



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2024-006

February 8, 2024

Memorial University of Newfoundland

Summary:

The Complainant submitted four access to information requests to Memorial University of Newfoundland related to expenditures incurred by three of the University's separately incorporated entities. Memorial did not perform a search for the records requested by the Complainant and instead responded claiming it does not have custody or control of the records as they relate to expenditures by the separately incorporated entities. The Commissioner noted that Memorial should have performed a search for responsive records, as without such a search a claim of lack of custody or control cannot be substantiated. Therefore, Memorial did not meet its duty to assist the Complainant pursuant to section 13(1) of *ATIPPA, 2015*. An analysis of Memorial's custody or control showed that on a balance of probabilities Memorial has custody or control of records containing information relating to the Complainant's access request.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 2, 3(1) 5(1) 8(1), and 13(1).

[Auditor General Act, 2021](#) SNL c. A-22.01, section 19.

[Memorial University Act](#) RSNL 1990 c. M-7 sections 3(1), 22(2), 34(1), and 38.

Authorities Relied On:

NL OIPC Reports [A-2023-020](#), [A-2023-029](#) and [A-2023-052](#); Ontario [IPC Order MO-2750](#); [Canada \(Information Commissioner\) v. Canada \(Minister of Defence\) \[2011\] 2 S.C.R 306](#); [PEI Order No. FI-15-002](#); [Memorial University Independent Auditor's Report](#).

BACKGROUND

[1] The Complainant submitted the following four access to information requests to Memorial University of Newfoundland (Memorial):

- *bonuses/special payments paid to C-Core executives and bonuses paid to C-Core management employees from January 1, 2019 to October 23, 2023 (OIPC File 0020-062-23-125);*
- *all bonuses and special payments paid to Genesis executives and all incentives paid to Genesis management employees from January 1, 2019 to October 23, 2023 (OIPC File 0020-062-23-126);*
- *all vehicle allowances paid to Genesis executive and management staff from January 1, 2019 to present (OIPC File 0020-062-23-126);*
- *all vehicle allowances paid to Centre for Fisheries Innovation executive and management staff from January 1, 2019 to November 2, 2023.*

[2] Memorial's response was that C-Core, the Canadian Centre for Fisheries Innovation (CCFI), and Genesis Group Inc. are not public bodies pursuant to *ATIPPA, 2015*, and therefore Memorial did not have custody or control over records belonging to these entities.

[3] The Complainant disagreed with this assessment, noting that C-Core, CCFI, and Genesis are located within Memorial and have substantial financial connections with the university

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

PUBLIC BODY'S POSITION

[5] It is the position of Memorial that C-Core, Genesis, and CCFI are separately incorporated entities (SIEs) of Memorial and function completely separate and apart from the university. Any relationship between the SIEs and Memorial are negotiated between the parties. As SIEs are separate from Memorial, they are not public bodies as defined in section 2 of *ATIPPA, 2015* and are not subject to the Act. Memorial asserts that determining that the SIEs are either part of Memorial or their own separate public body would be an improper piercing of the corporate veils of the SIEs.

[6] With respect to a lack of custody or control over the records sought by the Complainant, Memorial provided no evidence to support this claim. Memorial did acknowledge that it did not perform a search for the records requested by the Complainant. The lack of search also means that the three SIEs were not contacted as third parties with an interest in the records, pursuant to section 19 of *ATIPPA, 2019*. Such notice is only provided when records of interest to a third party exist and the public body intends to release them to the applicant.

COMPLAINANT'S POSITION

[7] The Complainant asserts that Memorial exerts a significant amount of control over the SIEs. The Complainant expressed no position as to whether this control means that the SIEs are an indivisible part of Memorial or their own public bodies, but the control is sufficient enough that it is likely that the university has custody or control over the requested records.

DECISION

[8] The sections of *ATIPPA, 2015* relevant to this matter are as follows:

2. *In this Act*

(h) “*educational body*” means

(i) *Memorial University of Newfoundland*

...

(p) “*local public body*” means

(i) *An education body,*

...

(x) “*public body*” means

(iii) *a corporation, commission, or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an At, the Lieutenant-Governor in council or a minister,*

(iv) *a local public body*

...

