OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2014-014

December 16, 2014

Memorial University of Newfoundland

Summary: The Applicant applied to Memorial University of Newfoundland ("Memorial") under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to records relating to his application for a [named senior position] with a particular faculty at Memorial, including all reports and feedback regarding his application. Memorial released the responsive records to the Applicant in part with portions severed in accordance with section 20(1) (policy advice or recommendations), section 22.1 (confidential evaluations) and section 30 (disclosure harmful to personal privacy) of the *ATIPPA*. The Applicant filed a Request for Review with this Office for a review of the exceptions to disclosure claimed by Memorial. The Commissioner found that Memorial had properly applied the exceptions to disclosure claimed under the *ATIPPA* and that Memorial had applied its discretion appropriately.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as amended, sections 20, 22.1, and 30; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c F-25, section 19.

Authorities Cited: Newfoundland and Labrador OIPC Report A-2009-002, Report A-2009-007, Report A-2014-001 and Report A-2011-009; Alberta OIPC Order F2002-008, Alberta OIPC Order 2000-029, Alberta OIPC Order 98-021, Alberta OIPC Order 97-002 and Alberta OIPC Order F2002-027; *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic*, *2013 NLTD(G) 185*.

File #: 0020-062-12-021

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request on June 21, 2012 to Memorial University of Newfoundland ("Memorial"). The request sought disclosure of records as follows:

> *I applied for the position of* [named senior position] – [named faculty]. *I would like to receive a copy of the committee's report to the Dean, the minority report also submitted and all the feedback to the committee pertaining to my application. This should include written letters, emails, forms as well as documentation of verbal and/or anonymous submissions to the committee.*

[2] Memorial confirmed receipt of the access request on June 22, 2012 and advised the Applicant on July 19, 2012 that it was extending the 30 day time limit for responding to the access request by an additional 30 days relying on section 16(1)(b) of the *ATIPPA*. Memorial contacted the Applicant on August 22, 2012 to advise that it was extending the time limit again for an additional 23 days in accordance with s.16(2)(c) of the *ATIPPA*. On September 12, 2012 Memorial informed the Applicant that his access request had been granted in part; certain information was withheld pursuant to section 20(1) (policy advice or recommendations), section 22.1 (confidential evaluations) and section 30 (disclosure harmful to personal privacy).

[3] On October 3, 2012 this Office received a Request for Review from the Applicant as follows:

> *Specifics of Request*
>
> *On June 21, 2012* [the Applicant] *requested from Memorial University of Newfoundland ("**Memorial**") records pertaining to his application for* [named senior position] – [named faculty]*, specifically the search committee's reports to the Dean and all feedback on his candidacy, as provided to the search committee.*
>
> *Memorial's Information Access and Privacy Protection Coordinator (the "**Coordinator**") granted his request in part, redacting significant portions of the records. She reported that the redacted portions related to information that she refused to disclose in accordance with sections 20(1), 22.1 and 30(1) of the Access to Information and Protection of Privacy Act ("**ATIPPA**"). All references to the legislative sections in this document are to ATIPPA.*
>
> [The Applicant] *requests that the Commissioner review the Coordinator's decision.*
>
> [The Applicant] *notes that the Coordinator did not specify on which subsections of section 20(1) she was relying.*

> [The Applicant] *states that he is entitled to his own personal information.*
>
> [The Applicant] *has been advised by third party(ies) that the records contain statements of fact (or statements alleged to be factual) that he circulated a false or misleading curriculum vitae and that he misused or misappropriated materials from the* [named faculty]. *He has been further advised that the records contain factual assertions of unethical and unprofessional behavior on his behalf.*
>
> *Pursuant to section 20(2), factual material is not exempt from disclosure under section 20(1). Information that a third party alleges to be factual should not be exempt from disclosure under section 20(1).*
>
> *Statements of fact are not "evaluative or opinion material" and therefore are not exempt from disclosure pursuant to section 22.1.*
>
> *As this material relates directly to* [the Applicant]*, disclosure of it is not an unreasonable invasion of a third party's personal privacy pursuant to section 30(2).*
>
> *While* [the Applicant] *is requesting that the Commissioner do a full review to ensure that he has been provided with all information to which he is entitled under ATIPPA, he specifically requests that the Commissioner review the Coordinator's decision with reference to the above points.*
>
> *Resolution Sought*
>
> *Full disclosure of all information to which the Applicant is entitled under ATIPPA.*
>
> *If this matter proceeds to a formal hearing,* [the Applicant] *requests to make further written submissions.*

[4] In keeping with our usual practice, an Analyst from this Office forwarded a copy of the Request for Review to Memorial and requested a copy of the responsive records. The records were received on October 12, 2012 and reviewed by the Analyst.

[5] Attempts to resolve this Request for Review by informal resolution were not successful, and by letters dated November 5, 2013 both the Applicant and Memorial were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this office in accordance with section 47.

II MEMORIAL'S SUBMISSION

[6] Memorial provided its submission in correspondence dated January 24, 2014 and it was Memorial's position was that it had properly applied the exceptions to disclosure under the *ATIPPA* and had exercised its discretion appropriately.

[7] Regarding section 22.1 Memorial advised that it was the first time it had to apply section 22.1 in response to an access to information request and its application of that section was further complicated by the fact that there was no precedent in Newfoundland and Labrador to guide its interpretation.

[8] Memorial provided a more detailed analysis of section 22.1 in its submission focusing on its discretion in relation to that section. Memorial relied on the recent Supreme Court of Newfoundland decision, *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic, 2013 NLTD(G) 185* for an analysis of the exercise of discretion required by the *ATIPPA*. In that case, the Court outlined two decisions that the public body must make when exercising discretion. The first decision is a determination by the public body whether the material in question fits the description of the material subject to being withheld from disclosure. The second decision is a discretionary decision as to whether the material should nevertheless be disclosed. Memorial determined that the information in question fell within the section 22.1 exception to disclosure and Memorial went on to provide a detailed analysis of the second decision – determining whether the information should be released despite the fact that it can be withheld.

[9] Memorial's opinion was that its exercise of discretion was done in good faith, taking into consideration the relevant factors. Memorial advised that the IAPP Office consulted extensively with senior administrators and Memorial carefully weighed the relevant factors to appropriately respond to the Applicant's Request.

[10] Memorial commented on the use of section 20(1) advising that the instances where this section was used involved responsive records where employees had suggestions regarding the process of the search. Memorial also explained that the IAPP Office consulted with the Provost and Vice-President (Academic), the Dean of [named faculty] and the Director of Faculty Relations on each instance

where section 20(1) was invoked and the decision was made to withhold the information subject to section 20(1). Memorial submits that it exercised discretion appropriately and in good faith.

[11] Memorial also made a submission in relation to section 30. Memorial's position was that the identities of the individuals providing feedback are protected under section 22.1, however, in the alternative Memorial relies on section 30(4)(f), 30(4)(g) and 30(1) to withhold the identities of the individuals providing feedback. When relying on section 30(1) or section 30(4) the harms test under section 30(5) must be examined. Memorial provided an analysis of this section in its submission.

[12] As Memorial's submission is detailed and lengthy, I will not reproduce it here in its entirety rather I will refer to and quote from it as needed in the discussion portion of this Report.

III APPLICANT'S SUBMISSION

[13] The Applicant provided a submission in correspondence dated January 24, 2014 regarding the application of exceptions to disclosure claimed by Memorial under the *ATIPPA*.

[14] With regard to the application of exceptions to disclosure under the *ATIPPA*, it is the Applicant's opinion that the exceptions to disclosure were not properly applied. The Applicant focused on the point that factual materials are not opinion, evaluative, advice, or recommendations and therefore should not be excluded from disclosure under the *ATIPPA*.

[15] The Applicant went on to discuss the fact that there is presumption in favor of disclosure inherent in the *ATIPPA* which has been recognized by this Office, referencing Report A-2009-002. The Applicant stated that the legislation is intended to promote disclosure of information while allowing the protection of personal information where it is appropriate to do. He emphasized the fact that the public body must establish the application of exceptions claimed and that the burden rests with the public body to establish that an exception to disclosure is applicable to a record.

[16] The Applicant commented on the use of section 22.1 noting that this section has not been considered by this Office previously. The Applicant referred to two Orders from the Office of the Information and Privacy Commissioner of Alberta ("Alberta OIPC"), Order F2002-008 and Order 2000-029 as general cases where the provision of confidential evaluations has been considered. The

Applicant discussed the distinction between what is evaluative or opinion material and what is considered to be a fact, relying on a number of orders from the Alberta OIPC.

[17] The Applicant concluded his submission as follows:

> *The specific sections of the ATIPPA that limit disclosure cannot be interpreted so broadly as to prevent a person from being informed about assertions of fact made about him. To do otherwise, would be to provide a safe house for defamers. A person has a right to be informed of the factual record he or she is being assessed under and a right to make corrections or clarifications to that record as necessary. We cannot allow tortious activity to be permitted under the guise of "evaluation". It is thus critically important that all statements be analyzed by the Commissioner very closely to ensure that <u>any</u> statements of fact contained therein be disclosed.*

[18] The Applicant's submission is detailed and lengthy therefore I will not reproduce it here in its entirety, but will refer to and quote from it as needed in the discussion portion of this report.

IV DISCUSSION

[19] Memorial claimed exceptions to disclosure under the *ATIPPA* in accordance with sections 20(1), 22.1 and 30. The issues to be discussed in this Report are whether Memorial properly applied the exceptions to disclosure under the *ATIPPA* and Memorial's use of discretion under the *ATIPPA*.

SECTION 20(1)

[20] Section 20(1) of the *ATIPPA* states as follows:

> *20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
>
> *(a) advice or recommendations developed by or for a public body or a minister;*
>
> *(b) the contents of a formal research report or audit report that in the opinion of the head of the public body is incomplete unless no progress has been made on it for more than 3 years;*
>
> *(c) consultations or deliberations involving officers or employees of a public body, a minister or the staff of a minister; or*

(d) draft legislation or regulations.

[21] Memorial claimed section 20(1) as an exception to disclosure in three instances. The Applicant quoted from a prior report from this Office that dealt with section 20(1), namely Report A-2009-007 wherein I concluded at paragraph 21 that:

> *[21] After a review of that e-mail, I have concluded that the severed information does not contain advice or recommendations. It does contain reference to the developing of advice and recommendations but does not contain a suggested course of action or an expression of opinion on policy-related matters such that section 20(1)(a) would be applicable. Consequently, the Department is not entitled to rely on that exception to deny access to the information in the e-mail.*

[22] The Applicant emphasized that factual material cannot be withheld under section 20(1) and that specifically section 20(2) states that a public body shall not refuse to disclose under subsection (1) factual material.

[23] Report A-2014-001 reviewed section 20(1)(a) and section 20(1)(c) in detail since the Bill 29 amendments. At paragraph 34 of that report I concluded that while section 20(1)(a) was amended I believe the position articulated in previous reports, namely Report A-2011-009 and Report A-2009-007, still applies. The amendment to section 20(1)(a) adding the terms "proposals...analyses or policy options" only serves to clarify the type of information which is encompassed within the term "advice". Regarding section 20(1)(c) I determined at paragraph 40 of Report A-2014-001 that in order for a record or information in a record to be considered a consultation or deliberation a four-part test must be met. In this instance I believe a consultation would be the more appropriate reference rather than a deliberation and the four-part test for a consultation is as follows:

1) *The record must contain the views of one of the enumerated categories of persons about the appropriateness of a specific proposal or potential action;*

2) *The views must be sought or expected, or be part of the responsibility of the enumerated person by virtue of that person's position;*

3) *The views must be directed toward taking an action; and*

4) *The views must be made known to someone who can take or implement the action.*

[24] The three records in question contain the views of employees of Memorial that were sought in relation to the competition for the [named senior position]. The views expressed are directed toward

taking an action – either with the search for candidates for the [named senior position] in general or specifically with regard to one candidate or another, and the views were provided to the Advisory Committee Search for the [named senior position] (the "Committee"), a Committee which can take or implement an action. I therefore conclude that these records meet the test for section 20(1)(c).

[25] I also believe section 20(1)(a) would equally apply to these records since the content of the records deal with employees' suggestions and recommendations in relation to the overall search for candidates for the [named senior position], therefore, having reviewed the three instances where Memorial applied section 20(1) I am satisfied that the information severed fits within section 20(1)(a) and/or 20(1)(c) of the *ATIPPA*.

SECTION 22.1

[26] Section 22.1 is a new section under the *ATIPPA* that was added with the Bill 29 amendments, which came into force on June 27, 2012. Section 22.1 of the *ATIPPA* states as follows:

> *22.1 The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material, provided explicitly or implicitly in confidence, and compiled for the purpose of*
>
> *(a) determining suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body;*
>
> *(b) determining suitability, eligibility or qualifications for admission to an academic program of an educational body;*
>
> *(c) determining suitability, eligibility or qualifications for the granting of tenure at a post-secondary educational body;*
>
> *(d) determining suitability, eligibility or qualifications for an honour or award to recognize outstanding achievement or distinguished service; or*
>
> *(e) assessing the teaching materials or research of an employee of a post-secondary educational body or of a person associated with an educational body.*

[27] Although section 22.1 of the *ATIPPA* has not been considered by this Office to date, several other jurisdictions have similar sections under their access to information and protection of privacy

legislation. For example, section 19 of *The Freedom of Information and Protection of Privacy Act* ("*FOIP*") for the province of Alberta is as follows:

> *19(1) The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body when the information is provided, explicitly or implicitly, in confidence.*
>
> *(2) The head of a public body may refuse to disclose to an applicant personal information that identifies or could reasonably identify a participant in a formal employee evaluation process concerning the applicant when the information is provided, explicitly or implicitly, in confidence.*
>
> *(3) For the purpose of subsection (2), "participant" includes a peer, subordinate or client of an applicant, but does not include the applicant's supervisor or superior.*

[28] Memorial's opinion with respect to section 22.1 is that:

> *The information in the records responsive to this request is personal information about the Applicant; it constitutes employment and educational status/history, as well as other individuals' opinions about him, as those terms are defined in ss. 2(0)(vii) and 2(0)(viii) of ATIPPA. The records also contain personal information about the faculty members who provided feedback. The information is also "evaluative or opinion material, provided explicitly or implicitly in confidence, and compiled for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body" as the records contain evaluative feedback from other faculty members about candidates.*

[29] The Applicant focused on the meaning of evaluative and opinion material as described in Order 98-021 from the Alberta OIPC. The Applicant also relied on Order 97-002 from the Alberta OIPC to differentiate between a "fact", an "evaluation" and an "opinion" and to support his position that factual material should be released. The Applicant quoted paragraphs 37-45 from Order 97-002 in his submission as follows:

> *[37.] The Applicants say that information about how an employee handles a job is not an evaluation, but a "fact" which must be disclosed. By implication, I believe that the Applicants are also saying that such "facts" do not constitute "personal information" for the purposes of section 16 of the Act.*
>
> *[38.] The Applicants' presumed rationale for saying this is "factual" information is that if a review is done at the request of the public, it is done to find out facts, that is, to find out what happened. The Applicants argue that if the information shows that certain persons did not know the law or the*

regulations, that is a fact that they did not know their jobs. The Applicants say that the reviewer is stating facts in the form of questions, is noting that everyone was aware of what happened, and is asking why things were not done. The Applicants also argue that where the information involves facts that an employee is not doing his or her job, it is not unfair for that information to be released.

[39.] The Public Body said it released factual statements that may or may not show competence. Information that did not contain factual statements was not released if that information was presented as questions which the Public Body considered were rhetorical or inflammatory.

[40.] The Public Body says that evaluations or opinions about how an employee does a job are nevertheless personal information and must not be disclosed.

[41.] I have already said that the information withheld under section 16(2)(f) constitutes "evaluations". However, if it did not constitute "evaluations", would it constitute "facts" or "opinions"?

[42.] The Concise Oxford Dictionary defines "fact", in part, to mean "a thing that is known to have occurred, to exist, or to be true; an item of verified information". An "opinion" is defined, in part, to mean "a belief or assessment based on grounds short of proof; a view held as probable." As an example of each, a "fact" would be a person's employment position, date of employment, or reason for leaving employment. An "opinion" would be a belief that a person would be a suitable employee, based on that person's employment history.

[43.] By definition, a "fact" may be determined objectively. An "opinion" is subjective in nature, and may or may not be based on facts.

[44.] I have reviewed the Record to determine whether the information the Public Body withheld under section 16(2)(f) would constitute "facts" or "opinions". Much of the information is in the form of the reviewer's questions or comments about the practices of certain identifiable individuals employed by the Public Body. The questions are worded so that a reader may readily infer that the reviewer is expressing an opinion about the competence of those identifiable individuals. Therefore, the information the Public Body withheld under section 16(2)(f) would constitute "opinions" rather than "facts".

[45.] Under section 1(1)(n)(viii), anyone else's opinion about an individual constitutes the personal information of the identifiable individual to whom the opinion relates. The Public Body concluded that the "opinions" are "personal information". I agree with the Public Body's conclusion.

[30] The Alberta OIPC has established a three-part test in relation to its confidential evaluations section which is similar to section 22.1 under the *ATIPPA*. The test was initially outlined in Order 98-021 at paragraph 12 and has been used in numerous other orders. The test is as follows:

1. *The information must be personal information that is evaluative or opinion material;*

2. *The personal information must be compiled solely for one of the following purposes:*

- *Determining the applicant's suitability, eligibility or qualifications for employment, or*
- *Awarding a government contract or*
- *Awarding other benefits;*

3. *The personal information must be provided, explicitly or implicitly, in confidence.*

[31] The first part of the test is determining whether the information is personal information that is evaluative or opinion material. Personal information is defined in section 2(o) of the *ATIPPA* and includes the following:

> *(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, except where they are about someone else;*

[32] Part one of the test states that the personal information must be evaluative or opinion material, however, section 22.1 does not specify whose personal information must be included in the record for that section to apply. Based on interpretations of similar sections in other jurisdictions I find that the personal information is generally an Applicant's personal information but also may include a third party's personal information.

[33] The personal information must be evaluative or opinion material. The Applicant quoted from Order 98-021 at paragraphs 16-17 in his submission addressing the meaning of evaluative or opinion material. These paragraphs state:

> *[para 16.] The Concise Oxford Dictionary defines "evaluative" to mean the adjective for "evaluate" which means "to assess, appraise, to find or state the number of". "Opinion" is defined as "a belief or assessment based on grounds short of proof; a view held as probable". I stated in Order 97-002 that an example of an "opinion" would be a belief that a person would be a suitable employee, based on that person's employment history. An "opinion" is subjective in nature, and may or may not be based on facts.*
>
> *[para 17.] I have reviewed the personal information contained in the Record in order to determine whether it is evaluative or opinion material. The Record sets out "opinions" of third parties in that the third parties relate characteristics of the Applicant with respect to the Applicant's character and personality. Some references provided their opinions in the context of employment experience with the Applicant. In that sense, the opinions are also evaluative of the Applicant's skills for employment and dealing with the public. In my view, therefore, the Record contains personal information, which is evaluative or opinion material. Therefore, the first part of the test is satisfied.*

[34] I have reviewed the records where Memorial claimed section 22.1 of the *ATIPPA* to withhold information and I have determined that these records do contain personal information. The records contain opinions about the Applicant which is the Applicant's personal information and the records also contain the personal information of individuals who supplied feedback. The personal information of the individuals who supplied feedback can include, but is not limited to, the individual's name, the individual's signature, the individual's employment title or designation, the name of the individual's organization and the individual's contact information.

[35] I have further determined that the opinions about the Applicant are evaluative or opinion material based on the above definitions. The opinions provided discuss the Applicant's character and personality as well as working relationships with the Applicant. The opinions provided are also evaluative since the individuals are commenting on the Applicant's skills and suitability for the [named senior position].

[36] While the Applicant emphasizes that factual material cannot be withheld, I must point out that in situations like this where opinions are provided it is difficult to separate opinions from fact from personal information. The objective of the feedback is to provide an opinion about the Applicant in

relation to his candidacy for the [named senior position] and the opinions may rely on and include other information which is incorporated into that opinion.

[37] The wording of section 22.1 is clear that it requires the personal information be evaluative or opinion material. Based on the fact that the personal information of the individuals providing feedback can include the individual's name, the individual's signature, the individual's employment title or designation, the name of the individual's organization and the individual's contact information, it may be argued that this information is not personal information that is evaluative or opinion material for the purposes of section 22.1. Normally this type of personal information in an employment context has been released under access to information and protection of privacy legislation as it is well established that personal information of individuals acting in the course of their work duties can be released. Here, mostly members of the [named faculty] were solicited for feedback in relation to the candidacy for the [named senior position] therefore I would normally conclude that the members were acting in the course of their work related duties when providing feedback and therefore their names and contact information could be released.

[38] Memorial commented on the issue of the confidentiality of the name of the individual providing feedback in its submission as follows:

> *When the university recruits candidates for a senior academic administrator position, part of the collegial decision making process is to solicit feedback from members of the faculty concerned. This feedback constitutes an important part of the evaluative materials considered by the hiring committee and is precisely the type of information that s. 22.1 is intended to protect. The university submits that all of the information in the feedback is subject to s. 22.1. In consultations on the matter with the Provost and Vice-President (Academic), Dean of* [named faculty], *and the Director of Faculty Relations regarding whether to give the Applicant access to this information, each feedback submission was reviewed and decisions were made to provide access to some but not all of the information. The university submits this was an appropriate exercise of discretion.*
>
> *A key characteristic of s. 22.1 is the implied confidentiality of the information that is to be protected. The university submits that the identification of people who provided feedback betrays that confidentiality. A holistic reading of s. 22.1 requires that we consider the "big picture." It may be the fact that someone gave confidential feedback, whether it was positive or negative, is something that that person thought would remain confidential and not shared with the Applicant, as it forms part of a confidential process. Therefore, in order to fully respect the protection afforded by s. 22.1, the university feels it is appropriate to withhold the identities of the individuals who provided feedback along with the content of the feedback*

> *Additionally, in our review of the records, it was virtually impossible to divorce the content of the feedback from the individuals who provided it, as much of the feedback contained anecdotal evidence that would clearly identify its author. As the faculty is small, and by process of elimination, someone familiar with the situation could accurately infer the substance of evaluative information supplied in confidence to the hiring committee. Even the way a faculty member articulates his/her feedback provides valuable clues as to his/her identity and, again, by process of elimination would provide the Applicant with a means to identify information that should be protected. It is our position that, looking at the circumstances as a whole, we had to protect the identities of individuals to better serve the purposes of s. 22.1 in its goal to protect, the confidentiality of the process.*

[39] The purpose and the intent of section 22.1 is to allow individuals to provide frank feedback when there is an evaluative process. Section 22.1 specifically withholds the personal information of an applicant (opinions about the applicant) from him or her in a specific context. I agree with Memorial that the feedback would constitute an important part of the evaluative materials considered by a hiring committee and it is my opinion that section 22.1 is intended to prevent repercussions to the individuals providing opinions about an applicant in that context.

[40] In reviewing orders from the Alberta OIPC I did not find a distinction under its confidential evaluations section between the name of the individual providing feedback and the opinions provided. Orders F2002-008 and F2002-027 determined that the confidential evaluations section was correctly applied but did not parse out the name of the individual providing the opinion from the opinion.

[41] To properly uphold the intent and purpose of section 22.1 within the *ATIPPA*, I find that the name of the individual providing feedback and identifying personal information, such as contact information, can be withheld under section 22.1. I wish to emphasize that it is only in this very limited circumstance that the name of the individual and contact information, such as a phone number or email addresses, of an employee of Memorial acting in the course of their employment is withheld. As discussed above, normally personal information of an employee acting in the course of their employment would be released.

[42] Moving on to part two of the test, the personal information must have been compiled for a specific purpose and a number of possibilities are listed. Subsections (a)-(e) of section 22.1 of the *ATIPPA* outline all the potential purposes, however, since the Applicant was applying for the position of [named senior position], section 22.1(a) would apply. The personal information in this

case would have needed to be compiled for determining the suitability, eligibility or qualifications for employment. Part two of the test is met as the opinions about the Applicant were provided to the Committee who recommended a candidate for the [named senior position]. The personal information was specifically compiled for determining the suitability, eligibility or qualification for the [named senior position].

[43] Part three of the test requires that the personal information be provided explicitly or implicitly in confidence. The feedback sheet provided to individuals for their comments regarding the candidates for [named senior position] stated "The Committee will hold your submission in the strictest confidence and it will be used solely for the purposes of this Search. However, we cannot guarantee anonymity under the Access to Information and Protection of Privacy Act." Memorial also stated that feedback provided in these types of situations has always been treated as confidential to allow individuals to provide frank and candid feedback which might be sensitive to a candidate or sensitive to other individuals, including the person providing the feedback. Memorial has stated that a key characteristic of section 22.1 is the implied confidentiality of the information.

[44] Based on the fact that the feedback sheet advised that the Committee would hold the individual's submission in confidence leads me to conclude that there was an expectation of confidentiality on behalf of the individuals providing the feedback. As section 22.1 had not yet been interpreted by this Office or the courts I think it was fair for Memorial to advise that it could not guarantee anonymity despite its statement regarding confidentiality. As some individuals provided feedback by email I am unable to conclude specifically in their situation if they had an expectation of confidentiality, however, Memorial has advised that members of the faculty involved in this process would have had an expectation of confidentiality as this was a normal expectation to have when providing feedback in an evaluative process. I conclude that the personal information was provided in confidence and part three of the test is satisfied.

[45] I wish to point out that in my review of the records there were a couple of instances where Memorial severed information in accordance with section 22.1 which I believe should have been classified as non-responsive. In other words, the information was not relevant to the Applicant's access request and therefore it was not encompassed within the Applicant's request for information. This may have been due to the fact this was Memorial's first time applying section 22.1, and if I am correct this information would not have been released to the Applicant since it was not responsive

to his access request. I do not believe this affected Memorial's application of section 22.1 in other instances therefore I conclude that the records severed are in accordance with section 22.1 and meet the three- part test outlined above and have been properly withheld under the *ATIPPA*.

SECTION 30

[46] Memorial has relied on sections 30(1), 30(4)(f) and 30(4)(g) to support its position that the personal information of the individual providing the feedback, specifically the name of that individual, should be withheld. The issue of the identity of the individual providing feedback has been dealt with under section 22.1 therefore I do not need to consider Memorial's submission on this issue in relation to section 30.

[47] Memorial relied on section 30 to withhold information in a number of instances. While section 22.1 applied to the majority of information in the Applicant's request there were some information withheld based on section 30. The instances where Memorial applied section 30 that did not involve the name of the individual providing feedback or where section 22.1 applied, were applied appropriately.

EXERCISE OF DISCRETION

[48] Memorial provided a detailed submission regarding its exercise of discretion specifically in relation to section 22.1. Memorial relied on *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic, 2013 NLTD(G) 185* at paragraph 48 as follows:

> *[48] In Pomerleau Inc. v. Smart, 2011 NLTOE(G) 105, Thompson, J. said this at paragraph 4:*
>
> > *4. I note in Dagg v. Canada (Minister of Finance) 1997 CarswellNat 867; 148 O.L.R. (4th) 435, SCC, that the Supreme Court of Canada confirmed at paragraph 114 the approach to be taken with respect to discretionary exemptions under the Act. Cory, J., writing for the majority, stated:*
> >
> > > *In Kelly v. Canada (Solicitor General) (1992), 53 F. T.R. 147 (Fed. T.O.), Strayer J. discussed the general approach to be taken with respect to discretionary exemptions under the Privacy Act. He stated, at p. 149:*
> > >
> > > > *It will be seen that these exemptions require two decisions by the head of an institution: first, a factual determination as to whether the material*

> *comes within the description of material potentially subject to being withheld from disclosure; and second, a discretionary decision as to whether that material should nevertheless be disclosed.*
>
> *The first type of factual decision is one which, I believe, the court can review and in respect of which it can substitute its own conclusions. This is subject to the need, I believe, for a measure of deference to the decisions of those whose institutional responsibilities put them in a better position to judge the mater.(sic) ...*
>
> *The second type of decision is purely discretionary. In my view in reviewing such a decision the court should not attempt to exercise the discretion de novo but should look at the document in question and the surrounding circumstances and simply consider whether the discretion appears to have been exercised in good faith and for some reason which is rationally connected to the purpose for which the discretion was granted.*
>
> *In my view, this is the correct approach to reviewing the exercise of discretion under s. 8(2)(m)(i) of the Privacy Act.*
>
> *[49] Thus, based on the approach in Pomerleau, the court would consider whether CONA's discretion was exercised in good faith and for a reason rationally connected to the purpose for the granting of the discretion. In my view, the issue of an improper exercise of discretion is one which calls for the onus of proof to be on the person asserting the improper exercise. [emphasis added].*

[49] With respect to the first decision Memorial stated as follows:

> *The information in the records responsive to this request is personal information about the Applicant; it constitutes employment and educational status/history, as well as other individuals' opinions about him, as those terms are defined in ss. 2(0)(vii) and 2(0)(viii) of ATIPPA. The records also contain personal information about the faculty members who provided feedback. The information is also "evaluative or opinion material, provided explicitly or implicitly in confidence, and compiled for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body" as the records contain evaluative feedback from other faculty members about candidates.*

[50] With respect to the second decision Memorial explained as follows:

> *Part two of the test requires that the university review the information subject to s. 22.1 and determine whether it should be released despite the fact that it can be withheld. In this case, the university consulted decisions of Commissioners in other jurisdictions that discussed the equivalent exception to disclosure as ours. 22.1. In a recent Ontario decision, the Information and Privacy Commissioner stated that, "the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations or it fails to take into account relevant considerations" (para 30,*

Order PO-3089-F). The Commissioner goes on to list several relevant considerations that a public body may reference when assessing the applicability of a confidential evaluations exception to disclosure:

1. *the purposes of the Act, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected;*
2. *the wording of the exemption and the interests it seeks to protect;*
3. *whether the requester is seeking his or her own personal information;*
4. *whether the requester has a sympathetic or compelling need to receive the information;*
5. *whether the requester is an individual or organization;*
6. *the relationship between the requester and any affected persons;*
7. *whether disclosure will increase public confidence in the operation of the institution;*
8. *the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;*
9. *the age of the information; and*
10. *the historic practice of the institution with respect to similar information. (para 32).*

[51] Memorial weighed the relevant factors above and concluded that Factors 1, 2, 6, 8, 9, and 10 strongly supported its decision to withhold the information while Factors 3 and 4 may support a decision to release the information. Memorial did not feel that Factors 5 and 7 supported either outcome. Memorial provided a detailed analysis of the relevant considerations as follows:

1. *The purposes of the ATIPPA are two-fold. Section 3 states that "[t]he purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy." The university was careful to balance the Applicant's right of access to information about him with the corresponding duty to protect the privacy of others while giving the Applicant access to as much information as possible. The accountability purpose of the ATIPPA speaks to the ability for objective review of university decisions. In this case, the information withheld in the records does not shed light on the process followed in order to come to the decision, rather it represents the substance of the material relied upon to make that decision and would only assist an outside party to judge the subjective nature of the decision-making, which is not the intent of the ATIPPA. There are other mechanisms in place by which to appeal a decision of a hiring committee based on the merit, or lack thereof, of candidates. Releasing the information withheld under s. 22.1 would not further the dual goals of accountability, or protection of privacy, as will be discussed in further detail below.*

2. *The purpose of s. 22.1 is to protect the substance of a process that is, by its nature, personal. S. 22.1, in contrast to other exceptions to disclosure in the ATIPPA, applies to a very specific set of circumstances. While the wording of other sections is broad and can be applied to a number of situations, s. 22.1 is focused on the particular situations enumerated within. It is our position*

that the information in the records at issue is exactly the type of information that this section is meant to protect.

3. *The Applicant requested his own personal information.*

4. *There may be a sympathetic or compelling need for the Applicant to receive the information, however, this consideration cannot outweigh the combination of all the other relevant considerations.*

5. *The Applicant is an individual.*

6. *The Applicant works in a relatively small faculty comprised of approximately* [named number of] *members. The faculty members who provided feedback in this case provided it in confidence. In order to effectively achieve the purpose of the collegial decision-making model, participants must be able to respond to requests for feedback openly and frankly. If this information is released to the Applicant, he will know who supported his appointment as* [named senior position] *and who did not. The working environment may be soured as power imbalances exist amongst junior and senior faculty members that could cause unnecessary stress and tension. Furthermore, collegiality amongst faculty members may be negatively impacted when personal emotions are involved. The Applicant has to maintain a working relationship with his colleagues and all faculty members must continue to work together in an environment that fosters mutual respect and confidence in each other. The type of information withheld in this case is collected for a specific purpose; disclosure of it for reasons extraneous to this purpose can place the working environment at risk.*

7. *As the information is personal information, its release will neither increase nor decrease public confidence in the operation of the institution.*

8. *The information is sensitive to the institution, the Applicant, and the individuals who provided it. As stated above, the information is comprised of opinions about the Applicant that directly relate to his candidacy for a senior academic administrator position. On the other hand, the individuals providing feedback in these situations provided frank and open opinions in order to facilitate a full evaluation of the candidates' suitability for the position. There is a customary expectation of confidentiality in the world of academia that accompanies the submission of this type of information and the faculty members must feel comfortable that the information they provide is used solely for the purpose for which it was intended. The process will be compromised in the future if faculty members cannot rely on the confidentiality of the information that they are accustomed to. This directly impacts the institution's ability to appoint the best person for the position and undermines the collegial decision-making model.*

9. *The information is relatively recent; the ATIPP Request was made in June 2012 and the successful candidate for the position of* [named senior position] *(Undergraduate) was not officially announced until* [named date].

10. *Historically, Memorial University, and universities in general, have treated this type of information confidentially.*

[52] While I do not agree with all of Memorial's analysis of all the above factors I do agree with most of what has been argued here and I find that Memorial has considered the objects and purposes of the *ATIPPA* and did not exercise its discretion for an improper or irrelevant purpose. In reviewing the records I note that Memorial did try and release as much information as possible by releasing partial opinions in some situations and occasionally entire opinions. I am satisfied that Memorial exercised its discretion properly.

V CONCLUSION

[53] In relation to the information severed in accordance with section 20(1) of the *ATIPPA*, I have determined that Memorial has properly relied on section 20(1)(a) and 20(1)(c). I have also concluded that Memorial has properly relied on section 30 of the *ATIPPA* to withhold information.

[54] In relation to the information severed in accordance with section 22.1 of the *ATIPPA*, confidential evaluations, I have concluded that the three-part test as outlined above in this Report has been met. The personal information is evaluative or opinion material, compiled for the purpose of determining suitability, eligibility or qualifications for employment for the position of [named senior position] and that information was provided in confidence.

[55] Although the name and contact information of the individual providing the feedback is not technically personal information that is evaluative or opinion material for the purposes of section 22.1, I have determined that this information in this particular situation should be withheld under section 22.1 based on the purpose and intent of section 22.1.

[56] As Memorial pointed out section 22.1 is focused on a particular type of information and is very specific in its application. I found that Memorial exercised its discretion in relation to section 22.1 appropriately and I trust that should Memorial rely on this section in the future that it will continue to exercise its discretion in order to release as much information as possible.

VI RECOMMENDATIONS

[57] In view of the conclusions I have reached above, there is no need for me to make any recommendations to Memorial under section 49(1)(a) of the *ATIPPA*.

[58] Although I have made no recommendations, under the 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 of receiving this Report to indicate the final decision of Memorial with respect to this Report.

[59] In addition, in accordance with subsection 49(2) of the *ATIPPA*, I hereby notify the Applicant of the right to appeal the decision of Memorial to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60. The Applicant must file any appeal within 30 days after receiving a decision of Memorial referenced above

[60] Dated at St. John's, in the Province of Newfoundland and Labrador, this 16th day of December, 2014.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador