



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-044

October 25 , 2021

Memorial University

Summary:

Memorial University received a request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015* or “the Act”) for records relating to the appointment of two senior administrative positions. Memorial provided a number of records, with some redactions claiming sections 29 (policy advice or recommendations), 32 (confidential evaluations), and 40 (disclosure harmful to personal privacy) of *ATIPPA, 2015*. Memorial told the Complainant that there might be additional records, and asked whether he wished the additional search to be done. The Complainant filed a complaint with our Office, raising a number of issues including the redactions and the duty to assist applicants under section 13 of the Act. During the investigation it was discovered that the additional search had mistakenly not been completed. The Commissioner concluded that the redactions had been properly made, and that notwithstanding that the additional search had not been completed, Memorial had met the duty to assist the applicant. The Commissioner commented that the Complainant could make a new access request for any records that might exist, and could file a new complaint if not satisfied with the results. 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, 13, 23, 29, 32, 40, and 42-48.

Authorities Relied On:

NL OIPC Reports [A-2008-006](#), and [A-2019-018](#).

I BACKGROUND

- [1] Memorial University (“Memorial”) received a request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) for records relating to the appointments of two senior administrative positions.
- [2] Pursuant to section 23 of *ATIPPA, 2015*, Memorial requested, and our Office granted, successive extensions of time to complete the request, totalling 55 days.
- [3] In its final response, Memorial provided a substantial package of records to the Complainant. Memorial redacted some information claiming sections 29 (policy advice or recommendations), 32 (confidential evaluations), and 40 (disclosure harmful to personal privacy) of *ATIPPA, 2015*.
- [4] In addition, in its final response, Memorial advised the Complainant that it had come to its attention in reviewing the records that some individuals, whose records had not yet been searched, might have responsive records in addition to those provided to the Complainant. Memorial advised the Complainant that it was willing to complete an additional search if he wished.
- [5] The Complainant filed a complaint with our Office raising a number of issues, including Memorial’s duty to assist under section 13 of the *Act* and the redactions applied to the records.
- [6] Although the Complainant assumed that Memorial was in the process of conducting a search for additional records, it was never conducted. This did not become apparent until late in the informal resolution period.
- [7] 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

[8] Memorial has made submissions in support of its position on all of the issues to be dealt with in this Report, and they will be discussed, as necessary, below.

III COMPLAINANT'S POSITION

[9] The Complainant asserts that Memorial has failed to meet its duty to assist under section 13 of the Act, given that it took 55 days to provide its final response to his access request, and failed to search the records of certain individuals. In addition, the Complainant argues that Memorial failed to conduct an additional search for records after offering to do so.

[10] The Complainant asserts that Memorial's requests for time extensions under section 23 of *ATIPPA, 2015* were improper as they were, in the Complainant's view, sought for invalid reasons. The Complainant also argued that section 23 does not permit the granting of successive time extensions.

[11] The Complainant submits that section 29 is not applicable to certain information in the responsive record because the advice to which the exception has been applied is "advice to follow an already devised policy" and that the public interest requires its disclosure.

[12] The Complainant states that section 32 does not apply because the records in question pertain to the decisions of an office-holder and to the allocation of resources. Therefore the public interest requires disclosure.

[13] The Complainant argues that section 40(2)(m)(i) (attendance at or participation in a public event or activity) applies to permit disclosure of some of the information redacted by Memorial under section 40.

IV ISSUES

[14] In the Notification of Formal Investigation sent by our Office to the parties, the unresolved issues were set out as follows:

1. whether Memorial University has met its duty to assist under section 13 of the *Act*;
2. whether Memorial's requests for time extensions under section 23 were improper;
3. whether *ATIPPA, 2015* permits the granting of successive time extensions;
4. whether section 29 (advice and recommendations) is applicable to the record;
5. whether section 32 (confidential evaluations) applies to the record;
6. whether section 40 (disclosure harmful to personal privacy) applied to the record;
7. whether the Acting ATIPP Coordinator, also legal counsel, is in a conflict of interest.

[15] Following our review of the submissions of the parties, our Office concluded that the second and third issues, relating to the granting of time extensions under section 23 of the *Act*, are not matters about which a complaint may be filed – section 42(8)(b) is explicit in that regard. Therefore this Report will not deal with those issues.

[16] The seventh issue (conflict of interest) has been dealt with in previous Reports (see for example Report A-2008-006). Under *ATIPPA, 2015* this Office does not review the motivation or personal interest of individuals involved in the process. Rather, we assess whether the application of the *Act* is objectively reasonable. We will therefore not deal with this issue in this Report. The remaining issues are discussed below.

V DECISION

The Duty to Assist (section 13)

[17] The Complainant has questioned whether Memorial met its duty to assist under section 13 of the Act, given that Memorial took 55 days to process his access request and failed to search the records of certain individuals. In our view, Memorial has satisfactorily explained why those individuals were not initially expected to have records that had not already been obtained from the other locations searched. The standard for searches is reasonableness, not perfection, and Memorial's search met that standard.

[18] Once Memorial discovered that additional records might possibly exist, it offered to complete the search, while at the same time notifying the Complainant and providing him, without further delay, with the records that had already been gathered. Those actions additionally indicate that Memorial in fact responded to the request in good faith and in an open and complete manner, and has fulfilled the duty to assist.

The Search for Additional Record

[19] In its final response to his access request, Memorial asked the Complainant for his decision on whether or not he wanted Memorial to conduct the additional search. The Complainant replied advising that he had filed a complaint with this Office, noting the willingness of the public body to carry out an additional search, and suggesting that the search might be carried out within the framework of informal resolution of his complaint.

[20] It appears that Memorial, mistakenly, did not recognize that the Complainant's reply email contained a passage that the Complainant intended to be an agreement with Memorial's offer to conduct the additional search. Neither Memorial nor our Office realized until late in the informal resolution process that the Complainant was expecting to receive additional records and to make additional submissions. However, by the time this was recognized the statutory time limit for informal resolution had been reached.

[21] The procedure for the investigation of complaints set out in sections 42 to 48 of *ATIPPA, 2015* is straightforward and complete. A complaint to this Office can be filed after the

applicant has received a final response from the public body (or after 20 business days, if there is no response). Once our Office has accepted a complaint, our investigation is focused on reviewing the “decision, act or failure to act of the head of the public body that relates to the request” as set out in its final response.

[22] It sometimes happens during the informal investigation process that the public body carries out additional searches, and may discover additional records. In some cases, that may contribute to a resolution of the complaint. However, the investigation process has statutory time limits and is not always conducive to additional searches, to the production and possible redaction of additional records, or to additional submissions by the parties. While such supplementary processes are in no way prohibited by the *Act*, and sometimes produce good results, there is not always time to conduct them.

[23] In the present case, the statutory access request process was complete when Memorial issued its final response. While an additional search might have been conducted voluntarily during the succeeding complaint investigation process, there was no longer a statutory deadline for Memorial to produce results, and no process within the current complaint file for the Complainant to make an additional complaint about the content of any further response from Memorial. The obvious solution is for the Complainant to make a new access request for any records that might be thought to exist. The normal rules and deadlines will then apply, and the Complainant will have the right to file a new complaint with this Office if he is not satisfied with the results.

Section 29 (Policy Advice or Recommendations)

[24] The Complainant submits that section 29 is not applicable to certain redacted passages in the responsive record on the ground that the advice to which the exception has been applied must be “advice to follow an already devised policy”, a distinction that was made by this Office in Report A-2019-018.

[25] That distinction in that earlier Report was made in unique circumstances, and its application is confined to those particular facts. More importantly, however, the Complainant’s argument is based on his suggestion that Memorial’s *Conflict of Interest* policy,

in the one case, and Memorial's *Appointment Procedures*, in the other case, are the basis of the redacted advice. This assertion is speculative and is not confirmed on review of the records. We conclude that section 29 was properly applied. There is no evidence that section 9 (the public interest override) is activated in this case so as to outweigh the reason for the section 29 exception.

Section 32 (Confidential Evaluations)

[26] The Complainant takes issue with the application of section 32 (confidential evaluations) on the ground that the records in question pertain to the decisions of an office-holder and to the allocation of resources. However, the central consideration in section 32 is the purpose for which the information was compiled. If the information is evaluative or opinion material and was compiled for the purpose of determining suitability, eligibility, or qualifications for a position, then it falls within section 32. The duties and responsibilities of the position may be relevant to the choice of candidates in the selection process, but are not relevant to whether the exception applies to the information under consideration.

[27] The Complainant suggests that there is a substantial public interest in the allocation of resources and the impact of the decisions of office-holders at Memorial and that, therefore, the information should not be withheld. However, the section 32 exception is not about those things, but about protecting confidential personal information gathered in the evaluation process. There is no evidence that the public interest outweighs the reason for the exception in this case.

Section 40 (Disclosure Harmful to Personal Privacy)

[28] We have reviewed the application of section 40 by Memorial, including those redactions about which the Complainant has objected, and we have concluded that Memorial has properly and consistently applied this exception. We would note that, contrary to the assertion of the Complainant, responsive records in the context of the present case such as expressions of intention or candidates' *curricula vitae*, are not public documents, but confidential personal information. The events in which individuals took part were not public ceremonial events within the meaning of section 40(2)(m)(i) but were confidential internal meetings. Therefore the latter provision has no application here.

VI CONCLUSIONS

[29] We have concluded that Memorial has met the duty to assist the Complainant in section 13, and has appropriately and reasonably applied the relevant provisions of *ATIPPA, 2015* to the responsive records.

VII RECOMMENDATIONS

[30] 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, 32 and 40 of the Act.

[31] 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.

[32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25th day of October 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador