



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2009-010

September 22, 2009

Memorial University of Newfoundland

Summary:

The Applicant, Dr. R.K.L. Panjabi, applied to Memorial University ("Memorial") under the *Access to Information and Protection of Privacy Act* (the "ATIPPA") for access to all e-mails, notes, tapes and electronic communications sent to or received by [named professor] from the time he assumed [position title] until 16 January 2008 in which Dr. Panjabi was referenced or discussed in any way or context. Memorial provided information to Dr. Panjabi 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 some of the information for which it was claimed, however, he refused to consider Memorial's late claim of section 21 with respect to other material. It was also determined that sections 20 and 30 were not applicable to some of the information for which they were claimed. Therefore, the Commissioner recommended that this information be released. The Commissioner also commented on the exercise of discretion by a public body, and determined that Memorial had exercised discretion correctly in this case.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A – 1.1, as amended, ss. 2(o), 21, 23, 30, *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165.

Authorities Cited:

J.R. Moodie Co. v. Minister of National Revenue, [1949] C.T.C. 61, *Ontario (Ministry of Transportation) v. Cropley* (2005) 34 Admin. L.R. (4th) 12 (Ont. C.A.), *Thomson v. Canada (Department of Agriculture)*, [1992] 1 S.C.R. 385

(S.C.C.), 3430901 *Canada Inc. v. Canada (Minister of Industry)* (2001) 282 N.R. 284 (Fed. C.A.), *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), *Canada (Attorney General) v. Canada (Information Commissioner)*, [2005] 4 F.C.R. 673 (F.C.A.), *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada* (1992) 10 C.P.C. (3d) (B.C.S.C.), *Rubin v. Canada (Canada Mortgage and Housing Corp)* [1989], 1 F.C. 265 (F.C.A.), *Kelly v. Canada (Solicitor General)* (1992), 53 F.T.R. 147, *Canada (Information Commissioner of Canada) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2001 FCA 56, *Canada (Information Commissioner) v. Canada (The Prime Minister)* [1993] 1 F.C. 427 (T.D.), *Canada (Information Commissioner) v. Canada (Minister of Industry)* 2001 FCA 254 (F.C.A.); Newfoundland and Labrador OIPC Reports 2007-015, A-2008-002, A-2009-002, A-2009-007.

Other Resources Cited: The "GRIDS", Office of the Information Commissioner of Canada, November 2006, online at <http://www.infocom.gc.ca/grids/pdf/grids-e.pdf>; Access to Information Policy and Procedures Manual, Department of Justice, Government of Newfoundland and Labrador.



I BACKGROUND

- [1] In accordance with the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) Dr. Panjabi submitted an access to information request dated January 16, 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 received by [named professor] from his assumption of the [position title] (his first term) through 16 January 2008, in which I am referenced, discussed in anyway or in any context.

[Emphasis in original]

While it is not the normal practice of this Office to identify an Applicant, Dr. Panjabi has asked that I name her as the Applicant in this case.

- [2] Memorial, by correspondence dated February 13, 2008, advised Dr. Panjabi 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 March 24, 2008, Memorial advised Dr. Panjabi 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 June 23, 2008 and received in this Office on July 4, 2008, Dr. Panjabi asked that this Office review the records to determine whether additional information should be released. This Request for Review came more than 60 days after Dr. Panjabi was notified of the decision of Memorial respecting access to the records as required by section 45(1)(a), however the Commissioner exercised his discretion under section 45(1)(c) and allowed the Request for Review to be filed with this Office.
- [4] Attempts to resolve this Request for Review by informal means resulted in the provision of additional material to Dr. Panjabi on November 14, 2008. However, further attempts at informal resolution were not successful and by letters dated February 10, 2009 both 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 in accordance with section 47.

II PUBLIC BODY'S SUBMISSION

[5] Memorial provided my Office with a detailed submission dated March 13, 2009. In its submission, Memorial states that it has fulfilled its duty to assist Dr. Panjabi, reasonable searches for all responsive records were carried out, and Memorial responded openly, accurately and completely to Dr. Panjabi's request. Further, Memorial recognized that the burden of proving that a particular exception to access applies to information within the record rests with Memorial. Memorial also states that while it recognizes the statutory right of access provided in the *ATIPPA*, this right is not absolute given the exceptions set out in Part III of the Act.

