



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2022-021

October 11, 2022

Memorial University

Summary:

The Complainant made an access to information request to Memorial University for records consisting of Firewall logs and McAfee data for a computer asset, and a variety of records relating to Microsoft Office downloaded and installed on personal devices. Memorial confirmed there were no Firewall logs and McAfee data for the date specified. Memorial provided the Complainant with records relating to Microsoft Office downloaded and installed on personal devices, but withheld some information pursuant to sections 29(1)(a) (policy advice or recommendations) and 40(1) (disclosure harmful to personal privacy). During the complaint investigation, Memorial agreed to release the information previously withheld under section 40(1) as well as some additional information previously withheld pursuant section 29(1)(a). The Commissioner found that Memorial had met its duty to assist in conducting a reasonable search for responsive records and recommended Memorial take no further action regarding its search efforts. The Commissioner recommended the remaining information continue to be withheld under section 29(1)(a).

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 9, 13, and 29(1)(a).

Authorities Relied On:

NL OIPC Reports: [A-2009-011](#), [A-2020-006](#), and [A-2020-003](#).
OIPC Practice Bulletins: [Reasonable Search](#), and [Section 29](#).

BACKGROUND

[1] The Complainant made an access to information request to Memorial University (“Memorial”) pursuant to the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) seeking the following information:

- 1) *Firewall logs and McAfee data for the asset [Asset Number] (desktop computer located in [Location Number]) for September 13, 2019. As per paragraph 5 of MUN’s Information Management Policy (<https://www.mun.ca/policy/browse/policies/view.php?policy=299>), their disposal must have been suspended*
- 2) *Records pertaining to the initiation and approval of the requirement of multi-factor authentication for Microsoft Office downloaded and installed on personal devices, including the number of Microsoft Office copies affected by the change. The new requirement reportedly came into effect on May 4, 2022*
- 3) *Records pertaining to the initial production of and subsequent changes in the news item ‘Changes coming to Microsoft Office on personal devices’ (<https://www.mun.ca/cio/news-articles/changes-coming-to-microsoft-office-on-personal-devices.php>), including those made on May 17, 2022’.*

[2] In response to the access request, Memorial advised that it did not have records for item #1 (*Firewall logs and McAfee data*), and provided the Complainant with records responsive to the remaining items in their request, with information withheld pursuant to sections 29(1)(a) (policy advice or recommendations) and 40(1) (disclosure harmful to personal privacy).

[3] The Complainant filed a complaint with our Office indicating that they did not believe that Memorial had located all of the responsive records and seeking our Office’s review of the exceptions to access applied by Memorial.

[4] During informal resolution efforts, Memorial agreed to release information it previously withheld pursuant to section 40(1) and also agreed to release some, but not all, information previously withheld under section 29(1)(a).

[5] As informal resolution was unsuccessful with respect to the remaining information withheld under section 29(1)(a), the complaint proceeded to a formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

COMPLAINANT'S POSITION

- [6] The Complainant submits that Memorial failed in its duty to assist, claiming that Memorial did not conduct a reasonable search for records and it therefore needs to redo the search and provide additional records. The Complainant also alleges that Memorial improperly destroyed records it was required to retain under its Information Management Policy and claims this to be a breach of Memorial's duty to assist under section 13.
- [7] In addition, the Complainant submits that Memorial improperly applied section 29(1)(a) and raised, in the alternative, that if the information was properly withheld under section 29(1)(a) the information ought to be released pursuant to the public interest override of section 9.

PUBLIC BODY'S POSITION

- [8] In its submissions Memorial provided the following details regarding the steps taken in searching for the requested information:

After receiving the Applicant's request, and prior to sending out the official Opening Email (a standard email we send to all offices asked to conduct a search for records) [Memorial's ATIPP Coordinator] met with [Interim General Counsel] and [Acting Chief Information Officer] for the University. The purpose of this meeting was to determine whether the University would have records of McAfee or firewall logs from 2019 (Item No. 1 of the Applicant's request) for the timeframe specified. Following our meeting, [Acting Chief Information Officer] followed up with the relevant IT specialists in her department and on 16 June 2022, she confirmed that we no longer had these records, given that those logs were from almost three years prior.

On 20 June 2022, the official Opening Email was sent to [Acting Chief Information Officer] with copy to [her assistant] and copy to the Vice-President (Administration and Finance). As [Acting Chief Information Officer] had previously confirmed there were no records responsive to Item No. 1, a search was conducted for the remaining requested records. [The Acting Chief Information Officer's Assistant] facilitated the search on behalf of OCIO and Information Technology Services (ITS) employees. All of those employees who assisted with this request have knowledge and experience with ATIPP requests, including expertise in conducting record searches.

On 23 June 2022, the responsive records were submitted to our office with the following message on behalf of the OCIO:

Records have been uploaded. There are no records for item #1.

Item #2 Office 365 rollout PowerPoint slide contains details on Multi-Factor Authentication (MFA), which was reviewed and approved by the steering committee (slide is uploaded in the records) and as of June 16, 2022 a total of 2810 users have downloaded Microsoft Office which requires users to access the Microsoft Office portal and set up MFA.

Item #3 the records have been provided.

Our office processed the responsive records, applying minor redactions, and responded to the Applicant's request on time, on the deadline date of July 12, 2022.

On the same day, despite receiving all records located in response to the request, the Complainant contacted our office to ask for assistance in locating records "...pertaining to changes in the news item 'Changes coming to Microsoft Office on personal devices' made on May 17?"

In accordance with our legislative duty to assist the Complainant and to ensure no responsive records were overlooked, our office followed up with the OCIO regarding the Complainant's question.

Senior employees with the OCIO conducted additional searches, which confirmed there were no changes to the May 17, 2022 news item regarding Microsoft changes. Our office communicated this message to the Complainant, on July 14, 2022, as follows:

We have followed up with the OCIO to ensure there are no additional responsive records and they have confirmed that there were no changes made to this particular news item of 17 May 2022. The "Last updated" date at the bottom of the webpage of ALL news items equals the most recent date that ANY news item was last changed. In this case, there was a network-related news item updated or created on May 17th.

There is no reason to believe that the employees of the OCIO did not conduct a diligent or reasonable search for responsive records.

- [9] Memorial submits, based on the foregoing, that it conducted a reasonable search for the records responsive to the request; responded to the Complainant in an open, accurate and complete manner; and maintains that it has met its duty to assist under the Act.

[10] In addition, Memorial submits it properly applied section 29(1)(a) by withholding information it maintains consists of policy options or opinions. Memorial did consider section 9 and determined that the burden for release under the public interest provision was not met.

ISSUES

[11] There are two issues to be addressed by this report. First, did MUN meet its duty to assist under section 13 and conduct a reasonable search? Second, where MUN did locate and provide records, did MUN properly apply section 29(1)(a) and, if so, does section 9 apply to override it?

DECISION

Did MUN meet its duty to assist under section 13?

[12] Under section 13 all public bodies have a duty to assist an applicant in making and responding to an access to information request:

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.

(2) The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.

[13] As outlined in our prior reports, this duty to assist has three components. First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner. Our Office has accepted that the standard for assessing a public body's efforts is reasonableness, not perfection.

[14] Memorial utilized staff of its Office of the Chief Information Officer ("OCIO") to conduct a thorough search for the requested records. These staff had knowledge of the subject matter of the request and experience in conducting records searches. Memorial maintained communication with the Complainant throughout the request process. Memorial provided its advisory response and final response to the Complainant within the time prescribed under the

Act. Memorial then responded to an additional inquiry of the Complainant as it related to some of the requested records, taking further steps to search again for these records and confirming to the Complainant that none existed.

[15] I find that Memorial did assist the Complainant throughout the request process, it conducted a reasonable search for the requested records and it did respond to the Complainant in an open, accurate and complete manner. Therefore, I find that Memorial has met its duty to assist under section 13 of the Act.

[16] Regarding the Complainant's allegation that Memorial failed to follow its own Information Management Policy, not only did the Complainant fail to provide evidence to establish this allegation, but our Office has previously confirmed in two prior reports, both involving Memorial, that this Office does not have jurisdiction to enforce a public body's internal information management policy, as set out in Report [A-2020-006](#) at paragraph 19 and Report [A-2020-003](#) at paragraph 23 which respectively state as follows:

*[19] An additional argument made by the Complainant is that Memorial's Information Management Policy considers records such as access logs to be official university records, and therefore Memorial has a duty to retain them and provide them on request. Regardless of any policy created by Memorial, **which this Office has no jurisdiction to enforce**, there can be no duty to retain records if those records have never been created. For the same reason, there can be no violation of the provision, in section 115 of ATIPPA, 2015, that establishes an offence where a person willfully destroys or conceals records with the intent to evade an access request, since the records were never created. [Emphasis added].*

...

*[23] With regard to the allegations that Memorial has failed "to properly retain/improperly destroy records in contravention of Memorial's Information Management Policy," this Office explained during the investigation that it is tasked with enforcement of the ATIPPA, 2015 **not enforcing compliance with Memorial's internal policy**. Secondly, the Complainant has not actually provided sufficient evidence to support an investigation into allegations that Memorial destroyed records either before or after his access to information requests were made. [Emphasis added].*

[17] As stated in these Reports above, our Office is tasked with enforcement of ATIPPA, 2015 and specifically section 115 as it relates to allegations regarding the destruction or concealment of records in efforts to evade an access request. I find that there is no evidence

that Memorial either willfully destroyed or concealed records with the intent to evade the access request in this matter.

Did MUN properly apply section 29(1)(a) and, if so, does section 9 apply?

[18] The relevant sections of the Act 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;

...

9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.

(2) Subsection (1) applies to...

(b) section 29 (policy advice or recommendations);

[19] I agree with Memorial's positions in the within matter. The information withheld by Memorial does consist of opinions or policy options and are therefore properly withheld pursuant to section 29(1)(a). I also find that the burden for release of information pursuant to section 9 has not been met.

RECOMMENDATIONS

[20] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that Memorial continue to withhold the remaining information pursuant to section 29(1)(a) and, whereas Memorial conducted a reasonable search for responsive records, I recommend Memorial take no further action regarding its search efforts for the requested information.

[21] 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.

[22] Dated at St. John's, in the Province of Newfoundland and Labrador, this 11th day of October 2022.

A handwritten signature in blue ink, appearing to read 'M. Harvey', with a long horizontal flourish extending to the right.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador