



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-029

June 29, 2023

Memorial University

Summary:

The Complainant made an access to information request to Memorial for records related to swimming pool chemicals purchased for the Aquarena, which is part of the Memorial University Recreation Complex Inc. (MURC). Memorial did not provide any records to the Complainant, stating MURC was not a public body as defined by *ATIPPA, 2015* and that, in any case, the records were not in Memorial's custody or control. The Complainant responded by filing a complaint with this Office. After review of submissions, the Commissioner concluded *ATIPPA, 2015* does not apply to the MURC and that the requested records were not in 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, 8.

Authorities Relied On:

NL OIPC Report [A-2023-020](#), Ontario Access to Information Order [MO-2750](#), *Canada (Information Commissioner) v. Canada (Minister of National Defence)* [2011 SCC 25](#), [2011] 2 SCR 306

Other Resources:

[Submission of the Information and Privacy Commissioner](#) to the Access to Information and Protection of Privacy Review Committee, June 16, 2014, [Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act](#)

BACKGROUND

[1] On March 20, 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 of Newfoundland (“Memorial”) for the following:

... a copy of the current March 2023 supply contract pricing for all the swimming pool chemicals purchased for the Aquarena, including the full cost of the Sodium Hypochlorite 205L drums, including the cost of drum deposit and shipping.

[2] The Aquarena is one facility that is part of a larger entity known as The Works and which is incorporated as “Memorial University Recreation Complex Inc.” (MURC).

[3] Memorial did not provide the requested records, stating the records are not in its custody or control and that MURC is not a public body subject to *ATIPPA, 2015*.

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

COMPLAINANT’S POSITION

[5] The Complainant states they are entitled to the requested documents as Memorial is subject to *ATIPPA, 2015* and MURC is owned by Memorial. The Complainant did not provide submissions on the issues of custody or control or the definition of public body.

PUBLIC BODY’S POSITION

[6] Memorial states MURC is a separately incorporated entity (“SIE”) and thus is not captured by *ATIPPA, 2015*’s definition of public body.

[7] Memorial further states the requested records are not within its custody or control as Memorial was not involved in the issuance of the contract relating to the swimming pool

chemicals purchased for MURC. Moreover, Memorial states it does not have physical possession of the requested records and would not have access to them.

ISSUES

- [8] The issues to be addressed in this Report are:
- a) whether MURC meets the definition of public body under section 2 of *ATIPPA, 2015*; and
 - b) whether the requested records are in the custody or control of Memorial as per section 8 of *ATIPPA, 2015*.

DECISION

- [9] This Office recently considered the issues of custody and control and the definition of public body in Report [A-2023-020](#). In that case, the Complainant made an access to information request to Memorial 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. After review of the submissions, this Office agreed with Memorial's position.

- [10] Both the Childcare Centre in [A-2023-020](#) and MURC are corporations established by Memorial to carry out specific functions. The records in question in both cases relate to day-to-day operations of the corporation and thus, at first glance, the analysis in [A-2023-020](#) appears to be applicable to the present case. However, the entities are SIEs with different functions and more analysis is needed to specifically assess MURC's status with respect to *ATIPPA, 2015* and the custody or control of the requested records.

Application of *ATIPPA, 2015* to MURC

- [11] Section 5 of *ATIPPA, 2015* states the *Act* applies to all records in the custody of or under the control of a public body. As noted above, this is the second time in recent months this Office has considered the application of *ATIPPA, 2015* to a corporation owned by Memorial.

While Memorial itself is a public body subject to *ATIPPA, 2015*, only certain government-owned corporations are recognized as public bodies in their own right under the legislation.

[12] On June 16, 2014, this Office provided [submissions](#) in conjunction with a statutory review of *ATIPPA*. One of our key recommendations in the submission was to “broaden the definition of “public body” to include a corporation or entity owned by or created by or for a public body or for a group of public bodies.” In response, the [Report of the 2014 Statutory Review of *ATIPPA*](#) recommended that “additional language be added to the definition of public body under section 2(p) of *ATIPPA* to include municipally owned and directed corporations.” This recommendation was accepted by government. Now, section 2(x)(vi) of *ATIPPA, 2015* specifically includes corporations created by municipalities to manage a government asset or discharge a government responsibility. It must be noted, however, that there is still no express language in *ATIPPA, 2015* with respect to corporations owned by educational bodies such as Memorial.

[13] 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

[14] After reviewing the definition of a public body under *ATIPPA, 2015*, our conclusion is that MURC is not a public body. MURC operates and is managed independently of Memorial, is regulated by its own articles of incorporation, and is financially self-governing. Moreover, it maintains its own separate registered head office and is responsible for its own record keeping. Therefore, I conclude it is separate from Memorial and does not fall within the definition of “educational body” in section 2(h)(i) of *ATIPPA, 2015* or any other definition of public body provided by section 2 of the Act. Had the legislature intended *ATIPPA, 2015* to apply to corporations set up by Memorial, such as MURC, it would have been specifically enumerated in the Act.

Custody or Control of MURC Records

[15] While MURC is not a public body subject to *ATIPPA, 2015*, this is not determinative of whether Memorial must provide records in response to the Complainant’s access request. Section 8 of *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] Memorial states that it is not in possession of the requested documents. However, the analysis does not end there. As discussed in A-2023-020, the Supreme Court in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306 established a two-part test for whether a document is under the control of an institution at paragraph 50:

... 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?

[17] 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.

[18] With regard to the first part of the test, records relating to swimming pool chemicals for the Aquarena appear specific to the day-to-day operations of MURC and do not appear to relate to a departmental matter (in this case, “departmental” would mean a matter relating to Memorial University). Memorial was not involved with the contract for swimming pool chemicals, nor does it purchase any materials or supplies for the Aquarena pool. On the other hand, if the MURC fitness and pool facilities are considered departmental, then records relating to their upkeep relate to a departmental matter. More analysis is therefore necessary to consider the functions and uses of MURC within Memorial.

[19] 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*. [Order MO-2750](#) from the Information and Privacy Commissioner of Ontario sets out factors to be considered when assessing custody or control:

- *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?*

[20] Not all of the above factors relate to the requested records. However, it is clear that Memorial would not have the right to regulate the records’ content and use, for example. The requested records are also not closely integrated with Memorial, as Memorial is not involved in the tendering process or purchase of swimming pool chemicals for the Aquarena. It also cannot be said that Memorial is relying upon these records in any way, nor were they created by an employee of Memorial.

[21] Memorial states swimming pool chemicals would not relate to a “core” or “central function” of the University. Instead, it states the records relate to the purchase of a product necessary for the function of MURC’s facilities. However, there is a significant level of integration between Memorial and MURC. For example, MURC provides numerous fitness, aquatic and recreational programs to the university community. The Sea-Hawks varsity basketball and volleyball teams play their home games at the Field House, a facility within MURC. The Field House is also attached to Memorial’s School of Human Kinetics and Recreation and most students have access to the MURC facilities. Arguably then, maintaining

a fitness facility is a core function of Memorial, as it would be at any University, and thus documents in relation to products purchased for same relate to its core functions.

[22] Despite this, however, the fact that a SIE provides services to the University is not necessarily determinative of custody or control. The Childcare Centre in [A-2023-020](#) also provided services to the University, and the requested documents in that case were still found to be outside Memorial's custody or control. In the present case, while MURC clearly provides facilities to the University, it also provides fitness, aquatic and recreational facilities to the general public through both drop-in classes and term-based memberships.

[23] MURC is a separately incorporated entity, established by Memorial to manage and maintain a fitness facility on Memorial's St. John's campus. As stated on its website:

Separately incorporated entities associated with Memorial University operate under the university's policies or policies approved by their individual boards. Each entity is wholly owned by the university and operates autonomously under the governance of a university-appointed board of directors that reflects the interests of its stakeholders.

[24] MURC is governed by its own Articles of Incorporation and a volunteer Board of Directors, which acts autonomously from Memorial, which was similarly the case in Report [A-2023-020](#). While Memorial owns MURC, it is not involved in operational issues such as the supply of swimming pool chemicals. Memorial states they have no correspondence or records with regards to this contract, and all documents are in the control or custody of MURC.

[25] The Complainant states previous tenders issued for Aquarena pool supplies were handled directly by Memorial as were cheques in relation to those contracts. However this is not determinative of custody or control of the requested records in this particular case. In the present case MURC entered into an agreement for the supply of swimming pool chemicals without an open tender process involving Memorial.

[26] On this point, MURC has the ability to enter into contracts as an agent of the University as may be necessary. Section 2.24 of the agreement between the two entities states MURC has the authority "...generally to do and perform and where desirable contract in its own name for

all things desirable or necessary for the proper and efficient management of the Facilities”. It is true that Memorial issues cheques on behalf of all SIEs such as MURC. However such cheques are issued from the revenue of and on behalf of all Memorial’s SIEs.

[27] There is some degree of connection between MURC and Memorial. However, on balance, and for the purposes of *ATIPPA, 2015*, I find the requested documents are not in the custody or control of Memorial.

RECOMMENDATIONS

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

[29] 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.

[30] Dated at St. John’s, in the Province of Newfoundland and Labrador, this 29th day of June 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador