NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2007-003

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 a 1994 report dealing with research integrity. This report was referenced in a television broadcast in early 2006 and is referenced on Memorial's website. Memorial denied access to the entire report claiming that the *ATIPPA* did not apply, in accordance with section 5(1)(k). Alternatively, Memorial claimed that the entire report should not be released to the Applicant under authority of sections 22(1)(a), 22(1)(h), 22(1)(p), 24(1), 27 and 30. The Commissioner concluded that section 5(1)(k) did not apply to the report and, as such, the report falls within the scope of the legislation and is subject to review by his Office. The Commissioner then reviewed each of the exceptions claimed by Memorial and concluded that only section 30 applied. The Commissioner did not agree that section 30 applied to the extent submitted by Memorial, but he did accept that some information is captured by the definition of "personal information" in section 2. The Commissioner recommended that the report and all associated appendices be disclosed to the Applicant, with the exception of specific information determined to be "personal information" and determined not to fall within any of the provisions of section 30(2).

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as am, ss. 2(e), (i), (o) and (t), 3, 5(1)(k), 5(2)(c), 7(2), 16(1)(b) and (c), 22(1)(a), (h), (n) and (p), 24(1), 27(1), 30(1), 30(2)(c), (f) and (h), 31(1), 47, 49(1), 50, 54(1)(a) and (b), 60, 64(1); *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss. 2, 3(1)(h), 17 and Schedule 1; *Interpretation Act*, R.S.N.L. 1990, c. I-19, ss. 3(1), 16 and 27; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, as am, s. 4(2)(i); *Rules of Civil Procedure*, Ontario, Rule 30.1; *Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F–22.01, as am, ss. 15(1)(c) and (k); *Memorial University Act*, R.S.N.L. 1990, c. M-7,

as am, ss. 3(1) and 34(1)(g); *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, s. 2; *Access to Information Act*, R.S. 1985, c. A-1.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-002 (2005), 2005-005 (2005), 2006-011 (2006), and 2006-014 (2006); British Columbia OIPC Order F05-26 (2005); *Sarvanis v. Canada*, [2002] 1 S.C.R. 921, [2002] S.C.J. No. 27; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, 140 F.T.R. 140, 1997 CarswellNat 2436; *Rubin v. Canada (Minister of Transport)*, 221 N.R. 145, 1997 CarswellNat 2190; *Marchand v. Manitoba (Minister of Government Services)*, 74 D.L.R. (4th) 186, 1990 CarswellMan 226; *S. (M.A.) (Litigation Guardian of) v. Ludwig* (2004), 2004 CarswellOnt 3853 (Ont. C.A.); *U.A., Local 488 v. Alberta (Industrial Relations Board)* (1975), 75 C.L.L.C. 14, 60 D.L.R. (3d) 690 (Alta. T.D.); *London Health Sciences Centre v. K. (R.) (Litigation Guardian of)*, [1997] O.J. No. 4128; Nova Scotia Review Office Report FI-05-47 (2005); *Goodman v. Rossi (1995), Carswell Ont 146*; *Goodman v. Rossi*, 120 D.L.R. (4th) 557, 1994 CarswellOnt 1042; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 and *Whiten v. Pilot Insurance Co.* (2002), 209 D.L.R. (4th) 257 (4th) 318 (S.C.C.); Saskatchewan OIPC Report F-2006-001 (2006); Ontario OIPC Order P-604 (1993); Privacy Commissioner of Canada *PIPED Act* Case Summary #15 (2001).

Other Resources Cited:

Black's Law Dictionary, Eighth Edition, St. Paul, Minn.: Thomson West (2004); *Black's Law Dictionary*, Sixth Edition, St. Paul, Minn.: West Publishing Co. (1990); *Canadian Law Dictionary*, Third Edition, Hauppauge, New York: Barron's Educational Services, Inc. (1995); *Merriam-Webster Online Dictionary*, available at http://www.m-w.com/; *Words and Phrases Judicially Defined in Canadian Courts and Tribunals*, Scarborough, Ontario: Carswell (1993); Memorial University of Newfoundland website, available at http://www.mun.ca/; *Access to Information and Protection of Privacy Act* Policy and Procedures Manual, Access to Information and Protection of Privacy Coordinating Office, Department of Justice, updated September 2004, available at http://www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf; Government of British Columbia's *Freedom of Information and Protection of Privacy Policy and Procedures Manual*, *available at http://www.mser.gov.bc.ca/privacyaccess/manual/toc.htm*; *Concise Oxford English Dictionary*, 10th Edition, Revised, New York: Oxford University Press (2002).

I BACKGROUND

[1] Under authority of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*"), the Applicant submitted an access to information request to Memorial University of Newfoundland ("Memorial"), dated 15 March 2006, wherein they requested access to the following:

> *We understand that Memorial University* [*of*] *Newfoundland has control over, and is in custody of a Report completed in 1994, as cited in the enclosed CBC-TV The National three-part series titled "The Secret Life of* [*individual*]*" broadcast Jan. 30-Feb. 1, 2006. We also enclose a document entitled "Statement from Memorial University of Newfoundland re.* [*individual*] *and research integrity," wherein the University acknowledges the Report exists and is in its control and custody.*
>
> *We request a copy of the Report. In addition, we request copies of all other documentation cited in the Statement, and all other documentation relating to the fraudulent nature of* [*individual's*] *research in custody or control of Memorial University* [*of*] *Newfoundland, including the findings of the two-person committee, and findings of the vice-presidents.*

[2] In correspondence dated 6 April 2006 Memorial advised the Applicant that the 30 day time limit for responding to an access to information request had been extended for an additional 30 days in accordance with sections 16(1)(b) and 16(1)(c):

> *16. (1) The head of a public body may extend the time for responding to a request for up to an additional 30 days where*
>
> *(b) a large number of records is requested or must be searched, and responding within the time period in section 11 would interfere unreasonably with the operations of the public body: or*
>
> *(c) notice is given to a third party under section 28.*

[3] In further correspondence dated 2 May 2006 Memorial advised the Applicant that access to the responsive record was being denied in accordance with section 5(1)(k) of the *ATIPPA*:

> *We reviewed the large volume of records identified in response to your Request and determined that they relate to an existing proceeding and, under the following section, are not subject to the Act. Please be advised that access to the records has been refused in accordance with the following section of the Access to Information and Protection of Privacy Act (the Act):*
>
> > *5 (1) This Act applies to all records in the custody of or under the control of a public body but does not apply to*
> >
> > *(k) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.*

At that time Memorial did not identify the "existing proceeding." In subsequent correspondence to this Office, however, Memorial identified a legal proceeding in the Ontario Superior Court of Justice, in which it was named as a defendant, as "…the prosecution we are referring to in our reliance on 5(1)(k)…." I note that this proceeding is a civil action between a plaintiff and several defendants.

[4] In response to Memorial's denial, the Applicant contacted Memorial by telephone and narrowed their request for information to the 1994 Report that, according to the Applicant, had been previously released to the Canadian Broadcasting Corporation (the "CBC"). In an e-mail response dated 22 June 2006 Memorial informed the Applicant that it had complied with the request for information "…in accordance with the requirements of the ATIPP Act," and suggested that the Applicant make any further inquiries directly to the CBC.

[5] The Applicant filed a Request for Review with this Office on 29 June 2006, asking that I issue a recommendation to Memorial to provide the Applicant with access to the 1994 Report, as referenced above. Memorial was notified of this Request for Review in correspondence dated 30 June 2006, and was asked to provide the appropriate documentation and a complete copy of the responsive record for my review.

[6] In a response dated 20 July 2006, Memorial advised this Office that it had not provided a report to CBC and, as such, was not able to verify what document was in the possession of CBC. As a result, there was some confusion over exactly what report the Applicant was requesting. Through discussions with this Office all parties eventually agreed that Memorial did have a

relevant report in its custody that was created in 1994 and was identified as a Preliminary Report. It was this report that was the subject of the Applicant's request for information. Consequently, it is this 1994 Report that constitutes the responsive record for the purpose of this Review. An unsevered copy of the 1994 Report was received at this Office on 24 July 2006, without the appendices. In response to our request, copies of the appendices were provided to us on 28 August 2006. I consider these to be part of the responsive record. I note that the 1994 Report is also referred to as the 1994 Preliminary Report.

[7] In providing a copy of the 1994 Report to this Office, Memorial reiterated its reliance on section 5(1)(k) of the *ATIPPA*. In addition, however, Memorial claimed a number of other exceptions as an alternative to section 5(1)(k): "We maintain our reliance on 5(1)(k) which excludes this record from ATIPP coverage. In the alternative, we deny access to this record in its entirety and rely on sections 22(1)(a), 22(1)(h), 22(1)(p), 24(1), 27 and 30."

[8] Attempts to resolve this Request for Review by informal means were unsuccessful. On 16 August 2006 the Applicant and Memorial were notified that the file had been referred to the formal investigation process and they were each given the opportunity to provide written representations to this Office under authority of section 47 of the *ATIPPA*. At the request of Memorial, this Office accepted an initial submission on the application of section 5(1)(k) only. In October of 2006 the Applicant and Memorial were invited to provide additional submissions on the application of sections 22(1)(a), 22(1)(h), 22(1)(p), 24(1), 27 and 30. Both the Applicant and Memorial provided written submissions in support of their respective positions.

II PUBLIC BODY'S SUBMISSION

[9] Memorial summarizes its position with respect to section 5(1)(k) as follows:

> *Section 5(1)(k) of the Act permits Memorial to refuse access to the report in question because of the existence of an ongoing legal proceeding in Ontario between* [*individual*] *and Memorial excludes the report from the scope of the Act* [sic]. *The position of Memorial is that the Ontario legal proceeding instituted by*

> [*individual*] *constitutes a "prosecution" as referenced in 5(1)(k) of the Act and that the matter is particularly prosecutorial given the punitive nature of the claim for damages made against Memorial.*

[10] In support of this position Memorial presents a number of arguments which I will briefly summarize. Memorial first recognizes the purpose of the *ATIPPA* as set out in section 3(1). While Memorial acknowledges that the stated purpose is relevant to the interpretation of the provisions of the legislation, it cautions that it is not determinative and, as such, submits that any such interpretation "…must be in accordance with the principles of statutory interpretation." Memorial goes on to explain that the British Columbia Information and Privacy Commissioner "…follows the approach to statutory interpretation as set out by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27. The meaning of words should be ascertained by a consideration of their grammatical and ordinary sense, the overall context of the words, the object of the statute and the intention of the legislature." In further support of this point, Memorial refers to section 3 of the *Interpretation Act*, R.S.N.L. 1990, c. I-19.

[11] With respect to the word "prosecution" in section 5(1)(k), Memorial submits that a complete and inclusive meaning should be used. As such, the meaning of "prosecution" should include civil actions and should not be restricted to a proceeding where a party is facing some type of criminal or regulatory charge. If the legislature had intended a more limited definition, Memorial submits that the legislature would have specifically delineated the scope of the word.

[12] Memorial also references the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and in particular Rule 30.1.01(3). Under this rule all parties to a proceeding undertake not to use evidence or information to which the Rule applies for any purposes other than those of the proceeding in which the evidence was obtained. According to the Ontario Court of Appeal in *Goodman v. Rossi* (1995), Carswell Ont 146, the rationale for this rule is based on a general right of privacy that a person has over his or her documents. Accordingly, Memorial argues that the Applicant, not being a party to the Ontario action, should not be entitled to the responsive record.

[13] In its submission, Memorial deals at length with the definition of "prosecution," noting that the term is not defined in the *ATIPPA*. Memorial does acknowledge that the public may have a

general perception that the term "prosecution" refers to a criminal matter, but argues that the term must be viewed from a strict legal sense: "While the principles of statutory interpretation must be applied to the Act Memorial submits such an interpretation is the proper 'legal definition' of prosecution within the confines of the Act."

[14] In support of a more inclusive definition, Memorial argues that if the legislators had intended a more narrow definition they would have done so directly. By way of an example, Memorial notes that the British Columbia *Freedom of Information and Protection of Privacy Act* includes a definition of prosecution which expressly limits its meaning to the prosecution of an offence under an enactment. Memorial believes that the absence of such a definition in the *ATIPPA* is a deliberate decision to maintain a broad definition of prosecution, which would include both civil and criminal matters. In addition, Memorial refers to the definition in *Black's Law Dictionary*, 7th edition, which includes the commencement and carrying out of any action or scheme.

[15] Memorial also refers to case law where prosecution was found to be criminal in nature. In each case, however, they argue that legislative provisions were clear in their intent. For example, in *S. (M.A.) (Litigation Guardian of) v. Ludwig* (2004), 2004 CarswellOnt 3853 (Ont. C.A.), the Court found that the "prosecution for perjury" exception in section 42(1) of the *Coroners Act*, R.S.O. 1990 c. 37 refers to a prosecution in the criminal law sense. Memorial submits that "[i]n the context of the governing legislation and the fact that one can not be civilly prosecuted for perjury...the decision is on firm ground." Memorial also refers to *U.A., Local 488 v. Alberta (Industrial Relations Board)* (1975), 75 C.L.L.C. 14, 60 D.L.R. (3d) 690 (Alta. T.D.), in which section 5(3) of the *Evidence Act (Alberta)* was considered. Memorial states that

> *Section 5(3) of* [*the*] *Evidence Act (Alberta) prevented a person from giving evidence against themselves in a prosecution under an Alberta statute. The court clearly found that in the context of the specific wording of* [*the*] *Evidence Act prosecution could only relate to a criminal or quasi-criminal act and not a labour board hearing as this was not a prosecution.*

Memorial goes on to point out that the Court in *U.A., Local 488* concluded that the term "prosecution" when used in a statute "…is intended to be used in its strict legal or technical

context rather than in general language usage or broad dictionary references." Memorial submits that such an analysis should be used when interpreting the *ATIPPA*.

[16] In its submission, Memorial also refers to the use of the term "civil prosecution" in several Court cases in a number of Canadian jurisdictions, including Newfoundland and Labrador. Memorial submits that the ongoing Ontario action against it "…is a civil prosecution and by logical extension a 'prosecution' under the [*ATIPPA*]." Memorial further submits that the use of such a term by Canadian Courts supports its position that "…a wide definition of the term 'prosecution' ought to be applied in the present matter in keeping with the proper interpretation of the Act."

[17] Memorial's final argument on the application of section 5(1)(k) of the *ATIPPA* relies on the punitive nature of the Ontario action. In a civil action where punitive damages are awarded, Memorial argues that such damages are in fact a form of punishment. In support of this point, Memorial refers to a number of Court decisions, including the Supreme Court of Canada (*Wallace v. United Grain Growers Ltd*., [1997] 3 S.C.R. 701 and *Whiten v. Pilot Insurance Co*. (2002), 209 D.L.R. (4^{th}) 257 (4^{th}) 318 (S.C.C.)), where punitive damages were considered a means of punishing a defendant as opposed to compensating the injured. Memorial submits that punitive damages are often significant and cases of this nature, including the current Ontario case, should be differentiated from other civil cases where such damages are not claimed. Memorial argues, therefore, that even if the Commissioner were to accept a more restrictive definition of prosecution, the punitive elements of the Ontario action should define it as a prosecution for the purposes of section 5(1)(k).

[18] In addition to its arguments on section 5(1)(k), Memorial submits that the responsive record must be withheld in accordance with a number of exceptions set out in Part III of the legislation. Namely, Memorial is relying on sections 22(1)(a), 22(1)(h), 22(1)(p), 24(1), 27 and 30. I will provide a brief overview of Memorial's submission on each of these exceptions.

[19] Memorial first points out that the only decision to be made under the mandatory exceptions, sections 27 and 30, is whether the responsive record is within the scope of the exception. If so,

Memorial submits that it must refuse disclosure to the Applicant. With respect to section 27 (third party business information), Memorial acknowledges the three-part harms test as referenced in my Report 2006-001, but argues that "…it should not matter who supplied the information to the public body, or whether it is the third party whose interests are affected." Memorial then goes on to present arguments on each part of the test.

[20] Memorial claims that the responsive record contains information regarding financial support and scientific conclusions, thereby meeting the first requirement of section 27(1). Memorial further claims that the second part of the harms test has been met as the information within the record was gathered with an explicit understanding of confidentiality, thereby allowing for candid opinions. Memorial states that the ability to communicate privately is necessary "…as it is in the public interest that Universities should be able to adequately and efficiently investigate allegations of academic or scientific misconduct." Memorial argues that if such confidential information were to "…become public *ex poste facto* this development would have a chilling effect on all academic institutions and impact their ability to ensure that the appropriate standards of research and integrity are maintained."

[21] With respect to the third part of the test, Memorial acknowledges the need to show an expectation of probable harm, and not merely a possibility of harm. As such, Memorial maintains that releasing the responsive record would likely seriously impair the effectiveness of future investigations into scholarly or research fraud. Memorial maintains that "[t]his potential is a considerable probable risk, as the importance of adequately and effectively investigating allegations of misconduct and uncovering such academic misconduct is critical to the reputation of Memorial."

[22] The other mandatory exception at issue is section 30 (personal information). Memorial claims that all names, opinions and other identifying information about individuals other than the Applicant must be excluded from disclosure, as well as all personal information of third parties:

> *In determining whether the report in question should be disclosed to the applicant, opinions about specified individuals and their training, personality, experience or competence must be deleted as they constitute personal*

> *information. In the present matter, this would exclude a significant portion of the 1994 Preliminary Report, as the bulk of said report concerns personal information about* [*named individual*] *and the opinions of individuals interviewed for the investigation.*

[23] In addition to the two mandatory exceptions claimed by Memorial, it also relies on a number of discretionary exceptions. Memorial states that several of these discretionary exceptions "…require the satisfaction of a three part harms test, wherein a public body must establish that disclosure is reasonably likely to result in harm." Memorial also acknowledges my Report 2006-014 in which I discuss and affirm the requirement to prove a reasonable expectation of probable harm.

[24] Memorial submits that release of the responsive record would be harmful to law enforcement, as provided for in section 22(1) of the *ATIPPA.* Specifically, Memorial argues that release of the responsive record would disclose information about a law enforcement matter, deprive Memorial of a right to a fair trial and harm the conduct of an existing legal proceeding.

[25] Memorial first argues that "law enforcement" is not limited to police activity, but "…includes any investigation, inspection or proceeding that could lead to a penalty or sanction." Memorial submits that the responsive record was generated as a result of an intention to investigate certain allegations and to recommend appropriate sanctions. In support of non-disclosure, Memorial refers to the *ATIPPA Policy and Procedures Manual,* which states that where a public body has started an investigation, records that are relevant to that investigation are excepted from disclosure. As such, Memorial claims that the responsive record falls within the scope of section 22(1)(a).

[26] In addition to section 22(1)(a), Memorial relies on section 22(1)(h) in claiming that disclosing the responsive record to the Applicant

> *…would be unfair and prejudice it in the ongoing action in Ontario as the disclosure to the Applicant may prejudice any entitlement by Memorial to claim a litigation or common-law privilege preventing disclosure of the Report given that the Report's production was ordered pursuant to ATIPP.*

Memorial acknowledges my Report 2006-014, wherein I concluded that incorporated public bodies are not intended to be "persons" for the purposes of section 22(1)(h), but submits that the creation of an "…artificial distinction between corporations are [*sic*] public bodies under ATIPP and corporations existing otherwise restricts Memorial's entitlement to legal safeguards that ensure a right to a fair trial and impartial adjudication." As such, Memorial submits that it's status as a corporation allows it to be considered a "person" for the purposes of section 22(1)(h), and claims that this exception is available to it, notwithstanding my previous conclusions in this regard.

[27] The third and final provision of section 22(1) claimed by Memorial deals with the conduct of existing or imminent legal proceedings (section 22(1)(p)). Again, Memorial refers to my Report 2006-014 wherein I concluded that the harm anticipated by section 22(1)(p) must be to the actual "conduct" of the proceedings and not to the public body itself. Memorial submits that the responsive record is directly related to the ongoing legal proceedings in Ontario and "[d]ue to the nature of those proceedings and the damages being claimed, disclosure of this document at this point would result in harm to those proceedings by potentially further exacerbating or injuring the relationship between the parties in that matter."

[28] Finally, Memorial claims that disclosing the responsive record could reasonably be expected to harm its financial or economic interests, as per section 24(1) of the *ATIPPA*. In referring to my Report 2006-011, Memorial acknowledges the requirement to show detailed and convincing evidence that harm to the financial or economic interests of a public body is probable and not merely possible. Memorial also referred to my Report 2005-002 where the public nature of the information being requested was a relevant consideration. Memorial submits, however, that the record in this case is not a "public" document and "…does not deal with issues well known to the public."

[29] With respect to harm, Memorial again refers to the Ontario legal action and submits that release of the responsive record "…may increase the claim…of punitive damages against Memorial." Memorial refers to its statutory authority under section 34(1)(g) of the *Memorial University Act* and maintains that the responsive record is confidential and has never been

released publicly. Given the potential increase in punitive damages, Memorial claims that "…it is reasonable to anticipate that the decision to disclose [the responsive record] may have significant ramifications on the financial and economic interests of Memorial."

[30] In concluding its submission, Memorial addresses the obligation of a public body to release information about a risk of significant harm to the environment or to the health or safety of the public, as mandated by section 31 of the *ATIPPA*. Memorial submits that "[t]he basis for this requirement is that public interest in the disclosure of information may be of more significance than the interest being withheld by refusing disclosure of the information." Memorial claims that there is no evidence to suggest that withholding the information in the record would lead to a significant risk to public health or safety.

[31] One final point raised by Memorial is the Applicant's claim that the responsive record should be released because it was previously released to the CBC. Memorial maintains that it did not release or authorize the release of the report to the CBC and its "…privacy interests should not be further compromised simply because CBC obtained a copy of the report."

III APPLICANT'S SUBMISSION

[32] The Applicant first references one of the fundamental purposes of the *ATIPPA* as set out in section 3(1)(a): to make public bodies more accountable to the public by giving the public a right of access to records. In order to uphold this purpose the Applicant argues that section 5(1)(k) should be read narrowly and should only apply to criminal or quasi-criminal proceedings. The Applicant further argues that "if section 5(1)(k) had been intended to apply to all legal proceedings, the word "legal proceeding" would have been used, as is found is [*sic*] section 22(1)(p) of the *ATIPPA*."

[33] In support of its position, the Applicant refers to the definition of "prosecution" in *Black's Law Dictionary*, Eighth Edition. Specifically, they highlight the reference to a prosecution being "a criminal proceeding in which an accused person is tried." In addition, the Applicant references

a decision of the Nova Scotia Review Officer. In his Report FI-05-47 the Review Officer states that section 4(2)(i) of the Nova Scotia *Freedom of Information and Protection of Privacy Act*, which is identical to section 5(1)(k) of the *ATIPPA*, "…is meant to apply to records relevant to criminal charges…"

[34] The Applicant acknowledges the existence of a court proceeding to which Memorial is a party, but states this proceeding is civil in nature and does not concern a criminal or quasi-criminal charge. As such, the Applicant argues that this proceeding is not a "prosecution" as contemplated by section 5(1)(k) of the *ATIPPA*.

[35] In addition to their arguments on the definition of "prosecution," the Applicant points out that the existence of the 1994 Report is cited on Memorial's website, the Report itself has been disclosed to a CBC reporter and portions of the Report have been broadcast on a CBC program. The Applicant argues, therefore, that "the existence of the report is public knowledge." In addition, the Applicant states that under the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 30.02(1) and 30.02(2), the Report will have to be revealed and possibly released to the Plaintiff. As such, the Applicant submits that "…releasing the 1994 Preliminary Report to the public will have no material effect on the legal position of any interested party to the lawsuit."

[36] On sections 22(1)(a), 22(1)(h), 22(1)(p), 24(1), 27 and 30, the Applicant refers to my comments in Report 2005-002 that the *ATIPPA* creates a bias in favour of disclosure and places the burden squarely on a public body to prove that information that is being withheld is done so appropriately and in accordance with the legislation. The Applicant goes on to comment on each of the sections in question.

[37] With respect to section 22(1)(a), the Applicant submits that "law enforcement" as defined in section 2 of the *ATIPPA* is not intended to include civil proceedings. As such, "Memorial's reliance on the earlier cited Ontario defamation lawsuit does not fit this exemption to access."

