party. The information at issue is the direct URL to their ShareFile folder. ShareFile is a tool for sending, receiving and organizing business files online. It is a password-protected area for sharing information with clients and partners. Memorial submits that this is technical information that was shared confidentially as the Third Party granted a Memorial employee specific permission to access the folder. Memorial asserts that if this information is disclosed it could reasonably result in similar information no longer being supplied to employees of a public body when it is in the public interest that similar information continue to be supplied in this secure, confidential way for the purpose of benefiting Memorial in its active legal proceedings with this Complainant.
- [13] Memorial applied section 40 of *ATIPPA, 2015* in two instances. However, Memorial had also claimed that this information fell under section 31. Memorial subsequently indicated that it would no longer be relying on section 40 with regard to this information.

III COMPLAINANT'S POSITION

- [14] The Complainant believes that Memorial failed to fulfill its duty to assist under section 13 of the Act. In particular, the Complainant believes that additional responsive records exist that were not provided in Memorial's response. The Complainant indicated that the following records should exist:
- a. exchanges with [named individual] prior to the May 4, 2021 virtual meeting;
 - b. .pst files extracted on May 11, 2021, and
 - c. follow-up exchanges on the May 27, 2021 virtual meeting.
- [15] Regarding section 30 of *ATIPPA, 2015*, it is the Complainant's opinion that the solicitor-client privilege is rebutted in the circumstances of this case as "the redacted exchanges

pertain to the extraction of the likely altered emails...” The Complainant states that the emails were modified.

[16] With respect to the redactions under section 31, the Complainant is of the opinion that there is no potential for harm in releasing the information relating to Webex links and passwords. The Complainant states that the Webex manufacturer denies that web links, meeting identifiers and passwords can be misused provided that they are correctly chosen.

[17] The Complainant commented on the redaction under section 39 stating that the ShareFile link had most likely expired and there is no reason to withhold this information.

[18] While the Complainant focused on the reasonableness of the search and the redactions, he also questioned the authenticity of a particular email dated September 9, 2019, believing that it may have been altered.

IV ISSUES

1. Has Memorial fulfilled its duty to assist under section 13?
2. Has Memorial properly applied section 30?
3. Has Memorial properly applied section 31?
4. Has Memorial properly applied section 39?

V DECISION

[19] A public body’s duty to conduct a reasonable search for records responsive to an access request is found in section 13 of *ATIPPA, 2015*, the relevant portion of which reads as follows:

13.(1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

[20] This Office has elaborated on the content of this provision in a number of previous Reports. Report A-2019-023 summarizes the duty to assist and reasonable search and more recently

Report A-2021-034 comments on this section as well. This Office also has a Practice Bulletin on Reasonable Search which outlines that a reasonable search is one conducted by knowledgeable staff in locations where the records in question might reasonably be located. The standard for assessing a public body's efforts is reasonableness, not perfection.

[21] Memorial explained how the search for records was conducted, who was involved in the search and who had knowledge of the subject matter of the request. When asked about the specific records that the Complainant believed should exist but were not provided, Memorial advised that additional searches were conducted but no further records were identified.

[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] Memorial declined to provide the records redacted under section 30 for our review, however a description of the records and an explanation as to why section 30 applied was provided. In this case, the description and explanation are sufficient to determine that the exception was properly applied.

[24] The relevant portion of section 31(1)(l) states:

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;

[25] With regard to the redactions made under section 31(1)(l), this same issue of Webex videoconferencing links and passwords was previously considered in Reports A-2021-034 and A-2021-025. In those reports we found that section 31(1)(l) applied and that Memorial could continue to withhold information related to Webex videoconferencing links and

passwords. As noted in A-2021-034, the provision does not require a public body to establish a risk of harm. Rather, the question is whether the release of information could reasonably be expected to reveal arrangements for the security of a computer system. As in A-2021-025 and A-2021-034, we are satisfied that disclosure of the requested information could reveal these arrangements.

[26] Section 39(1) of *ATIPPA, 2015* is as follows:

39. (1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[27] As noted above, Memorial applied section 39 in one instance to protect technical information of a Third Party. The information at issue is the direct URL to their ShareFile folder. ShareFile is a password-protected area for sharing information with clients and partners.

[28] Recently, Report A-2021-010 reviewed a similar section 39 redaction by Memorial. In that case, the redacted material included the login information of a third party law firm's teleconferencing account, specifically, the number for a lawyer's "personal room" and "guest dial-in access code".

[29] The Complainant claims that it is likely that the ShareFile link has expired and that there is no harm in releasing the information.

[30] For section 39(1) to apply, all three parts of the harms test must be met. With respect to the first part of the test it is sufficient that the information relate or pertain to matters of finance, commerce, scientific or technical matters as those terms are commonly understood. The ShareFile link is provided to facilitate confidential communications with the third party. This information can therefore qualify as technical information.

[31] With respect to the second part of the test, Memorial states that the information was supplied in confidence with the Third Party allowing only one Memorial employee to access the folder.

[32] As to the third part of the test, Memorial believes that if this information is disclosed, it could reasonably result in similar information no longer being supplied to its employees. Memorial has active Court proceedings with the Complainant and Memorial requires a way to share information with the Third Party in a secure, confidential way. Memorial believes that the disclosure of the URL to the ShareFile folder could lead to access to the information being shared in the Court proceedings. As the Complainant is the other party involved in the Court proceeding, disclosure of this information could result in the harm outlined in section 39(c)(ii).

[33] As the information withheld under section 40 was also properly withheld under section 31, it is not necessary to assess the application of section 40.

[34] Finally, the Complainant has alleged that an email, dated September 9, 2019 may have been altered. However, the Complainant has not provided any compelling evidence in support of this claim.

VI RECOMMENDATIONS

[35] 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 30, 31 and 39 of the *Act*.

[36] 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.

[37] Dated at St. John's, in the Province of Newfoundland and Labrador, this 1st day of October 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador