



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

**A-2021-047**

**November 25, 2021**

**Memorial University**

**Summary:**

The Complainant submitted an access request to Memorial University under the *Access to Information and Protection of Privacy Act, 2015* for records relating to an application for approval to disregard a request which had been made by Memorial to this Office. Memorial provided a number of responsive records to the Complainant, with some redactions claiming sections 30(1)(a) (legal advice), 40(1) (disclosure harmful to personal privacy), and 41(c) (disclosure of House of Assembly service and statutory office records). The Complainant objected to some of these redactions, alleged that Memorial breached its requirement of anonymity under section 12, and that Memorial did not meet its duty to assist under section 13. The Commissioner recommended that Memorial continue to withhold the redacted information, concluded that there was no evidence that Memorial breached the anonymity requirement, 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 2(u)(ix), 5(2)(c), 12, 13, 40(1), 40(4)(g), 40(5), 41(c).

**Authorities Relied On:**

NL OIPC Reports [A-2019-023](#), [A-2020-003](#), [A-2020-014](#), [A-2020-017](#), [A-2021-034](#), and [A-2021-036](#).

OIPC Practice Bulletin: [Reasonable Search](#).

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

## I BACKGROUND

[1] The Complainant filed an access request with Memorial University (“Memorial”) under the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015”) for:

*All documents pertaining to the initiation, preparation and internal approval of MUN’s application to disregard ATIPP request [access request file number]  
Period covered: July 8, 2021 to date.*

[2] Memorial released the responsive records to the Complainant, but redacted some information under sections 30(1)(a) (legal advice), 40 (disclosure harmful to personal privacy), and 41(c) (disclosure of House of Assembly service and statutory office records) of *ATIPPA, 2015*.

[3] The Complainant was not satisfied with Memorial’s response and filed a complaint with this Office, requesting that we review the exceptions that Memorial had claimed. The Complainant subsequently raised the additional issues of whether Memorial complied with the requirement of anonymity pursuant to section 12, and whether Memorial met its duty to assist the Complainant pursuant to section 13.

[4] During the informal resolution process, Memorial agreed to release some, but not all, of the information that it had previously withheld under section 40. The Complainant takes issue with only one of the remaining redactions under section 40, and does not object to the others.

[5] Further, through the informal stages of the investigation, the Complainant narrowed down the scope of the Complaint to the remaining redactions under sections 40 and 41(c), the duty to assist per section 13, and the requirement of anonymity per section 12. Accordingly, this Report will not address issue of redactions under section 30(1)(a).

[6] As informal resolution of the above issues was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

## II PUBLIC BODY'S POSITION

[7] As we will address below, the Complainant takes issue with two instances within the records where Memorial's General Counsel referred to the Complainant's personal pronoun, "he", in correspondence with Memorial's President. This correspondence was regarding its application to this Office for approval to disregard a request for access to information. Memorial has stated that the Complainant's identity and personal information, including the Complainant's gender, has not been shared in contradiction of section 12. Memorial further states:

*... that the pronoun used in respect of an individual is not an identifying characteristic as contemplated by the definition of "personal information" in the Act. While there may be specific limited instances where an individual's pronoun may reveal their identity in a record, this is not generally the case. The use of a pronoun, on its own, could not reasonably be enough to establish a person's identity.*

[8] Memorial explained the steps it took in responding to this particular access request. It explained how it conducted its search for records, including who was involved in the search, and who had knowledge of the subject matter of the request. Memorial provided this Office with copies of its correspondence with the Complainant following its receipt of the access request. It acknowledged receipt of the access request to the Complainant, and provided the Complainant with its Advisory Response and Final Response within its legislative timelines per sections 15 and 16 of *ATIPPA, 2015*. Memorial submits that it has complied with its duty to assist in all aspects of responding to this request.

[9] With regard to the one remaining redaction made under section 40(1) to which the Complainant objects, Memorial's position is that this information meets the definition of personal information per section 2(u)(ix) of *ATIPPA, 2015*, and describes the information as, "*inherently personal*". Memorial further states that, "*there is nothing in section 40(5) that would rebut the presumption of privacy that attaches to this redaction under section 40(4)(g)*".

[10] Memorial also continues to withhold information which it claims is subject to a mandatory exception to access under section 41(c).

### III COMPLAINANT'S POSITION

- [11] The Complainant believes that his identity was shared contrary to section 12 of *ATIPPA, 2015*. The Complainant believes that a redaction under section 40(1) may contain his personal information, specifically his gender.
- [12] Further, and as we noted above, the Complainant takes issue with the two instances within the records where Memorial's General Counsel referred to the Complainant's personal pronoun, "he", in correspondence with Memorial's President regarding its Application to Disregard an Access to Information Request.
- [13] The Complainant believes that, if the redacted information does not contain his personal information, Memorial must have failed to conduct a reasonable search per section 13 of *ATIPPA, 2015*, and that, "*not all responsive records have been located and released, those records likely contain the requestor's personal information*". He believes that he should have access to Memorial's metadata to verify whether Memorial conducted a reasonable search for records.
- [14] The records contain email correspondence between a third party and Memorial's ATIPP Coordinator, wherein there is a redaction under section 40(1) to which the Complainant objects, though Memorial has released the majority of the contents of the email to the Complainant. The Complainant believes that this redacted portion may contain a reference to his gender, which the Complainant believes must indicate that this third party knew his identity.
- [15] The Complainant believes that Memorial is applying the section 41(c) exception inconsistently since he is privy to the information within these redactions as a result of legal proceedings. He further points to another matter that was before the Supreme Court of Newfoundland and Labrador where Memorial sought the Commissioner's agreement prior to releasing records previously redacted under section 41(c).

