



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2024-012

March 20, 2024

### Executive Council

#### Summary:

The Complainant made a request under the *Access to Information and Protection of Privacy Act, 2015* to Executive Council for records relating to the submission to government and the subsequent public release of the Auditor General's report about Memorial University. Executive Council located records and provided some of them to the Complainant, withholding some information under section 7(2) (conflict with other Acts) and section 30 (legal advice). The Commissioner found that Executive Council had met its duty to assist the applicant as required by section 13 of the Act, had conducted a reasonable search for records, and had properly applied the claimed exceptions to access. Accordingly, the Commissioner recommended that Executive Council maintain its position and continue to withhold the redacted information.

#### Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, sections 7(2), 13, and 30.

[Auditor General Act, 2021](#), SNL 2021, c A-22.1, sections 2 and 30.

#### Authorities Relied On:

NL OIPC Report [A-2024-009](#); [Practice Bulletin on Reasonable Search](#)

## BACKGROUND

- [1] The Complainant made an access request to Executive Council under the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* for records relating to the submission to government, and the subsequent public release, of the Auditor General's report about Memorial University. Executive Council located records and provided some of them to the Complainant. Some records were withheld in their entirety under section 7(2) of *ATIPPA, 2015* (conflict with other Acts) as Executive Council concluded they fell into the category of "audit working papers" as defined in section 2 and 30 of the *Auditor General Act*. In addition, Executive Council withheld some information in accordance with section 30 (legal advice).
- [2] The Complainant filed a complaint with our Office, asserting that Executive Council had not met its duty to assist the applicant, as required by section 13 of the *Act*; that Executive Council had not provided all of the records responsive to the request; and that exceptions to access were not properly applied. As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

## PUBLIC BODY'S POSITION

- [3] Executive Council maintained that it had conducted a reasonable search for the requested records, and had provided such records to the Complainant, withholding only such information as had been properly redacted in accordance with exceptions in the *Act*.

## COMPLAINANT'S POSITION

- [4] The Complainant argued that:
- Executive Council had not met its duty to assist the applicant under section 13 of the *Act*;
  - Executive Council had failed to answer some of the Complainant's questions; and
  - Executive Council had likely withheld, or had not adequately searched for, certain kinds of records, including:

- ♦ exchanges with Memorial University;
- ♦ exchanges with the Department of Justice and Public Safety;
- ♦ records pertaining to setting the submission and release dates;
- ♦ the report itself and covering letters; and
- ♦ records analyzing public reaction to the report.

The Complainant also argued that Executive Council did not properly apply the exceptions to access used to withhold information.

## DECISION

- [5] There are two issues to be dealt with in this Report. First, whether Executive Council has met its duty to assist the applicant under section 13 of *ATIPPA, 2015*, including the duty to conduct a reasonable search for records; and second, whether Executive Council properly redacted some information under sections 7(2) and 30 of the *Act*.

### Reasonable Search

- [6] A public body's duty to conduct a reasonable search for records responsive to an access to information request is found in section 13 of *ATIPPA, 2015*. As noted in numerous previous reports, the standard applied to a search is "reasonableness, not perfection." In our [Practice Bulletin on Reasonable Search](#), a reasonable search is defined as "one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the request."
- [7] We have reviewed the final response from Executive Council to the Complainant, the responsive records, and the response of Executive Council to our Office about the complaint. From the detailed description of the search process provided to us, from discussions with Executive Council, and from a review of the records located, we conclude that the search appears to have been reasonable and complete.

- [8] Executive Council confirmed that it had specifically searched for records pertaining to exchanges with Memorial University and with the Department of Justice and Public Safety, and for records relating to the setting of the submission and public release dates of the report, but no such records responsive to the access request were located. Executive Council noted that the Auditor General is independent of government, and it would not be expected that Executive Council would have any involvement in “exchanges with Memorial” by the Auditor General, or in setting the submission date for the report.
- [9] Executive Council further confirmed that apart from one record, partially redacted, which will be referred to below, no records of relevant exchanges with the Department of Justice and Public Safety were located in the search.
- [10] The Complainant stated that Executive Council had not provided a copy of the Auditor General’s report or the cover letter that would normally have accompanied it. Executive Council noted that the Complainant, in the access request itself, had stated that the report had been publicly released. For that reason Executive Council did not think it necessary to provide the report in response to the request. Perhaps Executive Council ought to have noted in its response to the access request that the report was a responsive record and was publicly available. However, in the circumstances of this case that was a minor oversight.
- [11] During the course of the investigation Executive Council determined that the Auditor General’s report had actually been hand-delivered to the Clerk of Executive Council. A paper covering letter that accompanied the report was then found, and a copy was provided to the Complainant.
- [12] Executive Council confirmed that it had also specifically searched in the Communications and Public Engagement Branch for records of public reaction to the report, but did not locate any such records.
- [13] Following Executive Council’s response to the access request, and also during the complaint investigation, the Complainant put a number of questions to Executive Council that were not answered to his satisfaction. Those questions mainly asked Executive Council to

identify or to further describe records that had been withheld under the exceptions to access claimed.

[14] As we have stated before, most recently in Report [A-2024-009](#), public bodies are free to answer questions from applicants outside the statutory process. However, the access to information process is designed to provide expeditious access to records. The public body is not normally required, in responding to access requests, to provide interpretations of, or draw conclusions from, the information in the records, to create new records, or to answer additional questions. This is especially so if answering such questions could potentially lead to the disclosure of information that has been properly withheld.

[15] The Complainant argued strenuously that a reasonable observer would conclude “on a balance of probabilities” that various other records must exist. However, such conclusions were, in part, based on suppositions, and in other instances on a misunderstanding of how routine government communications may happen. In such cases the “balance of probabilities” test for whether a record might likely exist must defer to the facts actually revealed by a competent investigation. From correspondence and discussions with Executive Council we have confirmed that a thorough search was conducted. Additional records that the Complainant supposes might exist were not in fact located.

### Redactions

[16] On review of the responsive records withheld from the Complainant, it was clear that the exceptions to access had been properly applied.

[17] Section 7(2) states:

*(2) Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in Schedule A, that provision shall prevail over this Act or a regulation made under it.*

[18] Schedule A includes section 30 of the *Auditor General Act*, which prohibits disclosure of “audit working papers” which in turn are defined in section 2 of that Act as follows:

- (e) *"audit working papers" include draft reports and all other documents which record the planning of, execution of and the evidence obtained during an audit;*

[19] Like the investigative records of other independent statutory offices, audit working papers comprehensively include everything that would be found in an audit working file, from the decision to commence an audit to the submission of the audit report. We are satisfied that the records that were considered by Executive Council to be audit working papers in the present case have been properly withheld.

[20] One email message from a solicitor in the Department of Justice and Public Safety to the Clerk of Executive Council was disclosed to the Complainant but some information in it was redacted under section 30 (legal advice). While the redacted information was not provided to our Office, the Department explicitly confirmed that the redacted information consisted of legal advice. Given the nature and context of the communication, that confirmation was sufficient for our Office to conclude that the information was properly withheld on the basis of solicitor client privilege.

[21] We conclude that Executive Council has responded adequately to this access request, has met its duty to assist the applicant, and has properly applied the claimed exceptions to access.

## RECOMMENDATIONS

[22] Under the authority of section 47 of *ATIPPA, 2015* I recommend that Executive Council maintain its position and continue to withhold the records originally withheld from the Complainant.

[23] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of Executive Council 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.

[24] Dated at St. John's, in the Province of Newfoundland and Labrador, this 20<sup>th</sup> day of March, 2024.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador