OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2012-009

July 25, 2012

Memorial University of Newfoundland

Summary: The Applicant requested records from Memorial University pertaining to the observational study of MS patients announced on September 13, 2012 by the Minister of Health and Community Services. Memorial denied access to all the records under section 5, which exempts "research information" from the *Access to Information and Protection of Privacy Act*. During the course of the Review, Memorial took issue with the fact that records were requested from them by this Office while, in its opinion, the records were outside the jurisdiction of the Commissioner. The Commissioner stated that when a Request for Review is filed with this Office, the responsive records are requested from the public body as a matter of course, as it is often impossible to determine exactly what the records consist of without seeing them. Further, while the Commissioner cannot compel production of records which the public body states are exempt from the *ATIPPA* under section 5, this Office can still request that such records be provided voluntarily and this request could be granted by the public body in the keeping with the spirit and intent of the *ATIPPA*. The Commissioner found that some of the records were indeed research information and exempt from the *ATIPPA* while others were not, and should therefore be disclosed. Other records which were also found not to be research information were excepted from disclosure under section 30.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A–1.1, as amended, s. 5; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s.5.

Authorities Cited: *Newfoundland and Labrador (Attorney General)* v. *Newfoundland and Labrador (Information and Privacy Commissioner)*, 2010 NLTD 19 (CanLII) British Columbia OIPC Orders 00-36, 10-42 and F11-21.

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request on February 16, 2011 to Memorial University of Newfoundland ("Memorial" or the "University"). The request sought disclosure of records as follows:

> *…I request all records pertaining to the observational study of MS patients announced on September 13, 2012 by Health Minister Jerome Kennedy. This would include all correspondence between Memorial University and the Department of Health before the study was announced publically and up until November 17, 2010. This would include, but is not limited to, all records relating to planning and setting up the study; all records pertaining to the decision to go with an observational study over other types of studies. This includes emails and other electronic records, hard copies of documents, consultations, meeting minutes, handwritten notes, budget preparations and any and all correspondence pertaining to the establishment of this study not mentioned in the above list.*
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> *I am mindful of the provisions laid out in Part III of the Access to Information And Privacy Act, and am not asking for records that would disclose information of a personal and private nature…*

[2] Memorial extended the time for responding to the request in accordance with section 16 of the *ATIPPA* and on April 1, 2011 informed the Applicant that all the records were excluded from the *ATIPPA* under section 5. Memorial notified the Applicant of her right to seek a review by the Information and Privacy Commissioner of this refusal of access. In a Request for Review received at this Office on May 6, 2011, the Applicant asked that this Office review Memorial's decision.

[3] As per the usual course of events, upon receipt of the Request for Review, an Analyst from this Office sent Memorial a letter informing them the matter was under review and requesting a copy of the responsive record. The record was received on May 30, 2011 and reviewed by the Analyst. The Analyst then met with officials from Memorial in early July to discuss the record and the applicability of section 5 to the record. In late August, Memorial advised this Office that it was of the opinion that I had no jurisdiction in this matter, as section 5 operated to exclude research information from the *ATIPPA*, and as such, I could not review the record. Attempts to resolve this Request for Review by informal resolution were not successful, and by letters dated December 2, 2011 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 PUBLIC BODY'S SUBMISSION

[4] Memorial provided this Office with a formal written submission dated February 15, 2012, and received February 21, 2012. In its submission, Memorial first takes issue with the exercise of power of this Office. Memorial states as follows:

> *Your office has powers granted by statute and operates under and is governed by these statutes. Your letter of May 9, 2011 requests our IAPP office to forward copies of the records to your office 'as required by section 52(3) of the Act.' Memorial takes the position that this request misrepresented the jurisdiction of the OIPC insofar as the records requested constituted 'research information', and, as such, were specifically excluded from the application of the Act by virtue of section 5(1)(h)….Notwithstanding the inappropriateness of the request by the OIPC, Memorial cooperated in supplying the requested records….*
>
> *As your office must rely on the goodwill of a public body [to supply records to this Office for review even if they might be excluded from review by this Office], public bodies, including the University, must also rely on the goodwill and commitment of the OIPC to the principles of ATIPPA. When records are provided to the OPIC, inadvertently or otherwise, and are records to which ATIPPA does not apply, the OIPC has an obligation to exempt those records from review.*

[5] With respect to the application of section 5 to the records, Memorial states that every record in question was created or received by the research team and is connected solely with the MS observational study. Memorial submits that the manner in which "research information" is construed vis-a vis the *ATIPPA* will "significantly affect the ability of the University to continue its world class research partnerships with partners and funding agencies who would be wary of continuing to partner in research with Memorial should the records be accessible through an access request." Memorial notes that research information is excluded from access to information laws across the country and research is well regulated through review by research ethics boards and by national standards that apply across the country which are meant to protect the public and facilitate the conduct of research and dissemination of knowledge to benefit all society. Memorial is also concerned that this Office does not fully appreciate the unique character of research information in a university setting, and states that the "matter of the application of the *ATIPPA* to research is one

of significant importance to us a University in upholding long-standing principles of academic freedom."

[6] In its conclusion, Memorial states that based on a "plain reading of the relevant statutory provisions and an analysis of applicable jurisprudence, Memorial respectfully submits that the OIPC does not have jurisdiction in respect of this matter."

III APPLICANT'S SUBMISSION

[7] The Applicant did not provide a formal submission.

IV DISCUSSION

[8] I would first like to address Memorial's comments with respect to the manner in which this Request for Review was handled by this Office and my jurisdiction to review this matter. Section 5 of the *ATIPPA* states as follows:

> *5. (1) This Act applies to all records in the custody of or under the control of a public body but does not apply to*
>
> *(b) a record containing teaching materials or research information of an employee of a post-secondary educational institution;*

[9] This Request for Review was processed as per this Office's standard operating procedure: a request comes in, it is reviewed by the Senior Access and Privacy Analyst who determines whether there is a reviewable issue and if the issue falls under the mandate of this Office. If so, it is then assigned to an Access and Privacy Analyst who writes to the public body and requests all records responsive to the request. Through analysis of the records, the legislation and the case law, in addition to consultation with the public body and applicant, the Analyst forms an opinion as to whether the decision of the public body is in accordance with the *ATIPPA* and attempts to resolve the matter informally.

[10] In this case, the request was quite broad and encompassed much more than what one might traditionally think of as "research information". Other than the description provided by an applicant in his or her request for information, this Office has no way of knowing exactly what the responsive record comprises. It is up to the head of the public body to classify the records, and determine if it is subject to the *ATIPPA* and if so, whether any exceptions to access are applicable or whether the head believes that a record is exempt from the *ATIPPA* and therefore not subject to my review as per recent court decisions. The public body must then advise this Office of its views.

[11] If a public body is of the view that the records are exempt from *ATIPPA*, while this Office may not be able to compel production of the record (see discussion below), there is nothing in the *ATIPPA* or jurisprudence that prohibits this Office from requesting that the public body produce these records for our review for the purpose of determining my jurisdiction. Accordingly, there is also nothing that prevents a public body from acquiescing to this request. In this way, an applicant can be satisfied that an independent oversight body has reviewed the record and formed an opinion about the applicability of the *ATIPPA*. Sometimes it will be clear, from the applicant's request itself, that the responsive record is exempt. Other times, this will not be the case, and if the public body does not allow this Office to review the record and make that determination, application will have to be made to the Supreme Court (at significant cost for all parties) for a review of the record and a judge will be asked to make a determination about the applicability of the *ATIPPA*. However, this need not be the case. The records can still be provided and reviewed by this Office, depending on the public body's good will and commitment to the principles of *ATIPPA*. Obviously, if this Office is also of the opinion that the record is exempt, our Review will proceed no further.

[12] Further, we acknowledge and agree with Memorial's assertion that research information is excluded from access to information laws across the country. However, Information and Privacy Commissioners across the country routinely conduct reviews that involve reviewing records to determine whether or not they contain research information.

[13] As noted previously, in cases where records are exempt from the *ATIPPA,* this Office cannot compel production of the records. This was the issue in *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner).* In that case, the public body denied access to records under section 5(1)(k), which states that records relating to a prosecution, if all

proceedings in respect of the prosecution have not been completed, are exempt from *ATIPPA*. When the applicant in that case submitted a Request for Review to this Office, the public body also declined to send the record to us for review, when requested to do so. Ultimately, Justice Fowler found that "the commissioner as empowered by the Access to Information and Privacy Act of this province does not have the authority as a preliminary jurisdictional issue to determine for himself whether or not the section 5(1)(k) information or record sought is outside the jurisdiction of the Commissioner as alleged in the matter before this Court."

[14] While this decision specifically deals with the limits of my jurisdiction with respect to section 5(1)(k) records, it is generally understood that the decision applies to all records enumerated in section 5 so that this Office also cannot compel any other record noted in section 5. However, Justice Fowler recognizes the different nature of the records noted in section 5 and states that:

> *When considering the items under section 5(1) of the Act it can safely be concluded that all enumerated items there do not carry the same level of security or restrictiveness to warrant the same exclusion from the public, for example, I would expect that a draft of a Court of Appeal decision would reasonably be considered a more serious matter than a record of a question on an examination or test.*

[15] Further, it should also be noted that Justice Fowler recognized the problem inherent with the Commissioner being unable to review the record and the built-in safeguards to protect the confidentiality of the information that is disclosed to the Commissioner. Justice Fowler states:

> *I accept that in the instant case there are difficulties in determining how the Commissioner can gain access to certain information deemed to be outside the Act as defined by section 5(1). However, as the Act is presently configured, it would require a legislative amendment to rectify this unfortunate circumstance….. I am satisfied that for the ATIPPA to achieve its full purpose or objects, the Commissioner should be able to determine his own jurisdiction. This would not require complex measures to safeguard those special areas where access is off limits. However, it is not for this court to rewrite any provision of the Act. It must be remembered that the Commissioner under no circumstances can release information or order the head of the public body to release information. He can only recommend such release which can be refused by the head of the public body resulting in the appeal process to the Trial Division. However, from a practical approach, I can see no way that the Commissioner can compel the production of, for example, a judge's notes or record. Since a judge's record is only one of the enumerated items under section 5(1) of the Act, all others would fall into the same category. This is equally true for prosecutorial notes.*

> *I am not convinced therefore that the reasoning of the Ontario Court of Appeal in Canoe applies with the same effect to the Newfoundland and Labrador ATIPPA since the issue in Canoe was less sensitive or unique.*

[16] The above comments indicate to me that it is desirous that I should be able to determine my own jurisdiction (possible only by actually reviewing the records). While I cannot compel production of records based on my interpretation of Justice Fowler's comments, a review by this Office to determine the applicability of section 5 can still occur through cooperation by the public body except in the most serious or sensitive of matters, as referred to by Justice Fowler. This is all the more important where it is not clear from the wording of the request that what is being sought by an applicant is clearly an exempted record. In such situations, review by this Office, an independent oversight body, goes a long way in assuring applicants that the *ATIPPA* is being properly applied and that one's right to access information is adequately protected.

[17] In any event, the records in this case were provided by the public body and reviewed by this Office. In determining whether the records in question are "research information", I looked mainly to orders from the British Columbia Office of the Information and Privacy Commissioner, as the relevant provisions in their legislation use wording similar to the *ATIPPA*.

[18] As noted above, research information is also excluded from the British Columbia access to information legislation. Section 3(1)(e) of the *Freedom of Information and Protection of Privacy Act* states as follows:

> *3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *(e) a record containing teaching materials or research information of*
> *(i) a faculty member, as defined in the* College and Institute Act *and the* University Act*, of a post-secondary educational body,*
> *(ii) a teaching assistant or research assistant employed at a post-secondary educational body, or*
> *(iii) other persons teaching or carrying out research at a post-secondary educational body;*

[19] The former Information and Privacy Commissioner for British Columbia stated as follows in Order 00-36:

It should be said that s.3(1)(e) will not apply simply because someone who happens to be employed by a post-secondary educational body is engaged, under contract or otherwise, to do research for or with a public body such as the CHR [Capital Health Region]. Section 3(1)(e) is intended to protect individual academic endeavour. It will protect the intellectual value in teaching materials or research information developed by an employee of a post-secondary educational body, for her professional purposes, by protecting it from disclosure to those who might exploit it to her disadvantage.

I will give an example of information that would likely not be excluded from the Act under s. 3(1)(e). If an expert on water quality, who happens to be employed by a university, is retained by a local government to conduct water quality tests, the results of those tests will not be "research information of" that person. If the person is retained to develop new methods for water testing (or does so in the course of conducting tests for a public body) and has or retains no intellectual property in the methods she devises, the methods - assuming they truly qualify as "research information" within the meaning of s. 3(1)(e) - will not be research information "of" that person. They will, at best, be research information of the public body and thus will not be excluded from the Act by s. 3(1)(e).

[20] In BC Order 10-42 it was likewise stated:

….the rationale underlying s. 3(1)(e) is the protection of the intellectual value in research information developed by an employee of a post-secondary educational body. Placing this research outside FIPPA's ambit protects it from disclosure to third parties who may seek to exploit it for their own advantage and/or the disadvantage of the researcher. There is no question that there are substantial rewards, as the University puts it, for employees of a post-secondary institution who are first to report a novel methodology or result. What s. 3(1)(e) does, in part, is preserve and enhance this incentive, thereby encouraging research that may benefit society as a whole.

[21] Again, in BC Order F11-21 , the meaning of research was also discussed at length:

Another example is Order F07-06, where Adjudicator Francis cited a definition in the Illustrated Oxford English Dictionary that is almost identical to that from the Manual: "the systematic investigation into and study of materials, sources etc in order to establish facts and reach new conclusions".[19] She also considered the meaning of "research information" and determined that it would encompass

> *the product of, or information relating to, the investigation or study by experts in a field of scholarly or scientific pursuit.*

In Order F10-43, Adjudicator McEvoy considered "research information" in the context of s. 3(1)(e), which exempts from the scope of FIPPA "research information of employees of a post-secondary educational body". In that order, he cited the definition of "research" in s. 2 of the Ontario Personal Health Information Protection Act, which reads:

> *a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and included the development, testing and evaluation of research.*
>
> *The Ontario Office of the Information and Privacy Commissioner also developed the following definition of "research":*
>
> *The systematic investigation into and study of material, sources, etc. in order to establish facts and reach new conclusions [and] ... an endeavour to discover new or to collate old facts etc. by the scientific study or by a course of critical investigation.*
>
> *The major research funding councils in Canada (Canadian Institutes of Health research, Natural Sciences and Engineering Research Council of Canada, and Social Sciences and Humanities Research Council of Canada) define "research" as follows"*
>
> *An undertaking intended to extend knowledge through a disciplined inquiry or systematic investigation.*
>
> *Taking these various definitions into account, two main criteria stand out. The first criterion is that, for a study to constitute "research", it must be systematic or scientific and the researcher must take a critical approach to their evidence. The study must involve more than the collection or collation of data. The methodology must be structured in a rational way, and the researcher should approach the information seeking answers to specific questions. The researcher should also subject the data or information to critical analysis to assess the extent to which it presents a reliable basis for forming conclusions or testing hypotheses or otherwise deriving something meaningful.*
>
> *The second criterion is that the purpose of the research must involve evaluation of the information to derive something meaningful, such as new knowledge, including principles, theories or facts. This would involve the development of new theories or conclusions, or the confirmation that existing theories or conclusions, which warranted re-examination, remain valid. This is not to imply that only scientists or professional researchers could meet this standard or that the conclusions must be formal or academic in nature. It does suggest, however, that it is necessary to derive some broader meaning from the results of the investigation.*

[22] I find these definitions of "research information" compelling and have applied them to my review of the record in this case. The records at issue here include information on the research methodology, the consent form for participants (which outlines the study), the study protocol, e-mails from interested individuals and e-mails between the research team and others about various topics relating to the study, including drafts of the consent and the protocol, meetings, etc. The records do not contain, nor did the applicant request, any of the actual research data.

V CONCLUSION

[23] Given the above definitions, I have no trouble concluding that a large part of the record is indeed research information and is therefore excluded from the *ATIPPA* by section 5. The excluded materials include the consent document and the study protocol. The e-mails from individuals interested in taking part in the study do not, in my opinion, constitute research information, however they do constitute personal information and are excepted from disclosure under section 30 of the *ATIPPA* (I note as well that the Applicant specifically stated she was not requesting any personal information, and therefore, these e-mails are also non-responsive).

[24] However, there are some e-mails between members of the research team and others that do not meet the above definitions. These e-mails are administrative in nature, and do not reveal anything about the nature of the study, or the methodology being employed. They do not contain any information of intellectual value nor would their release harm the pursuit of individual academic endeavor. In my view, the definition of "research information" cannot be stretched to include such records, and as such, these e-mails are not excluded by section 5. In fact, more details about the study have been publicly released in the media than are contained in the records I am now recommending for release.

[25] Contrary to Memorial's concerns, this Office does not wish to impede the conduct of this or any research which could ultimately be of great benefit to society. While the exclusion for actual research information is a valid one, as explained above, I do not believe that "research information" can be used to shield any and all records that are remotely connected to actual research. Such a broad approach would be contrary to the spirit and intent of the *ATIPPA*. In particular, it is worth noting that this research was commissioned by the Minister of Health and Community Services, and the disclosure of some preliminary administrative records in relation to this matter is in keeping with the purpose of the *ATIPPA* (as outlined in section 3) to make public bodies more accountable.

[26] Further, with respect to Memorial's concerns about the manner in which this file was handled, this Office will continue to request from public bodies records that are the subject of a Request for Review unless it is clear from the wording of the Applicant's request that the records requested are beyond the jurisdiction of this Office. While I cannot compel records in order to determine my

jurisdiction, public bodies can still voluntarily provide them in order to facilitate a discussion about the applicability of the *ATIPPA* to those records. It is of great concern to me that a public body may choose not to do so (except, perhaps, in the most sensitive and unique cases) because, as noted by Justice Fowler, "…*the Commissioner under no circumstances can release information or order the head of the public body to release information. He can only recommend such release which can be refused by the head of the public body resulting in the appeal process to the Trial Division*…." It is the mandate of this Office to uphold the principles of accountability and transparency set out in the *ATIPPA*. One of our main goals is to facilitate access to information and ensure that the rights set out in the *ATIPPA* are given a fair and liberal interpretation, so that citizens enjoy the greatest amount of access to information permissible under the law. This can only be done when we are given the opportunity to review the record, and make a recommendation with respect to the applicability of the *ATIPPA*.

[27] Public bodies should take advantage of the "recommendation only" authority given to the Commissioner in the *ATIPPA*. It is essentially a risk free (from the public body's perspective) process that allows this Office to focus on our ombuds role to either facilitate access or confirm a public body's decision to deny access, and to ensure the *ATIPPA* functions properly. If, after this Office has reviewed records and made a determination as to the applicability of the *ATIPPA*, and the public body disagrees with our position, it is not obliged to release records. However, the applicant has also received the benefit of independent oversight and may be in a better position to decide whether the issue is something he or she wants to take before a judge.

VI RECOMMENDATIONS

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

[29] 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.

[30] 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*.

[31] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25th day of July 2012.

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