



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-018

August 15, 2019

Memorial University

Summary:

Memorial University (“Memorial”) received a request for all records, including emails and financial documents, created in the process of generating, reviewing and investigating a Respectful Workplace complaint against him. Memorial provided access in part but redacted some information pursuant to sections 29 (policy advice and recommendations) and 40 (disclosure harmful to personal privacy). Memorial also withheld the financial records. The Complainant requested a review of the redacted information. The Complainant also stated that Memorial failed to conduct a reasonable search and did not fulfill its duty to assist him. The Commissioner determined Memorial incorrectly applied sections 29 and 40 to many of the records, and did not give sufficient reason for withholding the financial records. The Commissioner found that Memorial in certain respects had not conducted a reasonable search for records and failed in its duty to assist the Complainant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015, SNL 2015, c A-1.2, sections 13, 29, 33, and 40.](#)

Authorities Relied On:

Newfoundland and Labrador OIPC Report [A-2018-024](#)

Other Resources:

OIPC NL [Guidance Document: Section 33 – Information from a Workplace Investigation](#); OIPC NL [Practice Bulletin on Reasonable Search](#).

I BACKGROUND

- [1] Memorial University (“Memorial”) received an access to information request for:

All records, including emails and financial documents, generated in the process of preparing, reviewing and investigating the Respectful Workplace complaint dated [date], as well as when rendering the decision on this complaint.

The Complainant also identified possible locations where the records might be found and specified the time period of the records he requested.

- [2] Memorial provided records to the Applicant but withheld some information based on section 29 (policy advice and recommendations) and 40 (disclosure harmful to personal privacy) of the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or “*Act*”). Memorial indicated that financial documents were not included in the response as the financial documents were not the personal information of the Applicant.

- [3] The Applicant was not satisfied with Memorial’s response and filed a complaint with this Office. The Complainant stated that he believed the redactions were improperly applied to the records. As well, he felt Memorial was incorrect when they withheld the financial documents. The Complainant further asserted that Memorial had not fulfilled its duty to assist under section 13 of the *ATIPPA, 2015* by not conducting a reasonable search for requested records.

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

II COMPLAINANT’S POSITION

- [5] In his submissions to this Office, the Complainant states Memorial did not correctly apply the exceptions, specifically sections 29(1)(a) and 40(1) of the *ATIPPA, 2015*, to the responsive records. As well, the Complainant states that Memorial improperly exempted from disclosure

the financial documents and did not fulfill its duty to assist him by conducting a reasonable search for records.

[6] The Complainant states that section 29 was improperly applied to the records because the document to which the exception was applied neither is policy-related nor does it contain “advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister.”

[7] The Complainant asserts that he made his request for information subject to section 33(3) of the *ATIPPA, 2015*. The Complainant submits that, as a party to a workplace investigation, he is entitled to all records relevant to the investigation and to full details of the complaint. Therefore, the Complainant states that the exceptions under section 40 were also improperly applied.

[8] The Complainant argues that Memorial failed to meet its duty to assist him by improperly restricting the scope of the search to emails and failing to include handwritten notes, meeting notes, and other documents which were not sent via email. The Complainant states that he is in possession of responsive records which were not provided to him in Memorial’s final response.

[9] The Complainant also states that there are suggestions within the records that other responsive records exist but were not provided to him. These records include:

- handwritten notes;
- records related to the appointment of the investigator;
- questions asked by the investigator to the other party to the Respectful Workplace investigation;
- a draft letter written by the other party referred to in an email; and
- a record of contact from the other party to another faculty member.

III PUBLIC BODY'S POSITION

[10] Memorial provided a detailed submission to this Office, outlining the staff and Offices which conducted searches for records, the location of those searches within the offices, and the amount of time spent looking for records.

[11] Memorial explained that it did not seek records related to the workplace investigation from one of the locations suggested by the Complainant because, after consultations with that office, it was determined that there would be no responsive records in that location, as that particular office was not involved with Respectful Workplace investigations.

[12] Memorial stated that it did not provide the financial records requested by the Complainant because the request for information was for personal information of the Complainant. Memorial submits that:

In this case, an invoice by an external investigator and record of the university's payment of it are the university's financial records. They are not the personal information of the Applicant, even if his name appears on them as part of a file reference.

[13] With regard to the exceptions to disclosure that were applied to the records, Memorial provided a detailed breakdown of each occurrence where information was withheld from the Complainant.

[14] Memorial advised that information withheld under section 29(1)(a) of the *ATIPPA, 2015* was appropriately applied because the information withheld was considered a policy option.

[15] Pursuant to section 40 of the *ATIPPA, 2015*, Memorial withheld:

- An email exchange between the other party to the investigation and Head of Department;
- a memo regarding the other party's yearly performance;
- three emails from the other party to the investigator (one of which appears on numerous pages of the records);
- an email from the investigator to the other party to the investigation; and

- emails from the investigator to officials in the Faculty Relations department, containing the personal information of the investigator.

[16] Memorial advises that information in these documents were appropriately withheld as each piece of information withheld was not relevant to the conduct of or the outcome of the investigation and it is personal information of a third party. This analysis was driven by this Office's guidance on how section 33 and section 40 interrelate.

[17] During the course of the investigation, Memorial also answered questions posed by this Office regarding additional records which might exist, including handwritten notes and information related to the appointment of the investigator of the Respectful Workplace complaint.

IV DECISION

Issues

[18] There are four issues which are addressed in this report:

- 1) Did Memorial appropriately apply section 29(1)(a) of the *ATIPPA, 2015* to the records?
- 2) Did Memorial appropriately apply section 40(1) of the *ATIPPA, 2015* to the records?
- 3) Did Memorial appropriately withhold financial records regarding the investigation from the Complainant?
- 4) Did Memorial fulfill its duty to assist the Complainant by conducting a reasonable search for records?

1) Did Memorial appropriately apply section 29(1)(a)?

[19] Memorial withheld some information under section 29(1)(a) of the *ATIPPA, 2015*. Section 29 states:

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;

[20] Memorial asserts that the information withheld pursuant to section 29(1)(a) meets the criteria of this exception because the information was a policy option being offered. However, the Complainant counters that the information was not “developed by or for a public body or

minister". Upon review of the information, this Office has determined that the information was not policy advice, but rather advice to follow an already devised policy. As such, the information does not fall within the scope of section 29(1)(a). Further, as described below, the broad right of access in section 33 afforded to a party to the workplace investigation cannot be displaced by a discretionary exception such as section 29.

2) Did Memorial appropriately apply section 40?

[21] Before considering section 40, it is necessary first to note that this access request was made by the Complainant under section 33(3) of the *ATIPPA, 2015*.

[22] Section 33 addresses information to which a party to an investigation is entitled:

33. (1) For the purpose of this section

(a) "harassment" means comments or conduct which are abusive, offensive, demeaning or vexatious that are known, or ought reasonably to be known, to be unwelcome and which may be intended or unintended;

(b) "party" means a complainant, respondent or a witness who provided a statement to an investigator conducting a workplace investigation; and

(c) "workplace investigation" means an investigation related to

(i) the conduct of an employee in the workplace,

(ii) harassment, or

(iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public

which may give rise to progressive discipline or corrective action by the public body employer.

(2) The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.

(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).

(4) Notwithstanding subsection (3), where a party referred to in that subsection is a witness in a workplace investigation, the head of a public body

shall disclose only the information referred to in subsection (2) which relates to the witness' statements provided in the course of the investigation.

[23] Section 33(3) requires mandatory disclosure of relevant information if the request comes from a party to the workplace investigation.

[24] This Office has released a guidance document which outlines for public bodies the expectations when reviewing responsive records to a workplace investigations and in particular how section 40 and section 33 interrelate:

Much of the information collected in a workplace investigation is personal information. If a situation does not fit within section 33, decisions with respect to the disclosure of personal information would be made in accordance with section 40, as are all other decisions respecting the disclosure of personal information. Section 33 was included in the legislation to give complainants and respondents to a workplace investigation a greater right of access to personal information (in the narrow context of a workplace investigation) than what might otherwise be available under section 40 to a non-party applicant. It also clarifies that witnesses are only entitled to information that relates to their own statements.

When releasing information under this section, it is imperative that careful consideration be given to the word "relevant". In the course of workplace investigations, a lot of information may be created or gathered that is ultimately not relevant to the investigation. Examples of such information might include medical diagnoses unrelated to the issue or specifics of medical treatment. While a general diagnosis or description of a medical condition may be relevant in some situations, sometimes detailed treatment notes or plans are not relevant.

Similarly, detailed personal histories may be collected as part of a workplace investigation. Significant portions of the personal history may not be relevant to the investigation. Information that is not relevant to the investigation which is also an unreasonable invasion of personal privacy is still protected and should not be disclosed.

Email between party to the investigation and Department Head

[25] Memorial also applied section 40(1) to the information withheld under section 29(1)(a). Memorial has stated that this document was not provided to the investigator nor was it used in the investigation. A review of the content of this email reveals it be the personal information of a party to the complaint. It, however, cannot have been relevant to the investigation as it had not been provided to the investigator, therefore section 40 must be applied and the

document should continue to be withheld as section 33 does not override the mandatory withholding under section 40.

Performance Review Memo

- [26] A 2017 memo consisting of a review of the performance of the other party to the workplace investigation was included in the records considered responsive to the Complainant's request, but was withheld pursuant to section 40(1). Memorial has stated that this memo is solely the personal information of the Complainant and that it was not provided to the investigator as part of the investigation. The Complainant however has indicated that he believes the document is relevant and that it was in the possession of the Investigator as he has provided it to them. There is however, within the responsive records, an email which indicates the investigator refused to consider this evidence. Therefore this Office finds that this memo is not relevant to the workplace investigation and should continue to be withheld under section 40.

Three emails from the other party to the investigator

- [27] There were three emails sent by the other party to the workplace investigation to the investigator. One of these emails appeared seven separate times in the records in email threads. Memorial submits that the information withheld is the personal information of both the Complainant and the other party to the workplace investigation. Memorial also states that this information had no effect on the outcome of the investigation. Respectfully we disagree with this assessment in relation to two of the emails (dated December 5 & 13, 2018) which appears multiple times as upon review of the record. Memorial has failed to establish that this record was not relevant to the investigation, as such the requirement for disclosure under section 33 outweighs the protection afforded to personal information under section 40. Upon review, we agree that the email dated December 12, 2018 is personal information of the other party and is also not relevant to the investigation and therefore can continue to be withheld.

Email from the investigator to the other party to the investigation

- [28] During the workplace investigation, the investigator sent an email to the other party to the investigation (dated 6 December 2018). Memorial asserts this email contains the personal

information of the investigator. We disagree and find that this email is about the investigation process and should be released as its relevance is unclear.

Emails from the investigator to Faculty Relations Department

[29] The investigator sent to the Faculty Relations department three emails which contained her personal mobile telephone number. This information is not relevant to the workplace investigation conducted by the investigator. As the information is personal information of a third party, the information was properly withheld pursuant to section 40(1) of the *ATIPPA, 2015*. This Office recommends that this information continue to be withheld by Memorial.

3) Did Memorial properly withhold financial records and records relating to the appointment of the Investigator?

[30] Memorial submits that it withheld the financial records from the Complainant because the records were not the personal information of the Complainant, and that the Complainant's request was seeking only his personal information.

[31] This is an incorrect characterization of the request by Memorial. The access request does not specify that the Complainant is only looking for his personal information. The Complainant's request states that he is seeking "all records, including emails and financial documents, generated in the process of preparing reviewing and investigating the Respectful Workplace complaint dated [date]."

[32] Memorial states that the financial records related to the investigation are the financial records of the University. Section 3(2) of the Act provides a right of access to records without reference to the nature of these records (personal information versus general information). It is only when a public body considers the use of a cost estimate that the type of information becomes relevant (no fee can be charged for the personal information of the applicant). Therefore, as no exception to access was stated, this Office finds that the financial records were inappropriately withheld from the Complainant.

[33] Memorial also stated that records related to the appointment of the investigator had been located but were not provided to the Complainant because the request for information was specific to the Complainant's personal information. Memorial states that the records related

to the appointment of the investigator did not mention either the Complainant or the other party to the workplace investigation. Again, this Office finds that the appointment of the investigator fits within the parameters of the request (documents generated in the process of preparing, reviewing and investigating the complaint) and are therefore responsive to the request. As no exception to access under the Act have been claimed by Memorial, these records must also be released. Both sets of these records, financial and retention, should be reviewed and any information that may be an unreasonable invasion of personal privacy (per section 40) should be redacted before release.

4) Did Memorial fulfill its duty to assist the Complainant by conducting a reasonable search for records?

[34] Section 13 of the *ATIPPA, 2015* states:

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.

[35] This Office has considered the issue of a public body's duty to assist in many previous reports, including Report A-2018-024, which also involved Memorial. Further, our 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.

[36] Memorial provided this Office during our investigation with a list of what searches were conducted, by whom, in which locations. We have reviewed this submission and found it to have generally met the test set out in this Office's Practice Bulletin, set out above.

[37] Regarding the records the Complainant believes exist, Memorial has confirmed that no further records exist. The Complainant specified a number of records that he believes exists outside of those provided to him.

Handwritten notes

[38] The Complainant objected to the lack of handwritten notes contained within the records; however, Memorial has confirmed that they received the investigator's complete file and there were no handwritten notes within it. A public body is obligated to conduct a reasonable search. While Memorial has established their satisfaction with the response of the investigator that she had "provided all records", we are unable to find that Memorial's acceptance of this explanation was reasonable. This Office, during informal investigation, brought the issue of the lack of investigator's handwritten notes to Memorial but they have provided no evidence that anyone specifically asked the investigator if the thumb drive she provided included scanned copies of all her notes, including notebooks or other handwritten records. Therefore we find that Memorial did not conduct a reasonable search in this matter.

Formal questions to the other party to the investigation

[39] The Complainant also noted that the records contained a list of formal questions that had been sent to him, but none to the other party to the Respectful Workplace investigation. Memorial submits that the Complainant refused to sit down to speak with the investigator, so questions were written down and provided to him by the investigator. The Complainant provided written statements to these questions, whereas the investigator and other party spoke in person and via telephone. These conversations led to the generation of a statement which has been provided in the responsive records. Therefore it seems reasonable that no written questions for the other party ever existed, or if they did, they were captured in the final statement.

Draft letter by the other party to the investigation

[40] The Complainant mentions that Memorial did not provide a draft of a letter that the other party to the investigation references in an email. There is insufficient evidence to establish that the letter was provided to anyone else, via email or otherwise, or that it even still exists.

Contact by the other party to the investigation with faculty member

[41] An email referred to the other party to the investigation contacting another faculty member. The Complainant states that because the other party had previously contacted one faculty member by email, it was reasonable to assume that this faculty member was contacted

by email also. Memorial advised that both the sender and recipient of the email provided all records related to the access request. There is also no evidence that there is a record of the contact or that it was indeed conducted through email – only that contact had been made.

Hand Delivered Complainant's Response to Report

[42] The complainant indicated that he hand delivered his response to the investigation to the Office of the Provost and the Vice President (Academic). This record was not included in the responsive records. Memorial did seek all records from the Provost Office and did receive assurances that all records had been located, as paper records are not generated in these types of matters until the investigation is finished, and even then the records printed are included in the electronic version. Again, Memorial's acceptance of the assurance is deficient in some respects. In fact, very late in this investigation Memorial did follow up again with the Provost's Office and one paper record was located – the hand delivered response from the Complainant. This Office has recommended that this record be released to the Complainant immediately, subject to appropriate redaction. We also find this element of Memorial's search to not be reasonable.

[43] In conclusion, this Office finds that Memorial in certain respects did not conduct a reasonable search for responsive records and did not fulfill its duty to assist the Complainant in this case.

V CONCLUSIONS

[44] This Office finds Memorial did not properly apply section 29 to the records. This Office also finds that Memorial properly applied section 40 to some of the records, but not to others.

[45] This Office finds that Memorial also improperly withheld the financial records and records relating to the appointment of the investigator.

[46] Memorial did not fulfil its duty to assist under section 13 of the *ATIPPA, 2015* by conducting a reasonable search for records.

VI RECOMMENDATIONS

- [47] Under the authority of section 47 of the *ATIPPA, 2015*, this Office recommends that Memorial release to the Complainant the information indicated in the attached highlighted copy of the records, as well as financial documents and documents related to the appointment of the investigator, subject to any appropriate redactions under section 40.
- [48] Further we recommend follow up questions regarding the search be sent, in writing, to the Office of the Provost and to the investigator asking specifically that all paper records be searched, including notebooks and files and that any records found be released to the Complainant, subject to appropriate redactions.
- [49] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of Memorial University must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.
- [50] Dated at St. John's, in the Province of Newfoundland and Labrador, this 15th day of August 2019.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador