NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2007-015

Memorial University of Newfoundland

Summary: The Applicant, Dr. Ranee K.L. Panjabi, applied to Memorial University of Newfoundland ("Memorial") under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA"*) for access to the names, titles and designations of all persons who have seen, had access to or been provided with an uncensored version of the Katz Report. Dr. Panjabi also requested the dates on which access to the Katz Report was provided and the name of the administrator responsible for granting such access. Memorial denied access to the entire record claiming that the information was personal information and should not be released to the Applicant under authority of sections 30(1). Through negotiations with this Office, Memorial eventually released the majority of the record, but continued to withhold the names of four individuals. Several months into the Review process, Memorial attempted to claim that these four names were being withheld under authority of section 21 (solicitor-client privilege). The Commissioner concluded that the four names did constitute personal information, but further concluded that the four individuals in question were employees or members of Memorial and, as such, Memorial could not refuse to disclose their names. With respect to solicitor-client privilege, the Commissioner concluded that Memorial had claimed this exception much too late in the process and, therefore, could not rely on it to withhold information. Notwithstanding this conclusion, the Commissioner provided a detailed discussion on solicitor-client privilege and determined that even if he had accepted the late exception, the names of the four individuals would not be considered as information subject to the privilege. The Commissioner also raised a number of concerns with respect to the manner in which Memorial responded to the Applicant and to the Commissioner's Office. The Commissioner concluded that Memorial failed to honour its duty to assist and further concluded that Memorial lacks the commitment necessary to ensure that the language, the intent and the spirit of the *ATIPPA* are upheld.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as am, ss. 2(e), (o) and (q), 3, 9, 11, 12(1)(c), 21, 30(1), 30(2)(f), 46(2), 47, 49(1), 50, 52, 60, and 64(1); *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss. 22(1), (4)(e) and Schedule 2; *Interpretation Act*, R.S.N.L. 1990, c. I-19, ss. 22(j) and 27; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, as am, ss. 20(1) and (4)(e).

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-005 and 2007-007; British Columbia OIPC Orders 01-15 (2001) and F06-18 (2006); Nova Scotia Review Office Report FI-05-75 (2006); Alberta OIPC Order F2005-020 (2006); *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Imperial Tobacco Company Ltd. v. Newfoundland and Labrador (Attorney General)*, 2007 NLTD 172; *Municipal Insurance Association of British Columbia v. British Columbia (Information and Privacy Commissioner)* (1996), 143 D.L.R. (4th) 134; *Blank v. Canada (Minister of Justice)* (2004), 244 D.L.R. (4th) 80.

Other Resources Cited:

Access to Information and Protection of Privacy Act Policy and Procedures Manual, Access to Information and Protection of Privacy Coordinating Office, Department of Justice, updated September 2004, available at www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf; *Freedom of Information and Protection of Privacy Policy and Procedures Manual*, Government of British Columbia, available at http://www.mser.gov.bc.ca/privacyaccess/manual/toc.htm; *Preparing for a Review: Guidelines from the Office of the Information and Privacy Commissioner*, Office of the Information and Privacy Commissioner, Newfoundland and Labrador, January, 2006, available at http://www.oipc.gov.nl.ca/pdf/PreparingforaReview.pdf; McNairn, Colin H.H. and Christopher D. Woodbury. *Government Information: Access and Privacy*, looseleaf. Scarborough, Ontario: Carswell, 1992 to date.

I BACKGROUND

[1] Under authority of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*"), Dr. Ranee K.L. Panjabi submitted an access to information request to Memorial University of Newfoundland ("Memorial"), dated 11 April 2007, wherein she requested access to the following:

> *The names, titles and designations of all persons who have seen, had access to or been provided with the uncensored version of the Katz Report, the dates on which access was provided and the name(s) of the Univ. administrator(s) responsible for granting said persons access to the uncensored Katz Report.*

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. Dr. Panjabi currently holds the rank of Full Professor of History at Memorial and has been teaching at Memorial since 1969.

[2] The Katz Report is the result of an investigation launched by Memorial in January 2006 into the employment experience of a former assistant professor at Memorial. The Report was received by Memorial in August 2006. Detailed information on the Katz Report is available on Memorial's website at www.mun.ca.

[3] In correspondence dated 10 May 2007 Memorial advised Dr. Panjabi that access to the responsive record was being denied in accordance with section 30(1) of the *ATIPPA* (personal information):

> *Access to the unredacted version of Dr. Shirley Katz' report was strictly limited to members of Memorial University who needed access to perform their responsibilities and to legal counsel. No others had access.*
>
> *Your request for the names of these individuals is denied under section 30(1) of the Access to Information and Protection of Privacy Act (copy enclosed).*

[4] In a letter dated 18 May 2007 Dr. Panjabi asked the Information Access and Privacy Protection Coordinator for Memorial (the "Coordinator") for clarification of the term "members of Memorial University." Dr. Panjabi pointed out that this term could extend to any number of

groups, including Regents, students, senior, middle and junior administration, faculty and staff, etc. In the absence of any clarity, she stated that the term "members" could encompass more than 20,000 individuals. She also asked for clarification on the "responsibilities" of these members referenced in Memorial's correspondence of 10 May 2007.

[5] Having not received a response to her letter, Dr. Panjabi sent a reminder to the Coordinator on 20 June 2007. In a written response dated 22 June 2007, some five weeks after Dr. Panjabi's request for clarification, the Coordinator responded indicating that the file had been closed:

> *This file is closed in my office. In accordance with the requirements of the ATIPP Act, the university's final response to your application was sent to you on 10 May. It noted your right to request a review of the decision under section 43 of the ATIPP Act.*

No further information or clarification was provided.

[6] Dr. Panjabi filed a Request for Review with this Office on 26 June 2007. Memorial was notified of this Request for Review in correspondence dated 26 June 2007 (received by Memorial on 28 June 2007) and was asked to provide the appropriate documentation and a complete copy of the responsive record for my review within 14 days, as per section 52(3) of the *ATIPPA*.

[7] On 13 July 2007, one day after the 14 day deadline, this Office received the documentation and a copy of the responsive record from Memorial. The responsive record consisted of two pages and included a list of names of individuals who had received a copy of the Katz Report and the date, where applicable, the Report was returned. All other information requested by the Applicant was not included in the record. In addition, a number of copies of the Katz Report were listed but not identified as being assigned to an individual.

[8] Attempts to resolve this Request for Review by informal means were unsuccessful. On 30 August 2007 Dr. Panjabi and Memorial were notified that the file had been referred to the formal investigation process and they were each given the opportunity to provide written representations

to this Office under authority of section 47 of the *ATIPPA*. Dr. Panjabi provided a written submission in support of her position. Memorial did not provide a submission.

[9] I note that in correspondence sent to Dr. Panjabi, dated 17 September 2007, Memorial released a list of names of individuals who had received a copy of the unredacted Katz Report. However, the University withheld other names, claiming that these names were protected by solicitor-client privilege (section 21). Memorial also claimed in this correspondence that there were no other records, other than a document that had been previously released to Dr. Panjabi, responsive to her request. For reasons specified later in this Report, I did not accept Memorial's section 21 claim.

[10] It is also important to note at this point that once this Office received a copy of the correspondence referenced in the previous paragraph (received on 20 September 2007), it was evident that the responsive record previously forwarded to this Office in accordance with section 52 of the *ATIPPA* was inaccurate. Although the responsive record received at this Office on 13 July 2007 and the record sent to Dr. Panjabi on 17 September 2007 were both entitled "Katz Report – August 4, 2006," the earlier document was clearly incomplete as information was missing from the document. When advised of this discrepancy on 20 September 2007, Memorial's Coordinator replied indicating that she had "…mistakenly sent the wrong version of the report" to this Office.

II APPLICANT'S SUBMISSION

[11] Dr. Panjabi states in general that Memorial's denial in providing her access to this information is "…tantamount to a violation of the intent and spirit of the legislation." She claims that the term "personal information" "…cannot legally extend to cover a distribution list of persons who were provided the entire uncensored Katz Report."

[12] More specifically, Dr. Panjabi argues that the *ATIPPA* contains no provision that would prevent and preclude Memorial from providing her access to the information she is seeking. She

also makes reference to the fact that the individuals named in the responsive record are connected directly with Memorial, a public body under the legislation:

> *…the various recipients who have read the uncensored Report have, according to the University's own memo and Chart, obtained access because of their connection to the University. There can be no possible reason why the University would seek avidly to conceal the identity of its own officials and its governors etc. particularly as these are persons who work in some capacity for what is clearly and obviously a public body which is funded by the taxpayers of Canada.*

III DISCUSSION

[13] This investigation has raised significant concerns over the manner in which Memorial administers the *ATIPPA* and the manner in which it exercises its obligations under that *Act*. For this reason, the amount of information and level of detail in this Report exceeds that which I might ordinarily offer. I believe this is necessary in order to adequately address all of the issues before me. For ease of reference, I have divided the discussion into the following issues:

1. What constitutes the responsive record?
2. Did Memorial appropriately apply section 30 (personal information)?
3. Should this Office accept Memorial's late claim of solicitor-client privilege?
4. Did Memorial appropriately apply solicitor-client privilege?
5. Did Memorial fulfil its duty to assist Dr. Panjabi under section 9?

[14] Also, before addressing these issues I would first like to clarify the burden of proof as anticipated by the *ATIPPA*. Section 64(1) clearly sets out this burden with respect to a public body's decision to deny access to a record or part of record:

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

[15] As I have discussed in previous Reports, the *ATIPPA* does not set out a level or standard of proof that has to be met by a public body in order to prove that an applicant has no right of access to a record under section 64(1). As such, I adopted the civil standard of proof as the

standard to be met by the public body under this section. In order for the public body to meet the burden of proof in section 64(1), the public body must prove on a balance of probabilities that the applicant has no right to the record or part of the record.

[16] I will now discuss each of the issues I believe to be relevant to this case.

What constitutes the responsive record?