[38] With respect to sections 22(1)(h) and (p), the Applicant argues that the existence of the responsive record, as well as information within the record, has been revealed in a nationally

broadcast CBC program; the Ontario legal action is subject to documentary discovery under the Ontario *Rules of Civil Procedure*; and the record at issue is eleven years old. As such, the Applicant submits that release of the responsive record "…will have no material affect on anyone's right to a fair trial or impartial adjudication, nor will it harm the conduct of the existing legal proceedings."

[39] On the issue of financial or economic harm to Memorial as per section 24(1), the Applicant again refers to the CBC broadcast and argues that any harm that may have resulted from the release of the 1994 Report would have already occurred as a result of this broadcast. In addition, the Applicant refers to the stated purpose of the *ATIPPA* to make public bodies more accountable to the public. In accordance with this purpose, the Applicant argues that any harm that Memorial may suffer "…would be the result of Memorial being held publicly accountable for its actions or inactions…" In support of this position, the Applicant argues that there is nothing to suggest that the responsive record falls into any of the categories of information specified in sections 24(1)(a) to (e).

[40] The Applicant also submits that section 27 does not apply to the responsive record. The Applicant first argues that a number of individuals identified in the record were either employees of Memorial or were under contract to perform services for Memorial, as per the definition of "employee" in section 2. As such, these individuals are not third parties. With respect to any corporation that may be considered a third party for the purposes of section 27, the Applicant argues that those corporations did not "supply" any information and, therefore, are not entitled to the section 27 exception.

[41] The Applicant also suggests that any individual who is not an employee would not have revealed any trade secrets, or commercial, financial, labour relations, scientific or technical information about themselves and, as such, would also not be entitled to the section 27 exception.

[42] On the issue of harm, the Applicant again refers to the CBC broadcast and claims that any harm to individuals or corporations would already have occurred in response to this broadcast.

The Applicant submits that "…at worst, there is only a 'mere possibility of harm' to any of the third parties from the disclosure of the report at issue."

[43] With respect to section 30, the Applicant agrees that any information that is defined as "personal information," and is not captured by any of the provisions of section 30(2), must not be disclosed. Such information should be severed from the record with the remainder being disclosed in accordance with section 7(2). However, the Applicant, in referring to my statement in Report 2005-002 that the *ATIPPA* creates a bias in favour of disclosure, suggests that great care should be taken in defining information as "personal information."

[44] The Applicant submits that "…there is a distinction between information 'about an identifiable individual', and information which is the 'work product' of an identifiable individual." In support of this distinction, the Applicant refers to an Order issued by the Office of the Information and Privacy Commissioner of Ontario, as well as a decision of the Privacy Commissioner of Canada. The Applicant also refers to section 30(2)(h) of the *ATIPPA*, dealing with the opinions or views of third parties given in the course of performing services for a public body:

> *We submit that it would be nonsensical for the work product distinction to be recognized only for third parties. We submit that the work product distinction is implicit in the definition of "personal information", which specifies that the information must be "about" an identifiable individual. Opinions or views about an identifiable individual's "work product" are not "about" the individual.*

[45] The Applicant acknowledges that not seeing the record makes it "…difficult to speculate as to what should be included in the term 'work product.'" However, the Applicant submits that much of the information in the responsive record that is associated with an individual is "work product" information and not "personal information" for the purposes of section 30(1). With respect to information about a corporation, the Applicant submits that this is not personal information because a corporation is not an identifiable individual.

[46] The Applicant also provides additional arguments with respect to section 30(2)(h). Specifically, the Applicant addresses the limitation in this provision that it does not apply to

opinions or views given in respect of another individual. The Applicant submits that "…'given in respect of another individual' must be information 'about' the individual. If the opinions or views are about the individual's 'work product'…that information is not 'about' the individual and must be disclosed." The Applicant also points out that this provision does not require a contract to perform services, thereby including both paid and non-paid services.

[47] The final argument put forward by the Applicant deals with a person's health and safety, as provided for in section 30(2)(c). The Applicant suggests that there are sufficient health and safety concerns associated with some of the information that may be contained in the responsive record to warrant the disclosure of that information.

IV DISCUSSION

[48] The Applicant and Memorial have both referenced the purposes of the *ATIPPA* as set out in section 3(1):

> *3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
>
> *(a) giving the public a right of access to records;*
>
> *(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;*
>
> *(c) specifying limited exceptions to the right of access;*
>
> *(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and*
>
> *(e) providing for an independent review of decisions made by public bodies under this Act.*

[49] I believe it is important, therefore, to first clarify my position with respect to section 3 and its influence on the overall interpretation of the legislation. I have spoken on this point in previous Reports and believe it is useful to repeat some of my comments here. In my Report 2005-002 I said that

> *25 The language in the ATIPPA, like other access and privacy statutes in Canada, creates a bias in favour of disclosure. By providing a specific right of access and by making that right subject only to limited and specific exceptions, the legislature has imposed a positive obligation on public bodies to release information, unless they are able to demonstrate a clear and legitimate reason for withholding it.*

[50] In my Report 2005-005 I referred to the Supreme Court of Canada and its comments with respect to the influence of the overarching purposes of the federal *Access to Information Act*:

> *38 The relevance of a stated purpose in access to information legislation was highlighted by the Supreme Court of Canada. In Dagg v. Canada (Minister of Finance), 213 N.R. 161, 1997 CarswellNat 869 (eC), LaForest, J., at paragraph 63, remarked:*
>
> > *63 Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the Access to Information Act recognizes a broad right of access to 'any record under the control of a government institution' (s.4(1)(b)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.*

[51] It is clear from my previous comments that I consider the express purposes of the legislation to be very important when determining whether or not a public body has appropriately withheld information from an Applicant. While I do not diminish the importance of the specific wording of the legislation, I believe that any exception to the general right of access must be applied within the spirit and intent of the legislation. Section 3 clearly establishes this intent as one of accountability and it is within this context that I must interpret the wording of the *ATIPPA.*

[52] In its submission, Memorial relies on Order F05-26 of the Office of the Information and Privacy Commissioner for British Columbia. Specifically, Memorial refers to the British Columbia Commissioner's reliance on the Supreme Court of Canada's approach to statutory interpretation as set out in *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27. I believe it is useful to quote from Order F05-26:

59 As I noted in the Reyat decision, various cases interpreting the words "in relation to" or "relating to" illustrate how the same or similar words can yield narrow or broad interpretations, with differences in interpretation being the result of different statutory contexts. The relevance of statutory context and purpose is evident in Nowegijick and Slattery. More recently, Iacobucci J. underlined the importance of statutory context in Sarvanis v. Canada, which addressed the meaning of the phrase "in respect of" in the federal Crown Liability and Proceedings Act:

> *22 It is fair to say, at the minimum, that the phrase "in respect of" signals an intent to convey a broad set of connections. The phrase is not, however, of infinite reach. Although I do not depart from Dickson J.'s view that "in respect of" is among the widest possible phrases that can be used to express connection between two legislative facts or circumstances, the inquiry is not concluded merely on the basis that the phrase is very broad.*
>
> *24 In both cases [the English and French versions of the statutory provision], we must not interpret words that are of a broad import taken by themselves without looking to the context in which the words are found. Indeed, the proper approach to statutory interpretation requires that we more carefully examine the wider context of s. 9 before settling on the correct view of its reach. In Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, in discussing the preferred approach to statutory interpretation, the Court stated, at para. 21:*
>
> > *Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states*
> >
> > > *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*
>
> *In my view, the nature and content of this approach, and the accuracy of Professor Driedger's succinct formulation, has not changed. Accordingly, we cannot rely blindly on the fact that the words "in respect of" are words of broad meaning.*
>
> *60 As regards the general interpretive approach to the Act, I have previously acknowledged and applied the approach mentioned in Sarvanis, as well as the need to interpret the Act in light of s. 8 of the*

> *Interpretation Act. As regards the statutory context of s. 3(1)(h), I said this at p. 9 of the Reyat decision:*
>
> *At the end of the day, the scope of the words "relating to" in s. 3(1)(h) depends on analysis of the statutory context in which they occur. Section 2 of the Act is an important part of this context:*

I note that section 2 and section 3(1)(h) of the British Columbia *Freedom of Information and Protection of Privacy Act* are, in all material respects, equivalent to section 3 and section 5(1)(k) of the *ATIPPA*, respectively.

[53] It is clearly evident from the above noted passage that the Courts, including the Supreme Court of Canada, support my views on the importance of an express statutory purpose and the overall context and scheme of a particular statute, a view shared by the British Columbia Commissioner.

[54] In addition, my views on this point are fully supported by the *Interpretation Act*, R.S.N.L. 1990, c. I-19. Section 16 of this *Act* provides:

> *16. Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.*

[55] In denying access to the responsive record, Memorial has taken a two-tiered approach. It has first claimed that the record is captured by section 5(1) and is therefore not subject to the *ATIPPA*. In the event that I do not accept this argument, however, Memorial has claimed a number of exceptions in accordance with Part III of the legislation. If I were to accept the application of section 5(1) it would not be necessary to consider the Part III exceptions and Memorial would be entitled to withhold the record in its entirety. If, however, I conclude that the record is subject to the *ATIPPA*, I will determine if any of the exceptions apply. I will first deal with section 5(1).

Application (Section 5)

[56] Section 5(1) of the *ATIPPA* sets out categories of records that do not fall under the application of the legislation. Memorial has claimed that the record responsive to this request relates to an ongoing prosecution and is excluded from the *ATIPPA* in accordance with section 5(1)(k):

> *5. (1) This Act applies to all records in the custody of or under the control of a public body but does not apply to*
>
> *(k) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.*

[57] There is no dispute that Memorial is a party to an ongoing legal proceeding filed in the Ontario Superior Court of Justice, nor that the responsive record relates to that proceeding. There is also no dispute that the legal proceeding is a civil action between a plaintiff and a number of defendants, including Memorial. The question at issue, therefore, is not whether the responsive record relates to an ongoing legal proceeding, but whether the proceeding is indeed a prosecution. Specifically, I must address the question of whether or not a civil action is considered a "prosecution" for the purposes of section 5(1)(k).

[58] A logical starting point in my analysis is an attempt to define the term "prosecution." While nearly all jurisdictions in Canada have a section 5(1)(k) equivalent in their access to information legislation, it is interesting to note that only British Columbia actually defines the term. Schedule 1 of British Columbia's *Freedom of Information and Protection of Privacy Act* defines "prosecution" as "the prosecution of an offence under an enactment of British Columbia or Canada." In its submission, Memorial makes reference to this definition and accepts that British Columbia has specifically limited the scope of its equivalent section to matters involving the commission of an offence. By association, however, Memorial argues that the absence of such a definition in the *ATIPPA* is meant to maintain a broad definition of "prosecution" which would include both criminal and civil matters:

> *Memorial submits that what is clear from the* [*Order F05-26*] *case is that the British Columbia legislature clearly limited the defined term of "prosecution" to matters that required the commission of an offence. It was this clearly narrowed definition of "prosecution" which resulted in the Commission ordering the disclosure of the records. In the Newfoundland and Labrador Act the legislature has seen fit to maintain the broad definition of "prosecution" by the exercise of their deliberate decision not to limit its scope to criminal matters only and thus the proper analysis of "prosecution" is that it is inclusive of both civil and criminal matters.*

I do not accept that the absence of a definition in a statute automatically defines a term in its broader sense. In fact, I would consider a definition in another jurisdiction as support for an interpretation of a term in this jurisdiction, particularly when the provisions of the respective statutes are virtually identical.

[59] Memorial has clearly stated that the principles of statutory interpretation must be applied when defining the term "prosecution." Again, I would refer to the Supreme Court of Canada, in *Sarvanis v. Canada* and *Rizzo & Rizzo Shoes Ltd. (Re),* as quoted in British Columbia Order F05-26: "…we must not interpret words that are of a broad import taken by themselves without looking to the context in which the words are found…Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Surely, if Memorial supports the principles of statutory interpretation as articulated by the Supreme Court of Canada, as it claims to do, it would not support a broad definition simply based on the absence of an express definition. To do so would ignore the context, scheme and object of the statute. As I referenced earlier, the express purpose of the *ATIPPA* is to provide the public with a right of access to records, subject to specific and limited exceptions. I believe that it is this context that clearly supports a bias toward a more narrow interpretation of the term "prosecution" as found in section 5(1)(k).

[60] Such an interpretation of access to information legislation has been strongly endorsed by the Courts. In *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board),* 140 F.T.R. 140, 1997 CarswellNat 2436, Richard J. said that "…exemptions must be specific and limited. It is clear that Parliament intended exemptions to be interpreted strictly. Access to

information should be the normal course…" In *Rubin v. Canada (Minister of Transport)*, 221 N.R. 145, 1997 CarswellNat 2190, McDonald J.A. said that "…where there are two interpretations open to the Court, it must, given Parliament's stated intention, choose the one that infringes on the public's right to access the least." In *Marchand v. Manitoba (Minister of Government Services)*, 74 D.L.R. (4th) 186, 1990 CarswellMan 226, Oliphant J. said that "[t]he sections in the [Manitoba] Act providing for exemptions must be strictly interpreted. If access to a record is to be denied, the head of the department…must demonstrate that the record in question comes squarely within the ambit of one of the exempting sections of the Act."

[61] Notwithstanding the overall intent of the legislation, I believe it is important to more thoroughly explore the definition of "prosecution." As such, I have analyzed a number of dictionary definitions. Since both the Applicant and Memorial have referred to *Black's Law Dictionary* I will begin there.

[62] *Black's Law Dictionary*, Eighth Edition, defines prosecution as:

> *1. The commencement and carrying out of any action or scheme <the prosecution of a long, bloody war>. 2. A criminal proceeding in which an accused person is tried <the conspiracy trial involved the prosecution of seven defendants>. – Also termed criminal prosecution…3. The government attorneys who initiate and maintain a criminal action against an accused defendant <the prosecution rests>…*

I note that Memorial has referred to the Seventh Edition. However, both editions include the definition as quoted above. Specifically, Memorial is relying on the first part of the definition, which is quite general in nature; "the commencement or carrying out of any action or scheme." The Applicant, on the other hand, has placed emphasis on the express reference to "a criminal proceeding in which an accused person is tried."

[63] In its submission, Memorial refers to the Ontario Court of Appeal and its reference to the definition of prosecution in *Black's Law Dictionary*. In *S. (M.A.) (Litigation Guardian of) v. Ludwig* (2004), 2004 CarswellOnt 3853 (Ont. C.A.), Armstrong J.A. noted that the definition

includes civil litigation. I note, however, that the Court in *S. (M.A.) (Litigation Guardian of)* was relying on the Sixth Edition of *Black's Law Dictionary*, which includes the following:

> *A criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime…The term is also used respecting civil litigation, and includes every step in action, from its commencement to its final determination…*

The express reference to "civil litigation" in this earlier definition clearly establishes that the editors at the time intended civil matters to be included in the term "prosecution." Notwithstanding this reference to civil action, however, Armstrong J.A. stated that "[i]t appears clear to me that the editors of Black's [Law Dictionary, Sixth Edition] regard the primary meaning of 'prosecution' as referring to a criminal proceeding."

[64] It is also important to note that the express reference to civil litigation in the Sixth Edition of *Black's Law Dictionary* was removed from the Seventh Edition and the current Eighth Edition, upon which I am relying. I believe this to be significant. If the editors made a conscious decision to remove any reference to civil matters from the definition of prosecution, I suggest they intended the term to be used in the context of criminal matters.

[65] For these reasons I do not find Memorial's reliance on the *Black's Law Dictionary* definition to be convincing. In further support of this, however, I will look to some other definitions.

[66] The *Canadian Law Dictionary*, Third Edition, compiled by John A. Yogis, Q.C., defines prosecution as:

> *The act of pursuing a criminal trial by the Crown. Where the Crown fails to move the case towards final resolution or trial as required by the court schedule, the matter may be dismissed for "want of prosecution."*

The *Merriam-Webster Online Dictionary* (available at http://www.m-w.com/) defines the term as:

> *Function: noun*
> *1: the act or process of prosecuting; specifically: the institution and continuance of a criminal suit involving the process of pursuing formal charges against an offender to final judgment 2: the party by whom criminal proceedings are instituted or conducted 3: obsolete: Pursuit*

[67] I note that the Alberta Trial Division has used the *Oxford English Dictionary* to interpret the word prosecution. In *U.A., Local 488 v. Alberta (Industrial Relations Board)* (1975), 75 C.L.L.C. 14, 60 D.L.R. (3d) 690 (Alta. T.D.), Miller D.C.J. stated as follows:

> *…While it might therefore follow that all "prosecutions" could be called "actions" it does not follow that all "actions" can be called "prosecutions"….*
>
> *The Oxford English Dictionary, 1961 reprint, vol. 8, at p. 1490, gives several different meanings for the word "prosecution" but specifically refers to one meaning under the sub-heading "law" and goes on to define the word as follows:*
>
> *(a) In strict technical language: a proceeding either by way of indictment or information in the criminal courts, in order to put an offender upon his trial; the exhibition of a criminal charge against a person before a court of justice.*
> *(b) In general language; the institution and carrying on of legal proceedings against a person.*
> *(c) Loosely; the party by whom criminal proceedings are instituted and carried on.*
>
> *…When the word "prosecution" is used in a statute and particularly one such as the Alberta Evidence Act, which attempts to delineate certain rights and obligations with precision, it is my view that the term was intended to be used in its strict legal or technical content rather than in general language usage or broad dictionary references.*

I note as well that this quotation from the Alberta Trial Division is cited, in part, in Carswell *Words and Phrases Judicially Defined in Canadian Courts and Tribunals* as its definition of "prosecution."

[68] Interestingly, Memorial has cited *U.A., Local 488* in support of its position and in referencing the conclusions of Miller D.C.J., has submitted "…that the strict legal or technical context is the analysis to be used to properly interpret the Newfoundland and Labrador *Act*." I agree with Memorial on this point, but in my opinion such an interpretation provides support for a more

narrow definition of prosecution, a definition that is restricted to matters of a criminal or quasi-criminal nature. While many definitions of prosecution have general references to the term, such as the first definition in *Black's Law Dictionary*, Eighth Edition, it is the more legal definition that must prevail when the term is used in a statutory context. I believe the Court in *U.A., Local 488* has clearly determined that a strict legal or technical definition of "prosecution" limits the term to criminal matters. These conclusions are consistent with the approach of Elmer Driedger, as quoted in *Rizzo & Rizzo Shoes Ltd. (Re)* and referenced earlier in this Report. A more narrow definition of prosecution is harmonious with the scheme and object of the *ATIPPA* and with the intent of the legislature.

[69] I note in passing that in its same submission Memorial also endorses the use of a broad definition: "Memorial submits that a wide definition of the term 'prosecution' ought to be applied in the present matter in keeping with the proper interpretation of the Act." I believe this statement to be at odds with Memorial's reliance on *U.A., Local 488* and, specifically, its claim that a strict legal or technical analysis should be applied.

[70] Another issue raised by Memorial with respect to the definition of prosecution is the use of the term "civil prosecution." Memorial submits that use of this term in a number of Court cases supports its claim that the term "prosecution" is sufficiently broad so as to include civil matters. While I do not dispute the use of this term in the majority of cases cited by Memorial, I note that the term is not being used in the context of a "prosecution" as specifically referenced in a statute, nor is the term itself discussed in any detail. As I have previously indicated, I accept the conclusions of Miller D.C.J. in *U.A., Local 488* that when the word "prosecution" is used in a statute "… the term was intended to be used in its strict legal or technical content rather than in general language usage or broad dictionary references." I believe the term as used in the cases cited by Memorial is done so in the context of more general language and does not, as suggested by Memorial, "…illustrate that the legal ambit of the term 'prosecution' is beyond the commonly used 'criminal prosecution'…"

[71] While it is not my intent to discuss each of the cases cited by Memorial in support of their arguments on the term "civil prosecution," I do note that one particular case warrants some

comment. Memorial submits that the term was "…used in *London Health Sciences Centre v. K. (R.) (Litigation Guardian of)*, [1997] O.J. No. 4128, where the applicants sought an order granting them immunity from criminal and civil prosecutions…" On reviewing this case, however, I note that the Court established a clear distinction between a civil action and a prosecution. At paragraph 13, McDermid J. said that "[n]otwithstanding Mr. Hamer's vigorous submissions to the contrary, it is, in substance, if not entirely in form, an application for immunity from **civil suit and criminal prosecution**…" McDermid J. goes on, at paragraph 19, to say that "I do not believe that the applicants have a legal 'right' to immunity from **civil suit, or, for that matter from criminal prosecution**, or professional or other legal liability…" (emphasis added). Use of the term "prosecution" in this case is done so in the context of criminal matters and is clearly distinguished from civil proceedings. Despite Memorial's claim to the contrary, I believe this case further supports my conclusion that civil matters are not captured by section 5(1)(k) of the *ATIPPA*.

[72] I note as well that the term "civil prosecution" is not defined in *Black's Law Dictionary*, Eighth Edition, the *Canadian Law Dictionary*, Third Edition, the *Merriam-Webster Online Dictionary*, nor is the term referenced in Carswell *Words and Phrases Judicially Defined in Canadian Courts and Tribunals*. As such, it is my opinion that the general use of "civil prosecution" in a number of Court cases does not infer the inclusion of civil matters in the strict legal or technical definition of prosecution and, by association, does not infer an expanded definition of prosecution in the context of the *ATIPPA*.

[73] For all of the above reasons, I believe that the dictionary definitions of "prosecution" strongly support the conclusion that a prosecution, in the context of a statute, is limited to the criminal or quasi-criminal context. In this regard, I support the Applicant's general position as well as their specific reliance on the second definition of prosecution as set out in *Black's Law Dictionary*, Eighth Edition.

[74] Having considered specific definitions of the term "prosecution," I would now turn to the submission of the Applicant and, in particular, their reliance on a decision of the Nova Scotia Review Officer. In his Report FI-05-47, Review Officer Darce Fardy was required to interpret

section 4(2)(i) of the Nova Scotia *Freedom of Information and Protection of Privacy Act* which is, in all material respects, equivalent to section 5(1)(k) of the *ATIPPA*. In determining whether an autopsy report and other related records in the possession of the Department of Justice ought to be released, Review Officer Fardy refused to give a broad interpretation to the phrase "a record relating to a prosecution." Of particular importance to the case at hand, however, is his specific reference to the criminal nature of a prosecution:

> *…The Department is inviting me to give a broad interpretation to the phrase "a record relating to a prosecution" which, if adopted, could conceivably result in many records not being considered under FOIPOP at all.*
>
> *I accept the argument that the s. 4(2)(i) exclusion is meant to apply to records relevant to* ***criminal charges*** *which have been laid if all proceedings in respect to the prosecution have not been completed. I accept that the records sought to be excluded must have "a logical reasonable connection" to the* ***criminal charges*** *laid.*
>
> (Emphasis added)

While I acknowledge that the subject of the Nova Scotia case is a criminal matter, I believe Review Officer Fardy's reasoning and interpretation is supportive of civil matters not being included in s. 4(2)(i) of the Nova Scotia legislation. Given that this provision is virtually identical to section 5(1)(k) of the *ATIPPA*, this decision provides additional support to the Applicant's position that a prosecution relates only to criminal and quasi-criminal matters.

[75] Further to my earlier comments on the purpose of the legislation and its relevance to statutory interpretation, there are some basic principles that are also relevant to this analysis. First, other provisions in the *ATIPPA* use the broader term "legal proceeding." Section 5(2)(c) provides that the *ATIPPA* "does not limit the information otherwise available by law to a party in a **legal proceeding**." In addition, section 22(1)(p) protects information that could reasonably be expected to "harm the conduct of existing or imminent **legal proceedings**" (emphasis added). Clearly, the legislators meant something different by a "legal proceeding" as opposed to a "prosecution," particularly when both terms are used in the same section (section 5). As such, it is logical to conclude that a "legal proceeding" is to be interpreted more broadly and implies all

manners of legal action, including civil actions, whereas a "prosecution" does not lend itself to a similar implication.

[76] Second, it is useful to consider other instances of the term "prosecution" in the *ATIPPA*. For example, section 22(1)(n) protects information that would, among other things, adversely affect the "prosecution of an offense." The term here is clearly used in a criminal context. In the context of the admissibility of evidence, section 54(1)(a) and (b) relate to "a prosecution for perjury" and "a prosecution for an offence under this Act," respectively. These prosecutions would be criminal or quasi-criminal in nature. By association, I believe the meaning of a prosecution in the context of section 5(1)(k) is equally restrictive.

[77] In further support of its position, Memorial argues that the Applicant, not being a party to the Ontario action, has "…no entitlement to the documents as disclosure of the documents to third parties is generally not permitted under the Ontario Rules of Court as there is an implied undertaking that they not be disclosed." Specifically, Memorial is relying on Rule 30.1.01(3) of the Ontario *Rules of Civil Procedure*, which provides:

> *(3) All parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.*

On this point, Memorial refers to a decision of the Ontario Court of Appeal:

> *The Ontario Court of Appeal in Goodman v. Rossi (1995), Carswell Ont 146, which is the leading Ontario case on the implied undertaking rule explained that the principal rationale for the rule is "recognition of the general right of privacy which a person has with respect to his or her documents." Since the civil discovery process is "an intrusion on this right under the compulsory processes of the court…this intrusion should not be allowed for any purpose other than that of securing justice in the proceeding in which the discovery takes place."*

I note that Morden A.C.J.O. in this case set aside the order of the Divisional Court (see *Goodman v. Rossi*, 120 D.L.R. (4th) 557, 1994 CarswellOnt 1042), where Mr. Justice O'Leary concluded, on behalf of himself and Mr. Justice O'Driscoll, that there was no implied undertaking rule in

Ontario. Mr. Justice Moldaver, in dissenting on this point, held that such a rule does indeed exist. I will speak more on this shortly.

[78] I do not disagree with the intent of Rule 30.01.01(3), nor do I disagree with the rationale as set out by the Court of Appeal in *Goodman*. I am not convinced, however, that the application of this Rule extends to the case at hand and, as claimed by Memorial, bars the Applicant from access to the responsive record. A more complete analysis of *Goodman* reveals additional comments which I believe support my position on this issue. While there is no doubt as to the Court of Appeal's position with respect to an implied undertaking rule, it is important to note that Morden A.C.J.O. also said that "…the rule would cover only information that the receiving party could not otherwise have obtained by legitimate means independent of the litigation process…" On this point, Mordon A.C.J.O. was agreeing with the comments of Moldaver J. at the Divisional Court. Moldaver J., in dissenting, formulated an implied undertaking rule at paragraph 41:

> *Where a party has obtained information by means of court compelled production of documents or discovery, **which information could not otherwise have been obtained by legitimate means independent of the litigation process**, the receiving party impliedly undertakes to the court that the private information so obtained will not be used, vis-a-vis the producing party, for a purpose outside the scope of the litigation for which the disclosure was made, absent consent of the producing party or with leave of the court; any failure to comply with this undertaking shall be a contempt of court.*
>
> (Emphasis added)

Moldaver J. goes on to say, at paragraph 42, that

> *Framed this way, **the rule makes it clear that not all information obtained through production or discovery is entitled to protection but only information which the receiving party could not otherwise have obtained by legitimate means independent of the litigation process**. Such information, which I have labelled "private information," would include inherently confidential material such as sensitive financial data, customer lists and the like but it would not be restricted to that.*
>
> (Emphasis added)

[79] Returning to the Rule itself, as it now exists in the Ontario *Rules of Civil Procedure*, I refer specifically to Rule 30.1.01(2):

> *(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1).*

[80] I believe Rule 30.1.01(2) clearly puts into practice the conclusion of the Courts that access to information legitimately available outside the litigation process should not be defeated by the Rule. As such, I do not believe that the Ontario *Rules of Civil Procedure* in any way frustrates the ability of the Applicant to seek access to records that may be available under the *ATIPPA.*

[81] Notwithstanding my comments thus far on this point, I should also note that the application of Rule 30.1 of the Ontario *Rules of Civil Procedure* is restricted to evidence and information specifically obtained under Rules 30, 31, 32, 33 and 35. The Rule does not apply to information that "may" be obtained under one of these rules at some future date. I fail to see how such application extends to an access to information request, particularly a request that has been submitted prior to any disclosure under the Rules.

[82] The final argument of Memorial with respect to the application of section 5(1)(k) relies on the fact that the Ontario action involves a claim of punitive damages. In a civil action where punitive damages are awarded, Memorial argues that such damages are in fact a form of punishment. As such, Memorial submits that the "…punitive sanction imposed upon Memorial is the distinguishing characteristic that differentiates the [Ontario] civil action from other cases where a litigant might seek only monetary damages to replace something that has been lost." In support of this point, Memorial refers to a number of Court decisions, including the Supreme Court of Canada (*Wallace v. United Grain Growers Ltd*., [1997] 3 S.C.R. 701 and *Whiten v. Pilot Insurance Co*. (2002), 209 D.L.R. (4th) 257 (4th) 318 (S.C.C.)), where punitive damages were considered a means of punishing a defendant as opposed to compensating the injured. Memorial also points out that significant punitive damages have been awarded in response to a claim of defamation. Given that the plaintiff in the Ontario action seeks to financially punish the defendants, including Memorial, through punitive damages, Memorial argues that even if the Commissioner were to accept a more restrictive definition of prosecution, the punitive elements

of the Ontario action should define it as a prosecution for the purposes of section 5(1)(k) of the *ATIPPA*.

[83] Again, I have no reason to dispute the conclusions of the Courts with respect to the penal nature of punitive damages, nor do I have any reason to question the process by which such damages are determined and awarded. I do not agree, however, that a civil action involving punitive damages should be differentiated from an action seeking only compensatory damages to the extent that it would re-define the legal definition of "prosecution" and frustrate the overall purpose of the access to information legislation. The fact is, whether or not punitive damages are claimed, the action is still civil in nature and it is my position that a civil matter is not considered a prosecution for the purpose of section 5(1)(k) of the *ATIPPA*.

[84] Having determined that section 5(1)(k) does not apply to the responsive record, I have concluded that this record is within the jurisdiction of the *ATIPPA* and, by extension, within the jurisdiction of this Office. As previously indicated, Memorial has asked that in the event that I were to arrive at this conclusion that I would consider a number of other exceptions as set out in Part III of the legislation, namely sections 22(1)(a), 22(1)(h), 22(1)(p), 24(1), 27 and 30. Sections 22 and 24 are discretionary in nature in that they *permit* a public body to refuse access to records. Sections 27 and 30, however, are mandatory and *require* a public body to refuse access to any record which it deems to fall within the scope of the exception. Memorial submits that access to the responsive record in its entirety should be denied in accordance with each of these discretionary and mandatory exceptions.

[85] Other than section 30, these exceptions to access are predicated on the probability of harm. I have spoken on this point in a number of previous Reports. In my Report 2006-011, for example, I said at paragraph 16 that

> *16 The application of section 24(1) relies on a reasonable expectation of harm test. I have discussed this issue in previous reports and have concluded that any claim of harm under access to information legislation must meet a test of probability. The mere possibility of harm does not meet the test anticipated by the legislation and, as such, does not invite the protection of the legislation. In my*

> *Report 2005-002 I established that this concept has been clearly supported by the Courts:…*

[86] I note that Memorial in its submission states that "[s]everal of the discretionary exceptions…require the satisfaction of a three part harms test…" However, the only section of the *ATIPPA* containing a three part harms test is section 27, a mandatory exception. In order to accept the application of section 27, I must be satisfied that all three parts of the test are met. With respect to the other sections containing a harms test, including sections 22 and 24, I need only be satisfied that the public body has proven the existence of a reasonable expectation of probable harm. In so doing, however, I expect the public body to show clear and convincing evidence. I again refer to my Report 2006-011:

> *17 The Information and Privacy Commissioner of British Columbia has spoken extensively on the use of a reasonable expectation of harm test. In Order 02-50 he adopted the conclusion of the Supreme Court of Canada in Lavigne v. Canada (Office of the Commissioner of Official Languages), 2002 SCC 53, 2002 CarswellNat 1357. At paragraph 58 Gonthier J. stated that "[t]here must be a clear and direct connection between the disclosure of specific information and the injury that is alleged." While the Supreme Court of Canada reached this conclusion in the Lavigne case in the context of section 22(1)(b) of the federal Privacy Act, I believe it is quite pertinent to the case at hand and is an appropriate standard to apply when determining whether or not a reasonable expectation of harm exists in the context of an exception under the ATIPPA.*
>
> *18 In dealing specifically with the potential harm to the financial or economic interests of a public body, the British Columbia Commissioner in his Order 02-50 referenced a number of Court cases, including Canada Packers Inc. On reviewing the pertinent case law he summarized as follows:*
>
> > *137 Taking all of this into account, I have assessed the Ministry's claim under s. 17(1) by considering whether there is a confident, objective basis for concluding that disclosure of the disputed information could reasonably be expected to harm British Columbia's financial or economic interests. General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1). That exception must be applied on the basis of real grounds that are connected to the specific case. This means establishing a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the*

> *contemplated harm to be reasonably expected to result from disclosure of the information.…There must be cogent, case-specific evidence of the financial or economic harm that could be expected to result.*
>
> *Section 17(1) of British Columbia's Freedom of Information and Protection of Privacy Act is, in all material respects, equivalent to section 24(1) of the ATIPPA.*
>
> *19 In light of the burden of proof mandated by section 64 of the ATIPPA, and the extensive body of case law, it is the responsibility of the Town to clearly show a reasonable expectation of probable harm through the presentation of detailed and convincing evidence...*

[87] Section 64(1) clearly places the burden on the public body to prove that an applicant has no right of access:

> *64. (1) On a review of or appeal from a decision to refuse access to a record or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record.*

[88] In the context of section 64(1), and in consideration of Memorial's responsibility to provide detailed and convincing evidence that releasing the responsive record to the Applicant would probably cause harm, I now turn to each of the exceptions claimed by Memorial.

Harm to Law Enforcement (Section 22(1))

[89] Section 22(1) of the *ATIPPA* is a discretionary exception which allows a public body to refuse to disclose information associated with a law enforcement matter. Law enforcement is defined in section 2 to mean:

> *(i) policing, including criminal intelligence operations, or*
> *(ii) investigations, inspections or proceedings that lead or could lead to a penalty or sanction being imposed;*

[90] Section 22(1) contains 16 individual provisions which specify categories under which information may be protected. Memorial has specifically claimed three of these provisions:

> *22. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to*
>
> *(a) interfere with, disclose information about or harm a law enforcement matter;…*
> *(h) deprive a person of the right to a fair trial or impartial adjudication;…*
> *(p) harm the conduct of existing or imminent legal proceedings.*

Section 22(1)(a)

[91] The intent of a number of provisions of section 22(1) is to prevent the release of information that may lead to some form of harm. This is evident in a number of terms used throughout the section, such as "interfere with," "harm," "prejudice," "reveal," "endanger the life," "deprive," and "adversely affect." I am concerned, however, with the language of section 22(1)(a) which uses, in addition to the terms "interfere with" and "harm," the term "disclose information about." I also note that the word "or" in this section allows this latter term to stand alone. As such, section 22(1)(a) appears on its face to permit a public body to refuse to disclose any information about any policing matter or any proceeding that may lead to a penalty or sanction, without the requirement to show some adverse affect that release of the information may cause. I believe such broad language, in combination with the broad definition of "law enforcement," has established an exception which is at odds with the overall intent of the legislation. With this language, I would suggest that it was not necessary to use the terms "interfere with" and "harm" in section 22(1)(a) nor, for that matter, any of the other terms referenced above. In fact, if all information about law enforcement may be withheld by a public body without the requirement to show some form of harm, all other provisions of section 22(1) would be completely redundant.

[92] I note that a survey of all jurisdictions in Canada revealed that of the ten Provinces and three Territories, only Saskatchewan had similar language to section 22(1)(a) of the *ATIPPA*. In his recent Report F-2006-001, the Information and Privacy Commissioner for Saskatchewan dealt specifically with this point in the context of section 15(1)(c) of the Saskatchewan *Freedom of Information and Protection of Privacy Act*:

> *15. (1) A head may refuse to give access to a record, the release of which could:*
>
> *(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;…*

At paragraphs 35 to 38 the Saskatchewan Commissioner said

> *35 In fact, although there are many court decisions and orders from other Information and Privacy Commissioners that consider "lawful investigation", I have found that none of the comparable statutes in those jurisdictions have an exemption or exception to the right of access where this would "disclose information with respect to a lawful investigation". I note also that in a number of other jurisdictions, the "law enforcement" exemption is expressly designed as a harm-based exemption.*
>
> *36 It is therefore necessary to interpret section 15(1)(c) without reliance on those authorities from other jurisdictions.*
>
> *37 The obvious kinds of harms that might be anticipated to flow from disclosure of records or information of a lawful investigation appear to have already been addressed in other subsections of section 15. For example, if the records would be injurious to the Government of Saskatchewan or a government institution in the conduct of existing or anticipated legal proceedings; or would reveal investigative techniques or disclose the identity of a confidential source; or would deprive a person of an impartial adjudication or would reveal law enforcement intelligence information; there is a specific subsection that justifies denial of access.*
>
> *38 I am therefore required to interpret the words "disclose information with respect to a lawful investigation" by giving them a meaning different than the other 13 specified circumstances enumerated in section 15(1). Many of the other 13 circumstances would be subsumed in the broad interpretation of section 15(1)(c) that is urged by CPS. If section 15(1)(c) were to be given as expansive a meaning as urged by CPS and would capture "information with respect to a lawful investigation", regardless of whether that investigation is current or has been completed, there would be little need for prescribing those 13 other circumstances.*

[93] While I fully agree with the Saskatchewan Commissioner, and support his position on the implications of broad language within the law enforcement exemption in general, I note that his comments were made in the context of an "investigation." This is more specific than a "law enforcement matter," particularly in light of the broad definition of "law enforcement" in the

ATIPPA. While the Saskatchewan *Freedom of Information and Protection of Privacy Act* does contain an equivalent section (15(1)(k)) to section 22(1)(a) of the *ATIPPA*, wherein the term law enforcement matter is used, that particular provision was not at issue in Report F-2006-001, referenced above. I also note that, unlike the *ATIPPA*, law enforcement is not defined in the Saskatchewan legislation. Given the general nature of the term "law enforcement matter" and the overly broad definition of "law enforcement" in the *ATIPPA*, I am somewhat restricted in my ability to apply the Saskatchewan Commissioner's rationale to the case at hand, despite the succinctness of his arguments.

[94] I should note at this point that the legislators when drafting this legislation did so with the benefit of existing equivalent legislation in most Canadian jurisdictions. Why then did they choose such broad language when the vast majority of other jurisdictions did not? The answer appears to be a specific intent to create a blanket exemption with respect to law enforcement. As I explained earlier I will always interpret specific provisions in the context of section 3. In this particular circumstance, however, I find myself in the difficult position of having to accept the clear language of sections 2(i) and 22(1)(a), despite its apparent dichotomy with the legislation's purpose of providing a right of access subject only to limited and specific exceptions.

[95] Having acknowledged and accepted that section 22(1)(a) provides a very broad exception to the right of access, I must now apply that exception to the record at issue. In so doing, I must determine whether there is in fact a law enforcement matter and, if so, whether releasing the responsive record would reveal information about that matter.

[96] As previously indicated, the responsive record is a 1994 Report. Memorial submits that the activities of the authors of this 1994 Report "…were intended to investigate certain allegations against an individual, and recommend appropriate sanctions." As such, Memorial claims that the record should fall within the scope of the exception. It appears, therefore, that Memorial is considering the 1994 investigation that resulted in the creation of the responsive record to be the law enforcement matter to which section 22(1)(a) should apply. In this regard, I will first look specifically at the definition of law enforcement.

[97] The definition of law enforcement contains two distinct categories. The first category is specifically limited to policing activities, while the second category includes a much broader list of activities. It is this second category that is at issue in the case at hand. I note that within this category, there are two distinct elements. An activity must fall within the scope of an investigation, inspection or a proceeding, but it must also lead or have the potential to lead to some penalty or sanction. Given the broad nature of the terms "investigation" and "proceeding" I have no hesitation in agreeing that the 1994 investigation meets this portion of the definition. However, I believe the second element of the definition in considerably more restrictive.

[98] On reviewing the 1994 Report, I note that the authors in fact made no recommendations. The authors did reach a number of conclusions based on their findings, but at no point did they recommend any penalty or sanction. Furthermore, I have not been presented with any evidence indicating that any form of penalty or sanction was ever imposed as a result of the investigation that is the subject of the Applicant's request for access. It is also significant to note that the investigation was completed over 12 years ago. I believe this to be more than sufficient time to issue any sanctions, if indeed this was the intent.

[99] Given Memorial's claim, however, that the intent of the investigation was to recommend sanctions, this Office forwarded correspondence to Memorial on 14 December 2006 giving it an opportunity to provide additional information to confirm that sanctions were actually recommended and/or imposed. On 20 December 2006, this Office received a response from Memorial's solicitor stating that such additional information would not be provided. In the absence of any evidence to the contrary, I can only conclude that the 1994 investigation did not and will not lead to the imposition of a penalty or sanction and, as such, I must conclude that the responsive record does not constitute a law enforcement matter for the purposes of section 22(1)(a).

[100] I note that Memorial has referenced section 4.2.5 of the *ATIPPA Policy and Procedures Manual*, produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice (the "*ATIPPA Manual*"), which states that "[i]f a public body has started an investigation, records that are relevant to the investigation are

excepted from disclosure regardless of when the record was created." In the absence of any further explanation, I am assuming that Memorial's reference to this section of the *ATIPPA Manual* is meant to support its position that the elapsed time since completion of the 1994 Report should not adversely affect its argument that the Report should not be disclosed. With all due respect, I do not agree that this statement in the *ATIPPA Manual* captures the responsive record that is at issue in this case. The *ATIPPA Manual* is specifically referring to an investigation that has started, clearly indicating that it is meant to apply to an ongoing investigation. The intent of this statement, therefore, is to help ensure that information that is relevant to an ongoing investigation may be protected. I have no difficulty agreeing that the age of a record should not diminish the effect that the disclosure of that record may have on an ongoing investigation. In the case at hand, however, there is no ongoing investigation, nor even a recent investigation. I again refer to the Saskatchewan Report F-2006-001, where the Commissioner has determined that a "lawful investigation," for the purposes of section 15(1)(c) of Saskatchewan's *Freedom of Information and Protection of Privacy Act*, must be ongoing or active:

> *41 We view both parts of section 15(1)(c) of the Act to denote the same meaning of lawful investigations. If the legislature had intended a different meaning, then different words would have been used. The two parts of the subsection will only apply if there is an active investigation underway.*

[101] Based on all of the above, I conclude that a law enforcement matter does not exist in this case and, as such, section 22(1)(a) does not apply to the responsive record.

Section 22(1)(h)

[102] The intent of section 22(1)(h) is to protect a person's right to a fair trial or impartial adjudication. A key consideration in this provision is what constitutes a "person." While this term is not defined in the *ATIPPA*, section 27 of the *Interpretation Act* clearly states that a person includes a corporation. As such, Memorial is relying on its status as a corporation, pursuant to section 3(1) of the *Memorial University Act*, in claiming that it is a person for the purposes of section 22(1)(h) of the *ATIPPA*. In my Report 2006-014, I discussed the application of this section in detail. Notwithstanding section 27 of the *Interpretation Act*, in this previous Report I

established a distinction between a "public body," as defined in the *ATIPPA*, and a "person" for the purposes of section 22(1)(h). Specifically, I concluded that it is not the intent of the legislation to allow incorporated public bodies to have access to an exception while non-incorporated public bodies do not:

> *42 It is difficult to imagine that the legislators, in creating the ATIPPA, would design an exception in such a way that one category of public body would be able to rely on it and another would not, thus creating a double standard. Be that as it may, I believe that the legislators intentionally used the word "person" so as not to deny protection under this subsection to an incorporated entity which is not also a public body. It is an every day occurrence for trials and hearings to take place where one or more of the parties may be an incorporated entity. Section 22(1)(h) is there to equally protect the rights of all parties in such cases, with, I believe, one logical exception. Given the fact that the term "public body" is clearly defined in the ATIPPA, I do not believe the intention of the legislature was for this exception to apply to incorporated entities which are also public bodies…*

[103] In support of my conclusions in Report 2006-014, I referred specifically to the purpose of the *ATIPPA*, as expressly set out in section 3(1), and the interaction of this express purpose with section 3(1) of the *Interpretation Act*:

> *45 In further support of this position, I now refer to the first two subsections in the application section of the Interpretation Act:*
>
> > *3. (1) This Act extends and applies to every Act and every regulation enacted or made, except where a provision of this Act*
> >
> > *(a) is inconsistent with the intent or object of the Act or regulation;*
> >
> > *(b) would give a word, expression, or clause of the Act or regulation an interpretation inconsistent with the context or interpretation section of the Act or regulation*
>
> *This provides a clear opportunity to balance the specific provisions of the Interpretation Act with the spirit and intent of a particular piece of legislation. Given the purposes of the ATIPPA as set out in section 3 and the definitions in section 2, as well as the language of section 3 of the Interpretation Act, I think it is clear that an interpretation of the term "person" which would allow certain public bodies greater scope to protect records from disclosure than other public bodies is clearly inconsistent with the intent and object of the ATIPPA…*

[104] In its submission, Memorial has acknowledged my conclusions in Report 2006-014, but has stated that the inclusion of Memorial as a public body is meant to ensure that the *ATIPPA* applies to Memorial, and "…ought not to have been interpreted as somehow differentiating corporate bodies also designated as 'public bodies' from corporate entities who have not been so designated." There is nothing in Memorial's submission, however, which would cause me to reconsider my position on this issue. I stand by my conclusions in my Report 2006-014 and I have no hesitation in applying those arguments to the case at hand. I do not accept, therefore, that section 22(1)(h) applies to the responsive record.

[105] Notwithstanding my conclusion in this regard, I should note that even if I were to accept that Memorial is a person for the purpose of section 22(1)(h), I do not find Memorial's arguments in support of its claim of prejudice to be convincing. Memorial has claimed that releasing the information would prejudice it in the ongoing action in Ontario as it

> *…may prejudice any entitlement by Memorial to claim a litigation or common-law privilege preventing disclosure of the Report given that the Report's production was ordered pursuant to ATIPP. In the submission of Memorial such an order may limit the availability of fair trial or impartial adjudication of the Ontario matter.*

Firstly, this Office does not *order* the disclosure of information. I am mandated by the legislation to issue recommendations, where I have determined it is appropriate. While I would anticipate and prefer that a public body follow those recommendations, I acknowledge that the *ATIPPA* does not compel a public body to do so. In this province it is only through an appeal process to the Supreme Court Trial Division that a public body may be ordered to release information pursuant to access to information legislation. Secondly, I do not believe the statement as quoted above provides the detailed and convincing evidence that I would require in order to accept that information should not be disclosed in accordance with this provision. As referenced in my Report 2006-014, in order to accept the application of section 22(1)(h) I would expect specific arguments about how and why disclosure of information would deprive a person of the right to a fair trial or impartial adjudication.

Section 22(1)(p)

[106] Memorial submits that the responsive record is directly related to the ongoing legal proceedings in Ontario and disclosure of the record would result in both interference and harm to those proceedings. As such, Memorial has claimed that the responsive record should be withheld under authority of section 22(1)(p).

[107] The application of this provision was also discussed in my Report 2006-014, where I compared it to similar provisions in Manitoba and Saskatchewan:

> *49 The wording of the Manitoba provision, as with the one found in the ATIPPA, refers to some reasonably anticipated harm to the actual conduct of the legal proceedings, as opposed to harm to one of the parties, or to the public body involved. The provision in Saskatchewan's legislation refers to a harm which might befall the government or government institution in the conduct of those legal proceedings. To clarify, I do not believe that section 22(1)(p) of the ATIPPA is meant to protect public bodies from harm, as indicated in Saskatchewan's legislation, but to protect the conduct of the existing or imminent hearing itself.*

[108] Based on my earlier comments on harm, and in the context of section 64(1), Memorial must prove that releasing the records would result in a reasonable expectation of probable harm to the *conduct* of the aforementioned legal proceedings in Ontario. In so doing, Memorial must present clear and convincing evidence over and above the mere fact that a legal proceeding exists. As with section 22(1)(h), I am not satisfied that such a threshold has been met in this case. The only evidence that Memorial appears to be presenting is its claim that the responsive record is directly related to the ongoing legal proceeding in Ontario and "…disclosure of this document at this point would result in harm to those proceedings by potentially further exacerbating or injuring the relationship between the parties in that matter." I fail to see how the release of the information requested by the Applicant, even if it were to exacerbate the relationship between the parties, would lead to a reasonable expectation of probable harm to the conduct of the ongoing legal action in Ontario. The Ontario action is a civil matter duly filed in the Ontario Superior Court of Justice and will be conducted in accordance with the Ontario *Rules of Civil Procedure* and within the appropriate laws of that jurisdiction. I do not accept that releasing the

responsive record to an Applicant is likely to harm that process and, as such, I do not accept that section 22(1)(p) applies to the responsive record.

[109] I also question the strength of the relationship between the responsive record and the Ontario action. Memorial is claiming that "[t]he information contained in the [responsive record] is directly related to the claims of defamation made…against Memorial, and goes to the root of that matter." However, I note that the civil action filed in Ontario specifically deals with a news segment broadcast early in 2006 and, specifically, the "words spoken" and the "images portrayed" during this broadcast. In fact, the Statement of Claim filed with the Ontario Superior Court of Justice specifically states that the injuries to the plaintiff are "[b]y reason of the broadcast…" The claims of defamation, therefore, flow directly from the 2006 broadcast and not the 1994 Report. As such, I do not believe that release of the 1994 Report would result in a reasonable expectation of probable harm to the Ontario proceedings.

Harm to Financial or Economic Interests of a Public Body (Section 24)

[110] Section 24(1) is a discretionary exception which establishes a reasonable expectation of harm to the financial or economic interests of a public body. In its submission, Memorial has specifically quoted section 24(1)(c):

> *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:*
>
> > *(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; ...*

[111] Memorial acknowledges in its submission that detailed and convincing evidence of harm is necessary in order to apply this exception. They have also acknowledged my previous conclusion that in order to support a claim of harm, the public body must show a reasonable expectation of probable harm, and not merely possible harm. Memorial refers to my Reports 2006-011 and

2005-002. In both of these reports I concluded that the disclosure of the majority of information could not reasonably be expected to harm the financial or economic interests of the public bodies involved. Memorial points out, however, that in those cases the fact that information had been previously released or was already in the public domain was a significant factor in determining that the test of probable harm had not been met. Memorial submits that the case at hand is different in that the 1994 Report was not intended for public disclosure. Memorial goes on to say that the information in the Report "…does not deal with issues well known to the public but rather was information culled from a specific scientific/academic community dealing with a discrete investigation.…The information contained in the report is therefore not 'public information' and would result in harm to Memorial if it were to be released."

[112] While I take no issue with Memorial's claim that the 1994 Report (the responsive record) was not intended to be a "public" document, I question the claim that the issues within the record are not well known to the public and that the investigation was "discrete." I believe it is important to note that many of the issues to which the 1994 Report relates have received significant attention in the media, including locally, nationally and internationally. In addition, considerable information on these issues is available on Memorial's own website. For example, Memorial specifically refers to the 1994 Report on its website, including the reasons for establishing the committee that authored the Report and the identity of the committee members. In addition, the President of Memorial participated in several briefings on these issues, including an open forum where the President detailed Memorial's handling of the situation. According to information on Memorial's website, over 60 faculty, staff and students attended this open forum and they were given an opportunity to provide both general and specific comments. I believe that if Memorial intended the investigation to be confidential and "discrete," it would not be publicly releasing information about the investigation itself and about the issues to which the investigation relates.

[113] In further support of its section 24 claim, Memorial submits that release of the responsive record "…to parties outside of the Ontario proceedings may exacerbate any damage claim by [the plaintiff in the Ontario action] as currently the report is confidential and has not been released." Memorial goes on to state that the report was commenced under the statutory authority

of section 34(1)(g) of the *Memorial University Act*, allowing it to "…put in place the structure and policy to conduct such investigations." Consequently, Memorial claims that "…it is reasonable to anticipate that the decision to disclose this report in the present matter may have significant ramifications on the financial and economic interests of Memorial."

[114] With respect to section 34(1)(g) of the *Memorial University Act*, I do not dispute the authority which it provides:

> *34. (1) The board shall have the following powers*
>
> *(g) to establish faculty councils and other bodies within the university, to prescribe how they shall be constituted, and to confer upon them powers and to assign to them duties in relation to discipline, conduct of libraries or other matters that the board may consider expedient;*

I note, however, that while this provision allows Memorial to establish and empower faculty councils and other bodies, it does not require any commitment of confidentiality. The fact that Memorial had the statutory authority to cause the creation of the responsive record does not in any way prejudice an individuals right of access to that record, as long as such access is otherwise lawful. As such, the *Memorial University Act* has no bearing on my decision in this regard. Furthermore, the fact that Memorial is claiming that the 1994 Report is confidential and was not intended for public release does not justify its refusal to release the Report to the Applicant. In the absence of clear and convincing evidence that specific sections of the *ATIPPA* apply, such claims are irrelevant.

[115] With respect to Memorial's argument that release of the record may increase the claim of damages against Memorial, I would again refer to my earlier comments on the nature of the Ontario action. The civil action filed against Memorial in Ontario deals specifically with the words and images portrayed in a public broadcast. Any damages that may result from this action will be directly correlated with the statements made in this broadcast and the manner in which the images were portrayed. I have seen no evidence which would allow me to conclude that the information contained within the 1994 Report would affect, one way or the other, any potential

award of damages as a result of the Ontario action. I am not convinced, therefore, that release of the 1994 Report would exacerbate any claim of damages as submitted by Memorial.

[116] Notwithstanding my conclusions thus far, I would also like to comment on the intent of section 24(1). In this regard, I would again refer to the *ATIPPA Manual*. In describing section 24(1) the *ATIPPA Manual* states, at page 4-21, that

> *Public bodies hold significant amounts of financial and economic information critical to their financial management and the management of the provincial economy. Section 24 ensures that, where harm would result from disclosure, public bodies may withhold certain portions of this information.*

I do not believe that it is the intent of this section to mitigate any potential liability that a Court may impose on a public body in response to a legitimate legal proceeding. It is clear from the above noted passage that section 24(1) is meant to protect financial and economic information held by public bodies. In this case, I do not accept that an award of damages that may be imposed by a Court would constitute financial or economic harm for the purposes of section 24(1). In its submission, the Applicant points out that the purpose of the *ATIPPA* is to "make public bodies more accountable to the public." As such, the Applicant submits that "…to the extent Memorial will suffer any harm, such harm would be the result of Memorial being held publicly accountable for its actions or inactions, in accordance with a purpose of the *ATIPPA*." While I am in no way commenting on the merits of any legal action against Memorial, nor on the appropriateness of its actions or inactions, I believe the point raised by the Applicant is valid.

[117] In further support of this point, I refer to the Government of British Columbia's *Freedom of Information and Protection of Privacy Policy and Procedures Manual*. In describing section 17 of the British Columbia *Freedom of Information and Protection of Privacy Act,* this manual states that "[s]ection 17 does not prevent the release of information that reveals a liability which might lead to a suit against a public body for alleged wrongdoing by the public body." Section 17 of the British Columbia *Freedom of Information and Protection of Privacy Act* is, in all material respects, equivalent to section 24 of the *ATIPPA*. In the case at hand, Memorial is asking that information be withheld from the Applicant due to an allegation of wrongdoing by the plaintiff

in the Ontario action, and any liability that may flow from that action. I believe that the British Columbia manual supports my opinion that section 24(1) is not intended to prevent the release of information under these circumstances.

[118] My final comment on section 24(1) concerns Memorial's specific reliance on section 24(1)(c). I note that this provision protects "plans" that have not been implemented or made public. The *Concise Oxford English Dictionary*, 10th Edition, defines "plan" as "a detailed proposal for doing or achieving something," "an intention or decision about what one is going to do" or "a map or diagram." I do not believe that the responsive record constitutes a "plan" for the purposes of section 24(1)(c).

[119] Based on all of the above, it is my conclusion that section 24(1) does not apply to the responsive record. I do not believe that the release of this record would lead to a reasonable expectation of probable harm to the financial or economic interests of Memorial as contemplated by section 24(1) of the *ATIPPA*.

Harm to Business Interests of a Third Party (Section 27)

[120] Section 27(1) of the *ATIPPA* is a mandatory exception which establishes a reasonable expectation of harm to the business interests of a third party:

> *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, or*
>
> *(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.*

[121] "Third Party" is defined in section 2(t) to mean "…a person, group of persons or organization other than (i) the person who made the request, or (ii) a public body."

[122] As I have noted in numerous other Reports, and as acknowledged by Memorial in its submission, section 27(1) contains a three-part harms test. Part one of the test is set out in section 27(1)(a), part two is set out in section 27(1)(b) and part three is set out in section 27(1)(c). In order to invite the protection of this exception, a public body or third party must prove that all three parts of the test have been met. I note, however, that part one and part three of the test contain stand-alone provisions and within these specific parts of the test, only one of these provisions need apply. Specifically, Memorial is relying on sections 27(1)(a)(ii), 27(1)(b) and 27(1)(c)(iii).

[123] Memorial has submitted that when considering section 27(1) "…it should not matter who supplied the information to the public body, or whether it is the third party whose interests are affected." In support of this statement, Memorial references page 4-25 of the *ATIPPA Manual*. While the *ATIPPA Manual* supports the concept that information that may harm a third party need not have been supplied by that third party, it does not address Memorial's claim that it does not matter whether it is the third party whose interests are affected. I assume, therefore, that Memorial's claim in this regard is based on its reliance on section 27(1)(c)(iii), which allows part three of the test to be engaged in the event that disclosure of information may result in undue financial loss or gain to *any* person or organization. The language of this provision clearly

contemplates an effect on the interests of a person or organization other than a third party to which the other provisions of section 27(1) may apply. It is important to note, however, that the information at issue must still be about a third party, as required by the first part of the test set out in section 27(1)(a). As such, I agree that the undue financial loss or gain contemplated by section 27(1)(c)(iii) need not relate directly to a third party, but the information the disclosure of which is suspected to give rise to such financial gain or loss must relate directly to a third party. In further support of this latter point, the *ATIPPA Manual*, at page 4-27, states that

> *the third party must have ownership or claim of legal right to the information and the information must be of the type described in 27(1) (e.g., information about the third party's finances, proprietary processes or approaches, labour negotiations, scientific or technical information, etc.),…*

[124] Memorial has identified the third parties in this situation to be individuals whose information is contained in the responsive record. However, a number of these individuals are, or were at the time the record was created, directly affiliated with Memorial. The Applicant has suggested that such individuals "…were either employees of Memorial, or were 'under contract to perform services' for Memorial (in accordance with the definition 'employee' found in section 2 of the *ATIPPA*), they are part of Memorial, and not third parties." I agree with the Applicant in this regard. Given that Memorial is a public body, I do not consider its employees or a person it has retained under contract to be third parties, as defined by section 2(t), for the purposes of section 27(1) of the *ATIPPA.* As such, Memorial can not rely on section 27(1) to withhold information with respect to these particular individuals.

[125] Memorial, in addressing part one of the three-part harms test, as set out in section 27(1)(a), submits that the responsive record, as requested by the Applicant, "…contains information regarding both the financial support and scientific conclusions of [identified individual's] work, and statements made by other third parties concerning those matters." I have concluded, however, that the identified individual in this statement was an "employee" of Memorial and, therefore, not a third party for the purposes of section 27(1)(a). Given that part one of the three-part test applies specifically to a "third party," this portion of the test has not been met with respect to this individual.

[126] With respect to other individuals, the above noted statement by Memorial clearly indicates that it is applying part one of the three-part test to the financial and scientific information of the individual identified in the statement. Memorial has submitted no evidence to suggest that part one of the test applies to any other individual or organization. A statement made by individual A about matters involving individual B does not constitute the commercial, financial, labour relations, scientific or technical information of individual A. As such, Memorial has not met its burden of proof, as set out in section 64(1), and I must conclude that part one of the three-part test has not been met with respect to any individual identified in the responsive record.

[127] Having concluded that the first part of the test has not been met, it is not necessary to comment on the other two parts of the three-part test.

Personal Information (Section 30)

[128] Section 30(1) of the *ATIPPA* is a mandatory exception that protects personal information. Section 30(2) sets out a number of scenarios where section 30(1) does not apply.

> *30. (1) The head of a public body shall refuse to disclose personal information to an applicant.*
>
> *(2) Subsection (1) does not apply where*
>
> *(a) the applicant is the individual to whom the information relates;*
>
> *(b) the third party to whom the information relates has, in writing, consented to or requested the disclosure;*
>
> *(c) there are compelling circumstances affecting a person's health or safety and notice of disclosure is mailed to the last known address of the third party to whom the information relates;*
>
> *(d) an Act or regulation of the province or Canada authorizes the disclosure;*
>
> *(e) the disclosure is for a research or statistical purpose and is in accordance with section 41;*

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

(g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;

(h) the disclosure reveals the opinions or views of a third party given in the course of performing services for a public body, except where they are given in respect of another individual;

(i) public access to the information is provided under the Financial Administration Act;

(j) the information is about expenses incurred by a third party while travelling at the expense of a public body;

(k) the disclosure reveals details of a license, permit or a similar discretionary benefit granted to a third party by a public body, not including personal information supplied in support of the application for the benefit; or

(l) the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, not including

(i) personal information that is supplied in support of the application for the benefit, or

(ii) personal information that relates to eligibility for income and employment support under the Income and Employment Support Act or to the determination of assistance levels.

[129] Personal information is defined in section 2(o):

2. In this Act

(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;

[130] With respect to section 30, Memorial has referenced my Report 2005-005, where I noted that "…there is no test of reasonableness when dealing with the release of personal information. In the absence of any discretion, a public body simply has to determine if information meets the definition set out in section 2(o) and, if so, they must not release it." Memorial submits, therefore, that all personal information concerning individuals identified in the responsive record "…must be excluded from disclosure, as required by s.30(1)." Memorial does not, however, address any of the situations set out in section 30(2), which would prevent the application of section 30(1). Memorial did quote section 30(2)(f), but provided no commentary as to its relevance. While none of the provisions of section 30(2) applied to the case set out in my Report 2005-005, they must be analyzed in the context of the case at hand. I will deal with this issue later in this Report.

[131] In order to accept that information is protected by section 30, I must be satisfied that at least two conditions are met. First, the information must meet the definition of personal information in section 2(o) and, second, the information must not fall into one of the categories in section 30(2). On the first condition, the Applicant has asked that I carefully apply the definition of personal information, particularly in light of the *ATIPPA*'s bias in favour of a right of access. Specifically, the Applicant submits that "…there is a distinction between information 'about an identifiable

individual', and information which is the 'work product' of an identifiable individual." In support of this distinction, the Applicant refers to Order P-604 of the Office of the Information and Privacy Commissioner for Ontario. In considering the definition of "personal information" in Ontario's equivalent legislation, the Assistant Commissioner for Ontario stated that:

> *It has been established by a number of previous orders that information provided by an individual in a professional capacity or in the execution of employment responsibilities is not "personal information" for the purpose of the* [*Ontario Freedom of Information and Protection of Privacy*] *Act (Orders P-329 and P-377).*

[132] The Applicant also references the findings of the Privacy Commissioner of Canada in *PIPED Act* Case Summary #15. In determining whether a prescription is the personal information of a physician the federal Commissioner spoke on the limitations of personal information, as defined in the *Personal Information Protection and Electronic Documents Act* (the "*PIPEDA*"):

> *The word "individual" means a natural person, so it follows that it does not include legal persons such as corporations, partnerships or associations. There may be circumstances where information relating to an entity such as a sole proprietorship is so closely linked to an individual person, that the information can be said to be about that individual but for the most part "personal information" must be about an identifiable individual and not merely associated with the individual, by name for example. In my view, therefore**, the meaning of "personal information", while broad, is not so broad as to encompass all information associated with an individual**….*
>
> *…the prescription is not, in any meaningful sense, "about" the physician. It does not tell us how he goes about his activities, whether he is casual or formal, whether he works mornings or afternoons, whom he meets, where he goes, what views he holds, or any of the other myriad details that might constitute personal information. Rather, a prescription is the outcome of the professional interaction between the physician and the patient: the physician meets the patient, carries out an examination, perhaps reviews the results of tests, and then issues the prescription.* ***Hence, the prescription can perhaps most appropriately be regarded as a "work product." I find it to be information not about the physician, but about something once removed, namely the professional process that led to its issuance****….*
>
> *… in the case of federal works, undertakings or businesses covered under the Act, interpreting personal information so broadly as to encompass work products could have the effect of including under the rubric of personal information about*

> *employees such things as letters written by employees in the course of their employment, legal opinions, or reports prepared by employees for use by management.*
>
> *I do not believe that such results would be consistent with the stated purpose of the Act. Rather**, it is my view that the balance is properly struck by establishing whether the information is indeed about the individual, or rather about the tangible result of his or her work activity, namely the work product**.*
>
> (Emphasis added)

Similar to the *ATIPPA*, personal information is broadly defined in the *PIPEDA* as "…information about an identifiable individual…."

[133] I find these arguments to be convincing and I agree that a distinction between personal information and work product information is appropriate when determining whether information should or should not be withheld under section 30(1). I also agree that in the case before me there is information that may *prima facie* appear to be personal information, but in my opinion constitutes the work product of the individuals named and, as a result, is not information "about" the individual as contemplated by section 2(o). For this reason, I have concluded that such information is not "personal information" for the purposes of section 30(1) and, as such, I am recommending that it be released to the Applicant.

[134] Where information is determined to be "about" an individual rather than the tangible result of that individual's work activity, I must then look to the provisions of section 30(2). In the case at hand sections 30(2)(f) and 30(2)(h) are relevant. Section 30(2)(f) states in part that any information about the position and functions of an employee or member of a public body is not protected under section 30(1). As I indicated earlier a number of individuals identified in the responsive record are, or were at the time the record was created, directly affiliated with Memorial. I consider these individuals to be employees or members of a public body (Memorial) and, by association, information about their position and functions is captured by section 30(2)(f) and should be released to the Applicant.

[135] With respect to section 30(2)(h), I have determined that a number of opinions and views of individuals identified in the responsive record have been given in the course of performing a service for Memorial. As referenced by the Applicant, this provision contains no requirement that there be a contract to perform those services, only a requirement that the services are performed by a third party. This would include both paid and non-paid services. I acknowledge the limitation of this provision which excludes opinions or views given in respect of another individual, but would again refer to the submission of the Applicant: "We submit that 'given in respect of another individual' must be information 'about' the individual. If the opinions or views are about the individual's 'work product', …that information is not 'about' the individual and must be disclosed."

[136] Another point that I believe to be relevant to the case at hand deals with the specific language of section 30(1). This provision states that a public body shall not "disclose" personal information to an Applicant. *Black's Law Dictionary,* Eighth Edition, defines disclosure as:

> *1. The act or process of making known something that was previously unknown; a revelation of facts…2. The mandatory divulging of information to a litigation opponent according to procedural rules…*

[137] While the second part of this definition defines the term in its legal context, the first part provides a more general understanding of how the term should be interpreted. The *Concise Oxford English Dictionary,* 10th Edition, provides a similar definition: "make (secret or new information) known." A necessary component of a disclosure of information, therefore, is that the information was not previously known to the intended recipient. By association, I do not believe that providing personal information to an Applicant where that information is already known to the Applicant, or that is readily available to the Applicant, is actually a disclosure as anticipated by section 30(1). By way of example, the responsive record contains the names of several individuals who authored or co-authored certain journal articles which have been published. These articles are readily available and, as a result, releasing those names to the Applicant would not constitute a disclosure in accordance with section 30(1). For this reason, I have recommended that this information be released to the Applicant in this case.

[138] I note as well that the Applicant has asked that any information that is determined to be personal information and thus protected by section 30(1), be captured by section 30(2)(c). However, I see no evidence to suggest the existence of "compelling circumstances" affecting a person's health and safety. I submit that the term "compelling" in this provision elevates the test necessary to engage this exception to a higher level than found in other provisions. In order to accept the application of section 30(2)(c), I must be convinced that the risk to an individual's health or safety outweighs another individual's inherent right to have their personal information protected. I am not convinced that such a risk exists in the case before me.

[139] After thoroughly analyzing section 30, together with the appropriate definitions in section 2, I have concluded that much of the information in the responsive record that Memorial claims to be protected by the mandatory section 30(1) is either not personal information in the first instance, or is exempt from the protection of section 30(1) through the provisions of section 30(2). Notwithstanding my conclusions in this regard, I do agree that certain portions of information within the record, such as the names of certain individuals, is personal information and is not captured by section 30(2). In each of these situations I agree that the information must not be disclosed to the Applicant. For ease of reference I have provided Memorial with a copy of the responsive record with all information that I consider to be "personal information" appropriately highlighted. All other information should be disclosed to the Applicant.

Information in the Public Interest (Section 31)

[140] During the course of this investigation the issue of health and safety and public interest has been raised, in the context of section 31(1):

> *31. (1) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.*

[141] A number of provisions of the *ATIPPA* provide for a reasonable expectation of harm. I have discussed this issue in this Report and in several previous Reports. However, the harm

anticipated by section 31 must be shown to be "significant." I believe the language in this provision clearly sets the bar considerably higher than in other provisions of the legislation. This is similar to the term "compelling" as described earlier in this Report in the context of section 30(2)(c).

[142] I also note that section 31 contains a two part test. There must first be a risk of significant harm *and* disclosure of the information must clearly be in the public interest. This requirement that both situations must apply differs from a number of other jurisdictions in Canada with a similar provision. For example, section 25 of British Columbia's *Freedom of Information and Protection of Privacy Act* requires information to be released if in the public interest, independent of any potential harm:

> *25. (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information*
>
> *(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or*
>
> *(b) the disclosure of which is, for any other reason, clearly in the public interest.*

[143] I believe there is a strong argument that release of the information contained within the responsive record is in the public interest, but I have not seen any evidence to lead me to conclude that not releasing the record would result in significant harm. While British Columbia's legislation would clearly allow me to separate these two issues, the *ATIPPA* takes a more restrictive approach. In the absence of a potential for significant harm, therefore, section 31(1) does not compel the disclosure of information that is in the public interest. As such, I am not able to recommend that the record be released based on this particular provision. I note, however, that my conclusion in this regard has no bearing on my recommendation that the majority of the responsive record be released to the Applicant.

IV CONCLUSION

[144] The initial position of Memorial in this case was that the *ATIPPA* does not apply to the responsive record, in accordance with its interpretation of section 5(1)(k). Having thoroughly reviewed the definition of "prosecution" in general and in the context of access to information legislation in particular, I have concluded that a civil action is not captured by the term prosecution as it is used in section 5(1)(k). I also believe that such a conclusion is consistent with the stated purpose of the legislation and with the principles of statutory interpretation. As such, the responsive record does fall within the *ATIPPA* and Memorial is unable to rely on section 5 to deny access to the Applicant. I further believe that a thorough analysis of relevant jurisprudence in this area fully supports all of my conclusions in this regard.

[145] Having rejected the application of section 5(1)(k), I then looked to a number of exceptions which Memorial has claimed as an alternative to its section 5 arguments, namely sections 22(1)(a), 22(1)(h), 22(1)(p), 24(1), 27 and 30. Based on a thorough review of the legislation, the submissions of both Memorial and the Applicant, previous Reports and relevant jurisprudence, I have concluded that the information contained within the responsive record is not protected by any of these provisions, with the exception of information that I believe constitutes personal information in accordance with the definition set out in section 2(o) of the *ATIPPA*. This information has been identified and provided to Memorial with this Report. With respect to the remainder of the record, I am not convinced that any of the information can be withheld in accordance with the specified exceptions to access.

[146] With respect to section 31, I have determined that there was insufficient evidence to show a risk of significant harm resulting from non-disclosure of the record and, as such, I have concluded that section 31 does not apply to the case at hand. I do believe that the release of the responsive record would be in the public interest but, unlike other jurisdictions in Canada, I am restricted by the language of the *ATIPPA* in this regard.

V RECOMMENDATION

[147] Under authority of section 49(1) of the *ATIPPA*, I hereby recommend that Memorial University of Newfoundland provide the Applicant with a copy of the responsive record, identified as the 1994 Preliminary Report at issue in this case, including the Appendices, with the exception of specific personal information as indicated on a copy of the record provided to Memorial by this Office.

[148] Under authority of section 50 of the *ATIPPA*, I direct the head of Memorial University of Newfoundland to write to this Office and to the Applicant within 15 days after receiving this Commissioner's Report to indicate Memorial's final decision with respect to this Report.

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

[150] Dated at St. John's, in the Province of Newfoundland and Labrador, this 15th day of February 2007.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador