OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2025-040

September 9, 2025

Memorial University

Summary: The Complainant made an access to information request to Memorial University for a copy of the protected disclosure report regarding a complaint about the University's former President and a potential conflict of interest. The University responded that all information in the report and its appendices were covered by section 40(1) (disclosure harmful to personal privacy) of the Access to Information and Protection of Privacy Act, 2015. The Complainant made a complaint to this Office and during our investigation this Office requested a copy of the report and appendices for review. The University advised that it could not provide a copy to the Office of the Information and Privacy Commissioner, claiming that the report was highly confidential and it would not be fair to those involved in the protected disclosure process. Eventually the University did provide this Office with a copy of the responsive records, though it provided no explanation as to how section 40(1) applied to the material. This Office reviewed the responsive records and recommended that the University conduct a line-by-line assessment of the responsive record to justify the use of section 40(1).

Statutes Cited: Access to Information and Protection of Privacy Act, 2015, SNL 2015, c. A-1.2, sections 3, 5, 40, and 97.

Authorities Relied On: NL OIPC Reports 2005-005, A-2021-025, A-2021-030, and A-2023-021.

Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Justice and Public Safety) 2023 NLCA 27.

BACKGROUND

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

> Protected disclosure investigation into President Neil Bose re. Associate Vice-President of Harlow Campus and [named company] hire conflict of interest.

[2] The investigation report and its accompanying appendices do exist and are in the custody of the University. However, the University withheld both the report and the appendices from the Complainant, responding that section 40(1) applied to the entirety of the responsive records. In its final response to the Complainant, the University justified this position by citing the highly confidential nature of a protected disclosure investigation.

[3] In response, the Complainant filed a complaint with this Office and an investigation was started. As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of the Act.

PUBLIC BODY'S POSITION

[4] The University's position is based exclusively on what it terms as the "highly confidential" nature of the protected disclosure complaint process and investigation. A protected disclosure complaint is akin to a whistleblower complaint as it allows members of the University community to lodge a complaint of wrongdoing against an individual and to remain anonymous. Given this format, the University does not believe that access to a copy of a protected disclosure report should be provided through the Act. The University states that allowing access through the Act would be "antithetical" to the protected disclosure process.

COMPLAINANT'S POSITION

[5] The Complainant believes the information is subject to the Act and does not agree with the University's assessment regarding section 40(1); and asserts that the report and appendices, or at the very least part of them, can be disclosed and should be released.

DECISION

[6] This Office is concerned with how the University has managed this access complaint. In its submission to this Office, the University stated that it would not be providing this Office with a copy of the responsive records to review, citing the "highly confidential" nature of the protected disclosure process and that the release of any information from the protected disclosure investigation report and appendices would disclose information about the identity of the complainant in the matter, while also releasing information that could potentially be embarrassing and damage the reputation of others involved in the investigation. While the University did disclose some facts about the report to this Office, it was asking this Office to trust its opinion without any independent review. A week prior to the 65-business day deadline to conclude our investigation, the University provided this Office with the complete protected disclosure report and its appendices.

[7] The Act has a very clear purpose and mandate. Section 3 states:

> 3.(1) The purpose of this Act is to facilitate democracy through
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> (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;
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> . . .
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> (2) The purpose is to be achieved by
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> (a) Giving the public a right of access to records;
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> . . .

> (c) specifying the limited exceptions to the rights of access and correction that are necessary to:
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> (i) presser the ability of government to function efficiently as a cabinet government in a parliamentary democracy,
> (ii) accommodate established and accepted rights and privileges of others, and
> (iii) protect from harm the confidential proprietary and other rights of third parties.
>
> . . .
>
> (f) providing for an oversight agency that
>
> (i) provides independent review of decisions made by public bodies under this Act.

[8] Section 5 of the Act is clear in that the Act "applies to all records in the custody of or under the control of a public body" That same section sets out those types of records that are not subject to the Act, and there is nothing to suggest, from the record itself or the University's submissions, that a protected disclosure report is not subject to the Act. The Act also contains a Schedule "A" that sets out various sections of provincial legislation not subject to the Act. There is nothing in that schedule that covers a protected disclosure report.

[9] Under section 97, this Office has the authority to review records upon which an access complaint is based:

> (3) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record including personal information.
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> (4) As soon as possible and in any event not later than 10 business days after a request is made by the commissioner, the head of a public body shall produce to the commissioner a record or a copy of a record required under this section.

[10] The University was aware of the Act and how it relates to the protected disclosure process. The University's policy on protective disclosure was adopted by the University's Board of Regents several years ago. The policy's statement on confidentiality states:

> All persons involved in any process related to this Policy are required to maintain confidentiality. Confidential matters are handled in accordance with the Access to Information and Protection of Privacy Act, 2015, SNL 2015, C A-1.2 (ATIPPA), other privacy legislation to which the University is subject, and University policies.

[11] By not providing this Office with a copy of the responsive records in question within the ten business days set forth in the Act, the University was ignoring both its own policy and provincial legislation. This Office was provided with no adequate reason why the University chose to ignore its obligation under the Act for close to two months.

[12] It is the position of the University that all the content of the responsive records must be withheld pursuant to section 40(1) of the Act. Redacting information under section 40(1) is common in the access to information process. That section addresses personal information and is a mandatory exception to access: if a record contains information that meets the definition of personal information, that information must be redacted from the record.

[13] Section 40(1) is not a record-level exception to access. It requires a line-by-line analysis, with every redaction being justified on its own merits. The exception also does not call for a blanket application to all personal information: there are various factors to be considered, and, in some cases, personal information must be disclosed.

[14] From our review of the responsive records, this Office has significant concerns with the University's position that all the information in the responsive records is subject to section 40(1). The copies of the records provided to this Office contained only a few small redactions and there were no explanations provided as to why a certain page or paragraph should be subject to section 40(1). In some instances, the connection between the content of the record and section 40(1) was not apparent when reviewed by this Office. Such explanations need to be provided as the burden of proof to show the applicability of section 40(1) rests with the University.

[15] As noted earlier, there are also several factors that must be considered when assessing whether personal information is required to be withheld and there is no indication that the

University has done such an assessment. For one, the responsive records consist of an investigation into the actions of the former President of the University and section 40(2)(f) deems the disclosure of personal information related to a third party's position or functions as an employee of a public body is not an unreasonable invasion of privacy. Further, the records contain many different opinions, some explicitly about third parties but other times where that distinction is not so significant. Section 40(2)(h) requires, in some cases, the disclosure of opinions given in the course of performing services for a public body. Where the disclosure of personal information is presumed to be an unreasonable invasion of privacy, factors at section 40(5) must still be considered, among them whether disclosure is desirable for the purpose of subjecting the activities of a public body to public scrutiny (section 40(5)(a)). Conversely, section 40(5)(h) requires consideration of whether disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant. However, when considering section 40(5)(h), the University should be aware of Report A-2023-021 which stated that it is difficult to label "unfair" the results of a properly conducted investigation. In its submissions on this matter, the University has never alleged that the protected disclosure Policy was managed unfairly.

[16] To be clear, this Office is not giving the University a do-over on this matter. This Office has held in several decisions (see Report A-2021-030) that when it is mandatory to withhold information, such as with section 40(1), the late-application of an exception is usually accepted. In this case, section 40 was applied from the start, but there is certainly a late and lacking explanation for how it applies. As it currently stands, the University has not met its burden of proof. Nonetheless, the protected disclosure report at issue does contain personal information that needs to be properly addressed by the University. This Office has a responsibility to both support transparency and to protect personal privacy.

[17] With that said, this Office will not except the late applications of exceptions to access for information in the responsive records that are not mandatory. As this Office noted in A-2021-025: "exceptions are meant to be claimed by public bodies when responding to access requests. Furthermore, claiming a new exception at a late stage in the complaint process can be prejudicial to the complainant." The University needs to be accountable for how it managed

this access request. As stated in Report 2005-005:

> In my opinion, if the public body did not invoke a specific discretionary exception in its original denial to the Applicant, it is reasonable to assume that they considered the exception, reviewed all relevant factors and decided that it was appropriate to release the information to the Applicant.

[18] The University is experienced with the access to information process, and it is logical to conclude it did consider other exceptions to access and concluded only section 40 applied. Given the imbalance of resources and expertise between the Complainant and the University, to allow for the University to claim any discretionary exceptions to access during its new review of the records would be prejudicial to the Complainant.

RECOMMENDATIONS

[19] Under the authority of section 47 of the **Access to Information and Protection of Privacy Act, 2015**, I recommend that Memorial University, within 15 business days, provide a new response to the Complainant with a line-by-line review of the application of section 40 to the protected disclosure report and its appendices, disclosing to the Complainant any information in the records that cannot be withheld pursuant to section 40.

[20] As set out in section 49(1)(b) of the **Access to Information and Protection of Privacy Act, 2015**, the head of Memorial University of Newfoundland 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.

[21] Dated at St. John's, in the Province of Newfoundland and Labrador, this 9th day of September 2025.

Kerry Hatfield
Information and Privacy Commissioner
Newfoundland and Labrador