[17] In her original request Dr. Panjabi asked for the names, titles and designations of all persons who have seen, had access to or had been provided with a copy of the uncensored version of the Katz Report. She had also asked for the dates on which access was provided and the name of the administrator responsible for granting this access. In its letter of acknowledgment to Dr. Panjabi, dated 18 April 2007, Memorial referenced all information being requested. However, in its letter to Dr. Panjabi denying access to the record, dated 10 May 2007, Memorial refers only to the names:

> *On 11 April 2007, Memorial University received your request for access to the names of individuals who have had access to the unredacted Katz report.*
>
> …
>
> *Your request for the names of these individuals is denied under section 30(1) of the Access to Information and Protection of Privacy Act (copy enclosed).*

[18] When questioned on this issue, Memorial indicated that it "…does not have a record which sets out all of the information the Applicant is seeking…" Memorial further indicates that a record containing some of the information requested does exist and it is a severed version of this record that has been provided to Dr. Panjabi. In addition, when providing the severed record to Dr. Panjabi Memorial stated that "[n]o further record exists to provide you on this matter." The record that does exist includes the number of copies and the names of the individuals who received the copies. There are a total of 39 names included in this record. It does not contain the other information requested by the Applicant. Given that the definition of "record" in section 2(q) of the *ATIPPA* restricts information to that which is written, photographed, recorded or stored, I am prepared to accept that the responsive record for the purposes of this review consists of the list of names of those individuals who received an unredacted copy of the Katz Report, as

recorded in the document identified by Memorial and eventually provided to the Applicant in a severed format. I do note, however, Memorial's initial failure to address all of the information being requested. I will deal with this issue later in this Report.

Did Memorial appropriately apply section 30?

[19] Having determined what constitutes the responsive record, I will now look to the application of section 30. Memorial originally denied access to the responsive record in its entirety, citing section 30(1) of the *ATIPPA*. Section 30(1) is a mandatory exception and provides as follows:

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

[20] During informal negotiations with this Office, Memorial released to Dr. Panjabi a distribution list indicating the number of copies of the unredacted Katz Report that were distributed and the groups to which they were distributed. This distribution list, however, did not contain individual names and, as a result, the file was referred to the formal investigation process in accordance with section 46(2) of the *ATIPPA*. During this process Memorial released additional information to the Applicant. In correspondence dated 17 September 2007 Memorial provided a copy of the responsive record to Dr. Panjabi, with four of the names severed in accordance with section 21 (legal advice). The remaining 35 names were released to the Applicant.

[21] While I acknowledge Memorial's decision to release the majority of names, I must now determine if the remaining names were appropriately withheld. I noted in the preceding paragraph that Memorial is withholding these four names in accordance with section 21. I will deal with Memorial's section 21 claim later in this Report. For the purposes of section 30(1), I must still consider whether these names should be withheld as personal information.

[22] "Personal information" is defined in section 2(o) of the *ATIPPA* and clearly includes an individual's name. As such, I have no hesitation in concluding that the information being withheld from the Applicant is personal information for the purposes of the *ATIPPA*. Such a

determination, however, does not preclude the release of personal information in some circumstances. In this regard, I am guided by section 30(2), which provides for a number of exceptions to the mandatory prohibition against the disclosure of personal information set out in section 30(1). Specifically, I believe section 30(2)(f) is relevant to the case at hand:

> *30. (2) Subsection (1) does not apply where*
> . . .
>
> *(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;…*

[23] In considering section 30(2)(f), I have looked to British Columbia's *Freedom of Information and Protection of Privacy Act*. Section 22 of British Columbia's legislation contains similar language and has a comparable purpose to our section 30. The relevant provisions of section 22 are as follows:

> *22.(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
> …
>
> *(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
> …
>
> *(e) the information is about the 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,…*

[24] Unlike section 30(1) of the *ATIPPA*, section 22(1) of the British Columbia legislation contains a harms test by requiring personal information to be an unreasonable invasion of privacy in order for it to be protected from disclosure. No such test exists with respect to section 30(1) of the *ATIPPA* (see my Report 2005-005 at paragraph 77). Despite this difference in approach, the overall purpose of the two sections is the same and, as such, decisions of the British Columbia Information and Privacy Commissioner on section 22 are instructive to the case at hand.

[25] In his Order 01-15, the Information and Privacy Commissioner for British Columbia dealt, in part, with the decision of a public body to withhold names, addresses and telephone numbers of third parties, including employees, under section 22(1). The Commissioner disagreed with the public body (referred to as the Ministry) and at paragraph 35 stated that

> *[35] The Ministry argues that s. 22(1) applies to the names of Ministry employees and descriptions of their actions. As I noted in Order 00-53, [2000] B.C.I.P.C.D. No. 57, public body employees are third parties for the purposes of s. 22. This does not mean, however, that all recorded information about them must be withheld under s. 22(1). The information in records 4-9 as to Ministry employees' names and actions appears in the context of work-related activities and relates to their functions as employees of a public body. It therefore falls under 22(4)(e), in my view, such that disclosure of that information would not result in an unreasonable invasion of the employees' personal privacy.*

