



Report A-2011-003

March 24, 2011

Memorial University of Newfoundland

Summary:

The Applicant applied to Memorial University (“Memorial”) under the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) for access to information contained in three reference forms that were provided on her behalf in relation to her application for admission as a student into Memorial’s School of Music. Memorial allowed access to one of the reference forms upon receiving the consent of the instructor who provided the reference. However, Memorial denied access to the other two reference forms after the instructors who provided those references expressly refused to provide their consent. Memorial claimed that the information in the two reference forms was exempted from disclosure by section 24(1) (disclosure harmful to the financial or economic interests of a public body), section 27(1) (disclosure harmful to the business interests of a third party) and section 30(1) (disclosure of personal information). The Commissioner determined that Memorial is not entitled to rely on section 24(1) or section 27(1) to refuse access to the information in the two reference forms. The Commissioner also concluded that any opinions expressed in the forms about the Applicant constituted the Applicant’s personal information and this information should be released to the Applicant. The Commissioner did, however, find that the reference forms also contained the addresses and contact information of the instructors, which amounted to the personal information of the instructors. The Commissioner found that, pursuant to section 30(1), the personal information of the two instructors should not be released to the Applicant.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, ss. 2(o), 2(t), 24(1), 27(1), 30(1), 39 and 64; *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2005-003, 2007-001, 2007-003, A-2008-003, A-2008-005, A-2008-013 and A-2009-002; British Columbia OIPC Order F11-05.

Other Resources Cited:

Black’s Law Dictionary, Eighth Edition, St. Paul, Minn.: Thomson West (2004).

Teacher Reference Form. Memorial University Website at:
<http://www.mun.ca/music/programs/undergrad/teacherreference.pdf>.

Review of the Access to Information and Protection of Privacy Act. Report by John R. Cummings, Review Commissioner. January 2011. at:
http://www.justice.gov.nl.ca/just/publications/ATIPPA_Review_Report.pdf

I BACKGROUND

- [1] In accordance with the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) the Applicant submitted an access to information request to Memorial University (“Memorial”) on April 19, 2010, in which she requested disclosure of records as follows:

I am requesting copies of three references that were made on my behalf for the following years & music teachers:

[Name of Teacher] (2006)

[Name of Teacher] (2007)

[Name of Teacher] (2010)

- [2] Memorial responded to this access request on June 17, 2010, indicating that access was being granted to one of the references as the music teacher who had provided that reference had consented to its disclosure. However, Memorial advised the Applicant that access to the other two references was being denied on the basis of section 24(1) (disclosure harmful to the financial or economic interests of a public body), section 27(1) (disclosure harmful to the business interests of a third party) and section 30(1) (disclosure of personal information).

- [3] In a Request for Review dated August 10, 2010, and received in this Office on that date, the Applicant asked for a review of the decision made by Memorial.

- [4] Efforts by an investigator from this Office to facilitate an informal resolution were unsuccessful and, by letters dated October 1, 2010, the parties were advised that the Request for Review had been referred for formal investigation as per section 46(2) of the *ATIPPA*. As part of the formal investigation process and in accordance with section 47 of the *ATIPPA*, both parties were given the opportunity to provide written submissions to this Office.

II MEMORIAL’S SUBMISSION

- [5] Memorial provided its submission in correspondence dated October 18, 2010, and described the access request as follows:

The ATIPP request in this matter is for copies of three professional evaluations supplied confidentially to the university by the applicant’s private music instructors as part of the applicant’s application for admission to Memorial University’s School of Music.

[6] Memorial pointed out in its submission that it granted access to one of the three professional references based on the consent of the private music instructor who supplied that reference. However, the other two private music instructors expressly denied their consent and based on this Memorial denied access to those two references relying on the exceptions to disclosure set out in section 24(1) (disclosure harmful to the financial or economic interests of a public body), section 27(1) (disclosure harmful to business interests of a third party) and section 30(1) (disclosure of personal information).

[7] In relation to the section 24(1) exception Memorial stated:

. . . Memorial submits that the information in question is withheld under section 24. The exception to disclosure set out in section 24 is a discretionary exception which the university, after due consideration, invoked to support its decision to withhold the professional evaluations. The School of Music admits the best-qualified candidates from the pool of applicants for admission. The School relies on professional evaluations of private music instructors as part of its assessment of candidates for admission. Memorial University reasonably believes that if it cannot assure confidentiality of these confidential evaluations, then private music instructors may be reluctant to provide candid assessments of their students' abilities and suitability for admission to the School of Music, resulting in harm to the School of Music's recruitment of the best-qualified candidates.

[8] Memorial dealt with its claim for the section 27(1) exception by discussing the three-part harms test that must be met before this section can be used to deny disclosure:

The first part of the harms test requires that a disclosure would reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party. While music evaluations may not, in and of themselves, be described as any of these things, they represent the stock in trade of private music instructors and contain their evaluations of students' abilities.

The second part of the harms test is that the information has been supplied, implicitly or explicitly, in confidence. The evaluations were clearly supplied in confidence, as stated on the forms

The final part of the test is that disclosure of the information could reasonably be expected to result in one or more specified harms. Memorial submits that disclosure of the evaluations could reasonably be expected to result in (1) "similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied;" (2) "harm the competitive position of music instructors;" and (3) result in undue financial loss or gain to private music instructors. Given the small local community of qualified private music instructors, disclosure of evaluations could result in instructors choosing to provide less than candid evaluations or choosing not to supply evaluations. If a negative assessment of a student became known, then the instructor's professional reputation may be affected, resulting in students choosing not to study with a particular instructor who has a reputation for providing a negative assessment or "ruining my chances of getting into the School of Music."

[9] Memorial's submission in relation to section 30(1) stated:

The professional evaluations consist of opinions of the private music instructors and are, therefore, personal information in accordance with ATIPPA's definition of personal information [2(0)(ix)]. As a mandatory exception to disclosure, the university could not disclose this information without the consent of the private music instructors. The evaluation form which private music instructors complete states clearly that evaluations are held in strict confidence

The university recognizes that the information in the completed evaluation forms is also the personal information of the candidate, in accordance with ATIPPA's definition of personal information. However, the Access to Information and Protection of Privacy Act provides no resolution for this conflict in the definition of the term in this particular case.

The university has carefully reviewed your Office's Report A-2007-001, in which this conundrum in ATIPPA 's treatment of personal information was considered. We note that the Commissioner in that report acknowledged that giving access to the applicant would violate the privacy of another person. Nevertheless, the Commissioner resolved the "absurd contradiction" by deciding that "an opinion about the Applicant is the Applicant's personal information, rather than the personal information of the person offering the opinion." The case presently under review is distinguished in several respects:

- 1. The evaluations were supplied to the university with an express, documented expectation of confidentiality, and in accordance with the long-standing and well understood School of Music admission procedures.*
- 2. The university formally sought the consent of the private music instructors to disclose the evaluations and two of them (relating to the evaluations which are the subject of this Review) expressly refused consent.*
- 3. Part IV of ATIPPA was proclaimed into force in January 2008 and, accordingly, public bodies are required by law to protect personal information in their custody and/or control. None of the circumstances set out in section 39, the section in Part IV of ATIPPA which sets out permitted disclosures, applies in this case.*

The university is of the view that the personal information in question, while constituting personal information of the applicant, is also the personal information of the private music instructors and under ATIPPA disclosure would be a violation of their privacy.

III APPLICANT'S SUBMISSION

[10] The Applicant's submission is contained in correspondence dated October 16, 2010, in which the Applicant stated:

I feel that I have the right in having fair access to the copies of teacher reference forms given to the MUN School of Music by the voice teachers A copy of the reference forms was forwarded to the School of Music by the teacher for the purpose of my eligibility as a potential candidate for the faculty of music.

The content of these references concerns personal information about my performance as music student. In no way does it disclose discrete information about the School of Music or the University at large. The sharing of this information would then not harm the School of Music's or Memorial University's reputation. As well, the sharing of this information would not harm the music teacher's reputation since it is an assessment of my musical ability and which does not contain any of their personal information.

. . . Based on Section 24-27 Professional music teachers are expected to be candid in their appraisals to students. However, I have not been given a clear and candid appraisal. The university is a public body and it owes accountability to its students. Transparency is a major component of a public body that is the School of Music, a sector of the larger University. Section 27 reflects a disclosure harmful to the School of Music, however, this information only concerns "my person" and not third party interests. . . . I am only inquiring about information for "my person". In relation to Section 30, the personal information is about "my person" and no other harmful effects are weighed on another individual, group, or public body. . . .

[11] The Applicant indicates that she obtained the reference form from Memorial's website at <http://www.mun.ca/music/programs/undergrad/teacherreference.pdf> and personally delivered a copy of the form to the voice teachers. The Applicant states that the form "does not indicate in any written format that the information written by them is held in strict confidence by the University."

IV DISCUSSION

[12] The issues to be decided are as follows:

1. Is Memorial entitled to deny access on the basis of the exception set out in section 24(1)?
2. Is Memorial required to deny access on the basis of the exception set out in section 27(1)?
3. Is Memorial required to deny access on the basis of the exception set out in section 30(1)?

1. Is Memorial entitled to deny access on the basis of the exception set out in section 24(1)?

[13] Section 24(1) of the *ATIPPA* allows a denial of access where the disclosure could be harmful to the financial or economic interest of a public body. It provides as follows:

24. (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of the province or the ability of the government to manage the economy, including the following information:

- (a) trade secrets of a public body or the government of the province;*
- (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;*
- (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;*
- (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party; and*
- (e) information about negotiations carried on by or for a public body or the government of the province.*

[14] As I understand Memorial's argument regarding section 24(1), it maintains that the disclosure of the information in the two reference forms would result in it not being able to give an assurance of confidentiality with regard to this information in the future. As a consequence of this, private music instructors "may be reluctant" to provide a candid assessment of a student's abilities and the student's suitability for admission to the School of Music. This, in turn, would result in harm to the School of Music's ability to recruit the best-qualified candidates. I note that Memorial states that the instructors "may be reluctant", which in my view is only speculation on Memorial's part.

[15] This Office has discussed in a number of Reports that which must be proven by a public body in order to meet the burden imposed upon it by section 64(1) of the *ATIPPA* when it claims the exception set out in section 24(1). In Report A-2008-013, I made the following comment in paragraph 84:

[84] Previous reports from this Office have stated that in order for a public body to rely on the exception in section 24(1), the public body must establish by detailed and convincing evidence that there exists a clear and direct linkage between the disclosure of the information at issue and the probable harm to the financial or economic interests of the public body. Furthermore, in order to prove this linkage, the public body is required to give an explanation of how or why the alleged harm would result from the disclosure of specific information. (See Reports 2005-002 and 2008-002.)

[16] In my opinion, Memorial has not provided any evidence, and certainly not any “detailed and convincing evidence”, that there exists “a clear and direct linkage” between the disclosure of the information in the two reference forms and any harm to the financial or economic interests of Memorial. The most that Memorial has done is offer speculation that, as a consequence of the disclosure of the information, private music teachers “may be reluctant” to offer candid assessments, which would affect the ability of the School of Music to recruit the best qualified candidates. There is certainly no evidence to establish that the inability of the School of Music to attract the best candidates could reasonably be expected to harm Memorial’s economic or financial interest.

[17] Memorial has, therefore, failed to prove that it is entitled to deny the Applicant access to the two reference forms on the basis of section 24(1).

2. Is Memorial required to deny access on the basis of the exception set out in section 27(1)?

[18] Section 27(1) requires Memorial to refuse access where the disclosure could be harmful to the business interest of a third party. It provides as follows:

27. (1) The head of a public body shall refuse to disclose to an applicant information

- (a) that would reveal*
 - (i) trade secrets of a third party, or*
 - (ii) commercial, financial, labour relations, scientific or technical information of a third party;*
- (b) that is supplied, implicitly or explicitly, in confidence; and*
- (c) the disclosure of which could reasonably be expected to*
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*

- (ii) *result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
- (iii) *result in undue financial loss or gain to any person or organization,*
- (iv) *reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[19] As Memorial pointed out in its submission, in order for section 27(1) to be applicable a three-part test must be met. This test has been discussed in several Reports from this Office (See Report 2005-003 at paragraphs 38 to 39 and Report A-2008-013 at paragraphs 43 to 44). The three parts of the test have been clearly established as follows:

- (a) disclosure of the information will reveal the trade secrets of or the commercial, financial, labour relations, scientific or technical information of a third party;
- (b) the information was supplied to the public body in confidence, either implicitly or explicitly; and
- (c) there is a reasonable expectation that the disclosure of the information would cause one of the four injuries listed in section 27(1)(c).

[20] Section 2(t) of the *ATIPPA* provides the definition of a third party as follows:

(t) "third party", in relation to a request for access to a record or for correction of personal information, means a person, group of persons or organization other than

- (i) the person who made the request, or*
- (ii) a public body.*

[21] It has also been established by Reports from this Office that all three parts of the test must be met in order for a public body to deny access to information in reliance on section 27(1). If a record fails to meet either one of the three parts, it does not meet the test and the public body is not entitled to rely on section 27(1) to deny access to information in the responsive record (See Report 2005-003 at paragraphs 38 to 39 and Report A-2008-013 at paragraphs 43 to 44).

[22] In relation to the first part of the test, it must be proven that disclosure of the information will reveal one or more of the following items referred to in section 27(1)(a): the trade secrets of or the commercial, financial, labour relations, scientific or technical information of a third party. Memorial

in its submission refers to these items listed in section 27(1)(a) and concedes that “[w]hile music evaluations may not, in and of themselves, be described as any of these things, they represent the stock in trade of private music instructors and contain their evaluations of students' abilities.”

[23] In my view, if the music evaluations contained in the references cannot be described as one of the items mentioned in section 27(1)(a), then disclosure of the information in the references cannot reveal either the trade secrets of or the commercial, financial, labour relations, scientific or technical information of the two music instructors.

[24] Furthermore, I cannot accept Memorial’s suggestion that music evaluations are “the stock in trade of private music instructors.” The eighth edition of *Black’s Law Dictionary* provides three separate definitions of “stock in trade” as follows:

1. *The inventory carried by a retail business for sale in the ordinary course of business.*
2. *The tools and equipment owned and used by a person engaged in a trade.*
3. *The equipment and other items needed to run a business.*

[25] If, in fact, music instructors can have a “stock in trade”, then in my respectful opinion, it is not the music evaluations contained in references provided for candidates seeking admission to a music school. Such references are incidental courtesies that music instructors provide for their students; they are not a music instructor’s stock in trade.

[26] Consequently, it is my finding that the disclosure of the information contained in the two references would not reveal the trade secrets of or the commercial, financial, labour relations, scientific or technical information of the two music instructors. Since Memorial has not shown that the first part of the three-part test is applicable to the information in question, there is no need to address the other two parts of the test. Thus, Memorial is not entitled to rely on section 27(1) to deny the Applicant access to the information contained in the two reference forms.

3. Is Memorial required to deny access on the basis of the exception set out in section 30(1)?

[27] Section 30(1) sets out a mandatory prohibition against the disclosure of personal information as follows:

30. (1) *The head of a public body shall refuse to disclose personal information to an applicant.*

[28] Section 2(o) of the *ATIPPA* defines “personal information” as follows:

- (o) *personal information” means recorded information about an identifiable individual, including*
- (i) *the individual's name, address or telephone number,*
 - (ii) *the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
 - (iii) *the individual's age, sex, sexual orientation, marital status or family status,*
 - (iv) *an identifying number, symbol or other particular assigned to the individual,*
 - (v) *the individual's fingerprints, blood type or inheritable characteristics,*
 - (vi) *information about the individual's health care status or history, including a physical or mental disability,*
 - (vii) *information about the individual's educational, financial, criminal or employment status or history,*
 - (viii) *the opinions of a person about the individual, and*
 - (ix) *the individual's personal views or opinions;*

[Emphasis added]

[29] As indicated in Memorial’s submission, this Office discussed the definition of “personal information” in Report 2007-001 and, in particular, paragraph 2(o)(viii) which provides that personal information includes the opinions of a person about an individual and paragraph 2(o)(ix) which sets out that personal information includes an individual’s personal views or opinions. It is on these two paragraphs that Memorial relies for its position that the reference forms contain the personal information of the music instructors and also the personal information of the Applicant. In Memorial’s view, the reference forms contain the opinions of the private music instructors which in accordance with paragraph 2(o)(ix) represent the personal information of the instructors. Also, Memorial offers the view that the opinions of the instructors given in the two reference forms are about the Applicant, which in accordance with paragraph 2(o)(viii) constitute the personal information of the Applicant.

[30] Memorial points out in its submission that in Report 2007-001 this Office discussed the contradiction arising from the fact that certain information can be the personal information of an Applicant and also the personal information of another individual. This discussion involved first the identification of that contradiction at paragraphs 35 to 36:

[35] *The definition of personal information found in section 2 of the ATIPPA, as noted above, includes both the opinions of a person about an identifiable individual, as well as the opinions or views of an identifiable individual (see section 2(o)(viii) & (ix). . . . In other words, the way the ATIPPA is worded, the Applicant would have a right of access to another person's opinion about him, because it is an opinion about him, yet at the same time he does not have a right of access to the same opinion because it is also the personal information of the person who expressed the opinion, according to the ATIPPA definition.*

[36] *This leaves public bodies in a quandary when attempting to determine whether an Applicant in such a circumstance would have a right of access to the personal information. As noted above, section 2(o)(viii) and (ix) of the ATIPPA say that personal information includes both opinions about the individual, and the individual's personal views or opinions, thus leading to the paradox of the same information being considered the personal information of two different individuals. A public body must start with the premise that applicants have a right of access to their own personal information. In order to disclose the information to one of them, the public body must violate the right of the other not to have his or her personal information disclosed.*

[31] My predecessor continued the discussion in paragraphs 40 to 41 of Report 2007-001:

[40] *As Commissioner, it is my role to make recommendations in order to ensure compliance with the ATIPPA. The contradiction inherent in the definition of personal information in the ATIPPA as I have outlined above means that I am forced to decide, because of the paradoxical wording of the legislation, whether the opinion of person A about person B is the personal information of person A or person B. The mandatory prohibition against the disclosure of another person's personal information as found in section 30 of the ATIPPA prevents me from interpreting it as being the personal information of both.*

[41] *The ATIPPA must be interpreted in such a way as to ensure that its provisions are workable, practical, and consistent with the explicit purposes of the legislators as set out in section 3, and I must therefore issue a recommendation on this matter which will resolve the contradiction while preserving the principles upon which the ATIPPA is founded. . . .*

[32] In paragraph 50 of Report 2007-001, my predecessor resolved the contradiction as follows:

[50] *In terms of my decision regarding the definition of personal information, the necessity of introducing this interpretation is an unavoidable consequence of a contradiction inherent in the legislation. I have chosen to resolve this contradiction in favour of deciding that an opinion about the Applicant is the Applicant's personal information, rather than the personal information of the person offering the opinion. I believe this to be consistent with the purpose of the ATIPPA, the overall legislative context of access legislation in other jurisdictions, as well as relevant case law.*

[33] Likewise, in this Review I find that any opinions about the Applicant expressed by the music teachers in the reference forms constitute the personal information of the Applicant rather than the personal information of the music teachers.

[34] In its submission, Memorial acknowledged the decision of my predecessor in Report 2007-001 but suggests that the situation presently under review is distinguishable from that under review in Report 2007-001 in three respects:

1. The references were supplied to Memorial with an express, documented expectation of confidentiality,
2. Memorial formally sought the consent of the three private music teachers to disclose the references and two expressly refused consent, and
3. Part IV of the *ATIPPA* came into force in January 2008, subsequent to the decision in Report 2007-001 and, accordingly, public bodies are now required to protect the personal information in their custody or control. Memorial argues that none of the circumstances allowing a public body to disclose personal outlined in section 39 in Part IV are applicable to the present case.

[35] I will deal first with Memorial's argument that the assurance of confidentiality given to the music instructors makes the present case distinguishable from the situation in Report 2007-001. I have reviewed the two reference forms submitted by the music instructors and observe that they are the same form referred to by the Applicant as being found on Memorial's website at <http://www.mun.ca/music/programs/undergrad/teacherreference.pdf>. The form contains the following statement: "All information will be held in strict confidence."

[36] I acknowledge that the two reference forms do indicate that the information provided would be held in confidence. However, there is no exception to disclosure in the *ATIPPA* allowing public bodies to deny access solely on the basis that the information was provided to a public body by a third party who has been given an assurance of confidentiality.

[37] I recognize that the access to information legislation in several other jurisdictions in Canada does provide that whether or not personal information has been supplied in confidence is a factor to be taken into consideration when deciding if personal information should be released. All these other jurisdictions have a "harms test" for determining when personal information can be disclosed. A representative example of such legislation is the British Columbia *Freedom of Information and Protection of Privacy Act*, which provides in sections 22(1) and (2) as follows:

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

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

...

(f) the personal information has been supplied in confidence,

[38] In a recent Order the British Columbia Information and Privacy Commissioner discussed the proper application of section 22(2)(f) of British Columbia's act. In Order F11-05, the record in dispute was an employment reference form that a third party had completed in relation to an individual's employment application for a position with the Vancouver Island Health Authority (VIHA). The VIHA refused to give the individual access to the record, relying on section 22(2)(f), stating that the reference form had been supplied in confidence. The British Columbia Commissioner made the following comment in relation to section 22(2)(f) at paragraph 40:

[40] VIHA's interpretation of s. 22(2)(f) is incorrect. This provision does not "require" that VIHA withhold the information. The applicant is correct that confidential supply of personal information is simply one relevant circumstance that public bodies must consider among others in deciding whether s. 22(1) applies. As Commissioner Loukidelis said:

[25] Section 22(2)(f) is, of course, only one relevant circumstance in determining whether personal information must be withheld. Confidentiality is not a bar against disclosure of information under the Act. For this reason, a public body must, in embarking on an investigation, be cautious in giving assurances of confidentiality to potential witnesses or others. An assurance of confidentiality is certainly not a veto on disclosure. There can be no absolute guarantee of confidentiality, under the Act or otherwise. . . .

[39] My predecessor and I have pointed out in several Reports the distinctive nature of the *ATIPPA* with regard to the absence of a "harms test" in dealing with the disclosure of personal information. For example, my predecessor stated in paragraph 28 of Report 2007-001 as follows:

[28] Newfoundland and Labrador is unique in Canada in its approach to personal information protection under the ATIPPA access provisions. The equivalent exception to the disclosure of personal information in other jurisdictions is arguably more nuanced. The standard approach elsewhere involves a harms test, placing some discretion in the hands of public bodies to release a

certain amount of personal information when the harm in doing so is considered to be low. Similarly, Commissioners in other jurisdictions can order or recommend the release of some information which, even if it would meet the definition of personal information, would not constitute an unjustified invasion of personal privacy. In this province, section 30(2) outlines very specific circumstances where information which meets the definition of personal information should not be withheld, but no discretion exists to consider the relative harm of disclosure.

[40] Therefore, it is my view that in determining whether or not to disclose personal information, I am not entitled to take into account the fact that the personal information was supplied to the public body in confidence. Consequently, the assurance of confidentiality given to the music instructors is not a distinguishing factor in the present case that prevents me from applying the reasoning set out in Report 2007-001.

[41] Furthermore, I agree with the view of the British Columbia Commissioner and state that public bodies should be cautious in giving assurances of confidentiality because such assurances are “certainly not a veto on disclosure.”

[42] I note that the *ATIPPA* does have three sections dealing with circumstances where records can be provided to a public body in confidence. Section 22(1)(o) allows a public body to refuse access to information where its disclosure could reasonably be expected to reveal information in a correctional record supplied in confidence. Also, section 23(1)(b) dealing with disclosures that could be harmful to intergovernmental relations or negotiations sets out that a public body may refuse to release information if its disclosure could reasonably be expected to reveal information received in confidence from certain organizations and institutions. In addition, section 27(1)(b) provides that a public body must determine that information was supplied in confidence before it can deny access to it on the basis of section 27(1). These three provisions indicate to me that the legislature has turned its mind to the issue of when confidentiality should be a factor in determining whether information is to be released and has chosen not to make it a factor in deciding when access to personal information is to be denied in accordance with section 30(1).

[43] Memorial also submits that there is a second aspect of the present case that distinguishes it from the situation under consideration in Report 2007-001. Memorial points out that two of the music teachers have expressly refused their consent to disclosure of the reference forms they completed. I am not convinced that the fact that two instructors refused to consent to the release of

the references distinguishes this matter in any material manner from the situation discussed in Report 2007-001. In any case, the applicability to the present case of the resolution put forth in Report 2007-001 regarding the contradiction in the definition of personal information is not affected by any insignificant factual differences between the two cases.

[44] The third distinguishing feature suggested by Memorial is that since the release of Report 2007-001 on January 31, 2007, Part IV (Protection of Privacy) of the *ATIPPA* came into force on January 16, 2008. As I understand Memorial's argument, it submits that it is now required, in accordance with the provisions of Part IV, to protect all personal information under its custody or control. Further, Memorial argues, it can only release personal information in one or more of the 22 circumstances set out in section 39, which is found in Part IV of the *ATIPPA*. In Memorial's view, neither of those circumstances is applicable in this case.

[45] Section 39 of the *ATIPPA* sets out 22 circumstances in which a public body may disclose personal information. It provides in part as follows:

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

(a) in accordance with Parts II and III;

(b) where the individual the information is about has identified the information and consented to the disclosure in the manner set by the minister responsible for this Act;

(c) for the purpose for which it was obtained or compiled or for a use consistent with that purpose as described in section 40;

...

[46] In Report A-2008-003, I discussed the relationship of Parts II and III of the *ATIPPA* with Part IV. In that Report, I referred to section 39 and made the following comments at paragraphs 51 to 52:

[51] . . . Of the 22 separate paragraphs above setting out particular circumstances in which personal information may be disclosed by a public body, it can be seen that the first such circumstance is "(a) in accordance with Parts II and III." In other words, if a public body is considering whether or not to disclose personal information pursuant to an access to information request, it is directed to make that decision in accordance with the provisions of Parts II and III. If, on the other hand, the question whether or not to disclose personal information arises in some other way, other than in connection with an access request, then the public body is directed to make that decision in accordance with the provisions of Part IV, specifically by determining whether the disclosure contemplated is covered by one of the paragraphs of section 39(1) other than paragraph (a).

[52] This means that if disclosure of personal information is sought pursuant to an access to information request, Part IV of the ATIPPA does not come into play at all. Part IV is intended to govern the actions of public bodies themselves, in how they collect, use and disclose personal information in the course of their administrative operations. Parts II and III are intended to govern how public bodies respond to requests for information (including personal information) from the public. As a result, therefore, I conclude that even if Part IV of the Act had been in force at the time of the present request, it would have no application to the case at hand.

[47] Similarly, I conclude that in this matter Part IV of the *ATIPPA* has no application. There has been an access request by the Applicant and the provisions governing whether or not the information should be disclosed are contained in Part II and Part III. Therefore, Memorial does not have to be guided by the provisions in Part IV of the *ATIPPA* in determining whether or not to disclose the information. Accordingly, the coming into force of Part IV does not affect the findings made in Report 2007-001 with regard to whose personal information is contained in opinions about an access to information applicant.

[48] Consequently, in accordance with the reasoning set out in Report 2007-001, I find that the opinions expressed by the music instructors about the Applicant constitute the personal information of the Applicant rather than the personal information of the music instructors. Therefore, Memorial is not entitled to rely on section 30(1) to deny the Applicant access to that information. However, the reference forms completed by the instructors do have information that does not contain the music instructors' opinions about the Applicant. This information is under the heading "Teacher Information" on the form and contains the address and other contact information of the instructor completing the form. This information represents the personal information of the instructor and, pursuant to section 30(1), should not be released to the Applicant.

[49] The two reference forms also contain the name of the individual instructor who completed the form. In the circumstances of this case I do not consider the names of the instructors to be personal information that must be withheld in accordance with section 30(1). The Applicant is aware of the names of the instructors who provided the references and the nature of the opinions provided in the form would allow the Applicant to identify the name of the instructor who completed the reference. Therefore, there is no disclosure of information if the information is already known to the Applicant (See Report 2007-003 at paragraphs 136-137 and Report A-2009-002 at paragraphs 79-80).

[50] In addition, if the Applicant had made separate access requests for each of the reference forms then I would have determined in each case that the opinions expressed about the Applicant were the personal information of the Applicant and would have recommended releasing the personal information. In each case, the name of the instructor providing the reference would be apparent. The fact that the Applicant made one access request for three reference forms should not prevent the release of the name of the instructor who provided the reference. As a result, the name of the instructor on each of the forms should not be withheld.

[51] Additionally, I am aware that section 49(c.1) of Ontario's *Freedom of Information and Protection of Privacy Act* deals explicitly with personal information compiled in the situation under consideration in this Review. It provides as follows:

49. A head may refuse to disclose to the individual to whom the information relates personal information,

...

(c.1) if the information is supplied explicitly or implicitly in confidence and is evaluative or opinion material compiled solely for the purpose of,

...

(ii) determining suitability, eligibility or qualifications for admission to an academic program of an educational institution, . . .

[52] Section 49(c.1) was recently referenced by Review Commissioner John R. Cummings, Q.C. in his *Review of the Access to Information and Protection of Privacy Act*. Commissioner Cummings under the heading of "Opinions" on page 55 stated:

During consultations, public bodies expressed concern that the following types of information are not protected from disclosure under the ATIPPA: references for employment, opinions related to the awarding of an employment contract, opinions related to a person's admission into an academic program, opinions in the workplace dispute resolution processes, opinions related to the granting of tenure, peer review and opinions solicited for the purpose of granting an honour or award.

Other jurisdictions offer more comprehensive protection for opinions than that provided under the ATIPPA.

Opinions related to a person's admission into an academic program are explicitly protected under subsection 49(c.1) of Ontario's legislation.

[Emphasis added]

[53] Commissioner Cummings then outlined some of the submissions he had received regarding opinions during his consultation process on page 56:

During the consultation process, public bodies submitted that increased protection for evaluative records is necessary to encourage individuals to be forthcoming with their opinions. Public bodies maintain that if individuals are concerned that their opinions could be disclosed pursuant to the ATIPPA, they are less likely to be candid.

[54] Commissioner Cummings continued on page 56 by outlining a number of specific requests for amendments he had received, including the following from Memorial:

Memorial further requests that a discretionary exception be added to the ATIPPA permitting a public body to refuse to disclose information which has been provided in confidence for the purpose of assessing an individual's suitability, eligibility or qualifications for employment, for the awarding of an employment contract, or for admission to an academic program.

[Emphasis added]

[55] Commissioner Cummings concluded his discussion on “Opinions” by making Recommendation 19 on page 56 of his Report:

The ATIPPA should be amended to provide an exception to disclosure for the following opinions: references for employment; opinions related to a person's admission into an academic program; opinions related to the awarding of an employment contract; opinions in workplace resolution processes; opinions related to the granting of tenure; peer reviews; and opinions solicited for the purpose of granting an honour or award.

[Emphasis added]

[56] The concern expressed to Commissioner Cummings by public bodies that the ATIPPA does not currently protect from disclosure opinions related to a person's admission into an academic program, Memorial's request to Commissioner Cummings that an exception be added to the ATIPPA permitting public bodies to refuse access to information that has been supplied in confidence for the purpose of assessing an individual's suitability for admission to an academic program and Commissioner Cummings' recommendation that the ATIPPA be amended to provide an exception to disclosure for opinions related to a person's admission into an academic program, all combine to convince me that the ATIPPA as presently enacted does not protect from disclosure the information which Memorial has refused to provide in this matter. If the legislature follows the recommendation of Commissioner Cummings to create such an exception, then I would likely make a different recommendation as to whether the information in question should be released.

V CONCLUSION

[57] I conclude that Memorial is not entitled to rely on section 24(1) or section 27(1) to deny access to any of the information contained in the reference forms completed by the two music instructors.

[58] I have also concluded that Memorial is not entitled to rely on section 30(1) to deny access to the personal information of the Applicant. However, there is some information on the reference forms which is the personal information of the instructors and this should not be disclosed to the Applicant.

VI RECOMMENDATIONS

[59] Under the authority of section 49(1) of the *ATIPPA*, I hereby recommend that Memorial University release the reference forms completed by the two music instructors after severing the address and contact information of the instructors.

[60] Accordingly, under authority of section 50 of the *ATIPPA* I direct the head of Memorial University to write to this Office and to the Applicant within 15 days after receiving this Report to indicate its final decision with respect to this Report.

[61] Please note that within 30 days of receiving the decision of Memorial University under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*.

[62] Dated at St. John's, in the Province of Newfoundland and Labrador, this 24th day of March, 2011.

E. P. Ring
Information and Privacy Commissioner