January 22, 2009 **A-2009-002**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT A-2009-002

Memorial University of Newfoundland

Summary: The Applicant applied to Memorial University under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to her own personal information that was contained in a report of an investigation into the employment experience of a named assistant professor (the "Katz Report"). In the copy of the Katz Report provided to the Applicant, the vast majority of information was redacted in accordance with section 30. Other information had been redacted in accordance with section 21. Memorial argued that this Office's position that the *ATIPPA* created a bias in favour of disclosure would lead to "unsupportable interpretations of the Act's definitions." The Commissioner disagreed with this argument and found that there is indeed a presumption in favour of disclosure inherent in the *ATIPPA.* The legislation is meant to promote disclosure of information while allowing the protection of personal information where it is appropriate to do so. Public bodies must, as a general rule, provide access to information and only protect what is absolutely necessary, rather than deny access and only disclose what is absolutely necessary. The Commissioner determined that section 21 was applicable to some information contained in the records. Further it was also determined that section 30 is not applicable to some of the information for which it was claimed. For example, the Commissioner found that section 30 does not apply to that information which the Applicant supplied to Memorial (for example, quotes from her own correspondence to Memorial or from Memorial to her) because in this situation, there can be no "disclosure" of the information. Further, the Commissioner found that generally, wherever the Applicant's name appears in the Katz Report, she is entitled to this information, as it is clearly her own personal information. The Commissioner also found that names of employees of Memorial, where they are used in connection with

their position or functions as employees, should also be disclosed in accordance with section 30(2)(f).

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as am, ss. 2(o), 3, 7(1), 21, 23, 30, 35(1),39 and 64(1); *Memorial University Act*, R.S.N.L. 1990, c.M-7 s.38.1(2); *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165.

Authorities Cited: *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (S.C.C.); *Hayes v. New Brunswick (Minister of Intergovernmental Affairs &International Relations)*, 2007 NBQB 47; *Dickie v. Nova Scotia (Department of Health)*, 1999 CanLII 7239 (NSCA); *B.C. Teachers' Federation, Nanaimo District Teachers' Association et al. v. Information and Privacy Commissioner (B.C.) et al.*, 2006 BCSC 131; *Mislan v. Canada (Minister of Revenue)*, [1998] F.C.J. No. 704 (F.C.T.D.); *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, 140 F.T.R. 140, 1997 CarswellNat 2436; *Rubin v. Canada (Minister of Transport)*, 221 N.R. 145, 1997 CarswellNat 2190; *Maislin Industries Ltd. v. Canada (Minister for Industry, Trade & Commerce)*, 1 F.C. 939; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Imperial Tobacco Company Ltd. v. Newfoundland and Labrador (Attorney General)*, 2007 NLTD 172; Newfoundland and Labrador OIPC Reports 2005-002, 2005-005, 2007-008, 2007-015 and 2008-012; British Columbia OIPC Order 01-53; Nova Scotia Review Reports FI-07-27 and FI-07-72; Ontario Order M-444.

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); Access to Information Policy and Procedures Manual, Department of Justice, Government of Newfoundland and Labrador.

I BACKGROUND

[1] In January of 2006 the President and Vice-Chancellor of Memorial University of Newfoundland ("Memorial") publicly announced the commission of an independent investigation into the employment experience of a named assistant professor. The investigation would be conducted by Dr. Shirley Katz, Associate Professor at York University, and would include a review of Memorial's policies, procedures and practices regarding the environment for women at the university as well as the regulation of student conduct on campus. The President also announced that the results of the investigation would be made public, with the exception of any personal information that may need to be withheld in order to protect the privacy of particular individuals.

[2] Dr. Katz completed her report (the "Katz Report") in August of 2006. This Report contains detailed background information, analysis and commentary and provides specific recommendations. However, at that time Memorial stated that "…the president was prevented from releasing the report … because of privacy law considerations." Memorial subsequently engaged the services of a Winnipeg lawyer to review the Katz Report "…for the purpose of redacting (i.e. severing) information that must be protected under privacy law" (see http://today.mun.ca/news.php?news_id=2566). As a result of this independent analysis, in November of 2006 Memorial publicly released a redacted version of the Katz Report, claiming that the redacted portions must be withheld due to the personal nature of the information.

[3] Shortly after the release of the redacted Katz Report, Memorial received an access to information request under authority of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*"), dated 15 November 2006. The request was submitted by Dr. R.K.L. Panjabi, Professor of History at Memorial, who was seeking access to "[t]he full, uncensored Katz Report." I note here that it is not the normal practice of this Office to identify an Applicant. However, Dr. Panjabi has asked that I name her as the Applicant in this case.

[4] In correspondence dated 22 January 2007 Memorial provided Dr. Panjabi with a redacted copy of the Katz Report. While Memorial provided Dr. Panjabi with more information than had been released to the public, it informed Dr. Panjabi that the enclosed Katz Report had "…third party personal information severed in accordance with section 30(1) and information subject to solicitor and client privilege severed in accordance with section 21."

[5] On 29 August 2007 Dr. Panjabi submitted a second access to information request to Memorial, wherein she sought disclosure of records as follows:

> *With reference to the Privacy legislation, I am requesting ALL personal information about me including any and all opinions about me or any opinions attributed to me that are included in the Katz Report. This information has NOT previously been given to me.*
>
> [Emphasis in original]

[6] In correspondence dated 17 September 2007 Memorial's Information Access and Privacy Protection Coordinator responded to Dr. Panjabi's request, wherein she referenced her previous letter of 22 January 2007 to Dr. Panjabi:

> *On 22 January 2007, we sent you a copy of the Katz Report which had been redacted for you. All of your personal information, including any opinions about you or attributed to you, was disclosed to you at that time, except where doing so would reveal a third party's personal information. Therefore, there is no additional information pertaining to you in the Katz Report to disclose.*

[7] In a Request for Review received in this Office on 31 October 2007 Dr. Panjabi asked for a review of the decision of Memorial to deny access to certain information and indicated that she was seeking access to the "entire uncensored Katz Report." Specifically, Dr. Panjabi asked that she receive access to "… all the information contained within the Katz Report to which I am entitled per the legislation." A copy of this Request for Review was forwarded to Memorial together with a request for copies of documents pertinent to the Request, including a complete copy of the records sent to Dr. Panjabi and a complete copy of the records responsive to Dr. Panjabi's access to information application. In response, Memorial provided this Office with a

copy of the redacted Katz Report previously sent to Dr. Panjabi in response to her earlier request, as well as a copy of the unredacted Katz Report.

[8] The record at issue in this Request for Review, therefore, consists of the Katz Report in its entirety, which includes a total of 128 pages. Of these 128 pages, information has been redacted on 120 pages ranging from a single word to entire paragraphs. The vast majority of information has been redacted in accordance with section 30. Other information has been redacted in accordance with section 21.

[9] Attempts to resolve this Request for Review by informal means were not successful and by letters dated 10 June 2008 Dr. Panjabi and Memorial were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process both parties were given the opportunity to provide written submissions to this Office pursuant to section 47.

[10] I note here that in its submission dated 8 July 2008, Memorial indicated that it would disclose additional information in accordance with the suggestions of this Office:

> *Consistent with the approach we have taken above, Memorial University has carefully reviewed its previous redactions, in light of the OIPC's suggestions. As a result, Memorial University has un-redacted some information, and we will be sending by courier a copy of the Amended Redacted Report to the Applicant and the OPIC* [sic] *in the coming days.*

On 15 August 2008 this Office received a copy of the "Amended Redacted Report," wherein some additional information was disclosed to Dr. Panjabi. However, Memorial continues to withhold significant portions of the Katz Report from Dr. Panjabi.

II PUBLIC BODY'S SUBMISSION

[11] Memorial provided my Office with a detailed submission dated 8 July 2008. In its submission, Memorial refers to the "twin purposes" of the *ATIPPA* and states that the legislation is "…concerned with striking a balance between access to information and personal privacy."

Memorial claims that this balance is made clear in the stated purposes of the *ATIPPA*, as provided in section 3. Memorial also references the Supreme Court of Canada and its position on the consideration of words within a statute. Specifically, Memorial states that the Court, in *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, has said that "…the words in an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature."

[12] Memorial goes on to state that while the *ATIPPA* provides a general right of access to records, the legislation sets out a number of mandatory exceptions to this general right, including personal information. Memorial acknowledges the exceptions in section 30(2), but claims that it has considered the twin purposes of the *ATIPPA*, and in so doing "…has attempted to provide the Applicant with as much of the requested Record as possible, while still meeting its privacy obligations not to disclose personal information, unless it falls within one of the exceptions listed in s. 30(2) of the Act."

[13] Memorial states that it does not agree with the position of this Office that the purpose of the *ATIPPA* creates a bias in favour of a right of access:

> *…As directed by the Supreme Court of Canada, legislation must be interpreted as a whole; therefore, the twin purposes of providing the public access to records and the protection of privacy cannot be met if any part of the Act is reviewed in isolation. We suggest that the OIPC's previously stated articulation of the purpose of the Act may lead to unsupportable interpretations of the Act's definitions, such as "personal information".*

[14] With respect to "personal information," Memorial refers to the definition set out in section 2 of the *ATIPPA*. Memorial again refers to the Supreme Court of Canada, in *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (S.C.C.), [1997] 2 S.C.R. 403, wherein the Court states that a similarly worded definition of personal information is "undeniably expansive." Memorial states that personal information, by definition, "…is recorded information *about* an identifiable individual, including the individuals' name" [emphasis in original]. As such, Memorial takes the position that all such names contained within the Katz Report are exempt from disclosure. Similarly, Memorial takes the position that the opinions given by those individuals about the

Assistant Professor who is the subject of the Katz Report, as well as the Assistant Professor's personal views or opinions, are exempt from disclosure. Memorial expressly states that the names of those individuals who are employees are included here. Memorial also states that the only exception that applies in this circumstance is where the Applicant's name is used, as per section 30(2)(a) of the *ATIPPA*.

[15] Memorial claims that they have considered the applicability of sections 30(2)(f) and 30(2)(h) and that they have disclosed information that falls within these provisions, "…unless disclosure would have the effect of disclosing protected personal information."

[16] Memorial then goes on to state that "[a] number of decisions in New Brunswick have recently considered whether individual's names, including employee's names, contained in records were appropriately redacted." Specifically, Memorial refers to the New Brunswick Court of Queen's Bench in *Hayes v. New Brunswick (Minister of Intergovernmental Affairs & International Relations)*, 2007 NBQB 47:

> *…In considering whether names of individuals who had sent correspondence to the government should have been redacted on the basis that they were "personal information", the New Brunswick Court of Queen's Bench in Hayes, supra held, at para 48-49:*
>
> > *All that is necessary to trigger the personal information exemption is that the information contains a name. If it does, then at least that part of the information is exempt under section 6(b). I therefore find that under the RTIA the names of individuals, including government employees, are included in the meaning of the term "personal information" and exempt from disclosure under section 6(b).*

[17] Memorial also argues that "…other information, from which one can infer the identity of a referenced individual, must be redacted or the protection of personal information provisions would be meaningless." In support of this position, Memorial again refers to *Hayes*, wherein the Court held that e-mail addresses, telephone and facsimile numbers and titles are personal information in so far as they are likely to lead to the identification of individuals. Memorial also references the Alberta Information and Privacy Commissioner's Order 2000-028, wherein the

Commissioner noted that events, facts, observations or circumstances would be considered personal information if the disclosure of that information would identify a third party.

[18] Memorial in its submission also comments on the issue of work product:

> *Applying the relevant statutory interpretation principles, a narrow interpretation of what "personal information" is under the Act, in Memorial University's estimation, would not be supportable. The* [*Katz*] *Report itself is at its core about* [*assistant professor's*] *experiences, and about the recollections and opinions of those individuals interviewed in the completion of the Report. The fact that the Report itself is the work product of its author does not change the essential character of the Report, which is* ***about*** *an identified individual. As such, the Report is clearly "about"* [*assistant professor's*] *experiences, and the distinction between personal information and personal work-product is irrelevant, in the circumstances.*
>
> [Emphasis in original]

[19] In referring to our Report 2007-003, Memorial takes issue with the position of this Office that personal information cannot be "disclosed" to an applicant if the information is already known to the applicant: "Memorial University takes the position that such an interpretation is not sustainable by a close reading of the Act as a whole, and is contrary to case law that has considered the disclosure of personal information originally supplied by an applicant."

[20] Memorial states that personal information by definition is "…recorded information about an individual, regardless of who supplied the information" (emphasis in original). Memorial argues that once information is in the custody of a public body it is a record and can only be disclosed in accordance with Parts II and III of the *ATIPPA*. "Any attempt to incorporate a narrow definition of the word 'disclose' into an analysis of what can be disclosed is … an attempt to incorporate a 'harms' test into the Act that does not exist."

[21] Memorial also refers to the definition of "disclosure" and states that in Report 2007-003 this Office "…did not address the Black's Law Dictionary definition … which is the more general 'a revelation of facts.' Whether those facts were known or not known is not material to this

component of the definition." Memorial also points out the secondary definition of disclosure which is the "mandatory divulging of information to a litigation opponent according to procedural rules." Memorial argues that this secondary definition further supports its position:

> *Disclosure to an applicant pursuant to an access request is circumscribed by statute, and litigation disclosure is similarly mandated by law. Memorial University suggests that the legal obligation of disclosure, within the litigation context, would be meaningless if disclosure were interpreted to include only those documents a litigant were "unaware of". Similarly, protection from disclosure (of personal information) on the basis of whether an applicant personally knows the information would be equally meaningless if there* [sic] *an applicant's existing knowledge of, or access to, the information were to override the protection.*
>
> [Emphasis in original]

[22] While Memorial does not accept the argument that there is no disclosure of personal information under section 30(1) of the *ATIPPA* where that information is already known to the applicant, it submits that even if the argument had merit "…it cannot know for sure who supplied any information contained in the [Katz] Report." Memorial goes on to state that it "…has no definitive knowledge of what personal information the Applicant knows, or would have access to."

[23] Memorial continues its submission with a reference to a decision of the Court of Appeal in Nova Scotia. In *Dickie v. Nova Scotia (Department of Health),* 1999 CanLII 7239 (NS C.A.) the Court considered whether personal information should be released to an applicant where that applicant had herself provided the information to government. This case involved an allegation of workplace misconduct and Memorial points out that the applicant did not suggest, nor did the Court consider, that this "…supplied information would **not** amount to a disclosure of personal information (emphasis in original). Instead, this case dealt with the issue of "unreasonable" invasion of personal privacy. Memorial goes on to quote the following passage from paragraph 68 of *Dickie*:

> *The allegations made against the third party by the applicant are, of course, known to the applicant because she made them; the substance of them is*

> *summarized in documents released by the Department. Allegations made to the employer of workplace misconduct against an employee are personal information relating to employment history. Their disclosure is, therefore presumed to be an unreasonable invasion of privacy.*
>
> [Emphasis added by Memorial]

[24] Memorial also refers to the British Columbia Supreme Court in *B.C. Teachers' Federation, Nanaimo District Teachers' Association et al. v. Information and Privacy Commissioner (B.C.) et al.*, 2006 BCSC 131 (CanLII), wherein a number of parents were seeking information associated with the investigations of complaints made by them about their children's teacher. Memorial points out that the Court "…readily inferred that applicant's personal information is 'disclosed' when it is released." On the issue of information supplied by an applicant, Memorial quotes from paragraphs 48-49 of *B.C. Teachers' Federation*, as follows:

> *I do not understand the Commissioner to have found that information already known to the applicant was not personal information of the teacher … it does seem as if his decision to disclose the personal information was not premised on the basis that some of the information in the investigation report was not the teacher's personal information but rather that … the Commissioner found that disclosure of information that was the applicant's own information was not an unreasonable invasion of the third party's (that is in this case the teacher's) privacy.*
>
> [Emphasis added by Memorial]

[25] Memorial concludes its submission by discussing the right of an applicant to have access to his/her own personal information. Memorial argues that this right is not absolute where the release of information would reveal the personal information of another individual. Memorial claims that it "…has exercised its discretion to redact information in good faith, and has taken a cautious approach in its redactions, where appropriate." As such, Memorial states that it has redacted the Applicant's personal information where the disclosure of that information could inferentially identify another individual.

[26] In support of this argument, Memorial refers to *Mislan v. Canada (Minister of Revenue)*, [1998] F.C.J. No. 704 (F.C.T.D.), wherein the Court considered the redactions in a report about a complaint of sexual harassment against the applicant. Memorial described this case as follows:

> *The court found that the applicant did not have an absolute right of access to information. The court further concluded that information at issue was personal information of both the applicant and another individual, and that the discretionary power granted to the head of the government institution is paramount over the applicant's right to personal information about himself.*

III APPLICANT'S SUBMISSION

[27] Dr. Panjabi in her submission states that she has neither met with nor spoke to Dr. Katz. In fact, Dr. Panjabi states that the investigation that led to the Katz Report originally had nothing to do with her: "I had not sought it and it was not initiated on my behalf or because of me at all." As such, Dr. Panjabi stated that "I was shocked to find that I figured very prominently in [the Katz] Report…."

[28] While Dr. Panjabi acknowledges that some of her personal information has been released to her by Memorial, such as her name as it appears in various sections of the Katz Report, she believes that more of her personal information has been redacted. She contends that sentences concerning her have been withheld as well as portions of her own correspondence. Dr. Panjabi argues that she is entitled to the information she is seeking, including "…all personal information about me including any and all opinions about me or any opinions attributed to me that are included in the Katz Report." Dr. Panjabi further argues that Memorial's failure to provide her access to this information "…can only be attributed to a deliberate desire on the part of the Administration [of Memorial] to conceal and deceive."

[29] Dr. Panjabi also states that the Katz Report contains hearsay, innuendo and gossip about her and, given the fact that a significant number of individuals have received an un-redacted copy of the Katz Report, she believes that such commentary about her is "highly damaging, detrimental and prejudicial." Given Memorial's refusal to provide her with access to this information, Dr.

Panjabi states that she is unable to "formulate a suitable defence." In this regard, Dr. Panjabi states that

> *Although the concern of your office has to be the Privacy legislation and the accuracy or otherwise of the University's decision not to provide me with information concerning me, may I take the liberty of pointing out that in our Western legal system, underlying ALL legislation are the legal norms that underpin our democratic way of life. One of those norms happens to be the concept of natural justice. The rules of natural justice which are given primacy by all judicial and legislative and administrative bodies order that a person has a right to know what has been said against him and he must be provided with an opportunity to reply to allegations. Memorial University has violated the Privacy legislation of our province but I submit, it has violated as well my right to natural justice.*
>
> [Emphasis in original]

[30] In her submission, Dr. Panjabi also points out that because much of the information in the Katz Report is about her, including quotations from previous correspondence either authored by her or sent to her, she is the only person who can "…determine the veracity of [the Katz] Report and the authenticity of [Dr. Katz'] sources and quotations." Dr. Panjabi claims that in denying her an opportunity to defend herself against an investigator who was selected and paid by the President of Memorial to investigate his own Administration under his own terms of reference, Memorial has committed a serious disservice. Dr. Panjabi further argues that to deny her access to this information, including direct quotations from her own correspondence, "…is a serious abuse of the intent and spirit of the Privacy legislation."

IV DISCUSSION

[31] Before discussing the merits of the arguments put forward in this case, I would first like to deal with a preliminary matter. As I indicated in the Background section of this Report, Dr. Panjabi submitted her access to information request to Memorial in November of 2006, wherein she asked for a copy of the "full uncensored Katz Report." Memorial provided her with a

redacted version of the Katz Report, citing sections 21 and 30(1) of the *ATIPPA*. At that time, Dr. Panjabi did not file a Request for Review with this Office.

[32] In August of 2007 Dr. Panjabi submitted a second access request to Memorial, wherein she asked for similar information, but in this request she specifically sought access to her own personal information, including opinions about her and by her, contained within the Katz Report. In responding to this second request, Memorial referred to its earlier correspondence to Dr. Panjabi in response to her original access request, wherein Memorial had provided her with a redacted copy of the Katz Report. Memorial informed Dr. Panjabi in this second response that "…there is no additional information pertaining to you in the Katz Report to disclose."

[33] It is this second response from Memorial which resulted in Dr. Panjabi's Request for Review, filed with this Office in October of 2007. The issue I must resolve, therefore, is whether the responsive record is the entire Katz Report or just that information within the Katz Report that may be considered personal information about Dr. Panjabi, including any opinions about her or any opinions attributed to her.

[34] I first note that Dr. Panjabi's Request for Review form clearly states that her she is requesting the entire Katz Report. Under the section of the form which asks what resolution or remedy the applicant is seeking, Dr. Panjabi has stated that she is seeking receipt of "…all the information contained within the Katz Report to which I am entitled per the legislation." Clearly, Dr. Panjabi is seeking access to any and all information within the Katz Report to which she is entitled under the *ATIPPA*, regardless of whether it is considered her personal information or not.

[35] Nevertheless, I must still consider the more restrictive wording of Dr. Panjabi's second access to information request. In so doing, I believe it is important to look to the response of Memorial. In its response to her initial access request, Memorial clearly anticipates a more general request by providing access to a redacted version of the full Katz Report and not just portions of the Report. This makes sense given the unambiguous wording of Dr. Panjabi's initial access request. I note, however, that in responding to her second request, Memorial refers to its original response, notwithstanding the more detailed wording of this second request. As such, I

believe it is reasonable to conclude that Memorial treated Dr. Panjabi's second request in the same manner as her initial request; that is to consider her request as a request for the entire Katz Report and not merely portions of it. In addition, I note that in response to correspondence from this Office requesting a complete copy of the responsive records, Memorial provided a copy of the full Katz Report. I should note as well that Memorial has never raised this as an issue and in all of its interactions with this Office on this particular file has referred to the Katz Report in its entirety.

[36] Given the obvious intent of the Applicant in this case, and the response of Memorial to the Applicant and to this Office, I have concluded that the responsive record for the purposes of this investigation and Report is the entire Katz Report.

[37] Having determined the responsive record, I now turn to the issues to be decided in this review. These issues are as follows:

1. Does the *ATIPPA* create a bias in favour of disclosure?
2. Does the discretionary exception in section 21 apply to certain portions of the responsive record?
3. Does the mandatory exception in section 30(1) apply to significant portions of the responsive record?

1. Bias in favour of disclosure

[38] In a number of previous Reports, my predecessor has stated that the *ATIPPA* creates a bias in favour of disclosure. In Report 2005-002, for example, the Commissioner said that

> *[25] The language in the ATIPPA, like other access and privacy statutes in Canada, creates a bias in favour of disclosure. By providing a specific right of access and by making that right subject only to limited and specific exceptions, the legislature has imposed a positive obligation on public bodies to release information, unless they are able to demonstrate a clear and legitimate reason for withholding it. Furthermore, the legislation places the burden squarely on the head of a public body to prove that any information that is withheld is done so appropriately and in accordance with the legislation.*

[39] In Report 2005-005 my predecessor again addressed this issue and in so doing referred to an Order of the Information and Privacy Commissioner for Alberta:

> *[37] In his Order 97-007, the Alberta Commissioner also dealt specifically with this point. In considering the application of section 23 (advice) of Alberta's Freedom of Information and Protection of Privacy Act to briefing notes, the Commissioner said:*
>
> > *54 The Public Body submitted that once the ministerial briefing note is demonstrated to contain some component that could be construed as engaging the section 23 exception that the exception should be fully engaged to permit the statutory decision maker to withhold the entire record.*
> >
> > *55 Such an interpretation would be inconsistent with the general principles enounced in the Act regarding severing.* ***Section 2(a) provides that one of the purposes of the Act is to allow any person a right of access to the records in the custody or under the control of a public body, subject to limited and specific exceptions as set out in the Act. Accordingly, there is a presumption in favour of disclosure, placing upon the head of a public body an obligation to disclose as much as possible and accordingly sever only the exempt material****.*
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> [Emphasis added]

[40] In its submission Memorial states that it does not agree that such a bias exists, and argues that the "…OIPC's previously stated articulation of the purpose of the Act may lead to unsupportable interpretations of the Act's definitions, such as 'personal information.'" In support of its position, Memorial refers to the Supreme Court of Canada in *Rizzo and Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, wherein the Court directed that legislation must be interpreted as a whole. Memorial argues that under such direction, "…the twin purposes of providing the public access to records and the protection of privacy cannot be met if any part of the Act is reviewed in isolation."

[41] With all due respect to Memorial, I fully agree with the conclusions of my predecessor in Reports 2005-002 and 2005-005 and, in addition, I believe that the Supreme Court of Canada in *Rizzo* supports the position of this Office that there is indeed a bias in favour of disclosure

inherent in access to information legislation. I would, however, like to take this opportunity to clarify that the use of the term "bias" in this Report is in no way intended to be pejorative in nature nor is it intended to suggest that privacy is subordinate to access. As well, I do not believe that my predecessor intended the term to be used in this manner. The term as it is used in this context is simply meant to reflect that there is a tendency or inclination toward disclosure and that this tendency need not be prejudicial to any other procedure or right that may be inherent in the *ATIPPA*. As such, I believe that the term "presumption in favour" may more aptly reflect the intent of the legislation and, for this reason, it is this term which I will now rely on. Nevertheless, I continue to believe the arguments of my predecessor to be sound and, given Memorial's rejection of our previously stated position, I intend to provide additional commentary in support of his conclusions.

[42] On this issue, Memorial specifically cites paragraph 131 of our Report 2007-003 (I note here that the public body in this case was also Memorial), wherein my predecessor was referring to the submission of the Applicant in that case: "…the Applicant has asked that I carefully apply the definition of personal information, particularly in light of the *ATIPPA*'s bias in favour of a right of access." I note, however, that at paragraph 60 of this Report my predecessor made reference to a number of Court decisions which I believe support the notion that the *ATIPPA*, like other similar legislation, creates a presumption in favour of access. For example, the Federal Court of Canada, in *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, 140 F.T.R. 140, 1997 CarswellNat 2436, said the following in relation to the Federal *Access to Information Act*, R.S.C. 1985, c. A-1:

> *[32] Since subsection 4(1) confers a general right of access, exemptions must be specific and limited. It is clear that Parliament intended exemptions to be interpreted strictly.* ***Access to information should be the normal course****, exemptions should be the exception and should be confined to those specifically set out in the statute…*
>
> [Emphasis added]

[43] Richard J., in *Canada (Information Commissioner)*, also referenced the Federal Court of Appeal in *Rubin v. Canada (Minister of Transport)*, 221 N.R. 145, 1997 CarswellNat 2190, McDonald J.A., with agreement from Stone and Linden JJ.A., said that

> *In my opinion, therefore, all exemptions must be interpreted in light of this clause. That is, all exemptions to access must be limited and specific. This means that where there are two interpretations open to the Court, it must, given Parliament's stated intention, choose the one that infringes on the public's right to access the least. It is only in this way that the purpose of the Act can be achieved. It follows that an interpretation of an exemption that allows the government to withhold information from public scrutiny weakens the stated purpose of the Act.*

[44] In another Federal Court of Canada decision, also referenced by Richard J., the Court spoke on the overall intent of access to information legislation. Jerome A.C.J.F.C., in *Maislin Industries Ltd. v. Canada (Minister for Industry, Trade & Commerce)*, 1 F.C. 939, 1984 CarswellNat 14, said at paragraph 9 that

> *It should be emphasized however, that since the basic principle of these statutes is to codify the right of public access to government information two things follow: first, that such* ***public access ought not be frustrated by the courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure****; second, the burden of persuasion must rest upon the party resisting disclosure whether, as in this case, it is the private corporation or citizen, or in other circumstances, the government.*
>
> [Emphasis added]

[45] In its submission, Memorial argues that the "…*ATIPPA* is concerned with striking a balance between access to information and personal privacy," and in support of this argument, Memorial cites section 3 of the *ATIPPA*. Section 3 sets out the purposes of the legislation and provides as follows:

> *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.*
>
> *(2) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.*

[46] While I fully agree that the *ATIPPA* is meant to strike a balance between access and privacy, I believe Memorial's comments in this regard are not entirely accurate. Memorial's reference to "striking a balance" is made in the context of the mandatory exceptions set out in Part III of the legislation: "The legislature has created a statutory regime that has balanced the rights for access and privacy, and in so doing has created a number of specific mandatory exemptions from disclosure, including personal information, as this term is defined under the Act." The balance inherent in access and privacy legislation, however, is that which exists between the access to information provisions of the legislation and the protection of privacy provisions set out in Part IV of the *ATIPPA*. These latter provisions operate to limit the extent and means by which public bodies can collect personal information as well as the extent to which they can use and disclose that information. As such, these provisions place a positive obligation on each public body to prevent the unauthorized collection, use and disclosure of personal information in its custody or under its control. Indeed, this intent is expressed as a specific purpose of the *ATIPPA* (see section 3(1)(d)). The protection of privacy provisions of the *ATIPPA* are proactive in nature and need not be associated with an access to information request. In fact, the only reference to an "applicant" in Part IV is with respect to an individual's right to have their personal information corrected. The access to information provisions, on the other hand, are reactive in that they are not engaged until an "applicant" (a defined term in section 2) has filed a formal request for access to a record under section 8.

[47] These two aspects of the *ATIPPA* are reflected in the title and, in most respects, operate quite independently from each other. It is important to recognize, however, that with respect to personal information they often overlap. It is at this point that the mandatory exception set out in section 30 becomes important. Section 30 operates to limit the release of personal information with respect to an access to information request, thereby allowing a public body to respond to such a request appropriately while still maintaining its obligations under Part IV. I note here that section 30 does not prevent the release of personal information, but instead limits such release to situations captured by section 30(2). Section 30, therefore, provides a connection between the access and privacy provisions of the *ATIPPA*, and in so doing balances the otherwise seemingly contradictory purposes of the legislation as set out in section 3. As such, the balance does not exist within the access provisions, as articulated by Memorial, but instead exists between those provisions and the protection of privacy provisions. Section 30 simply operates to bridge two of the purposes of the *ATIPPA*: to give the public a right of access to records and to protect individual privacy. As further support on this point, I note as well that section 39(1)(a) of Part IV of the *ATIPPA* specifically allows personal information to be disclosed "in accordance with Parts II and III." In other words, the *ATIPPA* expressly allows personal information to be disclosed to an applicant in response to an access to information request, in accordance with section 30(2) for example, without having to contravene the protection of privacy provisions.

[48] Memorial has argued that the position of this Office that the *ATIPPA* creates a presumption in favour of a right of access serves to prevent the twin purposes of the legislation from being met, because parts of the *ATIPPA* would be reviewed in isolation. I disagree. Based on the structure of the *ATIPPA*, as I have described above, I believe that a presumption in favour of access in no way detracts from the protection of privacy provisions of the legislation. First, access and privacy provisions often operate independently of each other. Many access requests, for example, involve records that do not include personal information and, as such, protection of privacy is not at issue. On the other side, a public body's obligation to limit the collection, use and disclosure of personal information exists regardless of whether an access to information request has been submitted. Second, it is only when personal information is being requested under the access provisions that the twin purposes may overlap and, as I have indicated, section 30 operates to balance any conflict that may otherwise exist in these circumstances. Even within

section 30, there are numerous situations where personal information may be disclosed, providing further support for a presumption in favour of disclosure within the overall scheme of the *ATIPPA*.

[49] In further support of the points I have raised above, it is useful to look to the Federal access and privacy regimes. At the Federal level, the access and privacy statues (the *Access to Information Act*, R.S. 1985, c. A-1 and the *Privacy Act*, R.S. 1985, c. P-21) are separate and, as such, operate independently of each other. However, it is important to note that section 19 of the *Access to Information Act*, dealing with the disclosure of personal information, expressly refers to the definition of personal information in section 3 of the *Privacy Act*. In addition, section 19(2)(c) states that a government institution may disclose personal information if "the disclosure is in accordance with section 8 of the *Privacy Act*." Section 8 of the *Privacy Act* sets out a number of situations where personal information may be disclosed. Section 19 of the *Access to Information Act* and section 8 of the *Privacy Act* are comparable to sections 30 and 39 of the *ATIPPA*, respectively. As with the access and privacy regimes in this Province, these regimes at the Federal level normally operate in isolation from each other, but clearly interrelate in response to an access to information request involving personal information.

[50] The Supreme Court of Canada has provided a very useful discussion on the interrelationship of these two Federal statutes. In *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (S.C.C.), [1997] 2 S.C.R. 403, La Forest J. said the following:

> *45 This appeal involves a clash between two competing legislative policies -- access to information and privacy. … Recognizing the conflicting nature of governmental disclosure and individual privacy, Parliament attempted to mediate this discord by weaving the Access to Information Act and the Privacy Act into a seamless code. In my opinion, it has done so successfully and elegantly. While the two statutes do not efface the contradiction between the competing interests -- no legislation possibly could -- they do set out a coherent and principled mechanism for determining which value should be paramount in a given case.*

I believe that like the Federal statutes, the *ATIPPA* provides a successful mechanism, particularly through the operation of sections 30 and 39, which allows a presumption in favour of disclosure

while still protecting privacy where it is appropriate to do so. In this regard, I believe that the legislature in this province has successfully struck the appropriate balance.

[51] In support of its arguments, Memorial refers to the Supreme Court of Canada in *Rizzo*. Specifically, Memorial is relying on the Court's direction that legislation must be interpreted as a whole. At paragraph 21 in *Rizzo* the Supreme Court said:

> *21 Although much has been written about the interpretation of legislation … Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:*
>
> > *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

[52] I agree fully with the Supreme Court on this point. In fact, my predecessor relied on *Rizzo* in Report 2007-003. I do not agree, however, with Memorial's claim that a bias in favour of a right of access is at odds with the direction of the Supreme Court of Canada. Indeed, I believe that the direction provided by the Court in *Rizzo* clearly supports a presumption in favour of disclosure. The *ATIPPA*, by its very nature, has been passed by the legislature and proclaimed into force for the very purpose of providing access to information, while at the same time maintaining an appropriate level of privacy protection, for the citizens of this Province.

[53] When the words of the *ATIPPA* are read in its entire context harmoniously with the scheme and object of the *Act* and the intention of the legislature, it is clear that the legislation is meant to promote the disclosure of information. In other words, under the authority of the *ATIPPA* public bodies must as a general rule provide access to information and only protect what is absolutely necessary, rather than deny access and only disclose what is absolutely necessary. As I have previously indicated, this clear presumption in favour of disclosure in no way diminishes or conflicts with the protection of privacy provisions. As such, I do not accept that the position of this Office "may lead to unsupportable interpretations of the Act's definitions." With respect to Memorial's assertion that this Office is reviewing parts of the legislation in isolation, it is

important to note that parts of the *ATIPPA* do, in certain respects, operate independently. As I have said, Part IV can operate independently of Parts II and III, thereby allowing the twin purposes of the legislation to be met. In the event of a request for access to personal information, where the respective parts of the *ATIPPA* do overlap, the operation of sections 30 and 39 continue to allow the twin purposes of the *ATIPPA* to be met. Put simply, the legislation promotes disclosure while allowing the protection of personal information where it is appropriate and reasonable.

[54] In the case at hand, I note as well that the Applicant is seeking, among other things, access to her own personal information. The presumption in favour of disclosure is even more evident in this situation. One of the express purposes of the legislation (see section 3(1)(b)) is to provide individuals with a specific right of access to their own personal information as well as the right to request correction of that information. In addition, sections 7(1), 30(2)(a) and 35(1) support this purpose:

> *7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *30. (1) The head of a public body shall refuse to disclose personal information to an applicant.*
>
> *(2) Subsection (1) does not apply where*
>
> *(a) the applicant is the individual to whom the information relates;*
>
> *35. (1) An applicant who believes there is an error or omission in his or her personal information may request the head of the public body that has the information in its custody or under its control to correct the information.*

2. Section 21

[55] Memorial has withheld portions of information from the Applicant under authority of section 21 of the *ATIPPA*. This information appears on pages 7, 109 and 110 of the responsive record.

Section 21 is a discretionary exception which sets out a protection against disclosure of information subject to solicitor-client privilege as follows:

> *21. The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is subject to solicitor and client privilege; or*
>
> *(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.*

[56] In all three instances, Memorial relied on section 21(b) to withhold the information. On page 7 of the record Memorial also relied on section 21(a), which I will deal with shortly. Section 21(b) protects legal opinions provided by a "law officer of the Crown." While the "Crown" is not defined in the *ATIPPA*, it is defined in the *Interpretation Act*, R.S.N.L. 1990, c. I-19, as "the Crown in right of the Province of Newfoundland and Labrador." Section 21(b), therefore, protects legal opinions provided by lawyers employed by the Crown, commonly referred to as government lawyers.

[57] At pages 7 and 109 of the responsive record, Dr. Katz makes reference to two private sector lawyers. Obviously, section 21(b) would not apply to any legal opinions provided by these or any other lawyers employed by organizations other than government. At page 110, the information being withheld under section 21(b) is not attributed to a lawyer. This information is instead referred to as the "Administration's Response." There is no indication, therefore, that this information constitutes legal advice in the context of section 21. Even if I were to assume that the "Administration" of Memorial included in-house counsel, the information at issue on page 110 would not invite the protection of section 21(b). The *Memorial University Act*, R.S.N.L. 1990, c. M-7, expressly states at section 38.1(2) that Memorial is not an agency of the Crown:

> *38.1 (2) Notwithstanding paragraph 2(1)(a) of the Auditor General Act, the university is not an agency of the Crown for the purpose of that Act or any other purpose.*

Clearly, any lawyer employed by Memorial is not a "law officer of the Crown."

[58] The only other alternative that may invite the protection of section 21(b) in this case is that Memorial sought and received advice from a government lawyer. However, there is no indication within the responsive record or within Memorial's submission that this is the case. As such, I must conclude that section 21(b) does not apply to any of the information withheld from the Applicant.

[59] I note here that in April of 2008 an official with this Office sought clarification on this issue. In an e-mail dated 25 April 2008, Memorial's designated representative on this file was asked to clarify Memorial's use of section 21(b). There was no response to this e-mail. In a letter dated 5 May 2008 to this same representative, the official with this Office again referred to the April e-mail. Again, no clarification was provided by Memorial. I note as well that in its submission the only reference that Memorial made to section 21 was in relation to its response to Dr. Panjabi's initial request: "Some information was redacted pursuant to s. 21, on the basis that the exemption for solicitor client privilege was engaged." Memorial provided no reference to, nor any evidence in support of, its use of section 21(b). As such, Memorial has failed to meet its burden of proof as mandated by section 64 of the *ATIPPA*. As I said in my Report A-2008-012, "…if the head of a public body cannot satisfy the Commissioner (or the Court, on an appeal) that its decision is the right one, then that decision will not be upheld. It is therefore critical to the proper operation of the *Act* that a public body put sufficient effort into articulating the reasons for its decisions." Based on the above, it is obvious that Memorial did not put sufficient effort into justifying its use of section 21(b).

[60] As previously indicated, Memorial also relies on section 21(a) to redact information on page 7 of the responsive record. While section 21(b) is specific to legal opinions provided by Crown lawyers, section 21(a) protects in more general terms all information that is subject to solicitor-client privilege. In considering the application of solicitor-client privilege, both my predecessor and I have adopted the criteria established by the Supreme Court of Canada in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. In that case, the Court stated that a document must meet the following criteria in order for solicitor-client privilege to apply:

1. it is a communication between a solicitor and client,
2. which entails the seeking or giving of legal advice, and
3. which is intended to be confidential by the parties.

As my predecessor stated in Report 2007-015, "[i]f all three criteria are met, the privilege is engaged and section 21 may be applied…In the absence of one or more of the criteria, a public body cannot rely on the exception, thereby upholding the right of access."

[61] The first criterion set out in *Solosky* anticipates that in order for the privilege to exist there must be a solicitor and a client who have communicated with each other. In the case at hand, a lawyer has been identified in connection with the information redacted on page 7. As such, the existence of a solicitor has been identified. With respect to the client, I note that Dr. Katz was retained under a contract to conduct an investigation and to report her findings to the President. Section 2(e) of the *ATIPPA* states that an "employee" of a public body "includes a person retained under a contract to perform services for the public body." As such, for the purposes of this review, Dr. Katz was an employee of Memorial, which in turn was the client for the purposes of section 21(a). Given that the communication in this case was between the solicitor and Dr. Katz, I accept that the first criterion in *Solosky* has been met. Based on the information before me, I also accept that the information redacted on page 7, in accordance with section 21(a), entails the seeking and giving of legal advice, as anticipated by the second criterion. Application of the third criterion, however, warrants more detailed analysis.

[62] The information claimed by Memorial to be protected by section 21(a) appears in Chapter One of the Katz Report under the heading "Confidentiality and Privacy Concerns." The majority of this section had been previously released to the public and to the Applicant, including the comment by Dr. Katz that, from her perspective, her entire Report "…is submitted in confidence to the President [of Memorial]." On its face, therefore, it appears that Dr. Katz, who I have previously determined is the employee of the client, intended the information to be confidential, however, as an employee, Dr. Katz's intention is irrelevant. As an employee, Dr. Katz does not have the ability or the right to claim or waive privilege. The privilege belongs to the client

(Memorial) and only the client can waive privilege. Therefore, we must look to the actions of Memorial to determine whether the third and final criterion set out in *Solosky* has been met.

[63] The opening paragraph of this section of the Katz Report references a public statement made by the President. This paragraph was also previously released to the public and the Applicant and provides as follows:

> *In the press release of January 13, 2006, [the President of Memorial] told the community, "The results of the investigation will be made public, except for those aspects that the investigator concludes are necessary to withhold in order to protect privacy."*

[64] The information redacted under section 21(a) appears in the paragraph immediately following this opening paragraph. I believe it is reasonable to conclude, therefore, that Dr. Katz included this information in her Report under the full understanding that it may be released to the public. The only exception to public release articulated by the President is with respect to information that must be withheld in order to protect privacy, which is not at issue with respect to the application of section 21. For guidance on this issue I have looked to the Supreme Court of Newfoundland and Labrador Trial Division. Chief Justice Green, in *Imperial Tobacco Company Ltd. v. Newfoundland and Labrador (Attorney General)*, 2007 NLTD 172, considered a claim of solicitor-client privilege under authority of the prior access legislation for this province: the *Freedom of Information Act*, RSNL 1990, c. F-25. In that case, Government issued a news release in which it disclosed the existence of an agreement between itself and a named law firm as well as certain details contained within that agreement. Chief Justice Green concluded, at paragraph 102, that Government's actions in this regard are "…inconsistent with the actions of a litigant who intended to keep the terms of its fee arrangements with its lawyer confidential." Chief Justice Green went on to say the following at paragraphs 107 and 108:

> *107 The bare self-serving ex post facto assertion of an intention to maintain confidentiality, in the knowledge that an opposing party has claimed that actions of the party claiming privilege show that confidentiality was not intended or that the privilege has been waived, should not be given much weight. As Wigmore has stated: "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation". (8 Wigmore, Evidence*

> *(McNaughton rev. 1961 at para. 2327)). This is especially so when it is being asserted after the fact in the face of events that suggest a contrary conclusion. The actions of the privileged party in how he or she actually treated the information will generally be a much better basis for inferences of intention.*
>
> *108 In Wigmore's words again:*
>
> *There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder." (para. 2327)*

[65] Notwithstanding the comments of Dr. Katz with respect to her intentions of confidentiality, she submitted her report to Memorial with the understanding that it would be released to the public (with the caveat regarding the protection of personal privacy). However, as discussed above, the privilege did not belong to Dr. Katz, but to Memorial. When Memorial made the above noted statement with respect to the release of the Katz Report, the Report had not been finished or submitted to Memorial. Memorial had no way of knowing exactly what information would appear in the Katz Report. I am hesitant to conclude that Memorial, by making such a general statement near the beginning of the process, could waive privilege with respect to something they had yet to see. Therefore, I find that in making the general statement that the report would be released to the public with the exception of information that would compromise personal privacy, Memorial did not waive their privilege. As such, the third and final criterion set out by the Supreme Court of Canada has been met and section 21(2) applies to some of the information found on page 2 of the responsive record.

[66] It is also important to note here that on page 3 of the responsive record, Memorial has redacted the name of a law firm as well as the name of a lawyer employed by that firm. In this regard, I have looked to the conclusions of my predecessor in his Report 2007-015, which also involved a request from Dr. Panjabi to Memorial. In that Report, Dr. Panjabi requested, among other things, access to the names of all persons who have seen, had access to or been provided with an uncensored version of the Katz Report. Memorial denied access under authority of section 30(1), but several months into the Review process attempted to claim section 21. While my predecessor concluded that Memorial had claimed this exception much too late in the process

and, therefore, could not rely on it to withhold information, he did go on to provide a detailed discussion on solicitor-client privilege and determined that even if he had accepted the late exception, the names of the individuals would not be considered as information subject to the privilege:

> *[46] In the case at hand, the information in question does not even constitute a communication, let alone a confidential communication between a solicitor and a client in the context of seeking legal advice. The information is merely a list of names and in no way meets any of the three criteria endorsed by the Supreme Court of Canada. I would consider this information to be the factual information that exists independently of a communication, as articulated by Chief Justice Green in Imperial Tobacco Company Ltd. I am also guided on this point by the British Columbia Supreme Court in Municipal Insurance Association of British Columbia v. British Columbia (Information and Privacy Commissioner) (1996), 143 D.L.R. (4th) 134. Holmes J., at paragraph 27, states that*
>
> > *[27] The terms of a solicitor/client relationship are privileged, although the existence of the relationship in itself is not.*
>
> *[47] On a similar note, the Federal Court of Appeal, in discussing the severability of a record that is subject to solicitor-client privilege, said that certain general information may be disclosed. In Blank v. Canada (Minister of Justice) (2004), 244 D.L.R. (4th) 80, Létourneau J.A. said at paragraph 66 that*
>
> > *[66] …general identifying information such as the description of the document, the name, title and address of the person to whom the communication was directed, the closing words of the communication and the signature block can be severed and disclosed. As this Court pointed out in Blank, at paragraph 23, this kind of information enables the requester "to know that a communication occurred between certain persons at a certain time on a certain subject, but no more".*
>
> *If the intent of Memorial in denying Dr. Panjabi access to the names is to avoid disclosing the existence of a solicitor-client relationship or the fact that communications may have taken place with certain individuals, it cannot rely on section 21 to do so.*

[67] I note that in response to Report 2007-015, Memorial decided to follow the recommendation of this Office and disclose the names at issue, stating that it is committed to upholding the spirit and letter of the *ATIPPA*. It is disappointing, therefore, that less than one year after issuing Report 2007-015, Memorial has again denied access to the identity of a lawyer and law firm,

claiming that it is solicitor-client privileged. These actions serve only to frustrate the rights of the applicant and to prolong the Review process.

3. Section 30

[68] Section 30(1) states:

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

[69] Section 2(o) defines personal information as follows:

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

This definition includes *any* recorded information about an identifiable individual; the list that follows merely serves to provide examples of what *could* constitute personal information. These

specific examples are not exhaustive and only serve to illustrate the principal types of information legislators had in mind when drafting the provision.

[70] Memorial argues that the definition of "personal information" is "undeniably expansive". I agree with this characterization. However, section 30(2) provides numerous instances wherein personal information can be disclosed. Memorial states that it considered these exceptions and released personal information where warranted, in accordance with section 30(2). Memorial relies on *Hayes v. New Brunswick (Minister of Intergovernmental Affairs & International Relations),* 2007 NBQB 47 to support their position that names, including those of public body employees, are included in the meaning of "personal information." However, it is important to note that while the definition of "personal information" in the New Brunswick *Right to Information Act* ("*RTIA*") is identical to the *ATIPPA* definition, the *RTIA* has no section that is equivalent or even similar to section 30(2) of the *ATIPPA*. Therefore, under the *RTIA*, if information is personal information, there are no circumstances under which it can be disclosed. This is certainly not the case with the *ATIPPA*, and, of particular importance to the case at hand, the *ATIPPA*, in sections 30(2)(f) and 30(2)(h), specifically provides for the release of some information that is contained in the Katz Report. As such, it is my opinion that comparisons between the *RTIA* and the *ATIPPA* are not valid when it comes to a determination of the appropriate circumstances under which personal information can be released.

[71] Memorial also takes the position that "other information, from which one can infer the identity of a referenced individual, must be redacted or the protection of personal information provisions would be meaningless." I agree, except where the Applicant was the source of the information.

[72] While Memorial is quite right in its assertion that there is no "harms test" in the legislation and no discretion to apply a "reasonableness test" or a balancing of access and privacy interests, legislation should also be interpreted in a manner that avoids absurdity. Ruth Sullivan in *Sullivan and Dreigder on the Construction of Statutes* makes the following comment on page 247:

> *From the earliest recognition of the golden rule, contradiction and internal consistency have been treated as forms of absurdity. Legislative schemes are*

> *supposed to be coherent and to operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme may appropriately be labeled absurd.*

With respect to the current view of absurdity, Sullivan writes at pages 239 - 240:

> *Judges test consequences against a range of considerations:*
>
> - *Norms of rationality, such as logical coherence and internal consistency*
> - *Common law norms, such as rule of law*
> - *Shared community norms, such as reasonableness and fairness*

[73] Absurdity would certainly be the result if an applicant were denied access to information that she supplied to the public body herself. This is especially true in a case like this one, where Dr. Panjabi's correspondence (and in some instances, direct quotes) to Memorial was relied on, in part, to form Dr. Katz's opinions and conclusions. As mentioned, Dr. Panjabi did not take part in this investigation, and her correspondence was not sent to or received from Memorial as part of the investigation. When this investigation was initiated, Memorial provided this correspondence to Dr. Katz. It is absurd that the *ATIPPA* should be interpreted to prevent Dr. Panjabi from having access to this information that she herself provided to Memorial for purposes completely unrelated to the investigation. It is only logical and reasonable that Dr. Panjabi be given full and unredacted access to information that she herself provided to Memorial. To so otherwise would certainly produce "confusion or inconsistency or undermine the efficient operation" of the *ATIPPA.*

[74] I find support for this position in Order 01-53 from the British Columbia Information and Privacy Commissioner's Office. In that case, the Applicant requested copies of records created during a School District's investigation of the Applicant's complaint about another employee. **This included the Applicant's own submissions and interview notes**. Before I continue, I would like to point out that although British Columbia's *Freedom of Information and Protection of Privacy Act* ("*FOIPPA*") permits a public body to release personal information where there would be no unreasonable invasion of a third party's privacy, section 22(3)(d) of the *FOIPPA* creates a rebuttable presumption that disclosure of personal information relating to employment, occupational or educational history is an unreasonable invasion of personal privacy. Therefore, unless the applicant can prove that release of this type of information is not an unreasonable

invasion of privacy, it must be withheld. While the *FOIPPA* does allow for some discretion where the release of personal information is concerned, I believe the Commissioner's findings with respect to this matter are informative:

[75] In Order 01-53, the British Columbia Commissioner stated as follows:

> *Accordingly, in this case, the applicant's knowledge of the third party's identity and the allegations that she made against the third party is, in my view, a relevant circumstance that favours disclosure of that which is already known to her. I cannot, therefore, agree with the School District's contention that it should (for example) sever the applicant's own letters to the School District in which she initially made allegations that were later found to be unsubstantiated. Regardless of whether she has retained a copy of those letters**, it would to my mind be absurd to withhold the very allegations that the applicant made to the School District.** The observation applies to the other disputed records in which the allegations are recorded or described.*
>
> [Emphasis added]

Therefore, despite the fact that the Applicant did not provide evidence to rebut the presumption that release of the information would be an unreasonable invasion of privacy (as required by the *FOIPPA*), the Commissioner found that the information should nonetheless be released, simply because the applicant was the source of the information. To avoid absurdity, the Commissioner essentially "read in" this additional circumstance favouring disclosure despite there being no express statutory basis for this interpretation (although there is the general consideration of all relevant circumstances).

[76] Likewise, in Ontario Order M-444, the issue was whether certain information provided by the Applicant to the police in the course of an investigation (which, under Ontario access legislation is deemed to be an unreasonable invasion of privacy) should be released to the Applicant. The Inquiry Officer stated:

> *Turning to the presumption in section 14(3)(b), the evidence shows that the undisclosed information was compiled and is identifiable as part of an investigation into a possible violation of law (namely, a murder investigation) and for that reason, it might be expected that the presumption in section 14(3)(b)* [unreasonable invasion of privacy*] would apply.*

> *However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the Act is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, nondisclosure of this information would contradict this primary purpose.*

[77] Again, despite a clearly legislated presumption that disclosure of certain information would be an unreasonable invasion of privacy, the Inquiry Officer found that in order to avoid absurdity, the information should be disclosed to the Applicant.

[78] In Nova Scotia Review Reports FI-07-27, and FI-07-72, the above noted Ontario order was relied on to find that information which an applicant had provided could not be withheld from the applicant in the context of an access to information request. In Review Report FI-07-72, the Review Officer stated:

> *Where, as here, the personal information is largely information provided by the Applicant him/herself, once third party information and identity have been severed, it cannot be said that it should be shielded from access because it was supplied in confidence or would reveal a confidential source of law-enforcement.*

[79] Additionally, upon close examination of the wording of section 30(1), it is my opinion that providing personal information to an Applicant where there is clear and objective evidence (for example, because the information was originally provided by the Applicant) that the information and the person to whom it pertains is already known to the Applicant is not a "disclosure". Therefore, there is no violation of section 30(1) in cases such as these. In Report 2007-003, my predecessor stated as follows:

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

> ***1. The act or process of making known something that was previously unknown; a revelation of facts…2. The mandatory divulging of information to a litigation opponent according to procedural rules…***
>
> *[137] While the second part of this definition defines the term in its legal context, the first part provides a more general understanding of how the term should be interpreted. The Concise Oxford English Dictionary, 10th Edition, provides a similar definition: "make (secret or new information) known."* ***A necessary component of a disclosure of information, therefore, is that the information was not previously known to the intended recipient. By association, I do not believe that providing personal information to an Applicant where that information is already known to the Applicant, or that is readily available to the Applicant, is actually a disclosure as anticipated by section 30*****(1)…**
>
> [Emphasis added]

[80] I agree with this statement, however, I am cognizant of the fact that it is often difficult to know or to make a judgment with respect to exactly what information an applicant is aware of. Therefore, it is my opinion that the personal information of another individual can only be released to an applicant where there is objective, concrete, and clear evidence that the information is already known to an applicant, or is readily available to an applicant. In this case, the applicant has provided the information to the public body and thus already knows the information and the individual(s) involved. Where Dr. Panjabi has not provided the information to Memorial, then to the extent that Dr. Panjabi's particular knowledge would enable her to identify particular individuals referred to in the Report, withholding certain identifying information is justifiable. However, in contexts where she herself has supplied the information about the individual, it is clear that Dr. Panjabi already knows who the individuals are and what the information is, then the information cannot be withheld. In the circumstances of Report 2007-003, the personal information at issue was published author's names.

[81] In situations such as these, the evidence with respect to an applicant's knowledge or the availability of information is objectively clear, and it is absurd to withhold information in cases like these. Referring back to my discussion with respect to absurdity, in my view, this is the best and most appropriate way to interpret section 30 so as to avoid absurdity, in terms of both the logical outcome of the situation and the plain meaning of the word "disclose". Further, one of the purposes of the *ATIPPA* is to give individuals a right of access to information. While another

equally important purpose is to protect personal privacy, in the case at hand, this is not really at issue, because the information that is now in the possession of Memorial (and to which access is sought) originated with Dr. Panjabi or was originally intended for Dr. Panjabi and was sent to her in the past (for example, correspondence to her from officials at Memorial).

[82] Memorial states that in Report 2007-003, "the OIPC did not address the Black's Law Dictionary definition of 'disclosure' which is the more general 'a revelation of facts.' However, it is apparent from the above quote that this definition was addressed, and further, that the very first part of the Black's Law Dictionary definition is "The act or process of making known something that was previously unknown…" Further, when one reviews the definition of "revelation" in The Concise Oxford English Dictionary, 10th Edition, it is defined as "a surprising disclosure; the revealing of something previously unknown." "Reveal" is similarly defined as "disclose (previously unknown or secret information)." Therefore, it appears to me that a "plain meaning" interpretation of section 30(1) also allows for the disclosure of personal information to an applicant where it is objectively clear that the applicant already knows what the information is and to whom it pertains, such as in this instance where the Applicant was the initial source of the information.

[83] Further, Driedger's "Modern Principle" of statutory interpretation, adopted by the Supreme Court in *Rizzo* and relied on by Memorial is explained in the following manner by Sullivan in *Sullivan and Dreigder on the Construction of Statutes* at page 3:

> *At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms; it is reasonable and just.*

[84] I believe that the foregoing interpretation of section 30, and of the meaning of "disclose" in particular, is the most appropriate interpretation given the above noted statement by Sullivan. This interpretation gives effect to an important and stated purpose of the *ATIPPA*: to give

individuals a right of access. This interpretation is also in keeping with the presumption in favour of disclosure and avoids the absurdity that is apparent when one considers the alternative: that the Applicant is not entitled to information that has been provided to a public body by the applicant him or herself. I have also considered another important purpose of the legislation, that of protecting personal privacy, by stating that it is only in the clearest of circumstances and where there is objective and concrete evidence of an Applicant's knowledge (as is the case here) that there is no disclosure of information.

[85] Memorial also refers to the secondary definition of "disclosure" which is "[t]he mandatory divulging of information to a litigation opponent according to procedural rules." Memorial argues that:

> *the legal obligation of disclosure, within the litigation context, would be meaningless if disclosure were interpreted to include only those documents a litigant were 'unaware of'. Similarly, protection from disclosure (of personal information) on the basis of whether an applicant personally knows the information would be equally meaningless if there [sic] an applicant's existing knowledge of, or access to, the information were to override the protection.*

[86] However, it appears to me that the secondary definition of "disclose" is not applicable in the context of an access to information request. "Disclose", as used in the *ATIPPA,* is not used in a litigation context. Disclosure, in a litigation context, has an entirely different purpose, basis and process than disclosure under the *ATIPPA,* therefore the definitions are not comparable.

[87] Memorial has also redacted Dr. Panjabi's name in several places. Memorial argues that the right of an individual to his or her own personal information is not absolute where the release of information would reveal the personal information of another individual. However, there are two separate provisions (one being section 30(2)(a) and the other being section 3) in the *ATIPPA* that clearly provide an individual the right to access his or her own personal information. While there may conceivably be circumstances where one's personal information may reveal information which must be protected under another exception, I believe these circumstances are not present in the case at hand.While the right of an individual to his or her own personal information may not be absolute, given the stated purpose of the *ATIPPA*, it will only be in exceptional

circumstances where this right will be restricted. Thus, it is clear to me that in relation to the Katz Report, Dr. Panjabi is entitled to see all instances where her name appears, unless there are clear reasons why it must be withheld under an exception in the *ATIPPA*.

[88] Further, Memorial has also redacted the names of administrators, professors and employees of Memorial. Section 30(2)(f) states that the prohibition of disclosure of personal information does not apply where "the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff." Therefore it is clear that to the extent that these people are named in connection with their position and functions as employees of Memorial, section 30(1) is not applicable and they should be released. For example, where the names appear in the context of actions undertaken by these employees in the normal course of their duties, they should be released.

V CONCLUSION

[89] I have found that there is indeed a presumption in favour of disclosure inherent in the *ATIPPA*. The legislation is meant to promote disclosure of information while allowing the protection of personal information where it is appropriate to do so. Public bodies must, as a general rule provide access to information and only protect what is absolutely necessary, rather than deny access and only disclose what is absolutely necessary. It is quite possible for Part IV to operate independently of Parts II and III thus allowing the twin purposes of the legislation to be met. When these purposes overlap (when there is a request for personal information) sections 30 and 39 continue to allow the twin purposes to be met.

[90] With respect to section 21(b), I have found that this section is not applicable to the information in the present case, as this section protects legal opinions provided by lawyers employed by the government, and there is no evidence that Memorial sought the advice of a government lawyer. Further, any lawyer employed by Memorial is not a "law officer of the Crown." With respect to section 21(a), I have found that this section is applicable to some if the information for which it was claimed. While Memorial stated at the outset that it would release

all information except that which was necessary to withhold to protect personal privacy, they could not have known what Dr. Katz would write in the report and that some of that information would be subject to solicitor client privilege. I do not think they can be said to have waived privilege in this early statement without even knowing what information the report would contain.

[91] Further, I have found that section 30 is also not applicable to some of the information for which it was claimed. Specifically, I have found that section 30 does not apply to that information which Dr. Panjabi herself provided to Memorial. In this sense, there can be no "disclosure" of the information, based upon a plain meaning and avoidance of absurdity approach to statutory interpretation.

[92] Finally, I have found that generally, wherever the name "Dr. Panjabi" or "Ranee" or "Ranee Panjabi" occurs in the Investigation Report, Dr. Panjabi is entitled to this information, as it is clearly her own personal information. Only in circumstances where another exception is clearly applicable can this information be withheld. I have not found such to be the case regarding the responsive record in this Review. I have also found that names of employees of Memorial, where they are used in connection with their position and function as Memorial employees, should also be disclosed in accordance with section 30(2)(f).

VI RECOMMENDATIONS

[93] Under the authority of section 49(1) of the *ATIPPA*, I hereby recommend Memorial University of Newfoundland release to the Applicant the information highlighted in pink on a copy of the record that is enclosed with this Report.

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

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

[96] Dated at St. John's, in the Province of Newfoundland and Labrador, this 22nd day of January 2009.

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