## IV ISSUES

- [16] This Report will address the following issues:
- (i) whether Memorial complied with section 12;
  - (ii) whether Memorial met its duty to assist under section 13;
  - (iii) whether Memorial properly applied section 40(1); and
  - (iv) whether Memorial properly applied section 41(c).

## V DECISION

### Section 12 (Anonymity)

- [17] The relevant portion of the section 12 requirement of anonymity reads as follows:

*12.(1) The head of a public body shall ensure that the name and type of the applicant is disclosed only to the individual who receives the request on behalf of the public body, the coordinator, the coordinator's assistant and, where necessary, the commissioner.*

- [18] Based on the evidence provided, we see no reason to not accept Memorial's confirmation that it did not share the Complainant's identity or personal information contrary to section 12. Further, we have reviewed the contents of the section 40(1) redaction and have confirmed to the Complainant during the informal resolution process that the redaction does not contain the Complainant's personal information.

- [19] The Complainant contends that Memorial's General Counsel breached his anonymity when he made reference to the Complainant's personal pronoun. However, given the limited number of third-person personal pronouns available in the English language and the plentiful number of potential access applicants, we agree with Memorial that the use of the personal pronoun in this instance is not likely to identify the Complainant.

### Section 13 (Duty to assist applicant)

- [20] Section 13 sets out the duty for public bodies to conduct a reasonable search for records responsive to an access request. The relevant portion 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.*

[21] This Office has elaborated on the content of this provision in previous Reports (see, for example, Reports A-2019-023 and A-2021-034). 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.

[22] I accept Memorial's explanation of the search that it conducted, and find that it met its duty under section 13.

[23] Further, this Office has previously addressed requests for access to Memorial's metadata (see Reports A-2020-003, A-2020-014, and A-2020-017). As we stated in Report A-2020-017, applicants are entitled to file a complaint with this Office if they feel that a public body has failed to conduct a reasonable search. But I am once again satisfied that Memorial did conduct a reasonable search. I do not find that it is necessary for Memorial to provide metadata to the Complainant.

#### **Section 40(1) (Disclosure harmful to personal privacy)**

[24] Section 40(1) reads as follows:

*40. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.*

[25] Section 2(u) sets out examples of personal information. Specifically, section 2(u)(ix) reads as follows:

*2. In this Act*

*...*

*(u) "personal information" means recorded information about an identifiable individual, including*

*...*

*(ix) the individual's personal views or opinions, except where they are about someone else*

[26] With regard to the one redaction under section 40(1) to which the Complainant objects, the Supreme Court of Newfoundland and Labrador and this Office (see Report A-2021-036) have previously addressed very similar information to which Memorial applied section 40(1).

[27] The information in question forms part of email correspondence from a third party to Memorial's ATIPP Coordinator. We have reviewed the information and we can confirm that, contrary to the Complainant's speculation, the information does not contain the Complainant's personal information, but does contain the third party's personal information per section 2(u)(ix).

[28] In the decision *Oleynik v. Memorial University of Newfoundland and Labrador*, Justice Noel addressed this type of information at paragraph 31:

*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.*

[29] Therefore, Memorial has properly applied section 40(1) to this information.

#### **Section 41 (Disclosure of House of Assembly services and statutory office records)**

[30] The relevant portions of section 41 read as follows:

*41. The Speaker of the House of Assembly, the officer responsible for a statutory office, or the head of a public body shall refuse to disclose to an applicant information*

...

*(c) in the case of a statutory office as defined in the House of Assembly Accountability, Integrity and Administration Act, records connected with the investigatory functions of the statutory office.*

[31] Through the language, "shall refuse to disclose", section 41 carries a mandatory exception to access to information under *ATIPPA, 2015*.

[32] During the informal stages of this investigation, we explained to the Complainant that while Memorial may not release these records in response to an access request, *ATIPPA, 2015* does

not prohibit Memorial from providing these records in relation to a court proceeding. Section 5(2)(c) of *ATIPPA, 2015* states:

5. (2) *This Act*

...

(c) *does not limit the information otherwise available by law to a party in a legal proceeding*

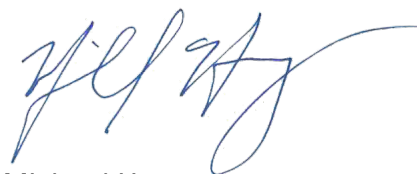
[33] With regard to the Complainant's assertion that on another occasion Memorial sought the Commissioner's agreement prior to releasing records subject to section 41(c) in the course of legal proceedings, that is not relevant to the complaint at hand. Rather, we find that Memorial has properly redacted the information under section 41(c) in response to an access request under *ATIPPA, 2015*. Per section 5(2)(c), Memorial was not wrong to supply the information that it was required to disclose to the Complainant by law as a party to a legal proceeding.

## VI RECOMMENDATIONS

[34] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that Memorial University continue to withhold the information it redacted from the responsive records in accordance with sections 40(1) and 41(c) of *ATIPPA, 2015*.

[35] 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.

[36] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25<sup>th</sup> day of November 2021



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador