



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2024-053

November 28, 2024

Memorial University

Summary:

The Complainant made an access to information request to Memorial University for the employment contract of a newly-created position for its Harlow campus located in the United Kingdom. Memorial University withheld the records pursuant to section 40(1) (disclosure harmful to personal privacy) of the **Access to Information and Protection of Privacy Act, 2015**, claiming the employment contract is not for a public body employee as it is between a third party individual and a third party entity (Harlow Campus) that is governed by a separate legal entity under United Kingdom law. For the same reasons, Memorial University refused to provide a copy of the record to this Office for review. Memorial University also claimed that Memorial University only has bare possession of the record and they do not have custody or control of the record. An analysis of Memorial University's custody or control showed that on a balance of probabilities Memorial University has custody or control of the record sought by 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 40(1).

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

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

Authorities Relied On: [Canada \(Information Commissioner\) v. Canada \(Minister of Defence\) \[2011\] 2 S.C.R. 306.](#)

[Ontario IPC Order MO-2750](#)

NL OIPC Reports [A-2024-006](#); [A-2021-008](#); [A-2023-029](#); [A-2023-029](#)

[Memorial University Independent Auditor's Report](#)

BACKGROUND

- [1] The Complainant filed an access to information request with Memorial University under the **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015), requesting the employment contract for the Associate Vice-President of Harlow and Global Partnerships. The employment contract is for a newly-created position that replaced the former manager position of Harlow Campus. Harlow Campus is one of Memorial's six campuses and the only one located outside of the province, as well as Canada.
- [2] In its final response to the Complainant, Memorial refused access to the record pursuant to section 40(1) (disclosure harmful to personal privacy) of ATIPPA, 2015. Memorial's response indicated that the employee is not a public body employee as the contract is between a third party individual and a third party entity (Harlow Campus) and that Harlow Campus is governed by a separate legal entity, MUN UK Ltd. (MUN UK), as well as laws in the United Kingdom. Memorial advised the Complainant that for these reasons, disclosure would be an unreasonable invasion of the employee's personal privacy. Nothing in the response to the Complainant noted the significance or application of the laws in the UK in the circumstances of this access to information request. The response simply stated that MUN UK is governed by UK law. The response to the Complainant also did not put forward a position on custody or control of the record.
- [3] The Complainant filed a complaint with our Office requesting Memorial release the employment contract.
- [4] Memorial refused to provide the contract to this Office during the investigation for the same reasons Memorial withheld the contract from the Complainant. Memorial directly acknowledged that they have possession of the record but in the response to this Office they also claimed they do not have custody or control of the record and asserted that the record is in the custody and control of MUN UK. Additionally, Memorial asserted that the law in the UK makes it an offence to provide a person with any record related to another person's employment, which it did not mention in its response to the Complainant.

[5] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of ATIPPA, 2015. As part of the investigation this Office conducted an examination of the nature of the relationships between Memorial, Harlow Campus, and MUN UK to have a complete picture of the context in which the complaint arose.

Nature of the Relationships

[6] Memorial University is comprised of six campuses. There are three campuses in St. John's (St. John's campus, Marine Institute, and Signal Hill campus), one in Happy Valley – Goose Bay (Labrador campus), and one in Corner Brook (Grenfell campus). Harlow is the sixth campus and is located in the United Kingdom.

[7] In October 2023, the Auditor General released a Report on Memorial University after conducting a performance audit. The Auditor General's Report reviewed Harlow Campus and MUN UK as part of the performance audit, although it did not include comparisons to compensation and benefits of certain employee groups, and Harlow employees were one of the groups not included. The Auditor General Act, 2021 states that it is the auditor of financial statements and accounts of all agencies of the Crown and Crown controlled corporations. Where an audit is being conducted of financial statements of an agency of the Crown or Crown controlled Corporation, the Act requires an agency of the Crown or Crown controlled corporation to make a number of documents available to the auditor general.

[8] The Report provides a wealth of information on the operations and spending at Memorial, including information setting out the relationship between Memorial, Harlow campus, and MUN UK. According to the Report, Memorial established MUN UK, a limited guarantee corporation, in 2016 to carry on the operations of the Harlow campus on behalf of Memorial. Oversight of the Harlow campus is conducted by MUN UK's Board of Directors and its Harlow Financial Oversight Committee. The Board of Directors for MUN UK report to Memorial University's Board of Regents through the Chair of the Board. The Articles of Association for MUN UK designate the President of Memorial University as Chair of the Board of Directors for MUN UK. The Vice-chancellor of Memorial University and the Vice-President (Academic) and Pro-Vice chancellor of Memorial University also serve as ex-officio Directors on this Board.

- [9] The Board of Regents is responsible for the budget of Harlow campus, funded from the University's operating budget, and appointments to the MUN UK Board. Each year Memorial University transfers a large sum of money to the Harlow Campus for operating expenses. The Auditor General's Report also noted that according to Memorial officials, the funds to support Harlow are expensed as a grant from Memorial on their financial statements.
- [10] The Board of Directors for MUN UK deal mainly with strategic issues of Harlow Campus and delegate responsibility for the operational day-to-day activities. In the past those tasks were delegated to the General Manager but recently, and in response to the Auditor General's Report, the General Manager position has been replaced with a newly-created position. This position, Associate Vice-President of Harlow and Global Partnerships, is the employment contract that the Complainant is seeking.
- [11] Similar to Memorial's separately incorporated entities (SIEs), it appears section 34(1)(s) of the **Memorial University Act** provides the Board of Regents discretionary authority to establish an entity such as MUN UK. Moreover, 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."
- [12] The filing history of MUN UK in the Companies House, the executive agency of the UK government that maintains the register of companies, includes a Notification of Memorial University as a person with significant control. The principal address on the notice is Memorial's campus at 230 Elizabeth Avenue in St. John's. The nature of the control is noted to be "the right to exercise, or actually exercises, significant influence or control over the company." Additionally, as a company of limited guarantee, MUN (UK) Ltd has no shareholders. In the event MUN UK is wound up or encountered any problems, it is the guarantor, Memorial, that is financially responsible.
- [13] Memorial also acted in response to a number of findings from the Auditor General's Report with respect to Harlow Campus. On October 11, 2024, Memorial University published online an update to the university community on a summary of work Memorial completed as a result of recommendations made in the Auditor General's Report. The update indicated that a review

of Harlow Campus operation and commitments had been completed and Memorial University implemented multiple changes. The work on the recommendations was overseen by an ad hoc action committee of the Board of Regents. The following changes concerning Harlow were implemented:

- Memorial University approves all appointments to the Harlow Board of Directors.
- An associate vice president (Harlow Campus and global Partnerships) has been hired to replace the former manager position, with a focus on developing a strategy to ensure the financial sustainability of the campus.
- Under the supervision of Memorial's chief financial officer and the director of Resource Allocation and Planning in the Provost's Office, an external accounting firm was contracted to manage the accounts for both the Harlow Campus and the Harlow Scholarship Trust. The 2022/23 financial statements have been completed, and all appropriate filings were made with the House of Companies and the Charities Commission.
- An audit of the 2023/24 financial statements has begun.
- Next steps for Harlow include updating campus policies and relevant Memorial policies to ensure compliance with UK law and/or best practices, and further developing action plans to improve financial sustainability.

[14] The findings of the Auditor General's Report along with the changes implemented by Memorial in response to the report are significant to the issues in this case.

PUBLIC BODY'S POSITION

The Employee Contract is Not a Public Employee Contract

[15] Memorial maintains that the employee contract is not for a public body employee and therefore not subject to ATIPPA, 2015. Memorial bases this claim on the apparatus Memorial put in place to manage the operations of the Harlow campus in the UK. In support of its argument, Memorial highlights that MUN UK is a completely separate legal entity from Memorial and is incorporated and governed by UK laws and regulations. Memorial asserts that while MUN UK is affiliated with Memorial, such that students of Memorial can enroll in courses and stay in residence at Harlow, the Harlow campus is ultimately owned, directed, controlled, and administered by MUN UK. Consequently, employees of the UK Company are not public body employees, namely employees of Memorial, as Memorial is not party to the

employment contract. For that reason, information relating to the employment is not subject to disclosure under ATIPPA, 2015.

[16] Memorial also contends that the contract between the employee and the UK company is considered the employee's personal data and is protected pursuant to UK legislation, in particular the **UK General Data Protection Regulations** and the **Data Protection Act, 2018**. In essence, the **Data Protection Act, 2018** states it is an offence to provide a person with any record related to another person's employment without that person's consent.

[17] Additionally, the contract itself contains provisions expressly stating the contract is governed by UK privacy laws. Memorial asserts that if this Office recommends Memorial to disclose the employment contract, this Office would essentially be counselling Memorial to commit an offence in another jurisdiction.

[18] As a corollary to all of this, Memorial argues that the release of the information in this jurisdiction would also violate sections 68(1)(t) of ATIPPA, 2015 (disclosure of personal information) which stipulates that a public body may disclose personal information only where it would not be an unreasonable invasion of an individual's personal privacy under section 40 of ATIPPA, 2015.

[19] Memorial submits that releasing the contract violates two subsections under section 40 of ATIPPA, 2015. First, section 40(4)(c), as the contract relates to the employment history of a third party who is a citizen of the UK and the contract is governed by UK privacy legislation. Second, section 40(4)(g)(i), as it consists of the employee's name along with other personal information. In support of this argument, Memorial repeats the assertion that the employee is not a public body employee and has an expectation of privacy given the UK legislation and there is a significant amount of personal information within the contract, such as their address. Memorial does not address whether withholding specific provisions or information within the document could address this issue and this Office did not receive the contract to conduct a line-by-line review.

[20] Memorial also submits section 40(5)(h) of ATIPPA, 2015 supports withholding the information. This section must be considered in determining whether subsections 40(1) and 40(4) of ATIPPA, 2015 apply. In support of this assertion Memorial states the individual is a UK citizen, employed by a UK company, their contract states it is to be governed by UK law, and UK privacy legislation makes it an offence to release employment contracts. They assert reputational harm could ensue with the release of the contract because the employee's personal information would be released to the public and would otherwise be protected in the UK. Memorial takes specific issue with the Complainant requesting the information, claiming they post all records they receive from ATIPP requests on a public blog and if done in this case, there will be significant damage to the reputation of the employee given their status as a UK citizen where this information should not be disclosed. Additionally, Memorial argues this would set a bad precedent for hiring future employees at Harlow Campus because UK citizens will not seek employment with a UK company that may be counselled to commit offences against their own privacy legislation. For that reason, disclosure could also harm the reputation of Harlow campus.

Memorial Does not have Custody or Control of the Record

[21] Despite replying to the Complainant that it was withholding the record under section 40, Memorial also claims it does not have custody or control of the record. Memorial acknowledges that it has a copy of the contract, but asserts it is bare possession only. Memorial submits that Memorial's President signed the contract in their capacity as Chair of the Board of Directors for MUN UK and not in their capacity as President of Memorial. As such, Memorial only has possession by virtue of the President of Memorial's position as a member of the UK Company's Board of Directors.

[22] Throughout its submissions Memorial claims that it does not have custody or control of the contract due to the legal status of MUN UK and the application of UK privacy laws.

COMPLAINANT'S POSITION

[23] The Complainant asserts that the contract should be released pursuant to ATIPPA, 2015. In support of this position the Complainant highlights that the President of Memorial University appointed the individual to the position in question.

[24] The Complainant also contends that the funding provided by Memorial University for Harlow to operate is evidence countering the concept that Harlow is part of a completely separate legal entity. As evidence of the financial connection between Memorial University and Harlow, the Complainant cited a record that sets out the funds Memorial University provides to Harlow campus annually. The record starts in the fiscal year of 2003 up to and including the fiscal year of 2024. The record was created by the Office of the Provost and Vice-President (Academic) of Memorial. The Complainant also cited the Auditor General's Report on Memorial from October 2023.

[25] The Complainant did not provide a position on custody and control as that was not specified in Memorial's final response to the Complainant.

DECISION

[26] 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 the 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;

...

3.(2) The purpose is to be achieved by

- (a) giving the public a right of access to records;

5.(1) This Act applies to all records in the custody of 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...

...

40.(1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where

...

(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

...

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where:

...

(c) the personal information relates to employment or educational history;

...

(g) the personal information consists of the third party's name where

(i) it appears with other personal information about the third party

...

40.(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;

...

(h) the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant;

...

68.(1) A public body may disclose personal information only

...

(t) where the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 40;

The sections of the **Auditor Generals 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 Sections 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 powers . . .

...

(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.

(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.

The Sections of the Board of Regents Bylaws relevant to this matter are as follows:

1. Unless the context specifies or requires otherwise, where used in these Bylaws, the following terms shall have the following meanings:

...

(t) “University” means Memorial University of Newfoundland and its affiliated colleges, institutes and separately incorporated entities;

Is Harlow Campus Part of a Public Body

[27] To determine whether Harlow is a public body or part of a public body, it is important to look at the entirety of the circumstances surrounding its existence, including its financing, management, oversight, and any other relevant criteria.

[28] To begin with, Harlow campus is a Memorial University campus and Memorial University is a public body as defined by ATIPPA, 2015. As set out in Report [A-2024-006](#),

[14] ... First, Memorial University 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.

[29] Unlike Memorial’s other five campuses, Harlow campus is located outside of Canada. It is only reasonable to expect the oversight and management of a campus in a foreign country will vary from Memorial’s other five campuses.

[30] Harlow is the only Memorial campus governed by a corporation. There are obvious practical and legal reasons to establish a corporation in the UK to assist in managing a campus in the UK, including the use of a foreign currency, administering payroll, tax remittances, and other elements that are unique to that jurisdiction. This aligns with MUN UK’s purpose, as noted in the Auditor General’s Report, to manage the day-to-day operations of Harlow campus on behalf of Memorial.

[31] There are multiple factors indicating Memorial has not delegated absolute oversight of Harlow campus to MUN UK and that Harlow campus is inextricably linked to Memorial. The filing history of MUN UK in the House of Companies designates Memorial as a person that has “the right to exercise, or actually exercises, significant influence or control over the company.” Moreover, the Board of Directors of MUN UK report to Memorial’s Board of Regents and the Board of Regents are responsible for selecting the Board of Directors. Additionally, the very bylaws of the Board of Regents defines “University” to include Memorial’s separately incorporated entities. Hence, despite the distinction in how and where Harlow campus operates from Memorial’s other campuses, it is ultimately governed by Memorial.

[32] It is also significant that Memorial funds MUN UK. As an example of the extent of the funds provided by Memorial, Harlow received a \$929,000 operating grant for the fiscal year ending in March 31, 2024. Moreover, the accounts for Harlow campus are managed by an external accounting firm and this is done under the supervision of Memorial’s chief financial officer and the director of Resource Allocation and Planning in the Provost’s Office. In fact, an audit of Harlow’s 2023-2024 financial statements has begun, as announced by the Chair of the Board of Regents and the President of Memorial in October, 2024.

[33] Memorial also created the position of an associate vice president of Harlow campus and global partnerships with a goal of developing strategy to ensure the financial sustainability of the campus.

[34] The issues raised in this Report are similar to those raised in Report [A-2024-006](#), where the Commissioner found Memorial University’s SIEs are a part of the University. One of the key considerations in that Report was the purpose of ATIPPA, 2015 and public funding. The report states at paragraph 19,

[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.

[35] All of the circumstances surrounding the nature of the relationships between Memorial, MUN UK, and Harlow campus, indicate that Harlow campus is inextricably linked to Memorial despite the day-to-day operations being governed by MUN UK. As previously stated, Memorial established MUN UK to carry on the operations of Harlow on behalf of Memorial. Memorial is also still registered with the House of Companies as a person with the right to exercise significant influence or control over the company. Memorial's position substantially downplays or completely ignores the fundamental role Memorial has in the formation, oversight, and continued operations of Harlow campus.

[36] The evidence from our investigation along with the pertinent legislation establishes on a balance of probabilities that Harlow is a part of Memorial and subject to ATIPPA, 2015. However, in keeping with this Office's analysis in Report [A-2024-006](#), my recommendation is not based upon this position; instead it is clear that Memorial University has custody or control over the records in question, regardless of whether Harlow is part of Memorial or a separate legal entity.

Does Memorial have Custody or Control of the Records

[37] Per section 5, ATIPPA, 2015 applies to all records in the custody or under the control of a public body. Neither custody nor control are defined in the Act, however, the issue of custody and control has been reviewed in a number of previous reports such as Report [A-2021-008](#) and more recently Report [A-2024-006](#) which considered the application of ATIPPA, 2015 to a corporation owned by Memorial. As stated in these reports, section 5(1) establishes an

important threshold. In order for ATIPPA, 2015 to apply to records, the records must either be in the custody of or under the control of a public body, it need not be both.

[38] Moreover, as stated in Report [A-2021-008](#),

[19] The terms “custody” and “control” are not defined in ATIPPA, 2015. However, these terms have been given a broad and liberal interpretation in keeping with the purposes of access to information legislation. One of the purposes of ATIPPA, 2015 is to facilitate democracy through ensuring that citizens have the information required to participate meaningfully in the democratic process, increased transparency in government and public bodies and protecting the privacy of individuals.

[20] It has generally been established that physical possession of a record is the best evidence of custody, simple possession is not determinative.

[39] In [Canada \(Information Commissioner\) v. Canada \(Minister of National Defence\)](#) the Supreme Court of Canada considered the concept of control in depth. 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.

[40] **Canada (Information Commissioner) v. Canada (Minister of Defence)** set out a two-part test to determine the question of control where the record requested is not in the physical possession of a public body. The record will be under the control of the public body if the following questions are answered in the affirmative:

- (i) Do the contents of the document relate to a departmental matter; and
- (ii) Could the relevant government institution could reasonably expect to obtain a copy of the document upon request.

[41] [Ontario IPC Order MO-2750](#) set out a non-exhaustive list of factors to consider in a determination of custody and control. The list factors, must be considered in the circumstances of each case to determine their relevance to custody or control, if any. The factors listed include:

- Was the record created by an officer or employee of the institution?
- What use did the creator intend to make of the record?
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?
- Is the activity in question a “core”, “central” or “basic” function of the institution?
- Does the content of the record relate to the institution’s mandate and functions?
- 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?
- If the institution does have possession of the record, is it more than “bare possession”?
- 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?
- Does the institution have a right to possession of the record?
- Does the institution have the authority to regulate the record’s content, use and disposal?
- 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?
- To what extent has the institution relied upon the record?
- How closely is the record integrated with other records held by the institution?
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances.
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances.

[42] The record sought here is an employment contract for the Associate Vice-President of Harow and Global Partnerships, a position that replaced the General Manager position of Harlow campus and responsible for ensuring the financial sustainability of the campus, which is funded by Memorial with public funds.

[43] Memorial University acknowledges it has physical possession of the record. While this is evidence of custody, it is not necessarily determinative. In this case Memorial claims this is only bare possession, submitting that the President of Memorial did not sign the contract in their capacity as President of Memorial, but in their capacity as Chair of the Board of Directors for MUN UK. Hence, Memorial only has possession of the record by virtue of the President of Memorial being the Chair of the Board of Directors for MUN UK. This argument completely ignores multiple factors set out below that indicate Memorial is in control of the record:

- Memorial's Board of Regents is responsible for the budget of Harlow campus which is funded from the University's operating budget funded in a large part by public funds;
- Memorial's Board of Regents is responsible for appointments to the Board of Directors for MUN UK;
- The Articles of Association of MUN UK designate the President of Memorial University as Chair of the Board for MUN UK;
- The Chair of the Board of Directors for MUN UK, which is the President of Memorial by designation, signed the employment contract;
- The Chair of the Board of Directors for MUN UK reports to the Board of Regents on behalf of MUN UK's Board of Directors;
- An external accounting firm manages the accounts for the Harlow Campus under the supervision of Memorial's chief financial officer and the director of Resource Allocation and Planning in the Provost's Office;
- The contract is for a position created to replace the General Manager of Harlow campus with a focus on the financial sustainability of the campus. This change was implemented by Memorial as a response to the Auditor General's Report on Memorial in October of 2023; and
- MUN UK only exists to carry out the purposes of Memorial University in operating a campus at Harlow for the education of Memorial University students.

[44] It is noteworthy that the Auditor General found that Memorial had previously paid \$65,000 for a consultant to provide advice on maintaining and further developing Harlow campus and the Auditor General had the opportunity to review the documents submitted by the consultant. Although it is not clear that the contract itself was provided to the Auditor General, several of the provisions were noted by the Auditor General in the report.

[45] The factors outlined above distinguish this case from Report [A-2021-008](#) where this Office determined the Town of Conception Bay South did not have custody or control of records in their physical possession. The complainant in that case had sought the minutes of the Long

Pond Harbour Authority received by specific officials of the Town. Similar to this case, the records were in the Town's possession only by virtue of the Harbour Authority by-laws that require the Town to appoint two employees to the Harbour Authority board of directors and the records sought had been sent to the work email for those two employees. Despite this similarity, the Port of Long Pond is not owned or operated by the Town, it is a privately-owned asset of the Harbour Authority. The Town did not have an obligation, or even the right to possess or hold the records sought. The directors of the Harbour Authority that were also employees of the Town were not permitted to provide the records to the Town council, other Town employees, or anyone else and were prohibited from permitting the Town council and Town employees to access the minutes without obtaining authorization from Harbour Authority. Moreover, the directors of the Harbour Authority were required to enter into a confidentiality agreement with the Harbour Authority to keep all information pertaining to the corporation in the strictest confidence and were required to sign an oath of office that they swear to not communicate information related to the business to those not legally entitled.

[46] Unlike the circumstances in Report [A-2021-008](#), the factors of this case indicate that Memorial's possession of the contract amounts to more than bare possession. These factors draw one to conclude that Memorial is entitled to and indeed holds both custody and control of the record. This conclusion is unavoidable due to the many factors noted above, including that Memorial funds Harlow campus and even the accounting firm that manages the accounts for Harlow Campus. Although the President of Memorial signed the contract in their capacity of Chair of the Board, the Chair of the Board is required to report to the Board of Regents on behalf of MUN UK's Board of Directors, and the President is designated Chair of the Board by the Articles of Association. Additionally, Memorial created the position for which the contract relates in response to the Auditor General's Report. Memorial is ultimately responsible for the budget of Harlow campus, which is partially subsidized with public funds. As such, it also aligns with the purposes set out in section 3 of ATIPPA, 2015 that Memorial has custody and control of the records.

[47] This Office previously determined in Report [A-2023-029](#) that Memorial did not have custody or control of records related to swimming pool chemicals purchased for the Aquarena, which is part of the Memorial University Recreation Complex Inc. (MURC), another of

Memorial's SIEs. Unlike this case, Memorial did not have the right to regulate the record's use and it was not closely integrated with Memorial as Memorial is not involved in the tendering process or purchase of swimming pool chemicals for the Aquarena. It was also noted that Memorial could not be said to rely upon these records in any way and it was not related to a "core" or "central function" of the University. In contrast, the present matter deals specifically with the employee contract for the most senior person at Memorial's Harlow campus, a position created by Memorial in response to the Auditor General's review of Memorial's operations.

[48] After a review of the submissions of the parties, the legislation, and the specific circumstances in this case, I have determined that Memorial has custody and control of the records the Complainant requested.

Should the record be withheld pursuant to section 40 of ATIPPA, 2015

[49] Having found that Memorial has both custody and control of the records, information within the records may still be withheld pursuant to section 40(1) of ATIPPA, 2015 if the necessary criteria are met. This is the section Memorial relied upon for withholding the records in its response to the Complainant. Memorial claims that subsections 40(4)(c) and 40(4)(g)(i) support withholding the records pursuant to section 40(1).

[50] In essence, these provisions establish a rebuttable presumption that disclosure of personal information is an unreasonable invasion of a third party's personal privacy where the personal information relates to employment or educational history or the personal information consists of the third party's name where it appears with other personal information about the third party.

[51] Memorial argues that the disclosure of the contract would be an unreasonable invasion of the employee's personal privacy pursuant to sections 40(1), 40(4)(c), and 40(4)(g)(i) as it pertains to the employment history of a UK citizen employed by a UK company; the contract is governed by UK privacy legislation that prohibits disclosure of the contract; and they are not a public body employee as defined by ATIPPA, 2015.

[52] Additionally, Memorial specifies that with respect to section 40(4)(c), UK citizens have an expectation of privacy as it relates to their employment history. With respect to section 40(4)(g)(i), Memorial highlights that the employment contract contains a significant amount of personal information, such as the employee's home address.

[53] It must be noted that that despite the laws in the UK, the contract is in the custody and control of a public body in this jurisdiction. While ATIPPA, 2015 may permit this Office to consider the laws in the UK as a factor to consider in the applicability of section 40 of ATIPPA, 2015, it is ultimately the law in this jurisdiction that is determinative to the contract, as it is in the custody and control of Memorial.

[54] Unfortunately, Memorial refused to provide the contract to this Office and there was no way for this Office to determine whether some of the information within the contract may be subject to section 40 or not. A line-by-line review of the record is required to determine what, if anything, should be withheld in the record.

RECOMMENDATIONS

[55] Under the authority of section 47 of the **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015), I recommend that Memorial University conduct a line-by-line review of the employee contract as a record in its custody or control and provide a new response to the Complainant within 10 business days.

[56] As set out in section 49(1)(b) of ATIPPA, 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.

[57] Dated at St. John's, in the Province of Newfoundland and Labrador, this 28th day of November 2024.



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