August 6, 2008 **A-2008-013**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT A-2008-013

Memorial University of Newfoundland

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to records relating to his candidate's interview in relation to his application for admission to the School of Pharmacy at Memorial University of Newfoundland ("Memorial"). The Commissioner determined that the information containing the interview questions asked during the interview constituted "a record of a question that is to be used on an examination or test" and is, therefore, exempt from the operation of the *ATIPPA* pursuant to section 5(1)(g). As such, the Commissioner ruled that he was without jurisdiction in relation to that information. However, the Commissioner concluded that the information contained in the notations made by interviewers in relation to the answers given by the Applicant is not exempt from the operation of the *ATIPPA*. The Commissioner did not accept the argument of Memorial that the mandatory exception in section 27(1) applied to the information contained in the notations because the disclosure of that information would not be harmful to the business interests of a Third Party. In addition, the Commissioner disagreed with Memorial's position that release of the information in the notations would be harmful to the financial or economic interests of Memorial pursuant to section 24(1). The Commissioner ruled that much of the severed information in the notations containing the Applicant's responses to the interview questions constituted the personal information of the Applicant. The Commissioner recommended release of all the severed information in the interviewers' notations.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as am, ss. 2(o), 3(1), 5(1)(g), 24(1), 27(1), 30 and 64(1); *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165; *Freedom of Information Act and Protection of Privacy Act*, S.N.S. 1993, c. 5; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.

F-31; and *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-002, 2005-003, 2006-004, 2006-005, 2007-004 and 2008-002; British Columbia OIPC Order 00-10; Ontario OIPC Orders PO-2387 and PO-2593; Alberta OIPC Orders F2002-012 and F2004-015; Nova Scotia Review Officer Report FI-03-27(M).

Other Resources Cited:

Black's Law Dictionary, Eighth Edition, St. Paul, Minn.: Thomson West (2004); *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 dated 11 July 2007 to Memorial University of Newfoundland ("Memorial"), wherein he sought disclosure of records as follows:

> *Records/notes related to assessment of my application for admission to the School of Pharmacy including:*
> - *notes/records made by interviewers about my interview held on June 8, 2007*
> - *analysis/report of my interview responses provided to the selection committee by the consultant*
> - *names of members of selections committee and consultant.*

[2] The Applicant had applied to become a student in Memorial's School of Pharmacy. As part of the selection process, the Applicant was interviewed by three persons on 8 June 2007. The records requested by the Applicant consist of the written materials used and produced in that interview process. As requested, the Applicant has been provided with the names of the members of the selection committee and the name of the outside independent consultant who designed the selection process used by the School of Pharmacy.

[3] By correspondence dated 10 August 2007, Memorial advised the Applicant that the 30-day time period for responding to his request was extended pursuant to section 16(1)(c) of the *ATIPPA* because notice was being given to a third party under section 28. Memorial indicated that the Applicant could expect a response by 12 September 2007.

[4] Memorial advised the Third Party by correspondence dated 13 August 2007 that there had been a request for information the disclosure of which could affect the Third Party's business interests as described in section 27(1) of the *ATIPPA.* Memorial indicated to the Third Party that it had 20 days from the date of the letter to provide any representations that it may wish to make regarding release of the information requested.

[5] The Third Party in correspondence dated 27 August 2007 outlined to Memorial its position regarding the disclosure of the information requested by the Applicant.

[6] Memorial, by correspondence dated 17 September 2007, advised the Applicant that it was withholding certain information pursuant to sections 5(1)(g), 24(1), and 27(1) of the *ATIPPA*. In relation to section 27(1), Memorial informed the Applicant that the disclosure of certain information would likely harm the business interests of the Third Party, who was an outside consultant responsible for designing the admissions process used by the School of Pharmacy.

[7] In a Request for Review received in this Office on 19 October 2007 the Applicant asked for a review of the decision of Memorial to deny access to certain information.

[8] Attempts to resolve this Request for Review by informal means were not successful and by letters dated 7 January 2008 the Applicant, Memorial, and the Third Party were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process all three parties were given the opportunity to provide written submissions to this Office pursuant to section 47. The Applicant and Memorial provided my Office with written submissions but the Third Party did not.

[9] The records at issue in this Request for Review consist of the 42 pages associated with the Applicant's interview on 8 June 2007. Memorial has disclosed some of the notes made by the interviewers during the Applicant's interview but has denied access to others and to all of the interview questions, the instructions to interviewers, and the scoring rubric contained in the 42 pages.

II PUBLIC BODY'S SUBMISSION

[10] Memorial provided my office with a 14-page submission (with 7 Appendices covering 11 pages attached) dated 22 January 2008 in which it provided information on the admissions process used by the School of Pharmacy at pages 1 to 2:

> *In addition to a written test completed by the candidates for admission to the School of Pharmacy, candidates are assessed using a behavioural interview. A behavioural interview is a technique used to evaluate a candidate's experiences and behaviours in order to determine their potential for success. Using identified desired skills and behaviours, the interviewer presents open-ended questions and statements. Using a rating system developed specifically for that purpose, the interviewers evaluate the candidate's responses based on selected criteria. Records associated with the Applicant's interview are the subject of the ATIPP request and this Review.*
>
> *The interview panel consisted of three individuals . . . . They are specifically trained by* [*the Third Party*] *to interview candidates for admission using the interview questions and scoring rubric, also designed by* [*the Third Party*]. *The School of Pharmacy is licensed to use this admissions test, which the consultant has stated is considered their "trade secret, proprietary approach." Each interviewer had a 13 page Interview Form which only the interviewers see. It contains instructions for them and the questions to be asked of the candidate. Each question is followed by criteria with weighted values for assessing candidate responses, and a column for the interviewer to enter the score s/he assigns to each of the elements in accordance with the candidate's response. Finally, each question page contains an area for the interviewer to make notes.*

[11] Memorial indicated in its submission at page 2:

> *Memorial provided the Applicant with the 42 pages of responsive records, severed under section 24(1), and section 27(1). As well, in accordance with ATIPPA's section 5 which states that records of questions or tests on an examination are excluded from application by ATIPPA, we excluded the interview questions, the scoring rubric, and information that would reveal the interview questions/scoring rubric.*
>
> *. . . Additionally, some of the interviewers' notes were redacted since disclosing the notes would reveal the questions or elements of the scoring rubric.*

[12] Memorial discussed in its submission the sections on which it relies to deny access. In relation to section 5(1)(g), Memorial states at page 4:

> *Memorial severed the interview questions and the scoring rubric under 5(1)(g). The questions are used and will continue to be used by the School of Pharmacy in assessing candidates for admission. The scoring rubric contains criteria that serve as the basis for judging the student response, definitions and examples to clarify the meaning of each criterion, and a scale of values on which to rate each. The information allows the trained interviewers to fairly and consistently assess*

> *each candidate. Revealing the scoring rubric would reveal the interview questions, which are excluded records under 5(1)(g).*

[13] Memorial in support of its position on section 5(1)(g) relies on Report 2006-004 in which my predecessor determined that questions used during an employment interview are questions as contemplated by section 5(1)(g) of the *ATIPPA*. Memorial submits that the interview questions put to candidates by the School of Pharmacy meet the definition of "test" adopted in that Report, that is, "a procedure intended to establish the quality, performance, or reliability of something."

[14] Memorial points out on page 4 of its submission that the Third Party in correspondence dated 27 August 2007 (attached as an Appendix to Memorial's submission) described the interview process which it has developed for Memorial as follows:

> *. . . interviewers are instructed to make notes which directly relate to the scoring rubric. They do not transcribe responses by candidates; rather, they make notes of those comments by candidates which directly correlate to the scoring criteria.*

Memorial submits that, as a result, some of the interviewers' notes were redacted because their disclosure would reveal information in the interview questions and scoring rubric. To support its position on these redactions, Memorial refers to a decision of the Ontario Information and Privacy Commissioner in Order PO-2387 where it was determined that disclosure of answers could lead to an accurate inference about "both the questions and the content of the passage on which the questions were based." Memorial points out that in Order PO-2387 the Commissioner ruled that the answers were appropriately excluded. Memorial submits that a similar approach should be taken in the case before me with respect to the scoring rubric and the interviewers' notations on the responses given by the Applicant.

[15] In relation to its reliance on section 27(1), Memorial submits that the information containing the interview questions, the instructions to interviewers, the scoring rubric, and some of the interviewers' notes meets the three-part harms test that has been adopted in previous Reports from this Office. Memorial discusses the three parts of the test as set out in paragraphs (a), (b), and (c) of section 27(1) of the *ATIPPA*.

[16] In relation to section 27(1)(a), Memorial submits that the information if disclosed would reveal the trade secrets and scientific or technical information of the Third Party. To support its position, Memorial quotes from its signed agreement with the Third Party which provides that the Third Party retains intellectual property rights over certain information and processes.

[17] As to section 27(1)(b), Memorial submits that the information at issue is supplied in confidence. Memorial indicates that all parties involved in the admissions process are required to sign confidentiality agreements and that the Third Party has a strict policy of confidentiality in relation to its products.

[18] Regarding section 27(1)(c), Memorial submits that the disclosure of the information would harm the Third Party's competitive position because it would reveal the unique proprietary methods used for the development of its products and would reveal technical and scientific information about the Third Party's unique approach that has been produced as a result of many years of research, investment and development. In addition, Memorial submits that the disclosure would result in undue financial loss to the Third Party and in undue financial gain for other companies which are in competition with the Third Party. Also, Memorial submits that disclosure of any copyrighted information would interfere with the Third Party's negotiating position with other institutions in relation to providing comparable products and services to those other institutions. Furthermore, Memorial notes that the Third Party has indicated that disclosure of the information may result in this type of information no longer being supplied to Memorial.

[19] Memorial submits that section 24(1) is applicable because disclosure of the information at issue could reasonably be expected to harm its financial or economic interests. Memorial submits that disclosure of the interview questions and scoring rubric could result in Memorial having to develop a new admissions test at considerable costs in terms of dollars and other resources.

III APPLICANT'S SUBMISSION

[20] The Applicant provided my Office with a written submission dated 19 January 2008, in which he indicated that he wished to reiterate some of the points made in his Request for Review and stated that he wished his entire file to be reviewed as part of the formal investigation process. In his Request for Review the Applicant had stated:

> *I was seeking information related to the assessment of my application as I had just received my letter of non-acceptance and had some concerns and questions about the process . . .*
>
> *The response I received in the latter part of September does not appear to be in keeping with the intent of the Act. They quote sections 5(1)(g), 24(1), and 27(1) as the rationale for severing the majority of the information. I have difficulty seeing how having access to my personal information and others' assessment/opinions of me qualifies as an examination or how it will cause undue economic hardship to Memorial or to some consulting firm. Their use of my information has affected me personally and I would like to have access to the severed information.*

[21] In his written submission, the Applicant made the following comments:

> *The following is my interpretation of the sections of the Act relevant to my file that support my perspective:*
>
> *Definitions*
>
> *Section 2(o) "personal information" means recorded information about an identifiable individual, including:*
>
> *(viii) the opinions of a person about the individual*
> *(ix) the individual's personal views or opinions*
>
> *Section 5*
>
> *With reference to 5(g), I disagree with the University that an interview constitutes an examination or test as indicated by the Act. If the Act was intended to exclude interviews/personal evaluations, I feel that those terms would have been included in the Act. The University in its correspondence to me referred to "interview", not "examination or test."*

Section 24 and 27

On Section 24(1) and Section 27(1), I disagree with the University that allowing me to have access to the records containing my personal information will harm the third party. The confidentiality agreement that I signed on June 8, 2007 protects the questions which I have not released. I am more interested in receiving the records related to my responses and evaluation. Besides, I already know the questions. In fact they are quite similar to the questions that can be found through the internet and literature about behavioral related interviews, which in itself challenges the notion of "trade secrets". It is not apparent how allowing me access to my responses and their subsequent evaluation will cause harm to a business, especially if the assessment tools used have proven reliability and validity.

Section 3

As mentioned in previous correspondence, I feel that I have a right to access my records as consistent with the purposes of the Act, particularly as stated in section 3(1)(a), (b) and (c).

. . . I feel my request is a reasonable one, given the fact that this evaluation process has impacted me personally.

IV DISCUSSION

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

1. Whether the interview questions, the instructions to interviewers, the scoring rubric, and some of the interviewers' notes on the Interview Form constitute "a record of a question that is to be used on an examination or test" such that they are excluded from the application of the *ATIPPA* pursuant to section 5(1)(g);

2. Whether the mandatory exception in section 27(1) (disclosure harmful to business interests of a third party) applies such that Memorial is obligated to deny access to the interview questions, the instructions to the interviewers, the scoring rubric, and some of the interviewers' notes;

3. Whether the discretionary exception in section 24(1) (disclosure harmful to the financial or economic interests of a public body) applies such that Memorial is entitled to deny access to the interview questions, the instructions to interviewers, the scoring rubric, and some of the interviewers' notes; and

4. Whether the information contained in the interviewers' notes constitutes the Applicant's personal information as defined in section 2(o) such that he is entitled to have access to that information.

1. Applicability of Section 5(1)(g)

[23] Section 5(1) sets out a number of categories of records to which the *ATIPPA* does not apply. It provides in part as follows:

> *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*
>
> . . .
>
> *(g) a record of a question that is to be used on an examination or test; . . .*

[24] As indicated by Memorial, my predecessor discussed section 5(1)(g) in Report 2006-004. He stated at paragraph 21:

> *[21] I will first deal with the issue of whether or not the questions asked in an interview constitute a test. The Concise Oxford English Dictionary 10th Edition, Revised (New York: Oxford University Press, 2002) defines "test" as "a procedure intended to establish the quality, performance, or reliability of something." I believe that an interview process is clearly captured by this definition. As such, I believe that the questions to which the Applicant is seeking access to are associated with a test, as anticipated by section 5(1)(g). This is also clearly supported by the ATIPPA Policy and Procedures Manual. This Manual is produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice. In describing section 5(1)(g) of the ATIPPA, this Manual, on page 1-10, states:*

> *The Act does not apply to "a record of a question that is to be used on an examination or test." This exclusion applies to questions to be used now or in the future on an examination or test. The exclusion applies, but is not limited, to questions to be used on examinations or tests given by educational institutions. . . .*

[25] In Report 2006-004, my predecessor discussed two cases from other jurisdictions dealing with provisions similar to section 5(1)(g) of the *ATIPPA*: Order F2002-012 from the Alberta Information and Privacy Commissioner and Report FI-03-27(M) from the Nova Scotia Review Officer.

[26] Following his discussion of these two cases, my predecessor made the following comment at paragraph 25:

> *[25] In light of my analysis of the language of the section 5(1)(g) of the ATIPPA, together with the Alberta and Nova Scotia decisions, I have concluded that the questions used in the interview are excluded from the application of the ATIPPA. I have no other choice, therefore, but to conclude that I do not have jurisdiction as it relates to these specific records.*

[27] I note that one of the issues for the Alberta Commissioner in Order F2002-012 was the interpretation of the word "question" as found in the comparable Alberta legislation. The Alberta Commissioner outlined the position taken by the public body regarding the meaning of the word "question" in paragraph 9:

> *[para 9] The Public Body said that the Record is used in its complete form. The Public Body maintained that the reading passages and questions are integrally related. Therefore, the Public Body argued that I should interpret "question" in section 4(1)(g) to include anything related to the question to be used on the examination, to avoid absurd consequences. In the Public Body's view, if any of the components of the Record were found not to fall within section 4(1)(g), that would render the Record useless. In particular, if the reading passages were found not to fall within section 4(1)(g), that would defeat the purpose of protecting the Record for future use. The Public Body does not want to repeatedly be required to develop a normative test.*
>
> [Emphasis added]

[28] The Alberta Commissioner agreed with the broad interpretation of the word "question" suggested by the public body and stated at paragraphs 11 and 12:

> *[para 11] I find that the questions are clearly going to be used on examinations in the future and therefore fall within section 4(1)(g). The evidence of the Public Body's employees was critical to my finding.*
>
> *[para 12] I also find that the instructions and the passages upon which the exam questions are based are integral to the questions and also fall within section 4(1)(g).*
>
> [Emphasis added]

[29] I agree with the reasoning of my predecessor when he says that an interview process clearly fits the definition of "test" that he applied. In this case, I find that the interview process conducted by Memorial's School of Pharmacy is a "procedure intended to establish the quality, performance, or reliability of something." I interpret the word "question" in section 5(1)(g) to include anything related to the question to be used on an examination or test. As such, I find that the interview questions, the instructions to interviewers, and the scoring rubric are a "record of a question that is to be used on an examination or test." They are all, to use the words of the Alberta Commissioner in Order F2002-012, "integral to the question." To disclose either one of the three (the questions, the instructions or the rubric) and to withhold the others would lead to the "absurd consequences" referred to by the public body in Alberta Order F2002-012.

[30] In conclusion, I have determined that the interview questions, the instructions to interviewers, and the scoring rubric on the Interview Form constitute a record of a question that is to be used on an examination or test and, as such, they are excluded from the application of the *ATIPPA* pursuant to section 5(1)(g). Therefore, I do not have jurisdiction as it relates to these specific records. Memorial has no obligation to disclose them by virtue of the *ATIPPA*.

[31] Memorial wishes me to go a step further with regard to the applicability of section 5(1)(g) and asks that I make a finding that certain of the notes made by the interviewers in relation to the Applicant's responses to the questions are also exempt from the *ATIPPA* by the operation of

section 5(1)(g). In support of its request, Memorial relies on a decision of the Ontario Information and Privacy Commissioner in Order PO-2387, where it was determined that disclosure of answers could lead to an accurate inference about "both the questions and the content of the passage on which the questions were based" and the Commissioner ruled that the answers were appropriately excluded. Memorial submits that a similar approach should be taken in the case before me with respect to the interviewers' notations on the responses given by the Applicant.

[32] In Order PO-2387, the issue for the Ontario Commissioner was whether section 18(1)(h) of the Ontario *Freedom of Information and Protection of Privacy Act* could be used to deny the applicant access to his examination booklets, which contained both questions and the applicant's answers. Section 18(1)(h) of the Ontario *Act* is a discretionary exception which allows the head of a public body to refuse disclosure of a record that contains "questions that are to be used in an examination or test for an educational purpose." The Commssioner quoted at page 5 the following passage from a previous order of that Office:

> *In addition, I am satisfied that, with respect to questions which required a constructed response answer, the disclosure of the answers could lead to an accurate inference about both the questions and the content of the passage on which the questions were based. Similarly, the disclosure of some of the short answers could lead to an accurate inference about the nature of the questions.*
>
> *As well, I accept the EQAO's position that the disclosure of the chosen multiple choice options would provide no useful information to the requester.*
>
> *Accordingly, I am satisfied that the records at issue contain questions to be used in an examination or test for an educational purpose, and therefore qualify for exemption under section 18(1)(h) . . .*

The Commissioner applied the same reasoning in Order PO-2387 and ruled that both the questions and the answers were excepted from disclosure.

[33] It is my opinion that the reasoning of the Ontario Commissioner in Order PO-2387 is not applicable to the facts of the case before me. In that case, the Commissioner decided that "constructed response" answers and "some of the short answers" provided by the applicant in

his examination booklet could lead to accurate inferences about the questions. I underestand the answers in that case to be the type where in responding to the question the applicant could have made reference to the nature of the question being asked. That is not the case here; the notations made by the interviewers contain no indication whatsoever as to the questions that were asked.

[34] Furthermore, I have analyzed the severed information contained in the notes made by the interviewers and carefully compared that information with the interview questions, the instructions to interviewers, and the scoring rubric. Having made this analysis and comparison, it is my finding that the severed information in the interviewers' notes would not allow accurate inferences to be made about either the interview questions, the instructions to interviewers, or the scoring rubric.

[35] I note that in the previously referred to Order F2002-012 from the Alberta Information and Privacy Commissioner, the public body involved released the answers provided by the applicant on the test but denied access to the questions relying on a provision in the Alberta *Freedom of Information and Protection of Privacy Act* similar to section 5(1)(g) of the *ATIPPA*. The Alberta Commissioner summarized the situation in paragraphs 2 and 3:

> *[para 2] Under the Freedom of Information and Protection of Privacy Act (the Act"), the Applicant requested access to a copy of her son's English 10-H final exam questions and her son's responses with notations resulting in his final mark. A request for other records is no longer at issue.*
>
> *[para 3] The Public Body provided access to the Applicant's son's responses, but refused access to the Record, which consists of exam questions, instructions and reading passages on which the exam questions are based. The Public Body said that the Record was excluded from the application of the Act by section 4(1)(g) [previously section 4(1)(d)], which reads:*
>
> > *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
> > …
> > *(g) a question that is to be used on an examination or test.*

[36] The Alberta Commissioner also discussed section 4(1)(g) of the Alberta *Act* in Order F2004-015. In that case, the records at issue were the questions, answers, and scores for intelligence and psychological tests administered to the applicant's daughter by the public body, a school district. The Alberta Commissioner described the records at issue in paragraph 16:

> *[para 16] Pages 3 to 12 and 14 to 23 of Record A – the largest portions of the first two tests - contain the questions to be asked of the test subject. These pages also contain answers handwritten by the test subject (the Applicants' daughter). As well, they appear to contain handwriting of the psychologist, recording the subject's answers, or results or scores. In some cases the answers as written by either the test subject or the psychologist reveal the questions. In some cases, in particular the 'spelling' parts of the test, the answers and the questions can be equated in the sense that the word that is spelled is the one that was asked to be spelled. However, in some cases the psychologist's handwritten notes or graphs record results or scores in a way that would be meaningless to the untrained reader.*

[37] The Commissioner then discussed the applicability of section 4(1)(g) of the Alberta *Act* at paragraphs 20 to 23:

> *[para 20] In my view this provision covers the questions in the intelligence tests. I do not have jurisdiction over these records. However, section 4(1)(g) does not apply to the Comprehensive Behavior Rating Scale for Children (pages 25 to 27), which contains questions for rating the subject to be answered by a third person (teacher), rather than to be administered to the subject.*
>
> *[para 21] In my view section 4(1)(g) does not apply to the answers to the tests written by the Applicants' child, except those (the spelling words) that can be equated with the questions in the sense described in para.16 above. Neither does section 4(1)(g) apply to the parts of the psychologist's notes that record the answers or results or that tabulate and graph the scores. <u>However, I note that some of the answers reveal the questions, or something about them. Though answers that reveal the questions do not fall outside the Act by virtue of section 4(1)(g)</u> (except for the spelling words), they do fall under section 26, and I will deal with them in the following section.*
>
> *[para 22] Section 26 provides:*
>
> > *26 The head of a public body may refuse to disclose to an applicant information relating to*
> > *(a) testing or auditing procedures or techniques,*
> > *(b) details of specific tests to be given or audits to be conducted, or*

> *(c) standardized tests used by a public body, including intelligence tests,*
> *if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.*
>
> *[para 23] I have already held that the test questions on pages 3 to 12 and 14 to 23 of Record A are outside my jurisdiction. I have no jurisdiction to decide whether section 26 applies to these records. The Public Body has no obligation to disclose them by virtue of the Act.*
>
> [Emphasis added]

I note that the *ATIPPA* does not contain a provision comparable to section 26 of the Alberta *Act*, which was relied on by the Alberta Commissioner in Order F2004-015.

[38] The Alberta Commissioner concluded in Order F2004-015 that section 4(1)(g) of the Alberta *Act* applies to the questions on the test but that it does not apply to answers that reveal the questions or something about the questions. It is my view that this is the proper interpretation of that section and also of section 5(1)(g) of the *ATIPPA*. As I have indicated, I am prepared to give a broad interpretation to the word "question" to include not only the interview questions, but also the instructions to the interviewers and the scoring rubric.

[39] However, in my view, it is stretching the plain meaning of the word "question" to say that it includes also the "responses" or "answers" to the question. The wording of Section 5(1)(g) clearly provides that it is a "record of a question" that is exempt from the operation of the *ATIPPA*. I interpret the word "question" in keeping with one of the purposes of the *ATIPPA* set out in section 3(1)(c): "specifying limited exceptions to the right of access." The exemption set out in section 5(1)(g) is limited to a "record of a question"; it does not exclude information containing the answers that reveal the questions, or something about them. In any case, I have already determined that in the case before me, the information in the notations made by the interviewers does not reveal the interview questions, the instruction to the interviewers or the scoring rubric, or anything about them.

[40] Therefore, it is my conclusion that while section 5(1)(g) excludes from the operation of the *ATIPPA* the interview questions, the instructions to the interviewers, and the scoring rubric, it

does not operate to exempt from the *ATIPPA* the written notations made by the interviewers in relation to the Applicant's responses to the interview questions.

[41] Having found that the interview questions, the instructions to the interviewers, and the scoring rubric are excluded from the operation of the *ATIPPA*, it is not necessary for me to discuss whether those three items are excepted from disclosure by sections 24(1) or 27(1). However, I have found that section 5(1)(g) does not exclude the notes made by the interviewers from the operation of the *ATIPPA* and, for that reason, I must discuss the applicability of sections 24(1) and 27(1) in relation to the portions of the notes to which access has been denied.

2. Applicability of Section 27(1)

[42] Memorial relies on section 27(1) of the *ATIPPA*, which contains a mandatory exception dealing with information harmful to the business interests of a third party as follows:

> *27. (1) The head of a public body shall refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
>
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party;*
>
> *(b) that is supplied, implicitly or explicitly, in confidence; and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
>
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
>
> *(iii) result in undue financial loss or gain to any person or organization, 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.*

[43] In Report 2005-003 at paragraph 38, my predecessor discussed the three-part harms test that must be met in order for the exception set out in section 27(1) to be applicable. The three parts of the test may be stated as follows:

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

[44] My predecessor also pointed out in Report 2005-003 that all three parts of the test must be met in order for a public body to deny access to information in reliance on section 27(1) and that if a record fails to meet even one of the three parts, it does not meet the test, and the public body is not entitled to rely on section 27(1) to sever information in the responsive record.

[45] Memorial takes the position that the interview questions, the instructions to interviewers, the scoring rubric, and certain notes made by the interviewers during the interview with the Applicant all constitute information that, if disclosed, would harm the business interests of the Third Party, who is the consultant responsible for developing and designing the admissions process used by Memorial's School of Pharmacy. Memorial submits that the disclosure of the information at issue would meet the three-part harms test set out in Report 2005-003.

[46] The Applicant takes the position that allowing him to have access to his responses to the questions, which he considers to be his personal information, will not harm the business interests of the Third Party. The Applicant points out that the confidentiality agreement that he signed protects the questions from release and that he is more interested in his responses and the evaluation of those responses.

[47] I will now discuss the three-part harms test that must be met before section 27(1) operates to obligate Memorial to deny access to the information at issue.

[48] In relation to the first part of the test, which is set out in section 27(1)(a), Memorial submits as follows:

> *The first part requires that the information, if disclosed, would reveal trade secrets of a third party or contain commercial, financial, labour relations, scientific or technical information of a third party.* [*The Third Party*] *considers the questions and scoring rubric and certain notes made by interviewers to be trade secrets (or would reveal trade secrets in the case of the interview notes) and to be scientific and technical information of* [*the Third Party*].

[49] Memorial points out that the *ATIPPA* does not provide a definition of "trade secret" and then suggests a definition as set out in section 3(1)(n) of Nova Scotia's *Freedom of Information and Protection of Privacy Act* as follows:

> *3. (1) (n) "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that*
>
> *(i) is used, or may be used, in business or for any commercial advantage,*
>
> *(ii) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,*
>
> *(iii) is the subject of reasonable efforts to prevent it from becoming generally known, and*
>
> *(iv) the disclosure of which would result in harm or improper benefit;*

[50] *Black's Law Dictionary*, Eighth Edition, provides the following definition of trade secret:

> *A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors; information – including a formula, pattern, compilation, program, device, method, technique, or process – that (1) derives independent economic value, actual or potential, from not being generally*

> *known or readily ascertainable by others who can obtain economic value from its disclosure or use, and (2) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy.*

[51] In Report 2006-005, my predecessor discussed the meaning of the phrase "scientific or technical information" at paragraph 31:

> *[31] . . . In Air Atonabee v. Canada (Minister of Transport) (1989) 37 Admin. L.R. 245, 27 F.T.R. 194, 27 C.P.R. (3d) 180, MacKay J. states that in understanding the use and application of the terms "financial, commercial, scientific or technical information," regarding third party business interests, it is sufficient "that the information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood." . . .*
>
> [Emphasis added]

[52] In order to determine how the terms "scientific" and "technical" are commonly understood, I have consulted the *Concise Oxford English Dictionary*, Tenth Edition, Revised. It defines "scientific" as meaning "of, relating to, or based on science" and as meaning "systematic" and "methodical." It defines "technical" as meaning "requiring special knowledge to be understood."

[53] In support of its position that the information at issue constitutes a "trade secret" and "scientific or technical information," Memorial has provided background information on the Third Party and its relationship with Memorial. Memorial points out that the Third Party is a business consultancy which provides ongoing services to Memorial and to other clients. Memorial indicates that the Third Party has provided information showing that over 20 years of research, experience and expertise have gone into the development of the Third Party's processes and products. Memorial further states that the Third Party and Memorial have an agreement whereby the School of Pharmacy is licensed to use the admissions test developed and designed by the Third Party. The agreement provides that the Third Party retains intellectual property rights to supplied psychometric instructions and materials, including the format and content of forms and rating scales.

[54] Memorial also points out that the Third Party derives commercial advantage from its development of the admissions process and its provision of services to Memorial. Memorial indicates that if the testing and admissions criteria or the scoring rubric were to become known to the public or to the Third Party's competitors then the Third Party would suffer economic loss, loss of reputation, loss of trust, and loss of clients. Therefore, states Memorial, the Third Party has attempted to maintain confidentiality regarding the admissions process it has developed for the School of Pharmacy, including establishing a requirement that all interviewers and candidates sign confidentiality agreements regarding the interview evaluation processes and the admissions materials provided.

[55] Following a consideration of the parties' positions, the documentation provided, and other evidence presented by Memorial, it is my view that the admissions process developed by the Third Party for Memorial's School of Pharmacy is a "trade secret" of a third party within the meaning of section 27(1)(a)(i) of the *ATIPPA* and that the developed selection process constitutes "scientific or technical information of a third party" within the meaning of section 27(1)(a)(ii) of the *ATIPPA*. Furthermore, it is my opinion that to disclose to the Applicant information about the interview questions, the instructions for the interviewers or the scoring rubric would reveal information about a trade secret of the Third Party and would reveal information about the scientific or technical information of the Third Party. However, these are not the matters I have to decide. Rather, I must determine whether disclosure of the notes made by the interviewers in relation to the Applicant's responses to the interviewers' questions would, in accordance with section 27(1), "reveal" a trade secret of the Third Party or "reveal" scientific or technical information of the Third Party.

[56] It is clear that the Applicant's responses to the questions do not themselves constitute either a "trade secret" or "scientific or technical information." The position of Memorial is that to give the Applicant access to the notes taken in relation to his responses would disclose either the interview questions, the instructions to interviewers, or the scoring rubric, thereby revealing a trade secret or scientific and technical information of the Third Party.

[57] As I have indicated, I have analyzed the severed information contained in the notes made by the interviewers and carefully compared that information with the interview questions, the instructions to interviewers, and the scoring rubric and I have determined that the notes do not contain any information that would reveal either the interview questions, the instructions to interviewers, or the scoring rubric, or anything about them.

[58] Therefore, Memorial has not met the first part of the three-part test because it has failed to show that the disclosure of the notes would, pursuant to section 27(1)(a), reveal either a trade secret of the Third Party or scientific or technical information of the Third Party. As I have indicated, if a record fails to meet even one of the three parts, it does not meet the test, and the public body is not entitled to rely on section 27(1) to sever information in the responsive record. Therefore, it is my finding that Memorial is not entitled to deny access to the information at issue on the basis of section 27(1).

3. Applicability of Section 24(1)

[59] Memorial also submits that it is entitled to deny access to the information at issue on the basis of section 24(1), which provides:

> *24. (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of the province or the ability of the government to manage the economy, including the following information:*
>
> *(a) trade secrets of a public body or the government of the province;*
>
> *(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;*
>
> *(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;*

> *(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party; and*
>
> *(e) information about negotiations carried on by or for a public body or the government of the province.*

[60] In support of its reliance on the exception set out in section 24(1), Memorial submits that the disclosure of the interviewers' notes would reveal either the interview questions, the instructions to interviewers, or the scoring rubric, thereby harming its financial or economic interests.

[61] The first issue to be decided is whether the information at issue is the type of information covered by section 24(1). On this issue, Memorial puts forth two alternative positions. First, Memorial proposes that the kinds of information specifically stated in paragraphs (a) to (e) of section 24(1) are not the only types of information that if disclosed could cause the contemplated harm. Secondly, Memorial suggests that if the only disclosed information that can cause the harm contemplated by section 24(1) is that information stated in paragraphs (a) to (e), then the information at issue is the type of information contemplated by paragraphs (a), (b), and (d).

[62] I will begin by discussing whether the information at issue is included under either paragraph (a), (b), or (d) of section 24(1).

[63] Memorial submits in relation to paragraph (a) of section 24(1) that the interview questions, the instructions to the interviewers, and the scoring rubric constitute a "trade secret" of Memorial and that to disclose the notations of the interviewers would reveal that trade secret. I have great difficulty with this submission, given that Memorial has already argued, as part of its position on section 27(1), that the admissions process is a trade secret of the Third Party. In fact, I have made a finding in my discussion of the applicability of section 27(1) that these items represent a trade secret of the Third Party. Memorial is now asking me to find that the same information is also a trade secret of Memorial. This is a finding that I am unable to make.

[64] I cannot accept that Memorial would enter into a licensing agreement with the Third Party for the use of the admissions process if that process was a trade secret of Memorial. In addition, the license agreement between Memorial and the Third Party states that the Third Party retains "intellectual property rights" to supplied psychometric instructions and materials, including the format and content of forms and rating scales, with "intellectual property rights" defined in the agreement as including copyrights, confidential information and trade secrets. Therefore, it is my finding that the interview questions, the instructions to the interviewers, and the scoring rubric do not constitute a trade secret of Memorial. Hence, paragraph (a) of section 24(1) is not applicable to the information at issue. As such, disclosure of the information in the notations of the interviewers could not reveal a trade secret of Memorial and thereby harm the financial or economic interests of Memorial.

[65] I turn now to Memorial's position with respect to paragraph (b) of section 24(1), which applies to "financial, commercial, scientific or technical information that belongs to a public body . . . and that has, or is reasonably likely to have, monetary value." Memorial submits that this paragraph is applicable to the admissions process because it is "commercial" information of Memorial which it obtained under license and that to give access to the interviewers' notations would disclose the "commercial" information of Memorial, thereby resulting in harm to Memorial's financial or economic interests within the meaning of section 24(1).

[66] I will first discuss whether the admissions process is "commercial" information within the meaning of section 24(1)(b).

[67] The meaning of the word "commercial" was discussed by my predecessor in Report 2006-005 at paragraph 31:

> *[31] With respect to the first two parts of this three-part harms test, neither the Department nor the Applicant make any specific arguments nor present any relevant evidence in their respective submissions. Third Party 3 notes that it is "aware" of the three-part test as noted in its submission, and states regarding the first part of the test that the information it wishes the Department to withhold is "commercial or financial information" of Third Party 3, "or in the alternative in the nature of a trade secret." In Air Atonabee v. Canada (Minister of Transport)*

> *(1989) 37 Admin. L.R. 245, 27 F.T.R. 194, 27 C.P.R. (3d) 180, MacKay J. states that in understanding the use and application of the terms "financial, commercial, scientific or technical information," regarding third party business interests, it is sufficient "that the information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood." Given that the information at issue relates to the pricing of a product which Third Party 3 sells, I accept that this information is commercial in nature, thus satisfying part one of the three-part test.*
>
> [Emphasis added]

[68] I agree with my predecessor that the pricing of a product which a business sells is the type of information that would be considered commercial information. This is consistent with the ordinary meaning of the word "commercial," defined in the *Concise Oxford English Dictionary*, Tenth Edition, Revised, as meaning: "concerned with or engaged in commerce." "Commerce" is defined in the same dictionary as "the activity of buying and selling, especially on a large scale." The information at issue clearly does not fit this definition of "commercial." Thus, I find that the information at issue is not "commercial" information within the meaning of section 24(1)(b).

[69] It is important to note that for paragraph (b) to apply the information must be such that it "belongs to a public body." In that regard, Memorial has stated that the information at issue is "commercial information of Memorial which it obtained under license." Memorial has also indicated that the Third Party and Memorial have an agreement whereby the School of Pharmacy is licensed to use the admissions test developed and designed by the Third Party. The meaning of "license" provided in *Black's Law Dictionary*, Eighth Edition, is "permission, usually revocable, to commit some act that would otherwise be unlawful." Thus, it is my view, that Memorial has a license to use the property that belongs to the Third Party, without that permission it would be unlawful for Memorial to use the selection process in which the Third Party has a proprietary interest. Memorial would not need a license to use a selection process that "belongs" to Memorial. In my view, this establishes that the information does not belong to Memorial; it belongs to the Third Party. Therefore, I find that paragraph (b) of section 24(1) does not apply to the information at issue.

[70] Memorial also argues that paragraph (d) of section 24(1) is applicable. In order for this paragraph to be applicable, Memorial would have to provide evidence that disclosure of the

information at issue could reasonably be expected to result in either "the premature disclosure of a proposal or project" or in "undue financial loss or gain to a third party."

[71] In support of its argument on the applicability of section 24(1)(d) Memorial made the following comment on page 13 of its submission:

> *Finally, the disclosure of the information meets the test in 24(1)(d) since disclosure would reasonably be expected to allow someone less qualified to be admitted to the School and benefit from the reasonable tuition rates enjoyed by Memorial University students while forcing a more qualified candidate to seek admission at an out-of-province university with significantly higher tuition rates.*

In my view, this comment does not support a finding that the information at issue could reasonably be expected to result in either "the premature disclosure of a project or proposal" or in "undue financial loss or gain to a third party."

[72] Since Memorial has submitted that paragraph (d) of section 24(1) is applicable it is necessary to discuss whether the disclosure of the information at issue could reasonably be expected to result in "undue financial loss or gain to a third party" within the meaning of that paragraph

[73] The term "third party" is defined in paragraph (t) of section 2(o) of the *ATIPPA* as follows:

> *2. (t) "third party", in relation to a request for access to a record or for correction of personal information, means a person, group of persons or organization other than*
>
> *(i) the person who made the request, or*
>
> *(ii) a public body.*

[74] Memorial has put forth the position that disclosure of the information at issue would result in undue financial loss to the Third Party and in undue financial gain to other companies who are in competition with the Third Party. The disclosure, Memorial submits, would reveal technical and scientific information about a unique approach developed by the Third Party as a result of many years of research, development, and investment prior to the Third Party's involvement with Memorial. Memorial indicates that the Third Party uses its developed methods with multiple

clients and the disclosure of the information at issue would compromise the Third Party's ability to use its proprietary methods with other clients. There is a particular concern, Memorial submits, because the production of a reliable and valid alternate process, starting completely from scratch, would likely take 12 to 18 months of development work. Memorial submits that the interference with the Third Party's proprietary interest in its developed methods and techniques resulting from the disclosure of the information at issue will necessitate the Third Party having to develop new methods and techniques, thereby resulting in "undue financial loss" to the Third Party.

[75] In addition, Memorial indicates that the companies in competition with the Third Party (which would include companies involved in human resources consulting, management consulting, and test/evaluation development) would benefit from an opportunity to access and exploit the Third Party's methods and products, which have been developed by the use of unique proprietary means. This, Memorial submits, would result in "undue financial gain" to the competitors of the Third Party.

[76] In my view, both the Third Party and any company in competition with the Third Party constitute a "third party" within the meaning of paragraph (t) of section 2(o). Therefore, the issues to be decided now are whether the disclosure of the information at issue could reasonably be expected to result in either "undue financial gain" to a competitor of the Third Party or to "undue financial loss" to the Third Party. In order to decide those issues, it is first necessary to determine the meaning of the word "undue" as used in paragraph (d) of section 24(1).

[77] The meaning of the word "undue" was discussed by the British Columbia Information and Privacy Commissioner in Order 00-10. In that case, an applicant brewery sought records containing sales data for two competing breweries, who both opposed the release of the data. The Commissioner stated at pages 16 to 18:

> *Molson argued that disclosure of this information could, within the meaning of s. 21(1)(c)(iii), reasonably be expected to "result in undue financial loss or gain to any person or organization". Labatt agreed with this. Molson submitted that disclosure of the information would cause loss to it because the information would hurt its competitive position, thus causing a loss of revenue. Molson also*

said it would allow Pacific Western or another competitor to make profits without having invested any capital to do that: "Molson's competitors would reap unfair monetary benefits, and Molson itself would sustain undue monetary losses".

As was noted earlier, the evidence establishes that this information has value. A buyer could be found for it because it would enable a competitor to fine-tune, at the very least, existing data about Molson and Labatt. The information would add value to that data and has value in its own right. Similarly, there is evidence that disclosure of the information could reasonably be expected to cause harm to Molson and Labatt. Whether or not the expected harm is significant, it might also be "undue". The central question is exactly that – would the gain or loss be "undue".

When is a financial gain or loss "undue"? As is the case with the significant harm test under s. 21(1)(c)(i), this test obviously requires one to consider what loss or gain might be 'due' in trying to define what is 'undue'. The ordinary meanings of the word "undue" include something that is unwarranted, inappropriate or improper. They can also include something that is excessive or disproportionate, or something that exceeds propriety or fitness. Such meanings have been approved regarding the similar provision in Alberta's freedom of information legislation. See Order 99-018. The courts have also given 'undue' such meanings, albeit in relation to other kinds of legislation. See, for example, the judgement of Cartwright J. (as he then was) in Howard Smith Paper Mills Ltd. v. The Queen (1957), 29 C.P.R. 6 (S.C.C.), at p. 29.

As Cartwright J. noted in Howard Smith, above, interpretation of the word 'undue' is not assisted by simply substituting different adjectives for that word. That which is undue can only be measured against that which is due. The Legislature did not, however, provide such a frame of reference for the purposes of s. 21(1)(c)(iii). It is necessary, therefore, to approach the issue of what is undue financial loss or gain in the circumstances of each case. This analysis can to some extent be guided by decisions in previous similar cases, which will give some sense of what may be undue in the present situation.

In this case, Molson and Labatt argue, disclosure of the information would give Pacific Western something for nothing. It would be given valuable competitive data without having had to pay for it through independent research or other means. As I understand it, they argue this information would present Pacific Western with a windfall.

. . .

In any case, it is plain that the Ontario and British Columbia provisions both protect against financial gain or loss that is undue. Ontario decisions consistently show that if disclosure would give a competitor an advantage, usually by acquiring competitively valuable information, effectively for nothing, the gain to

> *the competitor will be undue. See, for example, Ontario Orders 125, P-561, P-1105 and M-920. In the last case, the City of Toronto denied access to its contract with a third party computer service provider. The third party successfully argued that disclosure of the contract's details – including the terms between the third party and its sub-contractors – would enable its competitors to "replicate the company's technologies and services" and thus would cause it undue loss. The inquiry officer did not find that the result would also be an undue gain to the competition, although such a finding would appear to be supportable in that case.*
>
> *. . . In the circumstances, I find that the evidence supports the argument that disclosure of the disputed* [sic] *would result in undue gain to Pacific Western and undue loss to Labatt and Molson. On the question of gain, it is clear from the evidence that Pacific Western will gain some competitive advantage from disclosure of the requested records. Pacific Western did not seriously dispute this. Nor did it refute the suggestion by Labatt and Molson that Pacific Western's purpose in seeking the information is purely competitive. I accept the evidence of Labatt and Molson that the information would enable Pacific Western and other competitors to fine-tune existing data, derived from independent and costly research, regarding Labatt's and Molson's business in British Columbia. This would give the competition something for nothing. It would give them valuable competitive information for free and that information could then be used to make inroads into the market share of the third parties.*
>
> *In my view, this financial gain to Pacific Western, and others, would be undue. It would not be undue because the gain would be large. The evidence does not permit me to make any finding on the costs saved by Pacific Western if it were to obtain information that it would otherwise have to pay for. Nor does it allow me to decide what price Pacific Western would pay to buy such information if it were available. But the information doubtless has value to Pacific Western and to others. The gain to Pacific Western from having that information would be undue because it would be unfair, and inappropriate, for Pacific Western to obtain otherwise confidential commercial information about two of its competitors and thereby reap a competitive windfall. . . .*
>
> [Emphasis added]

[78] Having reviewed the circumstances of this case, it is my view that the disclosure of either the interview questions, the instructions to the interviewers, or the scoring rubric could probably result in undue financial harm to the Third Party. To disclose this information would reveal confidential technical and scientific information that was developed by the Third Party through many years of research, experience and expertise and would probably result in Memorial no longer being able to use the selection process developed by the Third Party. In addition, it is likely that the Third Party would be unable to offer similar developed processes to other clients

with the result being that the Third Party would have to develop other products and processes to offer to Memorial and other clients, at considerable financial cost. It is my view that such a financial cost to the Third Party would be "unwarranted, inappropriate and improper" and, therefore, would result in "undue financial loss" within the meaning of paragraph (d) of section 24(1).

[79] However, in order to establish that paragraph (d) is applicable in the present case, Memorial is required to demonstrate that the disclosure of the notes of the interviewers would result in "undue financial loss" to the Third Party. Memorial's position is that the disclosure of the notes would reveal either the interview questions, the instructions to the interviewers, or the scoring rubric, thereby resulting in the "undue financial loss" contemplated by paragraph (d) of section 24(1). With regard to this position of Memorial, I have already determined that the interviewers' notes do not contain any information that would reveal either the interview questions, the instructions to interviewers, or the scoring rubric, or anything about them. Thus, in my view, the information at issue is not the kind of information that could reasonably be expected to result in "undue financial loss" to a third party as contemplated by paragraph (d) of section 24(1).

[80] As indicated, Memorial also submits that the information at issue could reasonably be expected to result in undue financial gain to a competitor of the Third Party by allowing that competitor access to and the ability to use information in which the Third Party has a proprietary interest. This would produce undue financial "gain to a third party" within the meaning of paragraph (d) of section 24(1). In order to establish this, there would have to be evidence that disclosure of the interviewers' notes would result in undue financial gain to a competitor of the Third Party. It may very well be the case that disclosure of either the interview questions, the instructions to interviewers, or the scoring rubric could allow a competitor of the Third Party to get, in the words of the British Columbia Commissioner in Order 00-10, "something for nothing." However, what must be established for paragraph (d) to be applicable is that the disclosure of the notes of the interviewers would bring about that result. As indicated, my previous finding is that there is nothing contained interviewers' notes that would reveal information about the interview questions, the instructions to the interviewers or the scoring rubric.

[81] Consequently, paragraph (d) of section 24(1) is not applicable to the information at issue because the disclosure of the interviewers' notes could not reasonably be expected to result in "undue financial loss or gain to a third party."

[82] Hence, it is my finding that the information contained in the interviewers' notes is not the type of information contemplated by either paragraph (a), (b), or (d) of section 24(1).

[83] As indicated, Memorial has also submitted that the types of information listed in paragraphs (a) to (d) are not the only types of information that could harm the financial or economic interests of Memorial in accordance with section 24(1). I agree with Memorial on this submission. The use of the words "including the following information" immediately before the list makes in clear that there are other types of information besides those in the list that could cause the contemplated "harm to the financial or economic interests of a public body." However, in view of my findings set out below, it will not be necessary for me to decide whether or not the information at issue is the type of information contemplated by section 24(1).

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

[85] In support of its position that section 24(1) is applicable, Memorial submits that the disclosure of the information relating to the testing procedure used with candidates seeking admission to its School of Pharmacy would force Memorial to develop a new admissions test at considerable cost to Memorial in terms of dollars and other resources.

[86] It should be noted that section 24(1), unlike section 27(1), does not use terminology such as "undue" or "significant" to describe the harm contemplated to be caused to the financial or economic interests of the public body. All that is required for section 24(1) to be applicable is that the disclosure of the information at issue could reasonably be expected to "*harm* the financial or economic interests" of Memorial.

[87] The difficulty for Memorial with regard to its argument on the applicability of section 24(1) is that it must establish by detailed and convincing evidence that there exists a clear and direct linkage between the disclosure of the notations made by the interviewers and the harm to the financial or economic interests of a public body. Furthermore, in order to prove this linkage, Memorial is required to give an explanation of how or why that harm would result from the disclosure of the notations. It may very well be the case that a disclosure of either the interview questions, the instructions to the interviewers or the scoring rubric could result in the confidentiality of the testing process being compromised and Memorial being required to develop new testing procedures for its School of Pharmacy, at considerable cost to Memorial. But, it is not a disclosure of these three items that is at issue. Rather, Memorial is required to prove that there is a linkage between the disclosure of the interviewers' notations and the harm to its financial or economic interests. This Memorial has failed to do.

[88] I have already indicated that I have analyzed the severed information contained in the notes made by the interviewers and carefully compared that information with the interview questions, the instructions to interviewers, and the scoring rubric. Following this analysis and comparison, I made a finding that disclosure of this severed information in the interviewers' notes would not reveal information about either the interview questions, the instructions to interviewers, or the scoring rubric. Without evidence establishing that disclosure of the severed information in the notes would reveal either of these three items, there is no proof that disclosure of the notations could reasonably be expected to result in harm to Memorial's financial or economic interests.

[89] Therefore, I find that Memorial has not proven that section 24(1) is applicable to allow it to deny access to the notations made by the interviewers.

[90] At this point I wish to summarize my findings. I have determined that section 5(1)(g) does not exclude the notes made by the interviewers from the operation of the *ATIPPA*. I have also found that Memorial is not entitled to deny access to the notes on the basis of either section 27(1) or section 24(1) of the *ATIPPA*. In short, there is no reason to refuse access to the notes made by the interviewers. In addition, the Applicant submits that the information contained in the interviewers' notes is his personal information and for that reason should be released to him. As a result of the Applicant's submission, I will discuss whether the notes made by the interviewers contain the personal information of the Applicant.

4. Is the information in the interviewer's notes the personal information of the Applicant

[91] The Applicant submits that the information contained in the notes of the three interviewers constitutes his personal information in accordance with the definition set out in section 2(o) of the *ATIPPA*:

> *2. (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;*

[92] In particular, the Applicant submits that the information in the interviewers' notes constitutes his personal information pursuant to paragraph (viii) of section 2(o) because it contains the opinions of the interviewers about him and pursuant to paragraph (ix) because that information includes his own personal view or opinions. Therefore, the Applicant proposes that he has a right to his personal information in accordance with the purposes of the *ATIPPA* as set out in section 3(1), which provides:

> *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.*

[93] The Applicant suggests that, in light of the fact that one of the purposes of the *ATIPPA* as set out in section 3(1)(b) is to give individuals a right of access to personal information about themselves, his request is a reasonable one "given the fact that this evaluation process has impacted me personally."

[94] My predecessor discussed the definition of "personal information" in Report 2007-004 at paragraph 93:

> *[93] The definition of "personal information" as found in section 2(o) of the ATIPPA commences with the following wording:*
>
> (o) "*personal information" means recorded information about an identifiable individual, <u>including</u>*

> *The use of the word "including" means that the Legislature did not intend the list of what constitutes personal information in paragraphs (i) to (ix) of section 2(o) to be exhaustive. In other words, there may be information about an identifiable individual that constitutes personal information which is not listed in paragraphs (i) to (ix) of section 2(o) of the ATIPPA.*
>
> [Emphasis in original]

[95] I agree with my predecessor's interpretation of section 2(o). The types of information listed in paragraphs (i) to (ix) are examples of what constitutes personal information. There are other types of "recorded information about an identifiable individual" that can amount to personal information that are not provided in the list in section 2(o).

[96] In order to determine whether the information contained in the notes taken by the interviewers constitutes the Applicant's personal information, it is necessary to discuss briefly the nature of the Applicant's interview. Memorial has indicated that the Applicant's interview was a behavioural interview, which Memorial describes as "a technique used to evaluate a candidate's experiences and behaviours in order to determine their potential for success."

[97] The actual procedure followed in the Applicant's behavioural interview involved three interviewers asking the Applicant a series of questions (without the Applicant seeing the questions). Memorial has described in its submission how the interviewers were to record the Applicant's responses as follows: "interviewers are instructed to make notes which directly relate to the scoring rubric. They do not transcribe responses by candidates; rather, they make notes of those comments by candidates which directly correlate to the scoring criteria." Some of the notes taken by the interviewers have been disclosed to the Applicant. However, Memorial points out that "some of the interviewers' notes were redacted since disclosing the notes would reveal the questions or elements of the scoring rubric."

[98] I will now discuss the results of my review of the information in the severed notations. This review was conducted to determine if any of the severed information constitutes the personal information of he Applicant. I will discuss the information by making reference to the author of

the notes as indicated by that author's initials and to the page number on the 13-page Interview Form completed by that author.

[99] I will first discuss the notes on the Interview Form completed by interviewer CD. On page 3 of the Interview Form there are three severed notations in relation to the Applicant's response to Question 1. The information recorded here relates to the Applicant's educational history and his employment history and, as such, constitutes his personal information as defined in paragraph (vii) of section 2(o) of the *ATIPPA*.

[100] On page 5 of CD's Interview Form there are three items of information severed in relation to the Applicant's response to Question 2. I find that these items do not contain the personal information of the Applicant. On page 6, there are three items of information severed in relation to the Applicant's response to Question 3. This severed information relates to the Applicant's work experience and, as such, represents information about his employment history within the meaning of paragraph (vii) of section 2(o). Hence, it is the Applicant's personal information.

[101] On page 7 of CD's Interview Form there is severed information in relation to the Applicant's response to Question 4. This information describes a personal experience of the Applicant. Although this severed information is not one of the types of personal information listed in paragraphs (i) to (ix) of section 2(o), it is, nevertheless, information about the Applicant and I find that it is the Applicant's personal information within the meaning of section 2(o).

[102] On page 8 of CD's completed Interview Form there is severed information in relation to the Applicant's response to Question 5. This information describes the work experience and a personal characteristic of the Applicant and is, therefore, information about the Applicant within the meaning of section 2(o). Thus, it is the Applicant's personal information.

[103] On page 9 of CD's Interview Form there are three items of information in relation to the Applicant's response to Question 6 that have been severed. I find that the information that is written in quotation marks constitutes information about the Applicant and, as such, is the Applicant's personal information. However, the other two words that have been severed on this

page are not about the Applicant and, therefore, are not his personal information. On page 10, there are four items of information in relation to the Applicant's response to Question 7 that have been severed. I find that this information is not about the Applicant and, consequently, it does not constitute his personal information.

[104] On page 11 of CD's Interview Form there are four items of information in relation to the Applicant's response to Question 8 that have been severed. I find that the second item and the fourth item contain information about the Applicant and, as such, constitute his personal information pursuant to the definition set out in section 2(o). I conclude that items one and three do not contain information about the Applicant and, accordingly, do not constitute his personal information.

[105] I now wish to discuss the notes on the Interview Form completed by interviewer ER. On page 3 of this form, there are four severed notations in relation to the Applicant's response to Question 1. The information recorded here relates to the Applicant's educational history and his employment history and, as a result, it constitutes his personal information within the meaning of paragraph (vii) of section 2(o). On page 5, there are four items of information in relation to the Applicant's response to Question 2 that have been severed. I find that this information is about the Applicant and, thus, constitutes his personal information.

[106] On page 6 of ER's Interview Form there are four items of information in relation to the Applicant's response to Question 3 that have been severed. I find that the information found in line 1 is not about the Applicant and, as such, is not his personal information. However, I find that the information in the other three lines is about the Applicant and, therefore, it constitutes his personal information. On page 7, there are three lines of information severed that relate to the Applicant's response to Question 4. These three lines describe a personal experience of the Applicant and, accordingly, the information is about him. Therefore, the severed information is the personal information of the Applicant.

[107] On page 8 of the Interview Form of ER there are four lines of information relating to the Applicant's response to question 5 that have been severed. This information describes a work

experience of the Applicant and, as a result, is about him. Hence, the severed information is the personal information of the Applicant. On page 9, there is a severing of two words that relate to the Applicant's response to question 6. I find that this information is about the Applicant and, therefore, it is his personal information. On page 10, there is a severing of two words in relation to the Applicant's response to question 7. I find that this information is about the Applicant and, as such, it is his personal information. Also, on page 10, Memorial has severed a symbol, which I find is not about the Applicant and, therefore, is not his personal information.

[108] On page 11 of the Interview Form of ER there is a severing of four words that relate to the Applicant's response to question 8. This information cannot be described as being about the Applicant and, consequently, is not his personal information.

[109] I will now discuss the notes on the Interview Form completed by interviewer SE. On page 1 of this interviewer's form there are two items of information severed. The first severing of two words contains information describing the work experience of the Applicant and, therefore, is personal information as defined in paragraph (vii) of section 2(o). In relation to the second severing of one word in the last line of the notes, I am unable to find that this word represents the personal information of the Applicant.

[110] On page 3 of interviewer SE's Interview Form there is a severing of information in relation to the Applicant's response to Question 1. The information recorded here relates to the Applicant's employment history and, as a result, constitutes his personal information as defined in paragraph (vii) of section 2(o). On page 5, there is a severing of information in relation to the Applicant's response to Question 2. The information records the Applicant's recounting of a personal experience and, thus, is information about the Applicant within the meaning of section 2(o).

[111] On page 6 of interviewer SE's Interview Form there is a severing of information in relation to the Applicant's response to Question 3. The information contains the Applicant's description of an incident that occurred as part of a previous work experience and, as such, is about the Applicant's employment history within the meaning of paragraph (vii) of section 2(o). The

severed information is, therefore, the Applicant's personal information. Page 7 of the form contains notes on the Applicant's response to Question 4 in which he describes one of his personal experiences. Memorial has severed one line of this description. I find that this one line contains information about the Applicant and, for that reason, constitutes his personal information within the meaning of section 2(o).

[112] On page 8 of interviewer SE's Interview Form there are notes in relation to the response given by the Applicant to Question 5. Memorial has severed four of the five lines containing the Applicant's description of an incident occurring while he was at work. I find that this information is about the Applicant's employment history and, as such, is his personal information as defined in paragraph (vii) of section 2(o). On page 9, Memorial has severed one line of the information in the notes taken in relation to the Applicant's response to Question 6. I find that this severed information contains information about the Applicant's educational history within the meaning of paragraph (vii) of section 2(o) and also find that it is the Applicant's opinion about himself, and, therefore, constitutes his personal views or opinions within the meaning of paragraph (ix) of section 2(o). Thus, this information severed on page 9 is the Applicant's personal information. Also, on page 9 there is a handwritten notation near the middle of the page (not in the "Notes" section where the other handwritten notes are found). I find that this notation does not constitute the personal information of the Applicant.

[113] On page 10 of interviewer SE's Interview Form there are notes in relation to the response given by the Applicant to Question 7 in which the Applicant describes a personal experience. Memorial has severed one line of these notes. I find that the severed information contains the Applicant's personal views or opinions and, thus, constitutes his personal information pursuant to paragraph (ix) of section 2(o). Page 11 contains notes on the Applicant's response to Question 8, in which Memorial has severed two lines. I find that the severed information in these two lines contains the Applicant's description of a personal experience and, therefore, represents information about the Applicant. As such, this severed information is the Applicant's personal information.

[114] In summary, I have found that most of the severed information in the notes taken by the interviewers constitutes the personal information of the Applicant. This finding is certainly consistent with the stated purpose of the Applicant's behavioural interview, which was described by Memorial as being "a technique used to evaluate a candidate's experiences and behaviours in order to determine their potential for success." It is quite logical to conclude that the Applicant in relating his own "experiences and behaviours" in response to the questions would provide his own personal information. Therefore, not only is this personal information not exempt from the operation of the *ATIPPA* by section 5(1)(g) and not excepted from disclosure by either section 27(1) or 24(1), it is also subject to section 3(1)(b), which provides that one of the purposes of the *ATIPPA* is to give "individuals a right of access to . . . personal information about themselves." In keeping with this stated purpose, this personal information should be released to the Applicant.

[115] The only severed information in the notes which is not the Applicant's personal information is as follows:

1. The three items severed on page 5 of the Interview Form completed by CD,
2. The two words severed on page 9 of the Interview Form completed by CD,
3. The four items severed on page 10 of the Interview Form completed by CD,
4. Items one and three on page 11 of the Interview Form completed by CD,
5. Item one on page 6 of the Interview Form completed by ER,
6. The symbol on page 10 of the Interview Form completed by ER,
7. The four words severed on page 11 of the Interview Form completed by ER,
8. The one word severed in the last line of the notes on page 1 of the Interview Form completed by SE, and
9. The notation near the middle of page 9 (not in the "Notes" section) of the Interview Form completed by SE.

[116] As I have indicated, none of the information in the interviewers' notes is exempted from the operation of the *ATIPPA* by section 5(1)(g) or excepted from disclosure by either section 27(1) or 24(1). Thus, the information in the notes which is not personal information should also be released to the Applicant.

V CONCLUSION

[117] My conclusion in relation to the notes taken by the interviewers is that Memorial has not met the burden of proof imposed upon it by section 64(1) which provides that "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." Memorial has not convinced me that disclosure of the information in the interviewers' notes (much of which contains the personal information of the Applicant) would result in harm to the business interests of the Third Party such that section 27(1) would apply or in harm to the financial or economic interests of Memorial such that section 24(1) would be applicable. Nor am I persuaded that the notes are excluded from the operation of the *ATIPPA* by section 5(1)(g) because they are "a record of a question that is to be used on an examination or test."

[118] Therefore, I conclude that the interview questions, the instructions to the interviewers, and the scoring rubric are excluded from the operation of the *ATIPPA* pursuant to section 5(1)(g) because they constitute "a record of a question that is to be used on an examination or test."

[119] I conclude that the notes written by the three interviewers on their Interview Forms are not excluded from the operation of the *ATIPPA* pursuant to section 5(1)(g) because they do not constitute "a record of a question that is to be used on an examination or test."

[120] In addition, I conclude that disclosure of the information in the notes of the interviewers would not reveal information about the interview questions, the instructions for the interviewers or the scoring rubric and, therefore, the disclosure of these notes is not excepted by section 24(1) or section 27(1).

[121] Also, I conclude that much of the information in the interviewers' notes constitutes the personal information of the Applicant and, in accordance with one of the stated purposes of the *ATIPPA,* it should be released to the Applicant.

VI RECOMMENDATIONS

[122] Under the authority of section 49(1) of the *ATIPPA*, I hereby recommend that Memorial University of Newfoundland release to the Applicant all the severed information contained in the written notations made by the three interviewers during the Applicant's interview on 8 June 2007.

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

[124] Please note that within 30 days of receiving a decision of Memorial University of Newfoundland under section 50, the Applicant or the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal to the Trial Division as set out in the *ATIPPA*.**

[125] Dated at St. John's, in the Province of Newfoundland and Labrador, this 6th day of August 2008.

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