[6] Memorial goes on to state that as section 20 is a discretionary exception, it is not within the Commissioner's mandate to recommend that a public body release information it is authorized to withhold. The Commissioner's function is to review the record to determine if the severed information falls within the exception that has been claimed. If so, the exercise of discretion remains with the public body. If not the Commissioner may recommend that the information be released.

[7] With respect to section 20, Memorial set out the dictionary definitions of "advice", "recommendation" and "recommend" and quoted the following passage from *J.R. Moodie Co. v. Minister of National Revenue*, [1949] C.T.C. 61:

The word "advice" in ordinary parlance means primarily the expression of counsel or opinion, favourable or unfavourable, as to the action [...]. The Minister must be satisfied "on the advice of the Board" [...]. The advice to be furnished by the Board would, then, ordinarily contemplate at least its opinion in the main question and the facts or reasons upon which it was based.

[8] Memorial also quotes the Ontario Court of Appeal in *Ontario (Ministry of Transportation) v. Cropley* (2005) 34 Admin. L.R. (4th) 12 (Ont. C.A.) at paragraph 29, which in discussing section 13 of the Ontario *Freedom of Information and Protection of Privacy Act* (similar to section 20 of the *ATIPPA*), stated as follows:

“Advice” may be construed more broadly than “recommendation” to encompass material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation.

[9] Memorial further quotes the Supreme Court of Canada in *Thomson v. Canada (Department of Agriculture)*, [1992] 1 S.C.R. 385 (S.C.C.) at paragraph 24 as follows:

The simple term “recommendations” should be given its ordinary meaning. “Recommendations” ordinarily means the offering of advice and should not be taken to mean a binding decision. I agree with the conclusion of Dubé J. of the Trial Division who noted, at p. 92, that:

The grammatical, natural and ordinary meaning of the word “recommendation” is not synonymous with “decision”. The verb “to recommend” is defined in the Oxford English Dictionary as “to communicate or report, to inform”. In Webster’s Third New International Dictionary it is defined as “to mention or introduce as being worthy of acceptance, use, or trial; to make a recommendatory statement; to present with approval; to advise, counsel”.

[10] Memorial also notes that the Federal Court of Appeal has also commented on the use of the phrase “advice and recommendations” in *3430901 Canada Inc. v. Canada (Minister of Industry)* (2001) 282 N.R. 284 (Fed. C.A.):

[B]y exempting “advice or recommendations” from disclosure, Parliament must be taken to have intended the former to have a broader meaning than the latter, otherwise it would be redundant.

[11] Memorial also referred to the discussion of section 20(1) in the Department of Justice’s *ATIPP Policy and Procedure and Manual*, noting in particular the following passage:

Section 20 is intended to allow full and frank discussion of policy issues within the public service, preventing the harm which would occur if the deliberative process were subject to excessive scrutiny, while allowing information to be released which would not cause real harm.

Policy

Section 20 may be applied by public bodies in circumstances where the withholding of a record will protect the open and frank discussion of policy issues within the public service.

- [12] With respect to section 21, Memorial quoted from Report 2006-013, in which my predecessor stated as follows:

[30] Solicitor-client privilege is a concept borne out of the common law, which is found in the ATIPPA as well as equivalent access legislation in other jurisdictions across Canada. Generally speaking, it is meant to protect communication between a lawyer and his or her client for the purpose of seeking or giving legal advice. Further, McNairn in Government Information: Access and Privacy expresses an additional aspect of this form of privilege as follows:

Solicitor-client privilege is intended to facilitate full and frank consideration and discussion of the circumstances on which legal advice is sought, so that the advice may be informed and effectual, and to facilitate the preparation of a case for trial.

[31] It is irrelevant whether the communication takes place between an "in-house" legal counsel or someone who is contracted by a public body to serve such a role, as long as such communication between the lawyer and the public body takes place within the context of a solicitor-client relationship...

- [13] Memorial also quoted the following passage from the Supreme Court of Canada in *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353:

It has long been recognized that communications between solicitor and client are protected by a privilege against disclosure...

...this Court has described the privilege as a "fundamental civil and legal right": see Solosky v. The Queen, 1979 CanLII 9 (S.C.C.), [1980] 1 S.C.R. 821, at p. 839. Thus, while at one time it was thought that the privilege belonged to the solicitor and not to his client,

there is now no doubt that the privilege belongs to the client alone. One consequence of this is that confidential communications between solicitor and client can only be divulged in certain circumscribed situations...

So important is the privilege that the courts have also stipulated that the confidentiality of communications between solicitor and client survives the death of the client and enures to his or her next of kin, heirs, or successors in title...

- [14] Memorial also noted the following comments of the Federal Court of Appeal in *Canada (Attorney General) v. Canada (Information Commissioner)*, [2005] 4 F.C.R. 673 (F.C.A.):

...solicitor-client privilege is fundamental to the Canadian legal system and is more than a rule of evidence. It has evolved into a fundamental and substantive rule of law which commands a unique status within the legal system, integral to the workings of the legal system itself...

- [15] Memorial further quoted the British Columbia Supreme Court in *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada* (1992) 10 C.P.C. (3d) (B.C.S.C.)

Solicitor-client privilege originated in the 16th century. It developed as a rule of evidence. Now, the right to communicate in confidence with one's legal advisor is considered to be a fundamental civil and legal right, founded on the unique relationship between solicitor and client: Solosky v. R (1979), [1980] 1 S.C.R. 821 at 839.

The privilege arises when there is a communication between a solicitor and his client that entails the seeking or giving of legal advice which they intend to be confidential: Solosky v. R at 837. It is a privilege the law guards with great care, interfering only when justice leaves no other alternative, and then only to the extent that is absolutely necessary: Descoteaux v. Mierzwinski, [1982] 1 S.C.R. 860 at 875. The existence of a solicitor-client relationship raises a prima facie right of privilege with respect to professional communications passing between solicitor and his client which the party seeking disclosure must rebut. It must demonstrate either that the protection does not apply to the communications or that it has been waived: International Specialized Risk Mgmt. (I.S.R.M.) Ltd. v. Farris Vaughan Wills & Murphy (1988) 24 B.C.L.R. 195 at 198-99 (S.C.).

- [16] Finally Memorial quoted the Department of Justice's ATIPP Policy and Procedures Manual, which states as follows:

The primary purpose of this exception is to put a public body on a level playing field with other persons when seeking legal advice. Section 21 gives the head of a public body the discretion to refuse to disclose legal advice and communications that are subject to solicitor client privilege or that would disclose legal opinions provided to a public body by a law officer of the Crown.

The purpose of the exception is to facilitate full and frank consideration and discussion of the circumstances on which legal advice is sought, so that the advice may be informed and effectual, and to facilitate the preparation of a case for trial.

Under solicitor client privilege, a legal advisor must refuse to disclose communications between the legal advisor and the client, unless the client consents to the disclosure. The privilege belongs to the client and can only be waived by the client.

Generally, the decision on whether it is required by law or otherwise in the public interest to waive privilege will be determined in the course of routine consultations between the client public body and the Department of Justice or designated legal advisor.

Section 21 protects information flowing in both directions between the legal advisor and the client. This means that solicitor client privilege applies to client-generated documents, as well as legal opinions. The document may be as formal as a communication between lawyer and client or as simple as notes on file made to assist the lawyer in litigation.

Section 21 is not limited to the protection of legal advice and communications between a legal advisor and a minister or public body. The client can be a third party which is not a public body under the Act, but whose privileged documents are in the custody or control of a public body, and where the client has not waived the privilege.

[17] Memorial states that of the nine items for which it has claimed section 21(a), eight are direct communications between Memorial and its legal counsel, while the other item is a document prepared in contemplation of litigation and a claim of privilege was explicitly made upon the document. Memorial submits that disclosure of all this information would “undermine the full and frank consideration and discussion of the circumstances on which the legal advice was sought.” Memorial further states that it has properly exercised its discretion and the records at issue have been appropriately withheld.

[18] With respect to section 30, Memorial quotes from Report 2005-005, wherein my predecessor made the following comments:

[78] It is noted that this section of the ATIPPA does not include a harms test. Unlike some other jurisdictions, there is no test of reasonableness when dealing with the release of personal information. In the absence of any discretion, a public body simply has to determine if information meets the definition set out in section 2(o) and, if so, they must not release it. While exceptions to this general rule are set out in section 30(2), none of them are relevant to the case at hand.

[79] The Department has invoked section 30(1) in three areas within the responsive records. Individual names were withheld from pages 22, 65 and 81. As names are included in the definition of personal information, I agree that section 30(1) applies and the information specific to this section must be withheld

[19] Memorial then goes on to again quote from the Department of Justice's ATIPP Policy and Procedure Manual:

Summary

Section 30 is a mandatory exception which limits the disclosure of an individual's personal information to a third party.

Subsection 30(1) provides a mandatory exception to the general right of access established by section 7 of the Act. Subsection 30(1) applies to all records in the custody or under the control of public bodies as defined in the Act. The exception does not apply to records described in subsection 30(2).

Section 30 requires the head to refuse disclosure of personal information. This protection applies only to natural persons or individuals. Section 30 is considered when an applicant makes a request for someone else's personal information. Of course, a party may consent to the disclosure of their own personal information.

[20] Of the 11 items that are withheld pursuant to section 30, Memorial states that six are names of identifiable individuals, one is an e-mail address, three are opinions about an identifiable individual, and one is information about an identifiable individual's health care status. Memorial "submits that these redactions are mandatory and a proper and appropriate application of s. 30(1)."

III APPLICANT'S SUBMISSION

[21] Dr. Panjabi, in her submission, expresses immense displeasure with the severing practices of Memorial. She states there is an excessive use of exceptions to access and she asks the Commissioner to determine whether Memorial "exceeded the legislative guidelines and jurisprudence in terms of its actions in redacting so much information." Dr. Panjabi also states that Memorial has the burden of proving a particular exception applies, but she has not seen any convincing argument from Memorial that would justify its position.

[22] Dr. Panjabi feels that Memorial has not cooperated with her with respect to facilitating access, and that Memorial has not sufficiently explained its redactions in a comprehensive manner.

IV DISCUSSION

[23] A thorough review of the records received by Dr. Panjabi in response to her request revealed several discrepancies. An investigator from this Office, together with Dr. Panjabi, discovered some confusion surrounding the records as well as two indices that had been prepared for Dr. Panjabi. This was quite troubling to Dr. Panjabi, and to this Office as well. While these discrepancies were addressed by Memorial during the informal resolution process and the confusion surrounding several of the records and the indices was ultimately resolved, it is important that provision of records to applicants and this Office be done with the utmost care and attention. These types of mistakes often lead to confusion and can result in mistrust by applicants and undermine the ability of the parties to resolve issues arising from the access to information process.

[24] Prior to discussing the merits of the exceptions claimed, Memorial made some comments with respect to discretionary exceptions in general. Both sections 20 and 21 are discretionary exceptions that have been claimed by Memorial. This means that while a public body is authorized to withhold information that falls under either of these sections, it is not obligated to do so. Memorial states that it is up to the public body to determine whether an exception is applicable to certain information and if so, then the Commissioner has no mandate to recommend its disclosure. I wish to take this opportunity to

outline some points on the exercise of discretion by public bodies, including the role of the Commissioner in considering that exercise as part of a review.

[25] The *ATIPPA* creates a broad right of access to information, subject to limited and specific exceptions, as stated in section 3. As discussed at length in Report A-2009-002, this results in a presumption in favour of disclosure. This is an important consideration when deciding whether a discretionary exception applies.

[26] The Federal Court, Trial Division and the Federal Court of Appeal have commented several times on the exercise of discretion in applying the discretionary exceptions found in the federal *Access to Information Act*. In *Rubin v. Canada (Canada Mortgage and Housing Corp)* the court of appeal stated:

It is incumbent upon the institutional head (or his delegate) to have regard to the policy and object of the Access to Information Act when exercising the discretion conferred by Parliament pursuant to the provisions of subsection 21(1). When it is remembered that subsection 4(1) of the Act confers upon every Canadian citizen and permanent resident of Canada a general right to access and that the exceptions to that general rule must be limited and specific, I think it's clear that Parliament intended the exceptions to be interpreted strictly.

[27] In *Kelly v. Canada (Solicitor General)*, Strayer J., in considering discretionary exceptions under the federal *Privacy Act*, stated as follows:

The second type of decision is purely discretionary. In my view in reviewing such a decision the court should not itself attempt to exercise the discretion de novo but should look at the document in question and the surrounding circumstances and simply consider whether the discretion appears to have been exercised in good faith and for some reason which is rationally connected to the purpose for which the discretion was granted.

This position was approved by La Forest J. of the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)*.

[28] Canada's Information Commissioner's Office (see The "GRIDS", Office of the Information Commissioner of Canada, November 2006, online at <http://www.infocom.gc.ca/grids/pdf/grids-e.pdf>) has made comments to this effect as well:

[...] *It is simply not enough for a government institution to broadly categorize the requested information as subject to a discretionary exception; rather the head must consider whether, in the light of the object and purpose of the statute and the exception per se, if the information should be disclosed even though the exception applies.*

The exercise of discretion allows the head of a government institution to demonstrate that the institution is operating in the spirit of the legislation. It is not simply a formality where the head considers the issues before routinely saying no [...]

[...] *It must also be used in a manner which is in accord with the conferring statute (i.e., in exercising his discretion, the head must be governed by the principles that information should be available to the public and that exceptions to access should be limited and specific). Accordingly, it is incumbent upon the institutional head to have regard to the policy and object of the Access to Information Act when exercising his or her discretion.*

[...] *the discretionary exceptions require the head of a government institution to determine whether harm is likely to result from release of information that falls within the exception. If no harm is apparent, a government institution should release the information in keeping with the spirit and intent of the Act. On occasion, government institutions may wish to release the information even though it technically qualifies for exception. This could happen in cases where the benefits of disclosure outweigh the harm or where a combination of factors makes the harm negligible.*

[29] While the head of the government institution has the authority to exercise discretion, the Commissioner and the courts have the authority to determine if that discretion was properly exercised. If discretion was not properly exercised, the Commissioner can recommend (and a court can order) that the public body reconsider the exercise of its discretion. The Federal Court of Appeal in *Canada (Information Commissioner of Canada) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2001 FCA 56, adopted the approach set out by Strayer J in *Kelly v. Canada (Solicitor General)* that when reviewing claims for discretionary exceptions, the court should consider whether the discretion was exercised in good faith and for some reason which is rationally connected to the purpose for which the discretion was granted.

[30] In *Canada (Information Commissioner) v. Canada (The Prime Minister)* [1993] 1 F.C. 427 (T.D.), Rothstein J. stated:

In the case of discretionary exemptions [...], two decisions are necessary: first, does the record come within the description that is contemplated by the statutory exemption invoked in a particular case; and second, if it does, should the record nevertheless be disclosed.

[31] In *Canada (Information Commissioner) v. Canada (Minister of Industry)* 2001 FCA 254 (F.C.A.), the Court noted that the burden of proof as set out in the federal *Access to Information Act* encompasses both the burden of proving that the conditions of the exceptions were met and that the discretion conferred on the head of a government institution was properly exercised. The Court noted, however, that without some knowledge of the discretionary decision-making process it could not effectively review the decision of the head to refuse to release information. The Court stated that this could be addressed by imposing on the head a legal obligation to give reasons for the discretionary refusal to disclose, when reasons are requested and fairness requires that they be given. The Court could then consider whether the reasons provided a sufficient explanation for the refusal to disclose so as to enable the Court to perform its reviewing function. Presumably, in the absence of such reasons or if the reasons given to refuse disclosure were not sufficient, then it would be incumbent upon the Court on a subsequent review to question or reject the decision to refuse disclosure, and order or recommend that the public body reconsider its exercise of discretion.

[32] The federal Information Commissioner's Office has stated as follows (see The "GRIDS", Office of the Information Commissioner of Canada, November 2006, online at <http://www.infocom.gc.ca/grids/pdf/grids-e.pdf>):

The head must show that the relevant factors were considered and, if the decision is to withhold the information, that there were compelling reasons to support the decision. In exercising discretion, the head of the public body may also want to consult with other public bodies that may have an interest in the requested records. The discretion given to the institutional head is not unfettered. It must be exercised in accordance with recognized legal principles.

[33] Incidentally, the determination of whether discretion was lawfully exercised is closely related to an assessment of whether a public body has discharged the burden of proof imposed upon it by section 64 of the *ATIPPA*. This section states that in order to rely on a particular exception, the public body must prove that it is applicable to the information for which it has been claimed. Generally, in order to

discharge this burden, the public body must give reasons as to why the exception applies. If the public body cannot discharge the burden of proof, it will not be entitled to rely on the exception to withhold the information. These reasons may also show whether the head relied on relevant or reasonable factors or proper considerations that are consistent with the objects of the *ATIPPA*, and thus whether discretion was lawfully and properly exercised.

[34] Therefore, while it is certainly the obligation of the public body to make its own determination as to whether an exception applies, I am of the view that it is within the Commissioner's mandate to examine a public body's reasons for invoking a discretionary exception in order to determine if the exercise of discretion was properly considered. Despite the fact that a discretionary exception may apply to particular information, if the information to which the exception applies will not undermine the purpose for which the exception was created, then the Commissioner may recommend that a public body reconsider its exercise of discretion.

Section 20

[35] As noted, Memorial has withheld some information from Dr. Panjabi on the basis of section 20(1). Section 20(1) states as follows:

20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal

(a) advice or recommendations developed by or for a public body or a minister; or

(b) draft legislation or regulations.

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

[14] Having reviewed the discussions of the phrase "advice or recommendations" in my predecessor's Report 2005-005, in the Ontario Court of Appeal decision in Cropley, and in the Federal Court of Appeal decision in 3340901 Canada Inc. v. Canada (Minister of Industry), I have reached the following conclusions on the meaning of the phrase "advice or recommendations" found in section 20(1)(a):

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.”*
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.”*
3. *The words “advice” and “recommendations” have similar but distinct meanings. The term “recommendations” relates 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.*

[37] The informal resolution process presents another opportunity to reconsider the exercise of discretion. During the informal resolution process, an investigator from this Office encouraged Memorial to reconsider the applicability of section 20 to some of the information for which it had claimed section 20, and this resulted in Memorial releasing much of the information for which it had initially relied on that exception. With respect to the remaining information severed pursuant to section 20, Memorial states that it has duly reconsidered releasing the information but maintains that it should remain redacted.

[38] In the present case, it is my opinion that some of the information that remains redacted pursuant to section 20 does not meet the criteria supporting a claim of section 20 and should therefore be released. However, I would like to note that the amount of information that I am recommending for release is relatively small. Aside from this small amount of information, I am satisfied that Memorial has met the burden of proof with respect to section 20 and has properly exercised its discretion with respect to this section.

Section 21

[39] Memorial has withheld some information from Dr. Panjabi pursuant to section 21 of the *ATIPPA*. Section 21 is also a discretionary exception which sets out a protection against disclosure of information which is 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.

[40] In Report A-2008-002, among others, I found that section 21 contemplated both legal advice privilege and litigation privilege. In the present case, we are concerned with both aspects of the section. As discussed at length in Report A-2009-002, in order for solicitor-client privilege to exist there must be a communication between a solicitor and client, which entails the seeking or giving of legal advice, and 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.”

[41] It is clear to me, from an examination of the record, that some of the withheld information is communications between a solicitor and a client which entail the seeking or giving of legal advice and which were intended by the parties to remain confidential. As such, this information may be withheld.

[42] As noted, Memorial has also claimed the litigation privilege aspect of section 21 for some information. As stated in Report A-2008-002, 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. Some of the information for which Memorial has claimed this exception is information that was created for the dominant purpose of pending or apprehended litigation and can therefore be withheld.

[43] Subsequent to its original redactions, Memorial claimed section 21 for some additional information (for which section 20(1) had been originally claimed). It has been clearly communicated to public bodies by this Office that should public bodies wish to invoke any additional discretionary exceptions they must inform the applicant and this Office of their intention to do so within 14 days of notification from this Office that an applicant has filed a Request for Review. Any discretionary exceptions received after this period will not be considered by this Office. In this case, the additional claim of section 21 came well after this period and as such, will not be considered.

Section 30

[44] Section 30(1) states:

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

[45] 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 constitutes 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.

[46] Only 11 items have been withheld from disclosure on the basis of section 30, as described in paragraph 20 above. I agree that the names of the individuals should not be released. I also agree that some of the information constitutes opinions about an individual other than the Applicant and these opinions should also not be released. However, there is one instance where information, in addition to the opinion, has been severed, and this information should not be withheld.

V CONCLUSION

[47] Discretionary exceptions give public body heads the flexibility to release information in appropriate circumstances, thus furthering accountability and transparency. Given the purpose of the *ATIPPA*, discretion should be carefully exercised and used to withhold information only when absolutely necessary to protect the purpose for which the exception was granted. While the exercise of discretion is left up to the head of a public body, it is certainly within the Commissioner's purview to examine a public body's reasons for invoking a discretionary exception in order to determine if discretion was properly exercised, and to issue an appropriate recommendation if the information for which the exception has been claimed does not relate to the purpose for which the exception was created. In this case, I have found no issue with the exercise of discretion by Memorial.

[48] 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 contain an opinion on policy related matters. This information should, therefore, be disclosed to Dr. Panjabi.

[49] With respect to section 21(a), I have found that this section is applicable to some of the information for which it was claimed, however, Memorial is not permitted to claim section 21 for the additional information as it was too late invoking the exception.

[50] Further, I have found that section 30 is applicable in all but one of the instances for which it has been claimed.

VI RECOMMENDATIONS

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

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

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

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

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