[26] In a more recent decision (Order F06-18), the British Columbia Commissioner ordered another public body to disclose the name of an employee to an applicant. At paragraph 56 the Commissioner said that

> *[56] The second individual on p. 186 is a public body employee. This individuals name falls into s. 22(4)(e), in my view, as it appears in the context of the performance of his duties. For this reason, I find that s. 22(1) does not apply to this individual's name.*

[27] Sections 20(1) and 20(4)(e) of the Nova Scotia *Freedom of Information and Protection of Privacy Act* are, in all material respects, equivalent to sections 22(1) and 22(4)(e) of British Columbia's legislation, respectively, and, as such, have a comparable purpose to sections 30(1) and 30(2)(f) of the *ATIPPA*. In his Report FI-05-75, the Nova Scotia Review Officer dealt with section 20 in the context of a request for records related to the investigation of a complaint. The Review Officer concluded that the names and positions of employees ought to be disclosed:

> *Although the teacher-witnesses are third parties their personal information is about their "position" and "function" as an employee of a public body. [See s. 20(4)(e)]. Consequently I have concluded, again in line with the French decision, that personal information of the teachers, including their names and positions should be disclosed to the Applicant because this would not constitute an unreasonable invasion of their privacy.*

[28] With respect to the case at hand, it is important to first determine the status of the four individuals whose names have been withheld, vis-à-vis their relationship with Memorial. Section 30(2)(f) only applies to an officer, employee or member of a public body or member of a minister's staff. Of the four names withheld from release by Memorial, one of them is a direct employee of Memorial. The only clarification on the status of the other three individuals is a reference by Memorial to "outside legal counsel" in an e-mail to this Office. This is consistent with Memorial's attempted use of section 21 of the *ATIPPA*. In the context of section 30, however, it is important to note that section 2(e) of the *ATIPPA* defines an "employee," in relation to a public body, to include "…a person retained under a contract to perform services for the public body." Given the fact that Memorial provided an unredacted copy of the Katz Report to these three individuals, it stands to reason that they were retained to perform services for Memorial. As such, these three individuals ought to be regarded as public body "employees" as defined by the *ATIPPA*.

[29] Notwithstanding my comments on public body employees, I also note that section 30(2)(f) uses the term "member of a public body." While this term is not defined in the *ATIPPA*, the *Government of British Columbia Freedom of Information and Protection of Privacy Policy and Procedures Manual* provides some useful commentary. In describing section 22(4)(e) of the British Columbia *Freedom of Information and Protection of Privacy Act*, this Manual defines an "officer, employee or member of a public body" as "…anyone charged with carrying out services for a ministry, branch or office of the government of British Columbia, a local public body or an agency, board, commission, corporation, office or other body designated in Schedule 2 of the Act." I find this description to be equally applicable to this jurisdiction. In this regard, I now turn to the comments of Memorial's Information Access and Privacy Protection Coordinator. In her letter to the Applicant denying access to the record, dated 10 May 2007, Memorial's Coordinator stated as follows:

> *Access to the unredacted version of* [*the Katz Report*] *was strictly limited to members of Memorial University who needed access to perform their responsibilities and to legal counsel. No others had access.*

This is a clear statement by Memorial that all individuals named in the responsive record were considered "members of Memorial."

[30] This statement by Memorial's Coordinator also confirms the other important question with respect to section 30(2)(f); is the information associated with the position, functions, or remuneration of the individuals in question? In my view, the four individuals whose names have been withheld, as with those individuals whose names were disclosed, were provided a copy of the Katz Report in accordance with their work-related duties and functions as members of Memorial. Again, Memorial is clear on this point in its above noted statement by confirming that the individuals who received a copy of the Katz Report needed access to the Report in order to "perform their responsibilities."

[31] Based on all of the above, I have concluded that the list of names of the four individuals withheld from the Applicant is personal information as defined by section 2(o) of the *ATIPPA*. However, I have further concluded that these names constitute information about a third party's position and functions as an officer, employee or member of a public body and, by the operation of section 30(2)(f), are not protected by section 30(1). In this case, therefore, Memorial did not appropriately apply section 30 and, as a result, the names of these four individuals should be disclosed to Dr. Panjabi.

Should this Office accept Memorial's late claim of solicitor-client privilege?

[32] As previously indicated, Memorial originally denied access to the responsive record based solely on section 30(1), as per its letter dated 10 May 2007. It was on this basis that informal negotiations took place. When these negotiations were unsuccessful in resolving the matter, this Office referred the file to formal investigation by way of a letter dated 29 August 2007. In accordance with standard procedure, Memorial was given until 10 September 2007 to provide written representations in accordance with section 47 of the *ATIPPA*. On 10 September 2007, over 17 weeks after its response to the Dr. Panjabi, Memorial's Coordinator sent an e-mail to this Office indicating, in part, that they had decided to release the responsive record, with certain names severed as information protected by solicitor-client privilege.

[33] Section 11 of the *ATIPPA* requires a public body to respond to an applicant within a defined time frame. Section 12 then sets out the content of that response. Section 12(1)(c) is pertinent to the case at hand:

> *12. (1) In a response under section 11, the head of a public body shall inform the applicant*
>
> …
>
> *(c) if access to the record or part of the record is refused,*
>
> *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
>
> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
>
> *(iii) that the applicant may appeal the refusal to the Trial Division or ask for a review of the refusal by the commissioner, and advise the applicant of the applicable time limits and how to pursue an appeal or review.*

[34] Under authority of section 12, Memorial was obligated to inform Dr. Panjabi of all reasons for the refusal with specific reference to the provisions of the legislation. Recognizing, however, that public bodies may determine at some later date that additional exceptions may apply, our Office allows a certain period of time to raise these additional late exceptions, bearing in mind that the rights of the applicant must not be unreasonably prejudiced. In this regard, our Office, as a matter of course, sends a document entitled *Preparing for a Review: Guidelines from the Office of the Information and Privacy Commissioner* to all public bodies that are subject to a Request for Review. This document states in part that

> *Normally, all exceptions should be claimed at the time a response is issued to the Applicant's access request. Should you wish to invoke any additional discretionary exceptions under the ATIPPA, you must inform the Applicant and this Office of your intention to do so within 14 days of receipt of correspondence from this Office notifying you that the Applicant has filed a Request for Review. Any discretionary exceptions received after this period will not be considered by this Office.*

Memorial received this document on 28 June 2007, giving it until 12 July 2007 to raise any additional discretionary exceptions. No additional exceptions were claimed within that time period. Memorial first notified this Office of its intent to claim section 21, a discretionary exception, on 10 September 2007, 60 days after the deadline for doing so.

[35] In correspondence dated 20 September 2007, Memorial acknowledged the above noted policy of this Office, but clearly indicated that it was maintaining its reliance on section 21:

> *Notwithstanding your Office's policy to never accept late exceptions to disclosure, the University is maintaining that the names of legal counsel are privileged.*

I note here that it is not the policy of this Office to *never* accept late exceptions. Our policy is clearly designed to actually accept late exceptions but to do so within a defined time period. I believe such policy, in the interest of fairness, strikes a balance between the ability of a public body to recognize an exception later in the process with the right of an applicant to receive a timely, accurate and complete response. Furthermore, the above noted policy deals only with discretionary exceptions, as expressly indicated in the Guidelines. Our Office will always consider mandatory exceptions. Our policy in this regard has been clearly communicated to Memorial on prior occasions.

[36] Memorial's attempt to claim solicitor-client privilege four months after its initial response to the Applicant, despite the clear language of the legislation and the above noted policy, not only indicates a disconcerting attitude toward the *ATIPPA* and toward this Office, but shows a lack of support for Dr. Panjabi's rights under the legislation. Based on Memorial's apparent disregard for due process, I believe it is necessary to remind Memorial that the provisions of the *ATIPPA* are not voluntary. I do not accept Memorial's claim of solicitor-client privilege and, as such, Memorial cannot rely on section 21 to withhold any information contained within the responsive record from Dr. Panjabi.

Did Memorial appropriately apply solicitor-client privilege?

[37] Having decided that Memorial's claim of solicitor-client privilege is not acceptable, it would normally not be necessary to discuss the merits of the exception with respect to the information being withheld. However, in my view Memorial's decision to withhold names of employees on the basis of solicitor-client privilege shows a fundamental misunderstanding of the intent of the privilege and the section 21 exception. For this reason, I believe it is both useful and necessary to discuss Memorial's use of this exception in the context of this case. Section 21 provides as follows:

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

[38] I would first like to acknowledge the significance and the importance of solicitor-client privilege to the legal system in particular and to society in general. 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. The Supreme Court of Canada, in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, has said that

> *…The concept of privileged communications between a solicitor and his client has long been recognized as fundamental to the due administration of justice.*
> …
> *…the right to communicate in confidence with one's legal advisor is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client…*

[39] The Supreme Court is clear in this regard and it is for this reason that I fully support the exception set out in section 21 of the *ATIPPA*. The Supreme Court, however, has also clearly established the limitations to information protected by the privilege. I again refer to *Solosky*:

> *There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not intended to be confidential, privilege will not attach, O'Shea v. Woods, at p. 289.*

[40] The Supreme Court of Canada in *Solosky* goes on to affirm the three criteria necessary for solicitor-client privilege to exist. In a recent Supreme Court of Newfoundland and Labrador decision (*Imperial Tobacco Company Ltd. v. Newfoundland and Labrador (Attorney General)*, 2007 NLTD 172), Chief Justice Green, in referring to *Solosky*, succinctly set out these criteria at paragraph 46:

> *[46] Generally, each communication must meet three criteria for the privilege to exist: (i) there must be a communication between a solicitor, acting in his or her professional capacity, and the client; (ii) the communication must entail the seeking or giving of legal advice; and (iii) the communication must be intended to be confidential by the parties.*

[41] Mr. Justice Green also spoke specifically to the limitations of information protected by the privilege. At paragraphs 61 and 63 he commented as follows:

> *[61] The type of information protected is only that information that is necessary to achieve the purpose of the privilege, i.e., information that is "pertinent to the case" – the information platform, as it were – that the lawyer should have to be able to advise the client properly.*
>
> …
>
> *[63] It is incumbent on the Minister in this case to bring the government's claim of privilege within the umbrella of the privilege's underlying purpose i.e. to show that disclosure would jeopardize communications for the purpose of obtaining legal advice within the solicitor-client relationship.*

[42] It is important to note here as well that solicitor-client privilege is meant to protect a "communication." A communication, in its ordinary sense, is an exchange of information between two or more individuals. In this regard, I am again guided by *Imperial Tobacco Company Ltd.* At paragraphs 71 and 72 Chief Justice Green speaks directly to this point:

> *[71] The protection afforded by the privilege is for "communications" only; it does not cover facts or acts that exist independently of a communication...See also,* ***Stevens v. Canada*** *at para. [25]. (I recognize that the distinction between acts and communications will not be rigidly insisted on in some cases, particularly in criminal matters where other constitutional values, such as the protection against self-incrimination, are at play. See,* ***Maranda v. Richer****. Those considerations do not, however, apply in the current case.)*
>
> *[72] The entering into a contingency fee agreement is an act. The fact that it exists and the parties who are participating in it are identified would not therefore be protected by the privilege. It does not follow, however, that the information contained in the agreement could not be regarded as a "communication" and therefore protected.*
>
> [Emphasis in original]

[43] Colin McNairn and Christopher Woodbury, in *Government Information: Access and Privacy*, also speak to the nature of solicitor-client privilege:

> *Information protected by the privilege extends to confidential communications, passing both ways, between a lawyer and his or her client that took place in the course of a professional relationship, whether or not in contemplation of litigation. The communications must be in the context of the client seeking legal advice from the solicitor…*

[44] In addition, the *ATIPPA Policy and Procedures Manual*, produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice (the "Manual") provides useful commentary on the exception set out in section 21. At page 4-13 the Manual states, in part, that

> *…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.*
>
> [Emphasis added]

[45] As I indicated earlier, I fully support both the intent and the use of solicitor-client privilege in denying access to certain information in response to a request for that information. Equally

important, however, is one of the fundamental purposes on which access to information is built, which is to provide the public a right of access to records, subject only to limited and specific exceptions. As I have articulated in numerous Reports, this fundamental purpose is clearly set out in section 3 of the *ATIPPA*. This balance is no different when engaging the section 21 exception. The three criteria set out by the Supreme Court of Canada in *Solosky*, and generally accepted by the Courts across the Country, provide a clear test when balancing the right of an applicant to have access with the right of a client to communicate in confidence with his or her legal advisor. If all three criteria are met, the privilege is engaged and section 21 may be applied by a public body, thereby appropriately protecting the confidential communications inherent in the solicitor-client relationship. In the absence of one or more of the criteria, a public body cannot rely on the exception, thereby upholding the right of access.

[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.

[48] Based on all of the above, I do not accept that there is any support for Memorial's claim that the names of individuals acting for or on behalf of it are protected by solicitor-client privilege. In fact, I believe there are only two possible conclusions I can reach in this case: either Memorial lacks an appropriate level of understanding and knowledge of the *ATIPPA* in general and the intent of solicitor-client privilege in particular, or its actions in this case were intended to avoid providing Dr. Panjabi access to the material she is seeking for reasons beyond that which is acceptable within the access to information regime of the *ATIPPA*.

Did Memorial fulfil its duty to assist Dr. Panjabi under section 9?

[49] Section 9 of the *ATIPPA* sets out a duty on the part of public bodies to assist an applicant in making a request:

> 9. *The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.*

[50] In my Report 2007-007 I referred to the Office of the Information and Privacy Commissioner for Alberta:

> *[10] In considering the duty to assist, I am guided by the clear language of the ATIPPA and the corresponding language of the Manual. I am also guided by a number of Orders of the Office of the Information and Privacy Commissioner of Alberta. In his Order F2005-020 the Alberta Commissioner summarized as follows:*

> *[para 16] Interim Order 97-015 stated that how a public body fulfills its duty to assist will vary according to the fact situation in each request. In Order 2001-024, it was stated that a public body must make every reasonable effort to assist an applicant and respond openly, accurately and completely to him. The standard directed by the Act is not perfection, but what is "reasonable". In Order 98-002, Commissioner Clark adopted the definition of "reasonable" found in Blacks' Law Dictionary (St. Paul, Minnesota, West Corp., 1999) as "fair, proper, just, moderate, suitable under the circumstances. Fit and Appropriate to the end in view."*

[51] I consider the statutory duty of a public body to assist an applicant to be a significant obligation and to be a key element in the administration of the *ATIPPA*. This duty is fundamental to the purposes of the legislation as set out in section 3. As with the Alberta Commissioner, I recognize that the *ATIPPA* has established a standard of reasonableness with respect to section 9 and it is this standard by which I am guided.

[52] In analyzing the actions of Memorial in this case, it is not one single incident that on its own causes me concern. Rather, a combination of actions has led me to question Memorial's commitment to its duty to assist. In order to accurately reflect these actions it is necessary for me to provide in some detail an account of events that have led me to my conclusions on Memorial's obligation to assist the Applicant. As previously indicated, Dr. Panjabi submitted her original request on 11 April 2007, wherein she was seeking access to names, titles, designations and dates. In its letter of acknowledgement, dated 18 April 2007, Memorial quoted Dr. Panjabi's request verbatim so was fully aware of its intent. However, as indicated in paragraph 17 of this Report, in its letter denying access, dated 10 May 2007, Memorial only made reference to the names of individuals. This letter contained no reference to the titles and designations of these individuals, the dates on which access was provided, nor the name(s) of the University administrator responsible for granting access. It was not until several months later, in response to a request from my Office, that Memorial indicated that it "…does not have a record which sets out all of the information the Applicant is seeking…"

[53] After receiving the May 10 letter from Memorial, Dr. Panjabi wrote to Memorial's Coordinator on 18 May 2007 seeking clarification on specific comments made in that letter. The Coordinator did not respond and on 20 June 2007 Dr. Panjabi sent a reminder to the Coordinator.

The Coordinator responded on 22 June 2007 indicating simply that Memorial had issued its final response and that the file had been closed. After initially disregarding Dr. Panjabi's request for clarification, Memorial eventually responded but made no attempt to provide that clarification.

[54] At paragraph 20 of this Report, I referenced the distribution list that Memorial provided to Dr. Panjabi during informal negotiations. The intent of this document was to inform the Applicant of the number of copies of the responsive record that exists and to which groups these copies were distributed. While I acknowledge Memorial's decision to release additional information to the Applicant, I note that the information within this document was not accurate. There were discrepancies in the document which required clarification.

[55] It is also important to note at this point that the copy of the responsive record sent to this Office in July was also not accurate. When questioned on this point Memorial indicated that our Office had been sent the wrong version of the record: "…Unfortunately, when the request came under review and the materials were prepared to be sent to your office, the incorrect version was mistakenly selected from the file…" As a result of this error by Memorial, this Office spent over two months working with a copy of the responsive record that was neither complete nor accurate. Section 52 of the *ATIPPA* provides as follows:

> *52. (1) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the Public Inquiries Act.*
>
> *(2) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.*
>
> *(3) The head of a public body shall produce to the commissioner within 14 days a record or copy of a record required under this section, notwithstanding another Act or regulations or a privilege under the law of evidence.*
>
> *(4) Where it is not practicable to make a copy of a record required under this section, the head of a public body may require the commissioner to examine the original at its site.*

[56] When exercising the authority under section 52, this Office fully expects that public bodies will produce records that are accurate and complete. Failure to do so is prejudicial to the applicant and to the entire access to information process. While I accept that such errors are not always intentional, I would stress to Memorial the importance of responding accurately to this Office and to ensure that appropriate care is taken when exercising obligations under the *ATIPPA*. I should note here that in the event that I determine that a public body has intentionally provided inaccurate or incomplete records or other correspondence to this Office, it will be considered by this Office to be an obstruction and an attempt to mislead the Commissioner and, as such, an offense under section 72 of the ATIPPA.

[57] I should also note at this point that during our Review, an official from this Office sent two e-mails to Memorial's Coordinator in an attempt to get clarification on a number of issues. While there were a number of e-mail exchanges between Memorial and this Office, these two particular e-mails were dated 11 and 12 of September 2007 and the Coordinator was asked to respond at her earliest convenience, but not later than 14 September 2007. On 19 September 2007 this Office had still not received a response and, as such, it was necessary for our Office to contact Memorial's Vice-President (Administration and Finance). In response, Memorial's Coordinator provided clarification in an e-mail dated 21 September 2007. Again, this action is indicative of Memorial's disregard for due process and for the authority of this Office. In addition, such disregard on the part of Memorial does nothing to further the rights of the Applicant as mandated by the *ATIPPA* in general and section 9 in particular.

[58] Another issue which I believe warrants some comment here involves the effect of a statutory holiday on the mandatory 14 day time period set out in section 52(3) of the *ATIPPA*. During the course of this Review, Memorial's Coordinator pointed out that the Canada Day holiday fell within the 14 day response period and should be taken into account when calculating the due date. Specifically, the Coordinator argued that when a statutory holiday falls within this time period, the period should be extended to reflect the holiday. While I do not consider this to be a significant issue in this case, I believe it is important to clarify my position in this regard. In so doing, I would first refer to section 22(j) of the *Interpretation Act*, R.S.N.L. 1990, c. I-19, which states that when a time limit **expires** on a holiday the time limit is extended to the following day:

> *22. In an Act or regulation*
>
> …
>
> *(j) where the time limited for the doing of anything expires or falls upon a holiday, the time so limited shall be extended to and the thing may be done on the following day that is not a holiday;…*

[59] Section 22(j) of the *Interpretation Act*, therefore, is clearly intended to allow an additional day only when the time limit happens to end on a holiday, as defined in section 27 of the *Interpretation Act*. This provision is also referenced in the *ATIPPA* Manual. In referring to the 30 day time limit for responding to a request, section 3.20.1 of the Manual states that "[i]f the 30 day period ends on a Saturday, Sunday or statutory holiday, the time for responding is extended to the next day that is not a Saturday, Sunday or statutory holiday." Section 22(j) of the *Interpretation Act* is footnoted to this passage. Obviously, the *Interpretation Act* applies equally to other statutory time limits in the *ATIPPA* as well as other provincial statutes. Given that the 14 day time limit in this particular case fell on a regular business day, Thursday, 12 July 2007, there is no basis for an extension based on the Canada Day holiday on 2 July 2007. It is important for public bodies, and in particular Coordinators, to be guided by this process when calculating the date on which a response is required under authority of the *ATIPPA*.

[60] Based on all of the above, it is evident that Memorial is showing a troubling attitude toward the access to information process and lacks the commitment necessary to achieve the intent and the spirit of the *ATIPPA*. I cannot say whether this is due to a lack of knowledge and understanding of the legislation and due process, or a concerted effort to ensure that Dr. Panjabi does not get access to information she is likely entitled to. Whatever the reason, I can say with certainty that Memorial has failed to honour its duty to assist, as mandated by section 9. I do not believe that Memorial has provided a reasonable effort to be open, accurate and complete. All of the issues described above have together raised significant concern for this Office and my recommendations will reflect the need for Memorial to re-evaluate its commitment to this process and its attention to an appropriate level of care and diligence.

IV CONCLUSION

[61] Memorial originally denied access to the responsive record in its entirety, claiming that the information was personal information and therefore must be withheld in accordance with section 30(1). I have acknowledged in this Report that Memorial, through negotiations with this Office, has since released the majority of the responsive record to Dr. Panjabi, with the exception of the names of four individuals. In continuing to deny access to these four names, Memorial attempted to raise an additional discretionary exception (solicitor-client privilege – section 21) several months after its initial response to the Applicant.

[62] After a thorough analysis, I have concluded that the list of names of the four individuals is personal information as defined by the *ATIPPA*, but that Memorial cannot rely on section 30(1) due to the operation of section 30(2). I have determined that each of the four individuals in question is or was an employee or member of Memorial and that their involvement with this file is directly associated with their position or function as an employee or member of Memorial. As such, section 30(2)(f) is engaged and Memorial is unable to rely on section 30(1) in order to withhold the names of these four individuals.

[63] With respect to section 21, I concluded that Memorial cannot rely on this exception due to the fact that it was never claimed as an exception during the request process nor during the period of time provided by this Office for raising additional exceptions. In fact, Memorial did not claim section 21 until several months into the Review process. Notwithstanding my conclusions in this regard, I did provide a detailed discussion of solicitor-client privilege. I acknowledged the importance of this privilege, but at the same time emphasized the limitations to its use. Relying on the Supreme Court of Canada and other jurisprudence in this area, I concluded that the names of the individuals in this case do not constitute information that is protected by solicitor-client privilege. As such, even if I had accepted Memorial's late claim of solicitor-client privilege, I would have clearly rejected its application to the responsive record in this case.

[64] In addition to my conclusions on the application of sections 30 and 21, I have also raised a number of concerns with respect to the manner in which Memorial has conducted itself

throughout this entire process. These concerns include the manner in which Memorial has responded to Dr. Panjabi, the manner in which it has communicated with this Office and its overall lack of respect and commitment to the spirit and intent of the *ATIPPA*. As such, I have concluded that Memorial has clearly failed to honour its duty to assist as mandated by section 9 of the *ATIPPA*.

V RECOMMENDATIONS

[65] Under authority of section 49(1) of the *ATIPPA*, I hereby issue the following recommendations:

1. That Memorial release to Dr. Panjabi a copy of the responsive record, which is a list of names and is entitled "Katz Report – August 4, 2006," in its entirety, with no information severed. I note here that the responsive record is not the Katz Report itself, but simply a list of names of individuals who received an unredacted copy of the Katz Report;

2. That Memorial University of Newfoundland make every reasonable effort to assist an applicant in making an access to information request and to respond without delay to an applicant, in an open, accurate and complete manner, as required by section 9 of the *ATIPPA*;

3. That Memorial ensure that all employees who are, or may be, involved in the access to information process receive adequate training in this area;

4. That Memorial improve its level of commitment to the administration of the *ATIPPA*, and to ensuring that the rights of all applicants under the *ATIPPA* are upheld, in a manner that is consistent with the purposes, the intent and the spirit of the *ATIPPA*;

5. That Memorial where possible claim all relevant exceptions at the time a response is issued to the applicant's access request, as per section 12 of the *ATIPPA*. In the event that a late discretionary exception is necessary or desired, that it be claimed within the time frame set

out in the document entitled *Preparing for a Review: Guidelines from the Office of the Information and Privacy Commissioner*, or any other document produced by this Office;

6. That Memorial provide accurate and complete correspondence and records to this Office at all times and that it respond to this Office in a timely manner.

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

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

[68] Dated at St. John's, in the Province of Newfoundland and Labrador, this 24th day of October 2007.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador