OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

July 7, 2009 Report A-2009-009

REPORT A-2009-009

Memorial University

Summary: The Applicant applied to Memorial University ("Memorial") under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to all e-mails, records of phone discussions, tapes and electronic communications sent to or sent by or received by a named professor during a specified time in which the Applicant was referenced or discussed in any way or context. Memorial provided information to the Applicant redacting portions of the record in accordance with sections 20 (advice and recommendation), 21(legal advice) and 30 (personal information) of the *ATIPPA*. The Commissioner determined that section 21 was applicable to the information for which it was claimed. However, it was determined that sections 20 and 30 were not applicable to some of the information for which they were claimed. Therefore, the Commissioner recommended that additional information be released to the Applicant.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as amended, ss. 2(o), 20, 21, 30; *Right to Information Act*, S.N.B. 1978, c.R-10.3.

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. 2007 NLTD 172; Newfoundland and Labrador OIPC Reports 2007-003, A-2009-002, and A-2009-009; Alberta OIPC Order 2000-028;

Other Resources Cited: Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes.* Markham, ON: Butterworths, 2002. *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] In accordance with the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request dated 16 January 2008 to Memorial University ("Memorial"), wherein she sought disclosure of records as follows:

> *All correspondence and documentation including all e-mails, records of phone discussions, tapes and any other electronic communications sent to or sent by or received by* [named professor] *during the entire period [specified] in which I am referenced, discussed in any way or in any context.*
>
> [emphasis in original]

[2] Memorial, by correspondence dated 15 February 2008, advised the Applicant that in accordance with section 16 of the *ATIPPA*, it was extending the 30 day time limit for responding to the request due to the large number of records that had to be searched. On 27 February 2008, Memorial advised the Applicant that access to the requested records had been granted in part. However, some information contained in the records was severed in accordance with section 30, section 20 and section 21.

[3] In a Request for Review dated 9 March 2008 and received in this Office on 11 March 2008, the Applicant asked that this Office review the records to determine whether additional information should be released.

[4] Attempts to resolve this Request for Review by informal means were not successful and by letters dated 24 June 2008 both the Applicant and Memorial were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47.

II PUBLIC BODY'S SUBMISSION

[5] Memorial provided my Office with a detailed submission dated 8 July 2008, which was substantially similar to the submission it provided on an earlier matter which resulted in Report A-2009-002. 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 Supreme 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."

[6] 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 provisions set out 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 Records 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."

[7] Memorial states that it does not agree 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".*

[8] 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 Supreme 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].

[9] 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 refers to *Hayes v. New Brunswick (Minister of Intergovernmental Affairs & International Relations)*, 2007 NBQB 47 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.

[10] 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."

[11] 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."

[12] 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."

[13] 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…." Memorial goes on to state that it "…has no definitive knowledge of what personal information the Applicant knows, or would have access to."

[14] 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 (N.S.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 <u>are personal information relating to employment history</u>. Their disclosure is, therefore presumed to be an unreasonable invasion of privacy.*
>
> [Emphasis added by Memorial]

[15] Memorial also refers to the British Columbia Supreme Court decision 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.*
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> [Emphasis added by Memorial]

[16] Memorial concludes its submissions with respect to the application of section 30 by discussing the right of an applicant to access the applicant's 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.

[17] 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.*

[18] With respect to section 21, Memorial states that it redacted 5 pages in their entirety as these pages were prepared for the express purpose of dealing with a specified legal matter in which the university was involved.

[19] Regarding section 20, Memorial states that it invoked this exception to protect policy advice or recommendations, and did so carefully, redacting "from each record only the information which, if disclosed, would reveal policy advice or recommendations."

III APPLICANT'S SUBMISSION

[20] The Applicant, in her submission, states that she is only seeking her own personal information, to which she is entitled under the *ATIPPA*. She argues that in denying her access to her personal information, Memorial is "violating the Privacy legislation and practicing concealment and evasion…." The Applicant also states "I am very apprehensive as well that Memorial University has embarked on such a regressive policy with respect to your own Privacy Office and appears uncaring about displaying defiance and even arrogance against legally mandated authorities."

IV DISCUSSION

[21] As mentioned, Memorial's submission in this case is substantially similar to one it provided on another matter, which resulted in Report A-2009-002. All of Memorial's arguments were dealt with in detail in that report and do not need to be repeated here. I would also like to note that Memorial did not have the benefit of additional discussion on the provisions in section 30 found in Report A-2009-002 when it made its submission in this case.

[22] Memorial's argument with respect to the "twin purposes" of the *ATIPPA* as well as its argument that the *ATIPPA* does not create a "bias" in favour of disclosure were first advanced in the matter that led to the issuance of Report A-2009-002. These arguments were fully explored in that Report and need not

be dealt with again. It is sufficient for me to say that in Report A-2009-002, I found that the *ATIPPA* does indeed create a presumption (rather than a bias) in favour of disclosure and that this presumption in favour of access in no way detracts from the protection of privacy provisions of the legislation. Therefore, I must disagree with Memorial's arguments in this respect.

[23] I will now deal with the exceptions to disclosure claimed by Memorial.

1. Section 20

[24] Memorial has withheld some information from the Applicant on the basis of section 20(1), which provides as follows:

> *20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
>
> *(a) advice or recommendations developed by or for a public body or a minister; or*
> *(b) draft legislation or regulations.*

[25] Section 20 was most recently dealt in Report A-2009-007. In that Report, I stated as follows:

> *1. The statement by my predecessor in Report 2005-005 that "the use of the terms 'advice' and 'recommendations' . . . is meant to allow public bodies to protect a suggested course of action" does not preclude giving the two words related but distinct meanings such that section 20(1)(a) protects from disclosure more than "a suggested course of action."*
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> *2. The term "advice or recommendations" must be understood in light of the context and purpose of the ATIPPA. Section 3(1) provides that one of the purposes of the ATIPPA is to give "the public a right of access to records" with "limited exceptions to the right of access."*
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> *3. The words "advice" and "recommendations" have similar but distinct meanings. "Recommendations" relate to a suggested course of action. "Advice" relates to an expression of opinion on policy-related matters such as when a public official identifies a*

matter for decision and sets out the options, without reaching a conclusion as to how the matter should be decided or which of the options should be selected.

4. Neither "advice" nor "recommendations" encompasses factual material.

[26] In the present case, it is my opinion that some of the information that has been redacted pursuant to section 20 does not fit this definition and should therefore be released.

2. Section 21

[27] Memorial has withheld several pages from the Applicant pursuant to section 21 of the *ATIPPA*. This information appears on pages 182-187 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.

[28] In Report A-2008-002, I found that section 21 contemplated both legal advice privilege and litigation privilege. In the present case, we are concerned with litigation privilege as Memorial states that the record at issue was prepared in response to a legal matter in which Memorial was involved. In Report A-2008-002, at paragraphs 29 to 38, litigation privilege was discussed at length and that discussion need not be repeated here. In that Report, I found that litigation privilege, as an exception to disclosure, applies only to those documents created for the dominant purpose of pending or apprehended litigation; it does not apply to documents merely gathered or copied for the dominant purpose of litigation.

[29] It is clear to me, from an examination of the record, that the record was created for the purpose of responding to a legal matter. As such, I am satisfied that it was created for the purpose of litigation.

3. Section 30

[30] Section 30(1) states:

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

[31] 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 specific examples of what constitutes personal information. The list is not exhaustive and only serves to illustrate the principal types of information legislators had in mind when enacting the provision.

[32] As noted, Memorial's arguments in this case with respect to personal information were previously put forward in another, earlier, matter involving Memorial. As these arguments were dealt with at length at that time (see Report A-2009-002, paragraphs 68 to 88), I will not repeat myself here. To briefly summarize, in Report A-2009-002, I found that due to differences between New Brunswick's *Right to Information Act* ("*RTIA*") and the *ATIPPA,* 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.

[33] In my Report A-2009-009, while I agreed with Memorial's general statement 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 disagreed with this statement where the applicant is the source of the information. Given the meaning of the word disclose as set out in *Black's Law Dictionary* and the *Concise Oxford English Dictionary*, I concluded 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" within the meaning of the *ATIPPA.* Therefore, there is no violation of section 30(1) in cases such as these. This is also in keeping with comments made by my predecessor in Report 2007-003.

[34] Further, after review and consideration of *Sullivan and Driedger on the Construction of Statutes* and decisions from the British Columbia, Ontario, and Nova Scotia Information and Privacy Commissioner's offices, I concluded that failing to provide to an applicant (as part of an access to information request) information which he or she originally provided to the public body would result in an absurdity, and legislation should be interpreted to avoid absurd results. Therefore, the meaning of "disclose" in section 30 of the *ATIPPA* should be interpreted to avoid the absurdity that would result should an applicant be denied access to information of which he or she was the original source.

[35] I also concluded in Report A-2009-002 that 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 is only in exceptional circumstances where this right will be restricted.

[36] In the present case, some of the information that was redacted was provided by the Applicant and should therefore be released. Further, there is also other information that was redacted pursuant to section 30 which does not appear to be personal information and should therefore be released.

V CONCLUSION

[37] It remains the view of this Office that there is indeed a presumption in favour of disclosure inherent in the *ATIPPA*. However, this presumption in no way detracts from the protection of privacy aspect of the legislation. The *ATIPPA* is meant to promote disclosure of information while requiring the protection of personal information.

[38] Regarding section 20, I have found that not all of the information for which section 20 has been claimed relates to a course of action that will ultimately be accepted or rejected by its recipient. Nor does it relate to an expression of opinion on policy-related matters. Information which does not meet these criteria should, therefore, be disclosed to the Applicant.

[39] With respect to section 21(a), I have found that this section is applicable to the information in the present case as the record was created for the dominant purpose of litigation.

[40] Further, I have also found that section 30 is also not applicable to some of the information for which it was claimed.

VI RECOMMENDATIONS

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

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

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

[44] Dated at St. John's, in the Province of Newfoundland and Labrador, this 7th day of July 2009.

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