



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2010-016

November 23, 2010

Memorial University of Newfoundland

Summary:

The Applicant requested a copy of an internal investigation report from Memorial University of Newfoundland where she had been the originating complainant. This Office received a request to review the severing of the report by the university under section 30 (disclosure of personal information) of the *Access to Information and Protection of Privacy Act*. The Commissioner determined that only just over half of the instances of severing were done properly and that the others, while meeting the definition of “personal information”, were not actually being disclosed to the Applicant as there was objective, concrete and clear evidence that these facts were known to the Applicant already. For example, some of the severed information was made up of direct quotes from the Applicant. The absence of disclosure meant that these pieces of information did not need to be withheld from the Applicant under section 30. The Commissioner recommended the release of these items to the Applicant.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, ss. 2(o), 30(1) and 30(2)

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2005-005, 2007-001, 2007-003, 2009-002.

I BACKGROUND

- [1] The Applicant made a complaint to Memorial University of Newfoundland (“Memorial”) and had requested a copy of the investigation report produced as a result of that complaint. On October 14, 2009, Memorial provided a copy of the report but indicated that:

In accordance with the ATIPPA, the university’s information access and privacy protection coordinator redacted from the investigation report the personal information of the person who is the subject of the investigation, as well as the personal information of witnesses and other people contained in the report.

The letter went on to inform the Applicant that she could contact the Office of the Information and Privacy Commissioner if she wished to have these redactions reviewed.

- [2] In a Request for Review dated October 26, 2009, the Applicant asked that this Office review the response of Memorial.
- [3] Attempts to resolve this Request for Review by informal negotiation led to some additional information being released to the Applicant by Memorial on May 5, 2010.
- [4] However, further attempts at informal resolution were not successful, and by letters dated June 4, 2010 both the Applicant and Memorial were advised that the Request for Review had been referred for formal investigation pursuant to subsection 46(2) of the *Access to information and Protection of Privacy Act* (“ATIPPA”). As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47.

II MEMORIAL’S SUBMISSION

- [5] Memorial provided this Office with a formal written submission dated July 27, 2010, received July 29, 2010. In its submission, Memorial states that the redactions were done in accordance with subsection 30(1) of the *ATIPPA*, which states “the head of a public body shall refuse to disclose personal information to an applicant.”

- [6] Memorial also noted that subsection 30(2) sets out limitations on subsection 30(1). Memorial then reviewed several paragraphs of subsection 30(2) which could possibly have allowed for the release of information and argued that these paragraphs did not apply in this case.
- [7] Memorial addressed paragraph 30(2)(a), which states subsection 30(1) does not apply if “the applicant is the individual to whom the information relates.” While Memorial agreed that the report does contain the personal information of the Applicant, it stated the redacted portions of the report that may have contained the Applicant’s information could not be released without also committing an “unauthorized disclosure of the personal information of the individual who is the subject of the investigation and a violation of that individual’s privacy.” Memorial stated that “it is sometimes impossible to give one party access to his/her own personal information without violating the privacy of the other party.”
- [8] Memorial also considered paragraph 30(2)(b), which states that if the third party consents to disclosure of their personal information subsection 30(1) does not apply and release is allowed. However, it indicated that when consent was sought from the subject of the investigation, it was refused.
- [9] On the issue of paragraph 30(2)(f), which states that it is permissible to release personal information where it is related to the “positions, functions or remuneration as an officer, employee or member of a public body,” Memorial stated that it had released all information in this category “with the exception of the name of the individual who was the subject of the investigation and in cases where disclosing identifying information about an employee would lead to identification of the person who was the subject of the investigation.” Memorial also argued that the investigation and the resulting report formed part of the employee’s employment history, relying on past decisions of this Office and of the Ontario Commissioner’s Office to distinguish this from “positions, functions or remuneration as an officer, employee or member of a public body.”
- [10] Paragraph 30(2)(h) allows for disclosure where the “disclosure reveals the opinions or views of a third party given in the course of performing services for a public body, except where they are given in respect of another individual.” Memorial noted that it had disclosed some of the investigator’s

opinions but had “others redacted where [it] felt disclosure would violate the privacy of the subject of the investigation or others, including witnesses who provided information to the investigator.”

- [11] In its formal submission Memorial also described for this Office the type and purpose of the investigation that formed the subject matter of the Applicant’s request:

Such an investigation is about the researcher and the person’s research and the person’s reputation. It is designed to gather evidence to determine if an allegation of gross misconduct in academic research is substantiated; and if the accusation is substantiated, to impose discipline and notify an agency or publisher if the research is funded by an outside agency or published or submitted for publication. If the accusation is not substantiated, the process protects the reputation and the work of the individual concerned. One of the ways in which the individual’s reputation and work are protected is removing all documentation relating to the matter from the person’s personal file.

- [12] Memorial then explained the breadth of the redactions, which were intended to protect the identity of the individual who is the subject of the investigation, by stating that because they “had already disclosed to the applicant certain information related to the type of research [that] combining information about the type of research with ‘locational’ information would allow the reader to infer the name of the individual concerned.”

III APPLICANT’S SUBMISSION

- [13] The Applicant’s formal submission dealt primarily with the Applicant’s concerns regarding the process used by Memorial in completing the investigation and the perceived inaccuracies in the report. Unfortunately, a lot of the content of the Applicant’s submissions dealt with matters that are beyond the scope of my mandate. For example, the Applicant expressed concern that the subject of the investigation was provided with a draft of the report for review before the final version of the report was created. The Applicant stated that she too should have been given a draft to review. However, the internal policies of Memorial regarding its process for disciplinary investigations and its compliance with those policies are outside of the scope of this investigation and report.

[14] The Applicant's formal submission did contain two *ATIPPA*-related concerns: that several of the sections of the report were so heavily severed that the Applicant could not make comment on them and that the Applicant's own words had been severed.

IV DISCUSSION

[15] Personal information is defined in subsection 2(o) of the *ATIPPA* as follows,

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

- (i) the individual's name, address or telephone number,*
- (ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
- (iii) the individual's age, sex, sexual orientation, marital status or family status,*
- (iv) an identifying number, symbol or other particular assigned to the individual,*
- (v) the individual's fingerprints, blood type or inheritable characteristics,*
- (vi) information about the individual's health care status or history, including a physical or mental disability,*
- (vii) information about the individual's educational, financial, criminal or employment status or history,*
- (viii) the opinions of a person about the individual, and*
- (ix) the individual's personal views or opinions;*

[16] Subsection 30(1) of the *ATIPPA* is a prohibition against disclosing personal information:

30(1) The head of a public body shall refuse to disclose personal information to the applicant.

[17] Subsection 30(2) however, provides that there are a number of circumstances where the s.30(1) prohibition does not apply:

(2) Subsection (1) does not apply where

- (a) the applicant is the individual to whom the information relates;*
- (b) the third party to whom the information relates has, in writing, consented to or requested the disclosure;*

- (c) *there are compelling circumstances affecting a person's health or safety and notice of disclosure is mailed to the last known address of the third party to whom the information relates;*
- (d) *an Act or regulation of the province or Canada authorizes the disclosure;*
- (e) *the disclosure is for a research or statistical purpose and is in accordance with section 41;*
- (f) *the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;*
- (g) *the disclosure reveals financial and other details of a contract to supply goods or services to a public body;*
- (h) *the disclosure reveals the opinions or views of a third party given in the course of performing services for a public body, except where they are given in respect of another individual;*
- (i) *public access to the information is provided under the Financial Administration Act;;*
- (j) *the information is about expenses incurred by a third party while travelling at the expense of a public body;*
- (k) *the disclosure reveals details of a licence, permit or a similar discretionary benefit granted to a third party by a public body, not including personal information supplied in support of the application for the benefit; or*
- (l) *the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, not including*
 - (i) *personal information that is supplied in support of the application for the benefit, or*
 - (ii) *personal information that relates to eligibility for income and employment support under the Income and Employment Support Act or to the determination of assistance levels.*

[18] The application of subsections 30(1) and 30(2) has been discussed by this Office many times. For example, in Reports 2005-005 and 2007-003, respectively:

[77] [...] *there is no test of reasonableness when dealing with the release of personal information. In the absence of any discretion, a public body simply has to determine if information meets the definition set out in section 2(o) and, if so, they must not release it [...]*

[131] *In order to accept that information is protected by section 30, I must be satisfied that at least two conditions are met. First, the information must meet the definition of personal information in section 2(o) and, second, the information must not fall into one of the categories in section 30(2).*

[19] The issues to be considered in this case are:

1. does the information severed meet the definition of “personal information”;
2. is there in each case a “disclosure”; and, if the first two conditions are met,
3. does it fall within any of the circumstances set out in subsection 30(2)?

1. Does the information severed meet the definition of “personal information”?

[20] According to subsection 2(o) there are three elements of the definition of “personal information”

- a) is the information “recorded”;
- b) is it “about” an individual; and,
- c) is that individual an “identifiable individual”.

[21] Clearly all the information contained in the report is “recorded”, since it appears in a report.

[22] Whether it is it “about” the subject of the complaint was considered in Report 2007-001:

[47] *... Although there is little information specifically “about” the Applicant as described in the examples in the definition of personal information found in section 2(o), it is clear that this is a complaint “about” the Applicant, and as such, the entire document is “about” the Applicant.*

[23] The issue of whether it is about “an identifiable individual” is the key question in determining if the information in question meets the definition of “personal information.”

[24] Memorial has gone to great lengths to protect the identity of the individual who is the subject of the investigation in an effort to not reveal any of their “personal information” as defined under the *ATTIPPA*. Usually, when all personal identifiers are removed, this would be enough to allow for the release of information about that person, as the information would no longer be “about an identifiable individual.” However, in the context of this case, I cannot ignore the reality that the complainant is aware of the identity of the subject of the investigation. Therefore, any recorded information about that person is information about an “identifiable individual.”

2. Is there in each case a disclosure?

[25] One of the key concerns of the Applicant in this case was that her own words had been severed. This raises the issue of whether there is actually a “disclosure” when the person seeking the information was the original source or has knowledge of the information.

[26] Subsection 30(1) is clear that “the head of a public body shall refuse to disclose personal information to the applicant.” The language chosen in the subsection is significant in the present case – in particular the words “to the applicant”. As discussed in Memorial’s written submission, discussed above, the Applicant in this case already has a lot of information regarding the subject of the investigation’s identity. Memorial argued that this was a basis for severing more information than usual because “combining information about the type of research with ‘locational’ information would allow the reader to infer the name of the individual concerned.”

[27] In fact, the knowledge of the Applicant is a reason to sever less information than would be severed for an applicant who is a member of the general public. The “disclosure” that is prohibited is disclosure vis-à-vis this Applicant.

[28] This was discussed in Report 2009-002 from this Office

[79] *Additionally, upon close examination of the wording of section 30(1), it is my opinion that providing personal information to an Applicant where there is clear and objective evidence (for example, because the information was originally provided by the Applicant) that the information and the person to whom it pertains is already known to the Applicant is not a “disclosure”.*

[29] The above-quoted Report had built upon findings in an earlier report from this Office, Report 2007-003:

[136] *Another point that I believe to be relevant to the case at hand deals with the specific language of section 30(1). This provision states that a public body shall not “disclose” personal information to an Applicant. Black’s Law Dictionary, Eighth Edition, defines disclosure as:*

1. The act or process of making known something that was previously unknown; a revelation of facts...2. The mandatory divulging of information to a litigation opponent according to procedural rules...

[137] *While the second part of this definition defines the term in its legal context, the first part provides a more general understanding of how the term should be interpreted. The Concise Oxford English Dictionary, 10th Edition, provides a similar definition: “make (secret or new information) known.” A necessary component of a disclosure of information, therefore, is that the information was not previously known to the intended recipient. By association, I do not believe that providing personal information to an Applicant where that information is already known to the Applicant, or that is readily available to the Applicant, is actually a disclosure as anticipated by section 30(1). By way of example, the responsive record contains the names of several individuals who authored or co-authored certain journal articles which have been published. These articles are readily available and, as a result, releasing those names to the Applicant would not constitute a disclosure in accordance with section 30(1).*

[30] Report 2009-002 noted that:

[84] *This interpretation is also in keeping with the presumption in favour of disclosure and avoids the absurdity that is apparent when one considers the alternative: that the Applicant is not entitled to information that has been provided to a public body by the applicant him or herself.*

[31] I must be clear however, that Report 2009-002 set out a stringent test – it stated:

[80] *I am cognizant of the fact that it is often difficult to know or to make a judgment with respect to exactly what information an applicant is aware of. Therefore, it is my opinion that the personal information of another individual can only be released to an applicant where there is objective, concrete, and clear evidence that the information is already known to an applicant, or is readily available to an applicant. [Emphasis added]*

[32] In the case of the severing made in the investigation report at issue here, there are several instances where Memorial has severed information for which there is “objective, concrete and clear evidence” that it was previously known to the Applicant. In fact in many of these instances, the information came directly from the Applicant, and in several of these instances, the author of the report has used direct quotes from the Applicant.

[33] I have concluded that these severed items should be revealed to the Applicant as they do not form a disclosure and, as such, do not trigger the protection of section 30. I have provided a copy of

the suggested changes to Memorial by highlighting them on a copy of the record provided with this Report.

3. Does the information fall within any of the circumstances set out in subsection 30(2)?

[34] In its formal submission, Memorial reviewed all the paragraphs of section 30(2) that it felt may have been relevant. I agree with its arguments on these paragraphs but would add that the exception in paragraph 30(2)(h) does not apply when the opinion is “given in respect of another individual,” which further supports Memorial’s position, in that regard.

[35] Further, I can find no other paragraph of subsection 30(2) that would apply to Memorial’s severing so as to allow for further release of information.

V CONCLUSION

[36] For just over half of the items severed I have concluded that Memorial has conformed to the *ATIPPA* in its handling of the Applicant’s request. I have however found that almost half of the severing was incorrect.

VI RECOMMENDATIONS

[37] Under the authority of section 49(1) of the *ATIPPA*, I recommend that Memorial release to the Applicant the information highlighted in pink on a copy of the record that is enclosed with this Report.

[38] Under the authority of section 50 of the *ATIPPA*, I direct the head of Memorial to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of Memorial with respect to this Report.

[39] Please note that within 30 days of receiving the decision of Memorial under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*.

[40] Dated at St. John's, in the Province of Newfoundland and Labrador, this 23rd day of November 2010.

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

