



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2024-029

June 26, 2024

Memorial University

Summary:

The Complainant made an access to information request to Memorial University for records relating to the drafts of the Auditor General's performance audit of the University that was released in October 2023. The University withheld all responsive records related to this request on the grounds that they were "audit working papers." Pursuant to section 30(2) of the **Auditor General Act, 2021**, the **Access to Information and Protection of Privacy Act, 2015** does not apply to the disclosure of audit working papers. The Complaint claimed that the definition of audit working papers was too broad and that the exception could not be applicable to records created after the final draft of the audit report was delivered to the Provincial Government but not yet tabled in the House of Assembly. This Office agreed with the University's classification of the records as audit working papers, noting that the withheld records dealt explicitly with matters relating to the preparation and execution of the audit. With respect to the date upon which an audit is deemed completed, this Office determined that all of the responsive records were subject to section 30(2) of the Auditor General Act, 2021.

Statutes Cited:

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

[Auditor General Act, 2021](#) c. A-22.1 sections 2(1)(e), 23(4), and 30(2).

BACKGROUND

- [1] The Complainant made an access to information request under the **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015) to Memorial University for the following:

All records pertaining to the provision of drafts of the Office of the Auditor General Report on Special Assignment into Executive & Management Compensation Operating Expenses and Oversight at Memorial University of Newfoundland (OC2022-088) to MUN and the discussion of their contents with government that preceded the public release of the Report on October 23, 2023.

- [2] In its final response to the request, the University withheld all responsive records and advised the Complainant the records were “audit working papers” and, in accordance with section 30(2) of the **Auditor General Act, 2021** (AGA, 2021), ATIPPA, 2015 does not apply to their disclosure. The Complainant subsequently filed a complaint with this Office.
- [3] As informal resolution was unsuccessful, the Complaint proceeded to formal investigation in accordance with section 44(4) of ATIPPA, 2015.

PUBLIC BODY’S POSITION

- [4] It is the position of the University that all the records responsive to the Complainant’s access request are audit working papers, as defined by AGA, 2021, which applies to a wide variety of records created for the purposes of carrying out an audit under that Act. Section 30(2) of AGA, 2021 explicitly states that ATIPPA, 2015 does not apply to the disclosure of audit working papers and they, therefore, cannot be obtained through an access to information request.

COMPLAINANT’S POSITION

- [5] The Complainant argues that only certain records can be considered as audit working papers, asserting that certain records that accompanied exchanges between the University and the Office of the Auditor General, such as cover letters and emails containing attachments, do not fall within the scope of section 30(2) of AGA, 2021. Further, the

Complainant argues that the date on which the Auditor General report is delivered to the Executive Council is the date upon which the audit is finished. Therefore, the Complainant submits, any record created after that date could not be considered an audit working paper and should be subject to ATIPPA, 2015.

DECISION

[6] The provisions of ATIPPA, 2015 relevant to this matter are as follows:

7.(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.

...

Schedule A

(b.1) subsection 30(2) of the Auditor General Act, 2021;

[7] The provisions of AGA, 2021 relevant to this matter are as follows:

2.(1) In this Act,

...

(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.

...

23.(4) A report of the auditor general referred to in subsection (1) shall be submitted to the speaker and the speaker shall table the report before the House of Assembly at the earliest opportunity after receipt of the report.

...

30.(2) The Access to Information and Protection of Privacy Act, 2015 does not apply to the disclosure of audit working papers.

The Meaning of Section 7(2) of ATIPPA, 2015

- [8] In general, the provisions of ATIPPA, 2015 prevail over every other act or regulation enacted in Newfoundland and Labrador. This is in keeping with the mandate of ATIPPA, 2015 to facilitate transparency and promote democracy. However, as noted at section 7(2) of the Act, there are a limited number of provisions of other statutes designated in Schedule A of ATIPPA, 2015 which prevail over ATIPPA, 2015.
- [9] One such exception listed in Schedule A is section 30(2) of AGA, 2021. This section states that ATIPPA, 2015 does not apply to the disclosure of audit working papers. The definition of audit working papers contained in AGA, 2021 is broad, referring not only to drafts but (at section 2(1)(e)) “all other documents which record the planning of, execution of, and evidence obtained during an audit.” This definition encompasses many different types of records created under different circumstances.
- [10] A simple “but for” test can be applied to determine what is an audit working paper: but for the drafting, planning, investigating, and execution of an Office of the Auditor General audit and report, would this record exist or exist in its current form? Therefore, documents such as emails, letters, notes, statements, and records that are created or amended for the purpose of drafting, planning, and executing the audit would fall under the definition of audit working papers. On the other hand, records that exist regardless of the audit process, such as the University’s own records that may have been reviewed by the Office of the Auditor General, would not be an audit working paper even if used in the Auditor General’s report. Such information would still be subject to ATIPPA, 2015.
- [11] In this case, the records withheld by the University include all of the audit drafts exchanged between the Office of the Auditor General and the University; all emails exchanged between the University and the Office of the Auditor General regarding matters related to the audit report; and emails between the Office of the Auditor General and the University’s separately incorporated entities, which were copied to the University. All of these records relate specifically to the Office of the Auditor General audit and report. These records are clearly

audit working papers and are not subject to ATIPPA, 2015 pursuant to section 30(2) of AGA, 2021.

[12] The Complainant has argued that any claim of an audit working paper is no longer valid after October 19, 2023, the day the report was delivered to the Executive Council. Therefore, any emails, notes, or other records created between October 20, 2023 and October 23, 2023, the date the report was released, should not be considered to be audit working papers.

[13] The date when a final draft of an Auditor General's report is provided to another public body does not determine when the audit process is complete. The work conducted by public bodies in preparation for the release of the report is important, sensitive, and part of the audit process. This work is part and parcel of the execution of an audit, and is therefore included in the definition of audit working papers.

RECOMMENDATIONS

[14] Under the authority of section 47 of the **Access to Information and Protection of Privacy Act, 2015**, I recommend that Memorial University maintain its position on this matter.

[15] As set out in in section 49(1)(b) of the **Access to Information and Protection of Privacy Act, 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.

[16] Dated at St. John's, in the Province of Newfoundland and Labrador, this 26th day of June 2024.



Jacqueline Lake Kavanagh
Information and Privacy Commissioner (Acting)
Newfoundland and Labrador