NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT A-2008-06

Memorial University of Newfoundland

Summary: The Applicant on 1 November 2007 filed a request with Memorial University of Newfoundland (the "University") for access to records relating to course assignments and to the denial of travel funding. On 8 November 2007 the Applicant filed a second request covering a different time period. The University invoked section 16 of the Access to Information and Protection of Privacy Act (the *"ATIPPA"* or the *"Act")* to extend the time for responding to these requests, in response to which the Applicant filed Complaints with the Office of the Information and Privacy Commissioner. The University sent to the Applicant a record consisting of 169 pages, with some information withheld on the basis of section 20(1) of the *ATIPPA* (advice or recommendations) or section 30(1) (personal information). On 14 January 2008 the Applicant filed a Request for Review with this Office requesting disclosure of the withheld information.

During informal resolution efforts, the University released a small amount of additional information, and the Applicant was satisfied that most of the severed information was properly withheld. In addition, the Applicant withdrew his Complaints regarding the extension of time. However, there remained in dispute four pages from which the University had severed information on the basis of section 20(1), and it was not possible to resolve the matter completely. Therefore formal submissions were requested from the parties regarding the issue still in dispute.

The Commissioner determined that the University had correctly applied section 30(1) and section 20(1) of the *ATIPPA* and the remaining severed material had been properly withheld.

Statutes Cited: *Access to Information and Protection of Privacy Act,* SNL 2002, c.A-1.1, as amended, ss.16, 20(1), 30(1).

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-005, 2006-013; Alberta OIPC Order 97-007; Ontario OIPC Order PO-2028.

Other Resources: *Access to Information and Protection of Privacy Act Policy and Procedures Manual*, ATIPP Coordinating Office, Newfoundland and Labrador Department of Justice, updated September 2004.

I BACKGROUND

[1] The Applicant on 1 November 2007 filed a request with Memorial University of Newfoundland (the "University") for access to records relating to course assignments and to denial of travel funding, in the following form:

> 1. *All communications (memos, faxes, e-mails, notes, etc.) between* [first named official] *and others regarding my course assignments including tentative (under Article 3) during the academic years 2004-05, 2005-06, 2006-07, 2007-08.*
>
> 2. *All communications (memos, faxes, e-mails, notes, etc,) between* [second named official] *and others regarding my course assignments including tentative assignments (under Article 3) during the academic years 2004-05, 2005-06, 2006-07, 2007-08.*
>
> 3. *All communications (notes, memos, faxes, e-mails etc. between* [first named official] *and others regarding Travel Grant Denial in the year 2006 (Arbitration I-06-04(travel fund denial)).*

[2] On 8 November 2007 the Applicant filed a second request, similar in scope to the above but covering a different time period – the year 2003-2004 – and in addition, asking for:

> 1. *All course preferences given by faculty members in* [department] *in the year 2007-08.*
>
> 2. *Tentative teaching assignments of all faculty members in the* [faculty] *for the year 2007-08.*

[3] Between 14 November and 19 November 2007 the University corresponded with the Applicant by e-mail, clarifying the requests and asking the Applicant if he would be willing to combine the two requests into one, on the ground that it would simplify the search. The Applicant did not agree to do so.

[4] On 29 November 2007 the University wrote to the Applicant, advising him that the 30-day time limit for responding to his request under the *Access to Information and Protection of*

*Privacy Act (*the *"ATIPPA"* or the *"Act")* had been extended an additional 30 days, under the provisions of section 16, which states:

> *16. (1) The head of a public body may extend the time for responding to a request for up to an additional 30 days where*
>
> *(a) the applicant does not give sufficient details to enable the public body to identify the requested record;*
>
> *(b) a large number of records is requested or must be searched, and responding within the time period in section 11 would interfere unreasonably with the operations of the public body; or*
>
> *(c) notice is given to a third party under section 28 .*
>
> *(2) Where the time limit for responding is extended under subsection (1), the head of the public body shall notify the applicant in writing*
>
> *(a) of the reason for the extension;*
>
> *(b) when a response can be expected; and*
>
> *(c) that the applicant may make a complaint under section 44 to the commissioner about the extension.*

[5] The University stated that there were two reasons for this decision. First, it appeared that a large number of records would have to be searched, and this would interfere unreasonably with the operation of the organization. Second, on preliminary review, it appeared that it might be necessary to give notice to a third party. Both of those rationales are provided for under section 16.

[6] In December 2007, the Applicant filed a Complaint with this Office regarding each of the time limit extensions. He stated that he believed that the records in question were with just a few individuals, and that therefore 30 days should be sufficient. He took the view that third parties should not, apart from exceptional cases, prevent access to the documents, and requested that the documents be provided without any further delay.

[7] On 6 December 2007 an investigator from this Office wrote the University advising of the Complaint, and asking for the details of the number of records requested, the number that would have to be searched, the details of the time involved, and how responding within the first 30-day period would interfere unreasonably with the operations of the University. The University replied on 21 December 2007, indicating that it appeared that approximately 2,000 records needed to be searched, that 20 to 25 hours had already been spent in the searching and preparation of records, and that the search was not yet complete. Further, one of the named officials was out of the country and out of e-mail contact, and part of the search could not be conducted until his return. Also, the search time overlapped with the examination period, which is an extremely busy time for the University. Finally, there was a concern that because of the nature of some of the records, a third party, the MUN Faculty Association might have to be formally notified of the request. The University advised that it was sending to the Applicant on that same day (21 December 2007) all of the records retrieved to date, with the balance to be delivered by the extended date.

[8] The entire record was sent to the Applicant by 3 January 2008. It consisted of 169 pages of e-mails, letters and other documents. Of those, there were redactions on 11 pages, ranging from a few words, to entire paragraphs, either on the basis that the information was personal information and thus was exempted from disclosure under section 30(1), or on the basis that it constituted advice or recommendations developed by or for a public body, and was exempted from disclosure under section 20(1). On 14 January 2008 the Applicant filed with this Office a Request for Review, asking that the documents be supplied without redaction.

[9] During the following weeks, our Office embarked on an informal resolution process, seeking clarification of some details to do with the records themselves, and seeking further elaboration of the reasons for withholding the redacted information. The discussions with the parties that ensued proved relatively fruitful. The University released a small amount of additional information which it agreed did not fall into the category of “personal information” and to which, therefore, the section 30(1) prohibition did not apply. The Applicant was satisfied that most of the remaining withheld information properly belonged in the category of “personal information” to which none of the exceptions in section 30(2) applied, and that the redactions on one further

page were satisfactorily explained as advice or recommendations and therefore could be withheld pursuant to section 20(1). The Applicant further was satisfied that the explanation provided by the University for the time limit extension was not unreasonable, and therefore withdrew his two complaints.

[10] There remained, however, four pages of fairly heavily redacted material on which it was not possible to reach agreement. Accordingly, on 3 April 2008 the parties were notified that the file had been referred to the formal investigation process provided for in section 46(2) of the *ATIPPA*. The parties were asked to provide any written representations they wished to make.

[11] A written submission was received from the Applicant on 4 April 2008. A written submission was received from the University on 28 April 2008.

III APPLICANT'S SUBMISSION

[12] Most of the relatively brief submission received from the Applicant relates, not to issues that arise out of his access to information requests, but instead to matters which are part of the substance of an ongoing dispute between himself and the University. This dispute forms, at least in part, the background and context in which the access requests were made.

[13] In the present case, the Applicant argues that the severed documents in question are e-mails to or from certain individuals, and that those individuals have played a particular role in certain past events. The Applicant argues that because of that involvement, these individuals ought to have declared a conflict of interest, and ought not to be permitted, in the Applicant's words, to "claim a privilege." Therefore, he concludes, the documents ought to be released to him without redaction.

II UNIVERSITY'S SUBMISSION

[14] The University's submission may be summarized as follows:

(a) The records in question (pages 64 to 67 of the responsive record) consist of e-mails exchanged between several University officials.

(b) The e-mails concern a request for travel funding, and with the exception of one line on page 67, which was not severed, the e-mail discussion consists of advice sought and given in respect of the request.

(c) The University has appropriately severed the material in question pursuant to section 20(1) of the *ATIPPA,* ("advice or recommendations developed by or for a public body").

The University cited section 4.2.3 of the *ATIPPA Policy and Procedures Manual*, which deals with section 20 of the *ATIPPA,* in support of its decision. This will be discussed further below.

IV DISCUSSION

[15] Before I deal with the main issue to be decided in this review, there is a preliminary issue arising out of the Applicant's submission which, as summarized above, relates mostly to underlying issues between himself and the University. It needs to be stated that, in reviewing the denial of an access request, it is not part of the role and function of this Office to adjudicate, become involved in, comment upon, take into consideration or, under normal circumstances, even make reference to such issues. Under the *ATIPPA,* it does not matter who the Applicant in an access request may be, or why he or she wishes to have access to the information. For the purposes of an access request under the *ATIPPA,* and for the review of an access decision conducted by this Office, the only considerations are, first, whether the *Act* applies to the records

in question, and second, whether the information sought is subject to one of the exceptions to disclosure in the *Act.*

[16] The argument put forward by the Applicant appears to me to be a misunderstanding of the *ATIPPA* process. In the usual case, it is not the writers of such communications, or any of the individuals who may have had a hand in the creation of a record, who have the right to decide what information may or may not be disclosed. In a large organization, it may easily be the case that the individuals involved in the creating or compiling of a record may not even be aware of a subsequent access request. Even in the case of e-mails, memos or letters written by particular individuals, the decision whether or not to grant access is not a "privilege" that may be claimed by those individuals. Rather, it is the head of a public body, acting usually through its Access and Privacy Coordinator, who reviews the record and decides, based on the nature of the information and on its interpretation of the language of the *ATIPPA*, what is to be disclosed and what, if anything, is to be withheld.

Section 20 (Advice or Recommendations)

[17] The single issue to be dealt with in this Report, then, is whether or not the withholding of the severed portions of the four disputed pages is in accordance with section 20 of the *ATIPPA* as claimed by the University. Section 20 reads:

> *20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
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> *(a) advice or recommendations developed by or for a public body or a minister; or*
>
> *(b) draft legislation or regulations.*
>
> *(2) The head of a public body shall not refuse to disclose under subsection (1)*
>
> *(a) factual material;*
>
> *(b) a public opinion poll;*
>
> *(c) a statistical survey;*

(d) an appraisal;

(e) an environmental impact statement or similar information

;

(f) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies;

(g) a consumer test report or a report of a test carried out on a product to test equipment of the public body;

(h) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body;

(i) a report on the results of field research undertaken before a policy proposal is formulated;

(j) a report of an external task force, committee, council or similar body that has been established to consider a matter and make a report or recommendations to a public body;

(k) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body;

(l) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy; or

(m) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

(3) Subsection (1) does not apply to information in a record that has been in existence for 15 years or more.

[18] It can be seen that section 20 is a discretionary provision that allows a public body to refuse to disclose a record when it falls into the category of "advice or recommendations developed by or for a public body…." The meaning and intent of this section has been discussed on a number of occasions, both in reports from this Office and in reports of Information and Privacy Commissioners from other jurisdictions where similar provisions exist. In Report 2006-013, my predecessor adopted the explanation of the purpose of section 20 found in the *ATIPPA Policy and Procedures Manual*, produced by the Access to Information and Protection of Privacy Office of the Department of Justice. The *Manual* states, at section 4.2.3, that:

> *Section 20 is intended to allow full and frank discussion of policy issues within the public service, preventing the harm which would occur if the deliberative process were subject to excessive scrutiny, while allowing information to be released which would not cause real harm.*

As can be seen, however, from the restrictions placed on the interpretation of "advice or recommendations" in subsection 20(2), paragraphs (a)-(m) of the *Act* itself (above), advice is not intended to encompass purely factual or even analytical information. Rather, advice must consist of a suggested course of action, or an expression of opinion about a proposed course of action, that is intended to be accepted or rejected by the recipient in the course of reaching a decision. Ontario's Information and Privacy Commissioner, in interpreting a similar legislative provision, concluded:

> *A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word 'advice' in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.* (Ontario O.I.P.C. Order PO-2028. See also Alberta O.I.P.C Order 97-007, both referred to by my predecessor in Report 2005-005.)

[19] In the present case, the four disputed pages consist of a series of brief e-mail messages back and forth between several University officials. It was the responsibility of one of those officials to write a letter to another member of the University in response to a request. The responsible official wrote a draft letter, which he then forwarded to several other officials, asking for comments. One of the recipients wrote back, suggesting modifications to the letter and giving reasons for doing so. The writer replied, thanking the recipient for the suggestion and agreeing with it.

[20] On inspection, this series of communications clearly falls within the category of "advice or recommendations" in section 20 of the *ATIPPA.* The information conveyed between the writers and recipients was not simply factual material. Rather, the draft letter was offered as representing

a suggested course of action, and the response constitutes a recommendation about that suggested course of action.

[21] It should be noted that not all draft correspondence will fall into the exception to disclosure in section 20. There must be some evidence that the disclosure of the draft itself would result in the disclosure of advice or recommendations contrary to section 20. In the present case, that was clear from the context. Therefore the University has appropriately severed that information on the four disputed pages, pursuant to section 20.

V CONCLUSION

[22] Having carefully reviewed the disputed pages of the responsive record, and the submissions of the parties, I conclude that the University was entitled to withhold the severed material on pages 64-67 of the record. Given the conclusion I have reached, there is no recommendation for the release of further or other information as a result of this Report. Accordingly, I hereby notify the Applicant, in accordance with section 49(2) of the *ATIPPA*, that he has a right to appeal the decision of the University to the Supreme Court of Newfoundland and Labrador, Trial Division, in accordance with section 60. The Applicant must file any appeal within 30 days after receiving a decision of the University under paragraph 23 of this Report, below.

[23] Under the authority of section 50 of the *ATIPPA* I direct the head of the University to write to this Office and to the Applicant within 15 days of receiving this Report to indicate the University's final decision with respect to this matter.

[24] Dated at St. John's, in the Province of Newfoundland and Labrador, this 22nd day of May, 2008.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador