



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2018-025

October 1, 2018

### Memorial University

#### Summary:

Memorial University (“MUN”) received an access request for records pertaining to the hiring of a teaching term appointment with the Social Cultural Studies program at its Grenfell Campus. MUN provided the Applicant with records but withheld some information based on sections 5(1)(f) (application), 29(1)(a) (policy advice or recommendations), 32(a) (confidential evaluations) and 40 (disclosure harmful to personal privacy) of the *ATIPPA, 2015*. MUN advised that there were no records regarding the establishment of the search committee. The Applicant questioned the redactions and claimed that further records should exist that were not provided. The Commissioner determined that MUN had not conducted a reasonable search for responsive records, failing to fulfill its duty to assist under section 13 of the *ATIPPA, 2015*. The Commissioner further determined that in regards to the records provided to the Applicant, the redactions were consistent with the cited exceptions and recommended that MUN continue to withhold those records.

#### Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, sections 5, 13, 29, 32 and 40.

#### Authorities Relied On:

Newfoundland and Labrador OIPC Report [A-2018-020](#) and Report [2006-004](#).

#### Other Resources:

OIPC NL [Practice Bulletin Reasonable Search](#), March 2017.

## I BACKGROUND

- [1] Memorial University (“MUN” or the “University”) received an access to information request from the Applicant seeking the following :

Documents pertaining to: i) the initial search for the hiring of a teaching term appointment faculty member (academic staff members –ASM) in the Social Cultural Studies programme, School of Arts and Social Science, Grenfell Campus, for the 2018-19 academic year, including the assessment scheme (grid), comments made on the applications and scores (assessment) they received; ii) the establishment and composition of the search committee for this hiring process, including its membership list.

Period covered: January 23, 2018-May 2, 2018

Possible locations: Office of the Dean of the School Arts and Social Science.

- [2] MUN provided records to the Applicant but withheld some information citing sections 5(1)(f) (application), 29(1)(a) (policy advice or recommendations), 32(a) (confidential evaluations) and 40 (disclosure harmful to personal privacy) of the *ATIPPA, 2015*.
- [3] MUN advised the Applicant that no records existed regarding the establishment and composition of the search committee as the committee was established in accordance with Article 7 of the Collective Agreement. MUN quoted article 7.06(a) which states, “In the case of Academic Units or Grenfell Programme Units with fewer than seven (7) and more than two (2) Faculty Members, the Search Committee shall consist of all Faculty Members in the Academic Unit or Grenfell Campus Programme Unit.” MUN advised that the committee membership was decided in a meeting.
- [4] Before a complaining to this Office, the Applicant questioned why there were no records regarding the establishment of the search committee. MUN advised the Complainant there were no emails to the program members as “we all knew who would be on the committee by necessity (what happens in a small place)” and that “the committee membership was decided in a meeting of the programme which is why there isn’t any documentation”. No minutes were taken at the meeting. MUN also disclosed an additional 3 pages of records that were located but advised the Applicant that interview questions were withheld based on section 5(1)(f) of the *ATIPPA, 2015*.

- [5] The Applicant was not satisfied with MUN's response and filed a complaint with this Office. The Applicant claimed that not all responsive records had been located and that MUN failed to fulfill its duty to assist under section 13 of the *ATIPPA, 2015* by not conducting a reasonable search for the requested information. The Applicant also questioned MUN's application of the exceptions claimed.
- [6] In preparing its response to the complaint, MUN advised that it did not provide all of the records located in its first response to the Applicant due to an oversight arising from miscommunication within the Information Access and Privacy Office (IAP Office). These further records, comprising the Applicant's own application for the position as well as hand written notes authored by a member of the committee, were disclosed to the Applicant after our Office notified MUN of the complaint.
- [7] As informal resolution was unsuccessful, the complaint proceeded to the formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

## II PUBLIC BODY'S POSITION

- [8] During our investigation, MUN completed a second search for records, focused on the records the Complainant believed should exist (specific records were itemized by the Complainant to include in MUN's second search). MUN completed the second search and provided a detailed analysis of each of the items highlighted by the Complainant as well as answered additional questions posed by this Office regarding the search parameters and any additional records that might exist.
- [9] MUN located further records it considered responsive to the access request. These records mainly comprised of correspondence with candidates and referees as well as emails related to interview scheduling.
- [10] MUN's position is that even though a number of additional responsive records were located during the second search, its first search was reasonable. MUN's position is that the

initial search used reasonable parameters and search terms to retrieve responsive records. MUN explained that during the first search, the Dean and the assistant to the Dean had inadvertently overlooked searching the general Dean email account as it is infrequently used. Both the Dean and the Dean's assistant searched their own MUN email accounts that they used daily for work. On discovering this oversight, the account was searched and yielded further records. MUN stated that this was a genuine oversight of having a second email account available but not frequently used and that all individuals conducted a reasonable search for records.

[11] During our investigation MUN disclosed further records to the Complainant that were initially withheld based on section 40 of the *ATIPPA, 2015*. This consisted of some information initially withheld on cover letters, the Applicant's name in one instance and other information that did not fit within the exception claimed. MUN's position is that all remaining information withheld from the Applicant falls within the exceptions in sections 5(1)(f), 29(1)(a), 32(a) and 40.

### III COMPLAINANT'S POSITION

[12] The Complainant's position is that MUN failed to meet its duty to assist through its failure to conduct a reasonable search for records. The Complainant believes this resulted in omissions from the disclosed records.

[13] The Complainant argues that even though MUN located some further records in the second search that there are still records that should exist that have not been located. The Complainant has provided a detailed submission outlining many issues, asserting that additional records should exist in the following categories:

- a record confirming that a chair was elected by the search committee (as outlined in the Collective Agreement);
- further communication or correspondence between MUN and the Complainant's referees (some information was released but the Complainant believes that there is more);

- documents containing the assessment scheme/grid;
- documents containing the interview questions;
- further comments made on the applications; and
- records regarding the seniority of the applicants.

[14] The Complainant also stated as follows:

*I wish to conclude this part of my submission by referring to MUNFA's information bulletin titled 'ATIPPA and the work of Academic Staff Members' [provided by the Complainant]. It clearly shows that records pertaining to the committee work are responsive to the access to information requests. I quote: 'an ASM must provide copies of all correspondence and/or records that are responsive to the ATIPPA request...In one case, a Search Committee was required to turn over all feedback sheets submitted by ASMs and others in response to a request for feedback on applicants being interviewed for a position, and emails sent by members of the Search Committee to one another'. My access request was worded in such a manner that all documents pertaining to the assessment of my application and to the establishment of the 2017-18 Search Committee are responsive.*

[15] The Complainant also believes that MUN improperly withheld information under the exceptions claimed.

## IV DECISION

### Duty to Assist

[16] The duty to assist is outlined in section 13 of the *ATIPPA, 2015*:

*13. (1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.*

*(2) The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.*

[17] Many previous reports address the duty to assist, including Report A-2018-020. The duty to assist requires that public bodies make every reasonable effort to assist an applicant in

making a request and provide timely responses to an applicant in an open, accurate and complete manner.

[18] Report A-2018-020 states the position of this Office with regard to the duty to assist:

*[8] It is a long held position of this Office that the duty to assist has three components, as outlined in Report A-2009-011:*

*[80] ...First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner.*

*The standard for assessing a public body's efforts is reasonableness, not perfection.*

[19] Our guidance piece, *Practice Bulletin on Reasonable Search*, outlines that a reasonable search is one conducted by knowledgeable staff in locations where the records in question might reasonably be located.

[20] The Complainant raised issues with the completeness of the search, alleging there are more records responsive to the access request and not located by MUN.

[21] MUN provided the search parameters to this Office regarding the initial search. MUN advised that it contacted the Dean of the School of Arts and Social Science at Grenfell Campus as that office would have responsive records. The Dean provided records from his own account and advised that the chair of the search committee was consulted. There was follow up with the Dean that resulted in the Dean seeking responsive records directly from the search committee members. Further records were then located. The IAP Office received some of these records after issuing the decision letter to the Complainant. Because of a miscommunication within the IAP Office these records were not provided to the Complainant until the complaint was filed with this Office.

[22] MUN conducted a second search using the itemized list of potentially missing records provided by the Complainant as a guide. The Dean's Office and the Search Committee were asked to search for responsive records again. The second search yielded further records as

the first search, as the result of an oversight, did not include a general email account at the Dean's office. The search of that email account located further records comprising mainly of records regarding communication with candidates and referees and emails related to interview scheduling.

[23] MUN addressed each of the itemized categories of records that the Complainant believes should exist and provided our Office with a detailed response, outlining its efforts to search for these records.

[24] Regarding any minutes of the meeting electing the chair of the search committee, MUN advised that there were no minutes located during the initial search nor any minutes located during the second search. MUN advised: "The unit did not take minutes when the chair of the Search Committee was unanimously agreed upon. In my experience, there has never been a need for a search chair election. The unit is small and a relative consensus is common."

[25] No records of communications with the Complainant regarding the job interview were located in the initial search. The second search did locate responsive records, which were provided to the Complainant. Similarly, there were no records located regarding exchanges with referees of the Complainant during the initial search but records of this nature were located in the second search. These located records were properly withheld under section 32(a), set out below.

[26] MUN confirmed that there were no records relating to the assessment scheme/grid located in either search. MUN advised that there was no rubric nor was there any rubric demands under the collective agreement. MUN further advised that the oral discussion and observations that take place as part of the hiring process are not recorded and that the interview process and assessment was done primarily through discussion. The interview questions were located but withheld under section 5(1)(f).

[27] MUN advised that there were no records regarding comments made on the application and scores located in either search. MUN advised "The assessment was determined by

discussion and consensus among the committee members. The rankings were determined on the basis of credentials, teaching experience, what the candidate could offer the program in terms of areas, and the interview.”

[28] MUN advised there were no records located in either search that dealt with the seniority of the applicants. MUN stated, “Seniority did not come into play – this was an eight-month contractual appointment.”

[29] The Complainant believes, relying on the Collective Agreement that minutes should exist regarding election of a chair of the search committee. The Complainant also believes that there are further records regarding communication with her referees, to comments on applications, applicants’ seniority and furthermore that an assessment scheme/grid should exist.

[30] Broadly speaking, the parameters of the initial search were appropriate. However, due to an oversight, an entire email address was not searched. While the individuals involved in the searching may have conducted what they believed to be an appropriate search, missing an email account that one could reasonably foresee might have had responsive records is not reasonable. This particular oversight, missing the general email account at the Dean’s office, is aggravated by the fact that the advertisement for the job, that was the subject of the access request, directed applicants to send their applications to this account.

[31] While a search does not have to locate every record possible to be reasonable, it should cover the required locations, including all email accounts where records could exist. While MUN has explained how this happened, the email account was missed as it was not used regularly, it does not excuse this oversight as the records located in the second search should have been located initially.

### **Exceptions Claimed**

[32] MUN withheld records based on section 5(1)(f), section 29(1)(a), section 32(a) and section 40 which are 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*

...

(f) *a record of a question that is to be used on an examination or test;*

...

29. (1) *The head of a public body may refuse to disclose to an applicant information that would reveal*

(a) *advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;*

...

32. *The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material, provided explicitly or implicitly in confidence, and compiled for the purpose of*  
(a) *determining suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body;*

...

40. (1) *The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.*

[33] MUN applied section 40(1) mainly to the personal information of other candidates, including their names, education and work history.

[34] During our investigation, MUN disclosed some information it initially redacted under section 40. This information, which did not identify the applicants, was with respect to information on cover letters, the Complainant's name in one instance, and some comments that did not meet the section 40 exception.

[35] MUN applied section 29(1)(a) and section 32(a) minimally. In a couple of instances section 32(a) was applied improperly, however, another exception applied to the information. Section 29(1)(a) was applied properly in the limited circumstances in which it was used.

[36] MUN relied on section 5(1)(f) to withhold the interview questions, citing Report 2006-004 from this Office to support its position that interview questions are excluded from the Act.

[37] The Act at that time had a provision similar to section 5(1)(f) under the ATIPPA, 2015. Report 2006-004 reviewed whether questions in a job interview constitute a test at paragraph 21:

*[21] I will first deal with the issue of whether or not the questions asked in an interview constitute a test. The Concise Oxford English Dictionary 10<sup>th</sup> Edition, Revised (New York: Oxford University Press, 2002) defines “test” as “a procedure intended to establish the quality, performance, or reliability of something.” I believe that an interview process is clearly captured by this definition. As such, I believe that the questions to which the Applicant is seeking access to are associated with a test, as anticipated by section 5(1)(g). This is also clearly supported by the ATIPPA Policy and Procedures Manual. This Manual is produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice. In describing section 5(1)(g) of the ATIPPA, this Manual, on page 1-10, states:*

*The Act does not apply to “a record of a question that is to be used on an examination or test.” This exclusion applies to questions to be used now or in the future on an examination or test. The exclusion applies, but is not limited, to questions to be used on examinations or tests given by educational institutions. **For example, questions on a driver’s licence test and on a government job competition test would also be excluded from the Act if the questions are currently being used or will be used in the future.***

(Emphasis added)

[38] Having concluded that questions in an interview do constitute a test, that Report went on to analyze how other jurisdictions have viewed questions on a test:

*[22] With respect to the term “that is to be used,” there is no indication in section 5(1)(g) that such a term is meant to restrict a question to a single use. To accept such an interpretation, one must accept that once a question is asked on an examination or test it cannot be used again. While this may seem appealing, I do not believe it is reasonable to expect that questions may not be used more than once. It is my opinion, therefore, that the term “that is to be used” may be interpreted to mean “that was used,” as long as the questions will be used again in the future. This too is supported by the above quoted passage from the ATIPPA Policy and Procedures Manual. The Manual*

*specifically states that questions currently being used as well as questions that will be used in the future are excluded from the ATIPPA.*

*[23] Similar conclusions have been reached by the Information and Privacy Commissioner of Alberta and the Review Officer for Nova Scotia. In his Order F2002-012, the Alberta Commissioner agreed that the questions on a previously administered examination were excluded from Alberta's Freedom of Information and Protection of Privacy Act. In that case, an applicant had requested access to a copy of her son's English 10-H final exam questions and answers. In a letter setting out his reasons for his oral decision, the Alberta Commissioner stated that "I find that the questions are clearly going to be used on examinations in the future and therefore fall within section 4(1)(g)...." Section 4(1)(g) of Alberta's Freedom of Information and Protection of Privacy Act is, in all material respects, equivalent to section 5(1)(g) of the ATIPPA.*

*[24] In a similar case in Nova Scotia the applicant was an unsuccessful job candidate for a position with the Halifax Regional Police and was seeking access to information, including interview questions. In his Report FI-03-27(M) the Nova Scotia Review Officer concluded that questions used on tests are not subject to the Municipal Government Act, as per section 463(2)(d) of that Act. Section 463(2)(d) of Nova Scotia's Municipal Government Act is, in all material respects, equivalent to section 5(1)(g) of the ATIPPA.*

*[25] In light of my analysis of the language of the section 5(1)(g) of the ATIPPA, together with the Alberta and Nova Scotia decisions, I have concluded that the questions used in the interview are excluded from the application of the ATIPPA. I have no other choice, therefore, but to conclude that I do not have jurisdiction as it relates to these specific records.*

[39] Based on the above, I find that the interview questions do fit within section 5(1)(f) and are therefore excluded from the ATIPPA, 2015. While any public body can choose to disclose such records, the Act does not provide for their compulsory disclosure.

## V CONCLUSIONS

[40] I find that MUN did not conduct a reasonable search for records as the Dean's office missed searching an entire email account. As MUN conducted a second search for records, locating additional records, including in the overlooked email account, MUN has rectified this situation. This obvious omission, however, caused a delay in access for the Complainant.

[41] MUN has released further records to the Complainant it initially withheld based on section 40. All remaining exceptions were properly applied and there are no further recommendations for release of the remaining redacted information.

## VI RECOMMENDATIONS

[42] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend that MUN review its search parameters and specifically advise departments to include all email accounts of general/shared usage. I recommend MUN continue to withhold all remaining records withheld based on exceptions claimed.

[43] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of MUN 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 (in this case the Complainant) within 10 business days of receiving this Report.

[44] Please note that within 10 business days of receiving the decision of MUN under section 49, the Complainant may appeal that decision to the Supreme Court of Newfoundland and Labrador in accordance with section 54 of the *ATIPPA, 2015*.

[45] Dated at St. John's, in the Province of Newfoundland and Labrador, this 1<sup>st</sup> day of October, 2018.

Donovan Molloy, Q.C.  
Information and Privacy Commissioner  
Newfoundland and Labrador