- 3.(1) *The purpose of this Act is to facilitate democracy through*
- (a) *ensuring that citizens have the information required to participate meaningfully in the democratic process,*
 - (b) *increasing transparency in government and public bodies so that elected officials, officers, and employees of public bodies remain accountable;*
- ...
- 5.(1) *This Act applies to all records in the custody or under the control of a public body...*
- ...
- 8.(1) *A person who makes a request under section 11 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
- ...
- 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.*

The sections of the *Auditor General Act, 2021* relevant to this matter are as follows:

- 19.(1) *Notwithstanding any other Act or regulation, the auditor general is the auditor of the financial statements and accounts of all agencies of the Crown and Crown controlled corporations and shall make those examinations and inquiries that the auditor general considers necessary to enable the auditor general to report as required by this Act.*
- ...
- 19.(3) *Where an agent has been appointed to conduct an audit of the financial statements of an agency of the Crown or of a Crown controlled corporation, the agent shall immediately*
- ...
- (b) *make available to the auditor general, when requested by the auditor general, all working papers, reports, schedules and other documents in respect of the audit,*

The section of the *Memorial University Act* relevant to this matter is as follows:

- 3.(1) *The Memorial University of Newfoundland, consisting of a Chancellor, Convocation, Board of Regents, Senate, faculty councils and the faculties is continued as a corporation.*
- ...

22.(2) *The Board shall consist of*

- (c) *17 members appointed by the Lieutenant-Governor in Council of whom 3 shall be the same person who are appointed under subsection 10(2.1) of the College Act, 1996;*

...

34.(1) *The board shall have the following power*

...

- (s) *to do and perform all other matters and things which may seem appropriate and useful for the well ordering and advancement of the university, the doing of things not repugnant to this Act or to a law in force in the province.*

...

38.(1) *The accounts of the board shall be audited at least once a year by the auditor general, or by some person appointed by the Lieutenant-Governor in Council.*

38.(2) *Where an auditor other than the auditor general audits the accounts of the board, the auditor shall comply with subsection 19(3) of the Auditor General Act, 2021.*

Duty to Assist

[9] The duty to assist an applicant with an access to information request is one of the foundations of *ATIPPA, 2015*. The Act cannot work as it is intended if the public body was not required to actively help an applicant receive the information being requested. The duty-to-assist has several different components that encompass communication with an applicant to the manner in which a search for records is conducted.

[10] In this case, Memorial acknowledged that it did not perform a search for the records that the Complainant was seeking. Not conducting a search does not mean that the public body has not met its duty to assist. In Report A-2023-052, this Office determined that the House of Assembly had still met its duty to assist even though the House had not conducted a search for the responsive records sought by the Complainant. In that instance, the Complainant fundamentally misunderstood the purpose of the House, which had no connection with the documents the Complainant requested.

[11] The same circumstances are not present in this case. There are significant connections between Memorial and the SIEs that are the subject of this Complaint that will be addressed later in this Report. Memorial's response to this access request ignores all of these connections. Further, Memorial's position is based on an argument that because the SIEs are not public bodies, that Memorial by default will not have custody or control over any of the records requested by the Complainant. This is not how *ATIPPA, 2015* functions. Memorial has a duty to conduct a search for records unless it can provide strong evidence that it is highly unlikely that such records would be in Memorial's custody or control and therefore conducting a search would be a waste of resources. That evidence was not provided by Memorial. This Office routinely addresses complaints that involve documents created by third parties that are not public bodies. Under certain circumstances such documents fall clearly within the jurisdiction of *ATIPPA, 2015*. Memorial's argument that documents that may belong to a third party are by default not under the university's custody or control is without basis.

[12] Memorial did not meet its duty to assist the Complainant. Memorial should have conducted a reasonable search for the records that were requested to determine what it had custody or control over. Once the search was conducted, there could have been a determination on whether third parties needed to be notified.

Are the SIEs Independent Public Bodies or Part of Memorial

[13] This Complaint raises the important question of how *ATIPPA, 2015* applies to Memorial's SIEs. Given the complex relationship between Memorial and its SIEs, this Report does provide an analysis of this question. With that said, the recommendations made in this Report are not dependent upon whether the SIEs are public bodies, part of Memorial, or third parties. The recommendations are based on an assessment of Memorial's relationship to the records requested by the Complainant.

[14] Memorial is a public body under *ATIPPA, 2015* in two ways. First, Memorial is defined in section 2 of the Act as an "educational body," which in turn is defined as a "local public body," which is then listed as a public body pursuant to section 2(x)(iv) of the Act. Memorial is also a public body pursuant to section 2(x)(iii), as it is a corporation with a majority of its board appointed by the Lieutenant-Governor in Council according to the *Memorial University Act*.

[15] Memorial has 5 SIEs:

- C-Core
- Genesis Group Inc.
- The Canadian Centre of Fisheries Innovation
- Memorial University Recreation Complex
- Campus Childcare Inc.

There is nothing in the *Memorial University Act* that specifically grants Memorial the ability to establish an SIE, though it appears that the ability to do so is now incorporated into board discretionary authority granted in section 34(1)(s) of that Act. All five SIEs operate on Memorial's campuses and the university owns the buildings in which they operate.

[16] Memorial's Board of Regents appoints the boards of directors for C-Core, Genesis, and CCFI. In the bylaws of the Board of Regents, the term "University" is defined as "Memorial University of Newfoundland and its affiliated colleges, institutes and separately incorporated entities." In the "responsibilities" section of the bylaws, it states that the Board of Regents "Participates in setting the long term vision, mission and strategic direction of the University" and "provides oversight for and monitors progress towards the achievement of the University's goals." The bylaws clearly incorporate the SIEs into Memorial's overall plans and makes no distinction between them and its responsibility for the rest of the university. Financially, Memorial incorporates the assets and liabilities of the SIEs into its statutorily required financial statements. Annually, Memorial releases a consolidated financial statement, which states under in the notes under "Significant Financial Policies" that Memorial controls its SIEs.

[17] From our assessment, it does not appear that Memorial's SIEs are stand-alone public bodies. What remains unclear is whether the SIEs are in reality simply part of Memorial and therefore subject to *ATIPPA, 2015*.

[18] Memorial rejects this position. It argues that SIEs are separate from Memorial because they are incorporated as individual organizations. Furthermore, Memorial states that because

C-Core, Genesis, and CCFI are separately incorporated and are one-step removed from the University, the SIEs are neither local public bodies nor corporations that have boards that are majority appointed by the Minister, the Lieutenant-Governor, or an Act. Moreover, any finding that the SIEs are indeed part of Memorial would be an improper piercing of the corporate veil under which the SIEs currently operate.¹

[19] Two of the stated purposes of *ATIPPA, 2015* are to allow for meaningful citizen participation in the democratic process and to increase transparency in government and public bodies. To facilitate this purpose, the definition of a public body is broad so as to encompass essentially all organizations that are primarily funded by the public purse. If a public body is not covered by the Act that is made clear in legislation.

[20] Public bodies, as defined by section 2(x) of the Act fall into two general categories. The first are those that are funded exclusively or largely from provincial revenue. This includes all government departments; corporations owned by the Crown; corporations with boards that are majority appointed by the Lieutenant-Governor, a minister, or an Act, health care authorities; government-funded education systems, such as Memorial and grade schools; and the House of Assembly and statutory offices. The second category are local governments, which the provincial government do not control but which are funded by public money. According to section 2(x), not only is the municipal body covered by *ATIPPA, 2015*, but so is any other corporation or entity created by the municipality for the management of local government assets or responsibilities; in other words, any entity created by the municipality that could be engaged in spending public money is covered by the Act.

[21] The position of Memorial is that it has the right to establish an SIE; that it can provide resources to the SIE, such as space on Memorial's campuses to operate or use of Memorial's resources; that it can incorporate the revenues of the SIE into its statements or revenue and expenditures; and that an SIE is sheltered from public oversight because it is incorporated.

¹ In law, the primary benefit of incorporation is limited liability, which confines liability to the corporation and not beyond. Under certain circumstances, courts in Canada have pierced the corporate veil for a variety of reasons including general unfairness, the interest of justice, and equitable remedies, and in doing so have held employees, directors, or shareholders responsible for the actions of a corporation.

Thus, a public body creates a non-public body that shares the same resources as the public body. Such an interpretation offends the purpose of *ATIPPA, 2015*. It could be argued that this is a legislative oversight that only the legislature can address. But that is not clear. If a board appointed by the Lieutenant-Governor creates a new entity over which it retains significant financial, structural, and policy control, then it is impossible to say that this new entity is wholly distinct from that board controlled by the provincial government. More practically speaking, if the Board of Regents wanted this new entity to change focus, it would have the ability to appoint a board to this new entity that would enact the desired changes of the Board of Regents.

[22] Memorial's assertion that a decision finding that the SIEs are part of Memorial would involve piercing the corporate veil is misplaced. The purpose of this analysis is to determine whether an entity created by a public body is bound to follow legislated rules of transparency and disclosure. For that purpose, consideration of control of the entity and how it is funded is relevant. This analysis is not done for the purpose of attaching a legal liability between the SIEs in question and Memorial. A similar finding was made in 2015 by the Privacy Commissioner of Prince Edward Island in *Re. Department of Economic Development and Tourism (Island Investment Development Inc.)*. In that case, the Department sought to withhold information relating to seven financial intermediaries and argued that requiring such information to be released would involve piercing the corporate veil. The Commissioner disagreed, noting at paragraph 92:

In my view, the concept of "piercing the corporate veil" is a common law principle which may initiate directors', officers' or shareholders' liability where there would ordinarily be none. It has no application to this review.

I agree.

[23] From our investigation and based upon the balance of probabilities, C-Core, Genesis, and CCFI are part of Memorial and subject to *ATIPPA, 2015*. There is significant evidence to support this claim. However, my recommendation in this Report is not based upon this position; instead it is clear that Memorial has custody or control over the records in question regardless of whether the SIEs are part of Memorial, third parties, or their own public bodies. This will be addressed in the next section of this Report.

Custody or Control of the Records

[24] Both sections 5 and 8 of *ATIPPA, 2015* state that the Act applies to all records under the custody of or control of a public body. Neither custody nor control are defined in the Act, however, the concept of control was given extensive consideration by the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011, SCC 25. In its decision, the Court defined control as follows:

[48] *As “control” is not a defined term in the Act, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are “under the control of a government institution,” courts have considered “ultimate” control as well as “immediate” control, “partial” as well as “full” control, “transient” as well as “lasting control” and “de jure” as well as “de facto” control... In this case, “control” means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document even if it is only on a “partial” basis, a “transient basis” or a “de facto” basis.*

[25] The *National Defence* decision sets out a test for determining whether a public body has control over a record. The test is as follows:

[50] *in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request?*

[55] *Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that the Access to Information Act is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.*

[26] The information sought by the Complainant is as follows:

- Records disclosing bonuses or special payments made to C-Core executives and management;

- Records disclosing bonuses and special payments made to Genesis executives and incentives paid to management;
- Records disclosing vehicle allowances paid to Genesis executives and management; and
- Records disclosing vehicle allowances paid to executives and management of CCFI.

All of this information is financial in nature.

[27] Section 38 of the *Memorial University Act* requires that Memorial conduct an audit of the university's accounts once a year. As Memorial makes clear in its audited statements, its audit includes the expenditures and revenues of its separately incorporated entities. These expenditures and revenues are not listed separately, but are instead subsumed within the figures set forth within the financial statements.

[28] With respect to question one of the custody or control test, the information being sought by the Complainant certainly relates to a matter of importance to Memorial; in fact, it relates to a statutory obligation. The information requested by the Complainant directly impacts the result of the audit that Memorial is obligated to perform. What is being sought are expenditures made by three of Memorial's SIEs and these expenditures would have to be disclosed to Memorial in order for its audit to be accurate.

[29] As for the second part of the test, it is certainly reasonable for Memorial to be expected to obtain a copy of the record upon request. In fact, Memorial is statutorily required to be able to obtain a copy of a financial record, as section 38(2) of the *Memorial University Act* requires that the university comply with section 19(3) of the *Auditor General's Act*. This section states that the Auditor General is the auditor for all Crown and Crown-controlled corporations and that the Auditor General has access to all the information that went into an audit of these corporations. If the Auditor General can access this information upon request, then Memorial, by statutory necessity, has to either have custody, or can request copies of, the financial information sought by the Complainant.

[30] In addition to the two-part test, a non-exhaustive list of factors in Ontario IPC Order MO-275 for custody and control has been accepted in other jurisdictions. While not all circumstances considered by the Ontario decision are pertinent to this Report, numerous are and provide further evidence of Memorial's custody or control of the records sought by the complainant.

1. *Was the record created by an officer or employee of the institution?*

- This is not clear and depends on how the employees of the SIEs are classified and what resources of Memorial that the SIEs utilize. For example, some SIEs do utilize Memorial's Human Resources Department. This office does not know if the SIEs utilize Memorial's financial or accounting resources.

2. *What use did the creator intend to make of the record?*

- The creators of the record were recording the expenditures incurred by C-Core, Genesis, and CCFI, as is legally required. The creators should also know that such a document would inform the overall financial statements of Memorial because those financial statements incorporate the revenue and expenditures of the SIEs.

3. *Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?*

- The activity in question is not the payment of bonuses or vehicle expenses. The activity is the proper accounting of expenditures. As noted above, Memorial has a statutory duty to account for its expenditures, which includes those incurred by its separately incorporated entities.

4. *Is the activity in question a "core", "central" or "basic" function of the institution?*

- Yes. Managing Memorial's finances are a central component of the University – how it functions, its capacity, how it is viewed by the people of the province, etc. The provincial government and the public, whose taxes fund Memorial's

operations, expect the university to be accurate in its accounting of revenues and expenditures.

5. *Does the content of the record relate to the institution's mandate and functions?*
 - Yes, Memorial has a mandate to manage and account for all its expenditures.

6. *Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?*
 - Due to notes included in the Auditor General's Report of the university, it is likely that Memorial is in possession of the records sought by the Complainant. On page 31 of the report, table 6 covers "Entities Bonuses and Incentives Paid to Management Employees for the Period April 2019 to December 2022." This table only includes C-Core and Genesis. The number of management employees is redacted in the version of the report released to the public, as is the average bonus payment to management employees and the total payments. This information specifically relates to two of the four access requests addressed in this Report. At the bottom of the table, the source for the information that is redacted is Memorial. Similarly, tables listed on pages 27 and 28 of the report detail the management positions, bonuses, and incentive payments made by C-Core and Genesis. Again, the source of this information is listed as Memorial. There is no similar table setting out car allowances, which is the subject of the two other access requests covered in this Report, though the matter is addressed on page 32 of the report where specific car allowance amounts are listed though redacted. A review of the source for all information contained in the report shows that Genesis, C-Core, and CCFI provided no information directly to the Auditor General. Instead all financial information used in the report appears to have been sourced directly from Memorial. Therefore, it is likely that Memorial is also in possession of the records that disclose car allowances.

7. *If the institution does have possession of the record, is it more than “bare possession”? “Bare possession” means: does Memorial have ownership of the record without the right to use it for its benefit?*
- “Bare possession” means: does Memorial have ownership of the record without the right to use it for its benefit? Memorial does have more than “bare possession” of the records. It has sufficient possession to provide them to its auditor and the Auditor General to meet its legislative requirements.
8. *If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?*
- On a balance of probabilities, it is likely that Memorial has possession of the records.
9. *Does the institution have a right to possession of the record?*
- Yes, it has a statutory right.
10. *Does the institution have the authority to regulate the record’s content, use and disposal?*
- Yes. Since the financials of the three SIEs are consolidated into Memorial’s financial statements, the university would presumably regulate how the record is created, used, and maintained.
11. *Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?*
- Only those that may be imposed by legislation or the internal bylaws and policies of Memorial.
12. *To what extent has the institution relied upon the record?*

- The institution heavily relies upon the records in question as they are needed to establish accurate annual financial statements, which is legislatively required.

13. *How closely is the record integrated with other records held by the institution?*

- The records are integrated with all other financial records that are used to create Memorial's annual financial statement.

[31] There is no doubt that Memorial has custody or control over the financial records sought by the Complainant. Memorial's possession or right to access such records must exist if it is to be properly audited. While an audit does not examine every financial record, it does require access to every financial record so that the general figures and assumptions of the auditor can be confirmed.

[32] In 2023, this Office released two reports on Memorial's SIEs that contained recommendations not consistent with those set out in this Report. In Report A-2023-020, which involved Memorial's Child Care Centre, and Report A-2023-029, which involved the Memorial University Recreation Complex Inc., this Office found that the records requested – about childcare services and swimming pool chemicals, respectively - were not “departmental matters” of Memorial and were therefore not within the custody or control of Memorial. These Reports were issued before the recent performance audit of Memorial conducted by the Auditor General shone light on the fact that Memorial's financial records are consolidated with those of the SIEs. This revealed that: even if the SIEs are separate entities rather than part of the university, Memorial has financial control of them; at a minimum, it must have the authority to obtain these records for the purposes of audit; and it is likely that Memorial presently has custody of these records, having previously obtained them for audit and other purposes.

[33] In summary, by failing to perform a search for the records requested by the Complainant, Memorial did not meet its duty to assist pursuant to section 13(1) of *ATIPPA, 2015*. Such a search must be conducted regardless of the position of Memorial on custody or control over the documents. Further, as the above analysis of the legal standard of custody or control in

access to information cases makes clear, on a balance of probabilities Memorial does have custody or control over the records in question. Whether further exceptions to access apply to these records will have to be assessed once the search is concluded and the records in question are examined further.

RECOMMENDATIONS

- [34] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that: Memorial University of Newfoundland conduct a reasonable search for the records described in the four access to information requests that are addressed in this Report; if necessary, request any responsive records from C-Core, Genesis Group Inc., and the Canadian Centre for Fisheries Innovation; and that Memorial provide its final response to these requests to the Complainant within 30 business days of receipt of this Report.
- [35] As set out in section 49(1)(b) of *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.
- [36] Dated at St. John's, in the Province of Newfoundland and Labrador, this 8th day of February 2024.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador