



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

REPORT A-2010-003

March 19, 2010

College of the North Atlantic

Summary:

The Applicant applied to the College of the North Atlantic (the “College”) under the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) for access to records relating to the preparation of a Statement of Claim by the College’s external legal counsel. The Applicant alleged that the College had not conducted a proper search for the responsive records, had improperly withheld responsive records and had failed to meet the duty to assist imposed on the College by section 9 of the *ATIPPA*. The Commissioner determined that the College had complied with its duty to assist under section 9, including conducting a reasonable search for the records responsive to the Applicant’s request. The Commissioner concluded that the College acted appropriately by releasing all records responsive to the Applicant’s request to which the Applicant was entitled.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A – 1.1, as amended, s. 9.

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2006-009 and A-2009-011.

I BACKGROUND

- [1] In accordance with the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) the Applicant submitted an access to information request dated May 17, 2007 to the College of the North Atlantic (the “College”), seeking disclosure of records as follows:

I am requesting personal information, as defined by the ATIPPA.

I am requesting all records, which were relied on in the preparation of the Statement of Claim, filed in the Supreme Court of Newfoundland and Labrador by the Board of Governors of the College of the North Atlantic (plaintiff) against me, [Applicant] (defendant).

[External Legal Counsel], [Name of Law Firm], *filed this claim on behalf of the plaintiff. It is signed by [External Legal Counsel] and dated May 15 2003.*

Without limiting the generality of this request, I am particularly requesting all records relied on by the Board of Governors of CNA in making the following statements in that claim:

8. CNA states that since the time of his termination, [Applicant] has committed a number of violations of these provisions of the Employment Agreement, including, but not limited to:

- a. distribution of confidential correspondence among other employees at CNA-Qatar; and***
- b. downloading electronic material from CNA’s computer network.***

I am requesting all records, including but not limited to: letters, memos, meeting notes, reports, emails, and affidavits.

In order to assist in your search I have attached a copy of the Statement of Claim.

[Emphasis in original]

- [2] The College in correspondence dated June 18, 2007, advised the Applicant that it was granting him access to the requested records in full and attaching 47 pages of responsive records. In an e-mail dated June 27, 2007, the Applicant responded to the June 18, 2007 letter from the College by stating:

From my initial review of the supplied records, I cannot see any association with my request.

...

I maintain that either CNA has not supplied the existing records pursuant to my request or no records exist pursuant to the request.

...

I am requesting the records responsive to my request or in the alternative a statement from CNA that no records exist pursuant to my request.

- [3] In response to the Applicant's e-mail of June 27, 2007, the College stated in a letter to the Applicant dated June 29, 2007:

Clearing [sic] you have serious concerns about the response provided to you by this office. In way of clarification please be assured that a reasonable search was conducted based on the criteria provided in your Access to Information request. CNA consulted both internal and external legal counsel on the matter. They were requested to provide a list of the records responsive to your request. Based on the list provided this office went to considerable effort to isolate the records. Upon completion of the review of these records they was [sic] forwarded to you in their entirety.

- [4] In a Request for Review dated July 3, 2007 and received in this Office on July 6, 2007, the Applicant asked for a review of the decision of the College with respect to the access request.

- [5] During the informal resolution process the College released four additional records to the Applicant on December 12, 2008.

- [6] In correspondence to the Applicant dated April 14, 2009, the College stated:

Please be advised that the records disclosed in June 2007 were not the records used in the preparation of the Statement of Claim issued in May 2003. We apologize for the inconvenience this confusion caused.

CNA confirmed with external legal counsel that the only records relied on in the preparation of the Statement of Claim, filed in the Supreme Court of Newfoundland and Labrador by the Board of Governors of the College of the North Atlantic in May 2003, are the four records disclosed to you on December 12, 2008.

- [7] Attempts to resolve this Request for Review by informal means were not successful and by letters dated January 14, 2010 both the Applicant and the College were advised that the Request for Review had been referred for formal investigation pursuant to subsection 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

- [8] The College provided my Office with a written submission in correspondence dated March 1, 2010. In that submission the College outlined the history of the access request, the Request for Review and the informal resolution process that took place. In explaining the fact that it located four new records responsive to the access request the College made the following comment:

Based on the conversations with your office it became evident that records responsive to this request would be limited to the brief period between the termination of the employment and the date the statement of claim was issued. CNA undertook a new search in an attempt to satisfy the request in full. This search would focus on records created between May 11, 2003 and May 16, 2003.

- [9] The College continued its submission by pointing out that:

All four of these records were provided (without redaction) to the applicant on December 12, 2008. The fourth record was found at page 18 of the June 2007 disclosure but was provided a second time.

In an effort to provide further clarification to the applicant, CNA wrote the applicant again on April 14, 2009, explaining the redefinition of the search to include only records generated between May 11 and 16, 2003. We also advised the applicant that the records disclosed in June 2007 were not the records used in the preparation of the statement of claim in May 2003. After apologizing for the confusion and inconvenience caused, CNA confirmed that the four records disclosed in December 2008 were the only records relied on in the preparation on [sic] the May 2003 statement of claim.

...

While CNA maintains the records provided by CNA to our external legal counsel related to a legal action are Solicitor-Client Privileged records, CNA chose to waive this privilege and disclose the records. This decision was made with the intentions to make an open, accurate and complete response to the applicant. No redactions were applied to the information provided to the applicant.

- [10] In its submission the College commented on its response to the Applicant's access request:

The decisions and actions of CNA in the conduct of this file were appropriate and reasonable. CNA preformed [sic] the search for records responsive to this request in good faith. This office contacted CNA's general counsel as well as our external legal counsel. Records identified as responsive were gathered and produced for the applicant.

- [11] Also in its submission the College discussed its duty to assist as follows:

CNA remains committed to fulfilling the duty to assist all our applicants. As expressed in the Report A-2009-011 at paragraph 80:

The duty to assist, then, may be understood as having three separate components. First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner. ...

With respect to the first component CNA acknowledged the applicant's request with a formal letter, specifying the due date for the request. Based on our understanding of the request CNA moved forward with processing the request which is the second component of the duty to assist – a reasonable search.

This office conducted a search in cooperation with CNA's general counsel. This individual and her predecessor were asked to provide the appropriate records. These are the employees with the most knowledge of the records in question. Information about the preparation of a statement of claim would reasonably be found in these offices. The search conducted, therefore, was a reasonable search given that it was conducted in the place one would reasonably expect to find the records by the people who would have the best knowledge of the records.

In hindsight our original search may have been too broad. As a result records not responsive to the request were found and provided to the applicant. While working through the informal review process better search criteria were defined. Based on this secondary search CNA was able to provide the applicant with all the records requested.

The third component, an open, accurate and complete response to the applicant, was made by CNA. CNA conducted the original search in a reasonable manner and provided the resultant records in full. Correspondence from the applicant was answered in a timely manner with content appropriate to our understanding of the facts. CNA fully cooperated with the OIPC in the informal resolution process and conducted a second search as recommended during that process. Again, all records found to exist were provided in full to the applicant.

CNA has therefore met the three components required to satisfy the duty to assist in this request.

III APPLICANT'S SUBMISSION

[12] The Applicant's written submission was received in my Office on March 1, 2010. In that submission the Applicant pointed out his reason for making the access request:

My intention in accessing the records was to hold the College accountable for the actions taken by that public body; to determine what the College relied on in issuing that Statement of Claim. I knew that I did not at any time since my termination download any CNA electronic material, nor did I distribute any confidential material. On what basis then did the College make those false accusations? I sought answers to the questions arising from this matter, through the documents in the College's possession . . .

- [13] The Applicant expressed his view that there are responsive records not yet released and provided his reasons for holding that view:

. . . without question there are records responsive to this request which have not yet been released. The College has not released any correspondence either to or from [External Legal Counsel] regarding the filing of that Statement of Claim against me. Is it possible for . . . external counsel for CNA to file a Statement of Claim on behalf of the Board of Governors of the College and not have any written record from the client as to the instruction to file that Statement of Claim?

If it is, and [External Legal Counsel] can file a Statement of Claim on the strength of a phone call or a meeting without any paper trail at all, then there is no accountability regarding legal matters at the College; it is nonexistent. If there is no written record required of the College in requesting that Court action be initiated by external counsel, then on the strength of a phone call unnamed College employees can initiate court action at will with absolutely no accountability.

*It is my opinion that the College requires that instruction to external counsel, to start a civil action on behalf of the College is to be in written form. Further, I believe that the records regarding this action do exist and are with the College. The records have not been disclosed to the applicant and apparently not disclosed to the OIPC. The requirement under the ATIPPA was for the public body to provide to the OIPC all responsive records, and any record from the College to [External Legal Counsel] regarding that Court action against me would be a responsive record under my request which asked for, **“all records but not limited to letters, memos, meeting notes, reports, emails, affidavits.”***

[Emphasis in original]

- [14] In his submission the Applicant comments on the fact that the initial 47 pages sent to him were subsequently determined by the College not to have been responsive to his request:

The College stated in correspondence to me of April 14 2009 “Please be advised that the records disclosed in June 2007 were not the records used in the preparation of the Statement of Claim issued in May 2003. We apologize for the inconvenience this confusion caused.” This was after the College initially supplied me with records as totally unrelated as an email which discussed the student dress code. It was clearly a case of CNA declaring to the applicant once again that accessing records under the ATIPPA would only be possible through a protracted time consuming and often costly process.

- [15] Later in his submission the Applicant indicated that “[a] proper search was not conducted.” He then suggested that the College should have searched certain record sources, including those that would contain records of the College’s internal legal counsel. The Applicant then stated: “My guess is that files on this matter do exist and that there was no search of those files.”

[16] The Applicant summarized his position at the end of his written submission:

The College has still not been upfront with me as the applicant. My access to the College server was cut off as of the evening of May 10 2003. The allegation by the College as filed in Court was that after my termination I downloaded material from the College's electronic network. I did not do that, therefore any document in the possession of the College which states that I did, is a fraudulent document. Either the College relied on fraudulent documents or they had no documents on which to rely at all. This then is at the heart of the matter; this is why there is a need for me the applicant to be able to identify who is making the declaration that I committed a criminal act.

I am requesting that the College supply the records related to this request and be held accountable for the failure to assist the applicant.

[Emphasis in original]

IV DISCUSSION

[17] The Applicant took the position in his submission that the College has not conducted a proper search for the requested records, has not released certain responsive records and “has still not been upfront” with him. The Applicant ended his submission by asking that the College be held accountable for a failure to assist him in his access request. This position is consistent with the Applicant’s indication in his Request for Review form that he wished me to bring to the attention of the head of the College a failure by the College to fulfill its duty to assist the Applicant.

[18] The duty on the College to assist the Applicant is set out in section 9 of the *ATIPPA*:

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.

[19] The duty to assist has been discussed in a number of reports from this Office. As indicated by the College in its submission, I outlined its three components in paragraph 80 of Report A-2009-011.

[20] Also in Report A-2009-011, I discussed the measurement to be used when determining if a public body has met its duty to assist:

[79] . . . the standard against which the duty to assist is measured is reasonableness, not perfection. I would also observe that while the overall burden of proving that the duty to assist has been fulfilled rests with the public body, it may be the case that on any specific issue, the burden of proof of a particular proposition may rest with the party that is asserting it.

[21] In this Request for Review the Applicant has asserted that the College has not conducted a reasonable search for records and is refusing to disclose responsive records in its possession. In Report 2006-009, I discussed the onus on an applicant where such assertions are made:

[17] . . . It is important to note that when an Applicant, in a Request for Review, takes the position that a public body is intentionally withholding a record or has not undertaken an adequate search for a record, there is some onus on the Applicant to present a reasonable basis for that position. . . . adequacy of search with regard to access to information requests has been dealt with by other jurisdictions in Canada. In Ontario Order M-909, the Inquiry Officer commented that:

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

...

[18] I noted in my Report 2005-006 that "the Inquiry Officer in Order M-909 also states that records searches 'must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.'"

[22] The Applicant took the position that there must be records that relate to the written instructions given by the College to its external legal counsel to commence the action and that either the College has not done a proper search for those records or is refusing to disclose them to the Applicant. With respect, I take a different view from that of the Applicant regarding records relating to any instructions given to external counsel. In my view the Applicant's request is clear: he is requesting "all records, which were relied on in the preparation of the Statement of Claim." There is a distinction to be made between records relied on by a solicitor in the preparation of a Statement of Claim and those records which relate to a client's instruction to a solicitor to prepare a Statement of Claim. The former are the records used by counsel as the basis for the allegations set out in the Statement of Claim. The latter are records that relate to the client's wish that the solicitor prepare a Statement of Claim. In my opinion, the Applicant's request is for those records relied on by the College's solicitor as the basis for the allegations outlined in the Statement of Claim. There has been

no request by the Applicant for any written instructions from the College to its solicitor requesting that a Statement of Claim be prepared.

[23] The Applicant also took issue with what he refers to as “false accusations” in the Statement of Claim and seeks to know on what basis they were made. The College indicates in its letter to the Applicant dated April 14, 2009 that it has “confirmed with external legal counsel that the only records relied on in the preparation of the Statement of Claim . . . are the four records disclosed to you on December 12, 2008.” I would note here that a Statement of Claim is a document in which a plaintiff sets out the allegations against the defendant. It is not the role of this Office to determine the veracity of allegations made by the College in its Statement of Claim. Whether such allegations are true or false is to be proven by evidence at the trial of the matter. As such, the issue I have to decide is whether the Applicant has been granted appropriate access to all the documents relied on by the College’s external counsel when he prepared the Statement of Claim.

[24] I turn now to an assessment of whether a reasonable search has been conducted by the College. In assessing this I must determine if the search was conducted by knowledgeable staff in locations where the records might reasonably be located. In this case the College consulted with both its internal legal counsel and its external legal counsel, who actually prepared the Statement of Claim, as to which records were responsive to the Applicant’s request. The College also had confirmation from external legal counsel that the records provided to the Applicant on December 12, 2008 were the only records relied on in the preparation of the Statement of Claim. In my view, the search was conducted by the persons who would be most knowledgeable as to which records were responsive to the request. Furthermore, I am of the opinion that the most reasonable locations to search for the records would have been the files of counsel involved in this matter, particularly those of the external legal counsel who prepared the Statement of Claim.

[25] The Applicant appears to assert in his submission that the College intentionally sent him the initial 47 pages knowing that these records were not in fact responsive to his request. There is no evidence to support that assertion and I cannot accept it. In its letter to the Applicant dated April 14, 2009, the College acknowledged that the 47 pages sent to the Applicant in June 2007 were not the records used in the preparation of the Statement of Claim and apologized to the Applicant for the “inconvenience this confusion caused.” I accept that the initial 47 pages were sent as a result of

confusion or through inadvertence. While the response of the College does not amount to perfection, the response was a reasonable one in the circumstances.

[26] I would note, again, that the Applicant suggests that the College has not been “upfront” with him. This appears to be a reference to the duty imposed on the College pursuant to section 9 of the *ATIPPA* to respond to the Applicant “in an open, accurate and complete manner.” I find that there is no evidence that the College failed to respond to the Applicant in this manner. The College sent the Applicant 47 pages of records which it initially believed to be responsive to the Applicant’s request because they were relied on by external legal counsel when he prepared the Statement of Claim. If, in fact, these 47 pages had been relied on by external legal counsel to prepare the Statement of Claim, they would very likely have been subject to solicitor and client privilege. The College was willing to waive its right to claim solicitor and client privilege in relation to those documents which it believed were used by its counsel to prepare a court document on its behalf. In addition, the College has waived its right to claim solicitor and client privilege in relation to the four documents that were confirmed by its external counsel to be those relied on by him in preparing the Statement of Claim. In my view, such waivers are more consistent with a public body that is responding in an open, accurate and complete manner than they are with a public body that is attempting to withhold records responsive to an applicant’s access request.

[27] In summary, I find that the College has met its duty to assist the Applicant. The College has conducted a reasonable search for the requested records and has thereby fulfilled the requirement of the second component of the duty to assist. Also, the College has responded to the Applicant in an open, accurate and complete manner in compliance with the obligation imposed on it by the third component of the duty to assist. In relation to the first component of the duty to assist it was not specifically raised or discussed by the Applicant and was only referred to briefly by the College in its submission. Consequently, I make no specific finding in relation to the first component of the duty to assist which involves how a public body assists an applicant in the early stages of making an access request. In addition, I find that there is no evidence that the College is intentionally withholding records responsive to the Applicant’s request.

V CONCLUSION

[28] I will summarize my conclusions as follows:

(1) The Applicant's access request is for records relied on by the College's external legal counsel in the preparation of a Statement of Claim dated May 15, 2003. It does not include a request for records relating to the instructions given by the College to have the Statement of Claim prepared.

(2) The College has conducted a reasonable search for the records responsive to the Applicant's access request and has responded to the Applicant in an open, accurate and complete manner.

(3) The College has met the duty to assist imposed on it by section 9 of the *ATIPPA*.

(4) There is no evidence that the College is intentionally withholding records responsive to the Applicant's access request.

(5) Having found that the College of the North Atlantic acted appropriately by releasing all records responsive to the Applicant's request to which the Applicant was entitled, it is not necessary for me to make a recommendation.

(6) Although I have not made a recommendation in this Report, under authority of section 50 of the *ATIPPA* I direct the head of the College of the North Atlantic to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the College of the North Atlantic with respect to this Report.

(7) Please note that within 30 days of receiving a decision of the College of the North Atlantic under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*.

[29] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of March 2010.

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

