



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-020

May 4, 2023

Memorial University

Summary:

The Complainant made an access to information request to Memorial University for records related to discounts, reduced fees, credits, and registration at Memorial's Childcare Centre. Memorial did not provide any records to the Complainant, stating the Childcare Centre was not a public body as defined by *ATIPPA, 2015* and that the records were not in Memorial's custody or control. The Complainant disagreed and filed a complaint with this Office. After review of submissions from both parties, the Commissioner concluded *ATIPPA, 2015* does not apply to the Childcare Centre and that the requested records were not within Memorial's custody or control.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, Sections 2, 5, and 8

Authorities Relied On:

NL OIPC Reports [A-2017-021](#), [A-2021-008](#), [A-2014-012](#), Ontario Access to Information Order [Order MO-2750](#), *Canada (Information Commissioner) v. Canada (Minister of National Defence)* [2011 SCC 25](#), [2011] 2 SCR 306

BACKGROUND

- [1] On February 7, 2023, 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 the following:

I am requesting all information regarding discounts, reduced fees, credits, refunds, and registration for every other week (week on/week off) for after-school childcare at MUN's Childcare Centre's Activity Centre. I am requesting email (internal and external), internal documents (handwritten and digital), receipts, and any other means someone may use for recording information. I am requesting this information from the Childcare Centre's Front Office, Activity Centre, and Executive Director's Office. I am also requesting correspondence to and from the ATIPP Office and the respective departments in regards to this request.

- [2] Memorial responded that Memorial’s Childcare Centre (the “Daycare”) is not a public body and that the requested records were not in the custody or control of Memorial. As access had been refused by Memorial, the Complainant filed a complaint with this Office.
- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY’S POSITION

- [4] It is Memorial’s position that the Daycare is a separately incorporated entity and thus is not captured by *ATIPPA, 2015*’s definition of public body.
- [5] Memorial states further the requested records are not within the custody or control of the public body as the documents relate to core, day-to-day functions of the Daycare and do not pertain to the University. Memorial maintains that it does not have physical possession of the requested records and would not have access to them.

COMPLAINANT'S POSITION

- [6] The Complainant states the Daycare is a public body and that they are entitled to the requested records. Even if not a public body, the Complainant states Memorial has 'custody and control' of the emails as they are on a shared ("@mun.ca") email server. The Complainant also suggests the shared email server is evidence that the employees of the Daycare are employees of Memorial.
- [7] In the Complainant's view, the Daycare is Memorial and the two cannot be logically separated. Thus, since Memorial is specifically referenced as a public body in section 2(h) of *ATIPPA, 2015*, Daycare must also be a public body as it is a part of Memorial.
- [8] The Complainant further submits that because Daycare employees are represented by the Canadian Union of Public Employees Union ("CUPE") then they must be employees of a public body and of Memorial and thus the Daycare's records are subject to *ATIPPA, 2015*. He also raises the fact that the Daycare serves as a research facility for various departments within Memorial.

ISSUES

- [9] There are two issues to be addressed:
- a. Whether the Daycare meets the definition of a public body under *ATIPPA, 2015*, and
 - b. Whether the requested records are in the custody or control of Memorial.

DECISION

- [10] Section 5 of *ATIPPA, 2015* states the Act applies to all records in the custody of or under the control of a public body.

Application of ATIPPA, 2015 to the Daycare

[11] Relevant definitions at section 2 of *ATIPPA, 2015* are as follows:

2. In this Act

...

(h) "educational body" means

(i) *Memorial University of Newfoundland* ,

...

(o) "local government body" means

(i) *the City of Corner Brook* ,

(ii) *the City of Mount Pearl* ,

(iii) *the City of St. John's* ,

(iv) *a municipality as defined in the Municipalities Act, 1999* , and

(v) *a body designated as a local government body in the regulations made under section 116* ;

(p) "local public body" means

(i) *an educational body*,

...

(x) "public body" means

...

(ii) *a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown*,

(iii) *a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister*,

(iv) *a local public body*,

...

(vi) *a corporation or other entity owned by or created by or for a local government body or group of local government bodies, which has as its primary purpose the management of a local government asset or the discharge of a local government responsibility*

[12] After reviewing the definition of a public body under *ATIPPA, 2015*, our conclusion is that the Daycare is not a 'public body'. Further, while Memorial is a public body, the Daycare is not an integral party of Memorial and is a separate entity. The Daycare operates and is managed

independently of Memorial, is regulated by its own articles of incorporation, and is financially self-governing. Based on a plain reading, an entity incorporated separately from an educational body such as Memorial would not be captured by *ATIPPA, 2015*'s definition of public body.

[13] *ATIPPA, 2015* specifically recognizes certain corporations as public bodies in section 2(x). Section 2(x)(ii) recognizes corporations majority-owned by the Crown as public bodies. Section 2(x)(iii) recognizes corporations as public bodies where the majority of its board members are appointed by an Act or Cabinet. Neither of these apply to the Daycare.

[14] With regards to section 2(x)(vi), which discusses corporations set up by local government bodies, a local government body means a city or municipality as defined in section 2(o) and does not include Memorial. Had the legislature intended *ATIPPA, 2015* to apply to corporations, such as the Daycare, established by an educational body, it would have been specifically enumerated in the Act.

Custody or Control of Daycare Records

[15] While the Daycare is not a public body subject to *ATIPPA, 2015*, this is not determinative of whether Memorial must provide responsive records in response to the Complainant's access request. Section 8 of the *ATIPPA, 2015* establishes the right of access:

8.(1) A person who makes a request under section 11 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.

[16] Therefore, even if the Daycare is not a public body, any records about the Daycare which are in Memorial's "custody or control" are subject to *ATIPPA, 2015*. Memorial states it is not in physical possession of the requested records. However, that does not end the analysis.

[17] The Supreme Court of Canada considered the meaning of custody or control in the context of the federal *Access to Information Act*, RSC 1985 in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011 SCC 25](#), [2011] 2 SCR 306. At paragraph 50, the Court stated a two-part test for whether a document is under the control of an institution:

... in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

[18] The court elaborated further on the test at paragraph 55:

Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that the [Access to Information Act](#) is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.

[19] As to the first question, the request for “all information regarding discounts, reduced fees, credits, refunds, and registration for every other week (week on/week off) for after-school childcare at MUN's Childcare Centre's Activity Centre” is specific to the day-to-day operations of the Daycare and appear to not relate to a departmental matter. Despite this, it is still necessary to address the second part of the test and the relationship between the Daycare and Memorial.

[20] With respect to the second part of the test, all relevant factors must be considered, as stated by the Supreme Court of Canada in *Minister of National Defence*. A non-exhaustive list of factors has been developed and used in other jurisdictions in assessing custody and control, which was considered by this office in [A-2021-008](#) and [A-2014-012](#). [Order MO-2750](#) from the Information and Privacy Commissioner of Ontario sets out these factors as follows:

- *Was the record created by an officer or employee of the institution?*
- *What use did the creator intend to make of the record?*
- *Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?*
- *Is the activity in question a “core”, “central” or “basic” function of the institution?*
- *Does the content of the record relate to the institution’s mandate and functions?*
- *Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?*

- *If the institution does have possession of the record, is it more than “bare possession”?*
- *If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?*
- *Does the institution have a right to possession of the record?*
- *Does the institution have the authority to regulate the record’s content, use and disposal?*
- *Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?*
- *To what extent has the institution relied upon the record?*
- *How closely is the record integrated with other records held by the institution?*
- *What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?*

[21] Not all of the above factors relate to the requested records, but it is clear they do not relate to Memorial’s mandate, for example. They also do not relate to a “core” or “basic” function of Memorial and are not closely integrated with Memorial records, as it is a separate entity providing childcare. Rather, the information requested, which is for receipts and documentation relating to discounts and payments, among other related items, relate to the Daycare’s day-to-day operations. It is also apparent that Memorial would not have the right to regulate the content or use of the requested records, and that Memorial would not be relying upon such records.

[22] The existence of a shared email server in itself does not establish custody or control. Memorial provides email service to students, staff, retirees, and alumni. While Daycare employees do use the email server provided by Memorial, not all emails sent and received through @mun.ca are in the control of Memorial (see, for example, [A-2017-021](#)).

[23] The Complainant points out that employees of the Daycare are members of CUPE and argues this is evidence they are employees of Memorial. However, Daycare employees and Memorial employees are members of two separate, distinct bargaining units (CUPE 4554-01 and CUPE 1615, respectively). Moreover, CUPE represents other bargaining units, such as non-profit organizations, for example, which would fall outside *ATIPPA, 2015* and the mere fact of an organization’s employees being represented by a union that generally – but not

exclusively – represents public employees does not determine that the employer is itself a public body for ATIPPA, 2015 purposes.

[24] The Complainant submitted that as the Daycare also serves as a research facility for various departments within Memorial (such as Psychology, Early Childhood Education, Education, Nursing, and Human Kinetics), this means the Daycare is a ‘core’ part of Memorial’s functions. However, as it relates to custody or control, the question is whether the requested records relate to a ‘core’ function of the institution, which in our view they do not.

[25] To further assess the issue of custody or control, it is important to explore the structure of the Daycare’s operations and links it has to Memorial. In a history document on Memorial’s website, Dr. Carole Peterson writes about the Daycare’s organization within Memorial, and how it became a separate entity in 2006:

*As a consequence of the negotiations, the Board of the Childcare Centre was reorganized and the Centre became a Separately Incorporated Entity (SIE) within the University community in 2006. That meant that, financially and in other ways, we were on our own. We were **independent of both the Students’ Union and MUN**, and it was our responsibility to balance our books and run ourselves – of course still under the direction of the Board of Directors. Both the Students’ Union and members of the MUN administration sit on the Board, along with parent representatives and faculty members who have expertise in relevant areas (child development and education). But ultimately, **it is the Board who is responsible for the financial and policy well-being of the Centre**. We are now captains of our own fate.*

[26] With regards to the composition of the Daycare’s Board of Directors, Memorial’s website states the following:

Campus Childcare is operated by an appointed Board of Directors consisting of:

*University faculty members
human resources personnel
financial services personnel
legal counsel
student representatives
parent representatives
the centre’s executive director (ex-officio)*

[27] Elections for parent representatives are usually conducted in an open parent meeting in the Fall semester. As per the Daycare's Articles of Incorporation, the board shall be made up of nine individuals, four of which shall be elected by the Memorial University Students' Union and parents and five being Memorial appointees. The Daycare's board, while appointed by the Memorial's Board of Regents, operates separately and independent from Memorial. Employees of the Daycare are not employees of Memorial, nor does Memorial provide any pension or benefits.

[28] Memorial employees who sit on the board are not involved in the schedules or operational issues which related to the requested documentation. Memorial employees would have access to records such as board meeting minutes or agendas; however, the requested records do not relate to such documentation but relate to specific operational records of the Daycare itself. Furthermore, even if Memorial employees who sit on the board did have such operational records in their physical possession, an analysis would still be required to determine if those records were in Memorial's control or custody or not for the purposes of *ATIPPA, 2015* (see, for example, Report A-2021-008).

[29] The Daycare's financial statements, which are not at issue in the present case, are consolidated with the Memorial's financial statements each year, which does demonstrate a level of integration between the Daycare and Memorial. However, the documents requested are far more specific and thus fall outside Memorial's control.

[30] On balance, while there is a degree of connection between the Daycare and Memorial, for the purposes of *ATIPPA, 2015*, the Daycare is not a public body, nor are the requested documents within Memorial's custody or control.

RECOMMENDATIONS

[31] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that Memorial maintain its position.

[32] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of Memorial 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.

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 4th day of May 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador