

NEWFOUNDLAND AND LABRADOR
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

REPORT A-2008-001

College of the North Atlantic

Summary:

The Applicant applied to the College of the North Atlantic (“CNA”) for access to certain records. CNA responded by providing access to a portion of the records while withholding others under exceptions provided for in the *ATIPPA*. The Applicant asked the Commissioner to review CNA’s decision with regard to severing and withholding records, and he presented reasons why he felt additional records exist which should be disclosed to him. CNA disagreed, stating that a thorough and reasonable search had been conducted, and no additional records were found. CNA also noted that further searches were conducted during the Commissioner’s investigation, with the same result. CNA stated that it had released all of the records suggested for release by the Commissioner’s Office during informal resolution efforts, and the remaining records were being withheld on the basis of sections 20, 21 and 30 of the *ATIPPA*. The Commissioner accepted that a reasonable search had been conducted, and was not convinced by the Applicant’s argument that additional records must exist. He also agreed with the College’s decision to withhold records under sections 20, 21 and 30. The Applicant also filed a complaint under section 44 about the College’s use of an extension of time. The Commissioner found that the College was justified under section 16 in extending the time limit, and therefore the complaint was not well founded. The Commissioner did, however, issue one recommendation based on his assessment that the College did not comply with section 11(2) in that it did not issue its final response to the Applicant within the extended 60 day period.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A 1.1, as am. s. 9, 11(2), 16, 20, 21, 30(1), 44, 49(2), 50, 60.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-003, 2006-006, 2006-009, 2006-13, 2007-10, 2007-016.

I BACKGROUND

- [1] On 10 November 2006 the College of the North Atlantic (“CNA” or the “College”) received the following request under the *Access to Information and Protection of Privacy Act* (the “ATIPPA”):

It is my understanding that management level travel benefits, requisitioned and spent by me while a management employee of CNA, were subsequently assigned as a liability to [Applicant’s spouse], a faculty member.

I am requesting all records, which have anything to do with the assignment of my travel benefits to [Applicant’s spouse]. These records would include but not be limited to emails and financial records of CNA indicating a financial liability has been assigned, the date when the financial liability entered into CNA accounting, the amount of that financial liability and the current status of that debt.

I am including the relevant section from CNA’s Reply of the Board of Governors of the College of the North Atlantic, dated July 7, 2004 regarding [Applicant’s Spouse]’s Amended Complaint to the Human Rights Commission. In this section, in an affidavit [former CNA General Counsel] describes the process of this assignment:

- 11. The Respondent states that on or about May 16, 2003 and again on or about May 18, 2003 the Qatar Campus’ Director of Finance, [name], advised the complainant, via e-mail, that executive class airfare had been booked by the College for her, her spouse and her dependent child. She was further advised that she was not entitled to executive class airfare. She was provided with the option of changing the previously scheduled flight to economy class or of reimbursing the college for the difference between executive class and economy class. The complainant refused or otherwise failed to reply to the e-mail correspondence.*
- 12. The Respondent states that on or about June 24, 2003, the Complainant, her husband and their daughter returned to Newfoundland and Labrador using the executive class airfare booked and paid for by the College on or about April 23, 2003.*
- 13. The Respondent states that the complainant was provided with sufficient notice that the airline tickets originally requested by her husband were being assigned to her, that she was not entitled to executive class airfare, and that she would be held liable for extra costs associated with executive class travel. The College further maintains that the complainant refused to acknowledge or otherwise respond to this notice and that she is,*

therefore, liable for any excess benefit entitlement provided by the College.

- [2] On 20 November 2006 CNA wrote to the Applicant, requesting additional clarification with regard to the Applicant's request. CNA raised a number of questions and sought clarification on several items in this regard, and noted that section 8(2) places an onus on the Applicant to provide sufficient details so that an employee familiar with the records of the public body could identify the responsive records.
- [3] The Applicant responded by e-mail on 23 November 2006 to this request for clarification, and on 27 November 2006 CNA sent the Applicant a letter outlining the revised search criteria it intended to use. This letter also contained notification to the Applicant that CNA intended to extend the time limit based on section 16(1)(b) of the *ATIPPA*, which allows for an extension where a large number of records is requested or must be searched, and to do so would interfere unreasonably with the operations of the public body. The Applicant then sent a further e-mail dated 30 November 2006 to CNA in which he requested that the time frame for the records to be searched should be from May 2003 to present.
- [4] On 30 November 2006 CNA responded to the Applicant's request, again advising the Applicant that it was extending the time limit for responding, "... because of the large number of records returned in the search and responding within the 30 day time period would unreasonably interfere with the operations of our organization." CNA also stated that this extension was in accordance with paragraph 16(1)(a), which states that a public body may extend the time limit for a response where "the applicant does not give sufficient details to enable the public body to identify the requested record." CNA set 10 January 2007 as the due date for responding to the Applicant.
- [5] Further correspondence was again exchanged between CNA and the Applicant before the search criteria were finalized, including a letter from CNA to the Applicant dated 4 December 2006 and an e-mail response to CNA dated 8 December 2006, with a further change to the criteria made on that date by the Applicant.

[6] CNA forwarded a letter to the Applicant dated 10 January 2006, stating that his request for access had been granted in part, with some records withheld on the basis of sections 20, 21, 24, and 30 of the *ATIPPA*. Some of the records to be released to the Applicant were accompanied by that letter, while those resulting from searches at CNA-Qatar were not yet provided. The Applicant was advised that

... due to circumstances at CNA-Qatar in December, the search could not be completed until the campus reopened January 7, 2007. These records will be forwarded to you as soon as they are available.

[7] Correspondence from CNA dated 24 January 2007 included the remaining records which CNA designated for release to the Applicant. The records which were not released were withheld citing the same exceptions to access noted in the 10 January letter.

[8] On 29 January 2007 a Request for Review was received at this Office from the Applicant which requested that I review the withholding and severing of records. The Applicant was of the opinion that there were additional records to which he is entitled which were not provided to him. He wished to know whether or not those records exist. Furthermore, he indicated that he wanted me to investigate the length of time which it took CNA to respond to his request.

[9] During informal resolution efforts, CNA released all additional records suggested for release by this Office, however attempts to resolve this matter informally were unsuccessful because the Applicant was of the opinion that further responsive records must exist. Both parties were notified of this in a letter dated 27 August 2007, at which time they were given the opportunity to provide formal submissions. Both CNA and the Applicant chose to provide submissions, of which the most relevant points are summarized in this Report.

II PUBLIC BODY'S SUBMISSION

[10] In its submission, CNA responded to both issues raised by the Applicant's Request for Review, being the decisions made by CNA in relation to the severing and withholding of

records, as well as the extension of the time limit for responding. I will begin by summarizing CNA's position in relation to the extension of time.

[11] CNA states in its submission that it notified the Applicant of the extended deadline in its letter of 27 November 2006 based on section 16(1)(b). CNA reiterated its position on this in a letter to the Applicant on 30 November 2006, but also added a reference to section 16(1)(a) as a reason for the extension. The relevant parts of section 16 are as follows:

16(1) The head of a public body may extend the time for responding to a request for up to an additional 30 days where

(a) the applicant does not give sufficient details to enable the public body to identify the requested record;

(b) a large number of records is requested or must be searched, and responding within the time period in section 11 would interfere unreasonably with the operations of the public body; or ...

[12] CNA says that on 28 November 2006 instructions were issued to begin the search based on revised search criteria which were established through discussion with the Applicant. CNA says that the Applicant then sent an e-mail on 30 November 2006 in which he further clarified the intent of his request, and also indicated that the time frame to be covered by the search was from May 2003 to November 2006. Further clarification of the search criteria occurred through correspondence between the Applicant and CNA, concluding with a final confirmation of the search criteria by the Applicant on 8 December 2006.

[13] In terms of accounting for the delay, CNA states in its submission that CNA-Qatar was closed between the end of November 2006 and the first week of January 2007 by the State of Qatar due to "... important events happening in Doha at that time." CNA says that CNA-Qatar reopened on 7 January 2007.

[14] CNA says that on 10 January 2007 it sent a letter to the Applicant granting partial access to some records, while withholding others on the basis of sections 20, 21, 24 and 30 of the *ATIPPA*. CNA says that the Applicant was advised of the reason for the additional delay as noted above.

Further records were forwarded to the Applicant on 24 January 2007, after additional responsive records arrived at CNA in Newfoundland and Labrador from CNA-Qatar.

[15] CNA notes in its submission that it was in the process of negotiating search criteria with the Applicant at the time of the extension. CNA says that the wording of the request was part of the reason for the extension, but also the volume of records. CNA says that it had to wait for the campus to reopen in order to conduct the search, because CNA-Qatar was already closed when the final search criteria were agreed upon by the Applicant on 8 December 2007. CNA says that even though that campus reopened on 7 January 2007, at that point "... CNA-Qatar staff were primarily involved in registration related activities for the winter 2007 semester."

[16] In its submission, CNA asked that I consider the following factors in relation to the extension of time:

- *CNA-Q and CNA-Qatar refers to a project of the College being carried out by the College as a consultant to the State of Qatar (the client). The State of Qatar established a separate entity, the College of Technology (COT), to act on its behalf in overseeing the day-to-day implementation of, and operation of, the project.*
- *Pursuant to a comprehensive agreement, the State of Qatar owns all the facilities at CNA-Q as well as all furnishings, equipment etc.*
- *Not all persons who work at the facilities being used by the College in Qatar are College employees. The State of Qatar is responsible for maintaining and securing the facilities and as a result, security, cafeteria workers and the like are employed by the State of Qatar through the College of Technology. They are not College employees. Most of the staff who work with the computing facilities below the rank of managerial staff are also COT employees.*
- *CNA-Qatar was closed for this period by the State of Qatar (the client) through the College of Technology.*

[17] CNA also commented that the records sent to the Applicant on 24 January 2007 were only received by the Access & Privacy Coordinator at CNA in Newfoundland and Labrador for review and severing two days prior to that.

[18] CNA provided further commentary on 14 February 2008 in response to questions by this Office in relation to the circumstances at the CNA campus in Qatar which impacted CNA's ability to provide earlier access to records located there. CNA forwarded to this Office a copy of an e-mail sent out by the Manager of Human Resources to management in September 2006, in which he advised that 30 November 2006 was the "... last working day for faculty and staff..." until 7 January 2007, with the exception of December 17 to 21 and December 31 to January 6, when the campus was open only for the purposes of accepting applications from students and entrance testing, and in the latter period, for orientation of new employees.

[19] CNA made it clear that "most employees left the country during this break." CNA also said that the Manager of Information Technology at CNA-Qatar, was "the only CNA employee with the appropriate security access to the e-mail server and the necessary knowledge of Microsoft Exchange to perform the required search." CNA indicated that the person occupying the position at the time is no longer a CNA employee and is not available for confirmation of the details, but CNA shared with this Office information showing that a combination of annual leave, weekends, national and statutory holidays meant that this individual was not at work from 1 December 2006 until 7 January 2007. This time includes a national holiday declared by the Qatari Emir from December 3 to 14 for the Asian Games. CNA also shared with this Office a memo showing that it was expected that most employees would have made their holiday travel plans well in advance, and these "cannot be easily changed due to State of Qatar restrictions" requiring employees to acquire an exit visa. CNA also stated that during closure of the campus, employees are not banned from the facility, but are discouraged from being there "... for safety reasons," although CNA did not elaborate on what those reasons might be.

[20] CNA commented in some detail with regard to its decision to sever or withhold some records. As noted above, CNA provided the Applicant with access to some of the records on 10 and 24 January 2007. CNA then noted that during informal resolution efforts initiated by this Office, it released to the Applicant all additional records recommended for release by this Office.

[21] CNA pointed out that during the informal resolution process, it acceded to the recommendations of this Office that none of the records for which it had originally claimed

section 24 would continue to be withheld on the basis of that exception. CNA therefore made no submission regarding its initial use of section 24.

[22] CNA then proceeded to provide some brief commentary on its use of the other exceptions relied upon to withhold information from the responsive records. CNA stated that the information for which it claimed section 20 involved "... records containing copies of draft letters and e-mails, advising and seeking guidance on a particular matter." CNA commented on the use of section 20 by referring to Order 03-08 of the British Columbia Information and Privacy Commissioner in relation to the University of Victoria. In that decision, the University relied on British Columbia's equivalent of Newfoundland and Labrador's section 20 to withhold certain records. In that case, CNA says that

...the University argued that the records "set out internal deliberations of UVic staff and faculty 'as to how to manage a series of specific issues'" and that the information would either "reveal advice that influenced UVic's decision and actions respecting the applicant or would allow a reader like the applicant, who is familiar with the circumstances to infer advice that was given."

[23] The British Columbia Commissioner agreed with the decision of the University in Order 03-08. CNA submitted that the records withheld under section 20 which are subject to this Review are similar in criteria and description to those referenced in Order 03-08.

[24] CNA referred to three decisions by the British Columbia Information and Privacy Commissioner in relation to the application of solicitor-client privilege: Order 00-06, Order 02-01, and Order 03-08. CNA states that the substantive test for determining solicitor-client privilege can be found in *Kranz v. Attorney General of Canada* [1999] 4 C.T.C. 93 (B.C.S.C.), which quotes with approval the following passage from *B. v. Canada*:

As noted above, the privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:

- 1. there must be a communication, whether oral or written;*
- 2. the communication must be of a confidential character;*

3. *the communication must be between a client (or his agent) and a legal advisor; and*
4. *the communication must be directly related to the seeking, formulating, or giving of legal advice.*

If these four conditions are satisfied then the communications (and papers relating to it) are privileged.

[25] CNA says in its submission that this test has been adopted by Information and Privacy Commissioners in British Columbia, Alberta and Ontario. CNA further states that it applied section 21 to records containing two categories of records, one which involves "... correspondence between its General Counsel and external counsel, giving instructions or seeking legal advice..." and the other which is comprised of "... records containing correspondence between the General Counsel and staff or management of the College, giving legal advice and instruction." CNA says that all of the records withheld in both of these categories meet all four of the conditions noted above.

[26] CNA says that the records to which it applied section 30 contained the "... personal information of individuals other than the Applicant and the person for which the Applicant supplied a consent form ..." CNA says that it applied section 30 as a mandatory provision of the *ATIPPA* and severed this information.

[27] CNA then proceeded to outline its efforts with regard to the search for responsive records. CNA says that during the process of assisting the Applicant to define the search parameters, CNA made the following suggestion with respect to its search for financial records, which became part of the search criteria agreed to by the Applicant:

Also included in the search will be the financial records, should they exist, showing:

1. *Transaction record of the assignment of liability.*
2. *Date of the Assignment of liability*
3. *Total Amount of the liability*
4. *Current Status of the liability*
5. *Any statements related to the A/R account.*

[28] CNA says that it "... addressed these five items to CNA and CNA-Qatar's finance departments on November 28, 2006." CNA says that the result found that "... no records exist as described in items 1 to 4. With respect to item 5 CNA provided the Applicant with a print out of the Accounts Receivable account for [Applicant's spouse] from the CNA financial system." This latter record was provided by the Accounting Manager at CNA in Newfoundland and Labrador and disclosed to the Applicant on 10 January 2007, but no responsive records were found at CNA-Qatar relating to the five items listed above.

[29] CNA then commented on the Applicant's concern that there may be records relating to items one to four which had not been released:

Information around staff accounts receivable was not stored in college systems in 2002–2003. Travel Benefits (i.e travel authorizations and advances) were handled through the human resources department and benefits were tracked in a manual system. To [CNA-Qatar Comptroller]'s knowledge no documents around the assignment or transfer of liability in relation to travel benefits for [Applicant's Spouse] or [Applicant] exist. [CNA-Qatar Comptroller] also noted that there was nothing outstanding from either individual in the CNA-Qatar financial system.

[30] CNA then proceeded to recount some details from its search for financial records, noting that it conducted "... a very extensive search ..." for any records responsive to items one through five described above, and "... the only record found to exist was provided to the Applicant in January 2007." In response to a request from this Office, CNA conducted further searches, and re-examined the affidavit mentioned in the Applicant's request. CNA also noted that the Applicant was "... very active ..." in the process resulting in the precise search criteria to be used in the search, and CNA says that this search included both CNA-NL and CNA-Qatar.

[31] CNA says that it conducted a secondary search for items one to five in August 2007 in order to try to resolve the Applicant's concerns. CNA says during that exercise it contacted CNA's Finance Team Lead, Accounting Manager, Comptroller for CNA-Qatar, Finance Manager for CNA-Qatar, Vice President Qatar Project at CNA-Qatar, the former Comptroller of CNA-Qatar, and the Vice President Academic CNA-Qatar. CNA also says it undertook a detailed analysis of

the financial information of the Applicant and his spouse, but no further responsive records were found.

[32] CNA also discussed a July 2004 affidavit signed by the former CNA General Counsel which outlined the position of CNA in relation to a human rights complaint filed by the Applicant's spouse. The Applicant referenced this affidavit in his original request, considering it to be an indication that further records should exist which are responsive to his request. CNA's position on the affidavit is that the statements made therein

... were based on the emails provided to the office of CNA's General Counsel by [name], former Director of Finance at CNA-Qatar. In these emails [former Director of Finance, CNA-Qatar] outlined to the applicant's spouse that she would be expected to return the business class tickets purchased under the PO [number] (as per [Applicant]'s travel benefit) and book economy class tickets (as per her own travel benefit) or pay the difference for the business class tickets. These emails and the PO [number] have been previously released to the applicant.

[33] CNA also states that CNA's former General Counsel was asked whether "... the assigned financial liability was entered into the CNA or CNA-Q financial system..." CNA says that the former General Counsel stated that to his knowledge, no such entry was made.

[34] CNA reiterated that an Accounts Receivable statement for the Applicant's spouse was provided to the Applicant, and that no records were found to exist in relation to the other four items listed above. CNA also stated that "as the result of a different grievance process it was agreed that [Applicant's spouse] should not be held responsible for [the] cost of the business class tickets. CNA considered this matter resolved."

III APPLICANT'S SUBMISSION

[35] As noted above, the Applicant filed a Request for Review which alleged that CNA had failed to provide access to responsive records, and he wished CNA to acknowledge whether or not such records exist. Also, the Applicant asked me to review CNA's use of exceptions to access for the

records which had been severed or withheld, and in addition he lodged a complaint about CNA's extension of the time limit for a response.

[36] The Applicant forwarded a submission (of which I have summarized the most relevant portions) which was accompanied by copies of e-mail communications obtained through previous requests which he believed would support the notion that additional responsive records exist beyond those which have already been found by CNA. He began his submission by reiterating his original request for information, noting that the essence of his request was for "all records which have anything to do with the assignment of my travel benefit to [Applicant's spouse]."

[37] The Applicant began by expressing his view that there were two possible scenarios at play:

First, the assignment of the financial liability to my wife, was at the time of assignment and is currently, sanctioned and supported, and processed by CNA. The other possibility is that the assignment of this liability was not then and does not now have the sanction or support of CNA, and was not processed by CNA as per CNA accounting practice and policy. This second scenario would involve one or more persons operating outside of their mandate; essentially taking these actions on their own, for their own purposes.

In order to determine if the records supplied pursuant to my request have been accurate and complete, one must consider which of these possible pictures or scenarios is correct, and regardless of the correctness of the picture, which of these two scenarios is being currently advanced by CNA.

[38] The Applicant then proceeded in his submission to recount what he believes to be some relevant facts prior to examining the two possible scenarios. The first of these facts as set forth by the Applicant is that the assignment of a financial liability was made by the former CNA General Counsel. The Applicant cites the 2004 affidavit quoted in his original request as evidence of this, wherein the former General Counsel stated that "the College further maintains that the complainant refused to acknowledge or otherwise respond to this notice and that she is, therefore, liable for any excess benefit entitlement provided by the College."

[39] The Applicant suggests that this statement is clear and unambiguous, and that it is meant to represent the position of CNA on this matter. Furthermore, the Applicant states that there is nothing to indicate that there has been any change in this position on the part of CNA. The Applicant says that his spouse approached “senior CNA executives” with a request that they address the issue of assigning his travel benefit to her. He says that CNA refused to discuss the matter at that time, and “to date, CNA has not acknowledged to [Applicant’s spouse] in any manner or in any forum, the facts of the financial liability.”

[40] The Applicant also suggested that records of this liability must exist because “CNA is under obligation to follow the Financial Management Policy of the Province of Newfoundland and Labrador,” which he says would require all financial information to be maintained in keeping with generally accepted accounting principles. The Applicant states that a financial liability which was serious enough to be found in an affidavit by CNA’s former General Counsel, would, if such a liability were true and correct, be represented through an entry in CNA’s financial accounting system.

[41] The Applicant then went into detail as to his concerns about the status of the liability, such as whether CNA considered him or his spouse or both to be responsible for the liability, as well as CNA’s approach to dealing with this liability. The Applicant claims that records he has already received indicate that CNA has acted contrary to the accepted financial and accounting practices of a public body.

[42] The Applicant then reviewed aspects of CNA’s response to his request which he believes to be relevant. In particular, the Applicant focused on the origin of the decision to assign the liability to his spouse, and whether or not the decision to do so may have come from the former CNA General Counsel. The Applicant also presented evidence, in the form of copies of e-mails he had received from CNA through access requests, which contain discussions among senior CNA personnel about the issues raised in the Applicant’s request. The Applicant takes the position that these communications imply the existence of further undisclosed records in the possession of CNA which have not previously been acknowledged.

[43] The Applicant then reviewed some other factors which he believes must lead one to conclude that additional records exist. He referred to a videoconference in March 2006 involving the Applicant's spouse, her NAPE representative, as well as CNA's Associate Director of Human Resources and CNA's Accounting Manager which was held to deal with a grievance filed by his spouse about her travel benefits from 2002-2003. He says that CNA refused to deal with the issue outlined in his request for review, because CNA considered it to be a separate issue.

[44] The Applicant notes, however, that he has an e-mail which was received from CNA with handwritten notes from the Accounting Manager, in relation to discussions held about his spouse's grievance. The e-mail was sent by the Applicant's spouse to CNA, and in it the Applicant's spouse says that "in the interest of transparency and accountability, I need to know what happened to the nearly \$18,000 of Executive Class benefits [former CNA General Counsel] assigned to me and alleged that I refused to pay." Next to this sentence, there is a hand-written note by the Accounting Manager which reads "If cleared and [Applicant] owes then not her concern."

[45] The Applicant asks what is meant by "cleared" in this context. In his submission, he asks how this Accounting Manager would determine whether something has been cleared, when the clearance took place, and who authorized the clearance. In the Applicant's opinion, it is clear that his wife was assigned this liability. At a later date, it appears that the same liability was assigned to him. He expects that the Accounting Manager would have a record of this change in assignment, and of his spouse being cleared of it:

There should be some record of when these events took place. [CNA Accounting Manager] is a financial manager. Are financial transactions of this kind passed on over the years, through some sort of oral tradition? Surely [CNA Accounting Manager] as an accountant is required to follow Canadian accounting principles.

[46] The Applicant then went on to review, for comparison purposes, some excerpts involving the College of the North Atlantic from the Auditor General's Review of Departments and Crown Agencies for the year ending March 2006. In one section, the Applicant quotes the Auditor General as follows:

Monitoring of advances and travel

Travel advances and amounts to be recovered from third parties are not being adequately controlled. For example:

- *In 2003 an employee represented the College at 2 conferences. The employee indicated on the travel claims that the amounts, totaling \$1,939, were recoverable from the Association of Canadian Community Colleges; however, the Association was never invoiced.*
- *In one instance a travel advance of \$4,500 was issued in March 2005 but not recorded as an accounts receivable at year end.*
- *In one instance an advance related to the purchase of an unused airline ticket was recorded as an accounts receivable although the time frame for using the ticket expired two months previously.*
- *An advance to pay tuition fees in August 2004 was still outstanding at 31 March 2005 although the course had been completed. No receipt had been received to support the advance as of September 2005.*

[Page 94 of hard copy of Auditor General's Report]

[47] The Applicant also reported the College's response as contained in the Auditor General's Report:

Monitoring of spending:

- *The College will submit invoices to the Association of Canadian Community Colleges for reimbursement.*
- *The employee received the advance in mid-March and traveled to Qatar in April. The advance was settled upon the processing of a travel claim in May. The advance was properly recorded on the employee's account.*
- *The airline ticket was used within a few days of the postponement of the original trip. Accounts receivable staff later removed the charge from the employee's account.*
- *The course began in September, the finals were in December and the marks were released in February or March. The College does not remove the*

advance for Professional Development from the system until the employee produces his/her marks as proof of completion of the course.

- *The employee later submitted the marks and the advance payment was removed from the individual's account.*

[Page 113 of hard copy of Auditor General's Report]

[48] The Applicant believes that the Auditor General's findings, and the College's response to those findings, sheds light on the College's practices which, in his opinion, support his position that further records, particularly of an accounting nature, should exist in relation to his request. The Applicant's point is that the College's response to the Auditor General is essentially that all of the items referenced by his Report were properly recorded in the College's accounting records. In particular, the Applicant wishes to show that travel advances are recorded by CNA as accounts receivable items, and there should be a clear record of any transfer of said liability from the Applicant to his spouse. The Applicant implies that CNA cannot on the one hand maintain to the Auditor General that all such items are accounted for, while on the other maintaining, in similar circumstances, that there are no further accounting records in existence responsive to his request.

[49] The Applicant then proceeded in his submission to outline in some detail his concerns about what he feels is "the selective application of policy and changing position of CNA on these and similar travel benefits." The Applicant includes within the text of his argument excerpts (which I will not repeat here) from e-mails to and from various College officials who discuss matters related to employee travel benefits, and in particular, the matter which is at the heart of the dispute which the Applicant hopes to address by accessing further records from CNA. Through these excerpts, the Applicant revisits his central point, which is that accounting records of transactions or transfers of liability for the debt referenced in his access request should exist. The Applicant also, however, acknowledges that "it is possible that an accounting record was not created; however the available records indicate that CNA officials consider this to be a very real debt ..." which the Applicant believes must mean that "... there should be at the very least an entry into the accounting record." The Applicant also reiterated his position that authorizing and documenting such a liability is within the professional responsibility of accountants employed by

CNA, and as such, further responsive records should exist. The Applicant poses the question of whether it is "... possible that none of the CNA financial managers were willing to record this financial transaction and that it was only carried on by the verbal advice of [former CNA General Counsel]?" The Applicant then went on to reiterate the basis of his concern, alleging that CNA has improperly administered the employment benefits of him and his wife in comparison to other married couples where both partners were CNA employees, which he views as "... incredibly inappropriate accounting."

[50] The Applicant then concluded his submission with some general comments on the College's handling of his access request, as well as reiterating some of his main arguments. The Applicant says that "it appears that CNA is willing to provide a statement that [Applicant's spouse] does not currently owe money to CNA." The Applicant says that while such a statement would be appreciated, it still "... does not address in any way the request for the records detailing the assignment of this liability," which would include records of "... authorizations, processes, correspondence and all material which allowed the public college to maintain that [Applicant's spouse] is responsible for my travel benefit."

[51] The Applicant continued on to state as follows:

As long as CNA maintains that the assignment of a liability to [Applicant's Spouse] is legitimate, current and sanctioned by CNA then CNA does not have the right to maintain that there are no records to back up that claim. CNA cannot claim that this action followed CNA policy and at the same time declare that there are no financial records indicating that the assignment had taken place.

...

Further, CNA has not made any official statement declaring that the assignment was not in fact made ... lacking that statement then I am proceeding on the grounds that the assignment did in fact occur, and is current.

IV DISCUSSION

[52] I will begin by briefly commenting on the three exceptions to access which were ultimately relied upon by CNA in relation to the records it withheld from the Applicant. CNA had

originally also applied section 24, but it decided to drop its reliance on that exception as a result of informal resolution discussions with this Office. CNA maintained its reliance on the following exceptions:

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 minister

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.

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

[53] I have commented on each of these exceptions in several previous reports relating to the Applicant and CNA, so I will not go into significant detail here. Section 21 is a discretionary exception which allows public bodies to protect information which is subject to solicitor-client privilege. I have commented on the use of this exception in my Report 2006-013 at paragraphs 30 and 31, wherein I found that solicitor-client privilege is a common law concept which is found in all equivalent access legislation across Canada, and its general application is well established. Section 20 is a discretionary exception which pertains specifically to information which, if disclosed, would reveal advice or recommendations developed by or for a public body or minister. Section 30(1) is a mandatory provision which requires public bodies to refuse to disclose personal information. I discussed the application of sections 20 and 30 in some detail in my Report 2007-010. Of the records which CNA identified as responsive to the request, CNA released all additional records as proposed by this Office during the informal resolution process. I accept that the remaining records withheld by CNA under sections 20, 21 and 30 were withheld properly. The primary remaining question from the Applicant's point of view is his assertion that additional responsive records must exist, which is what I intend to focus on here.

[54] Both CNA and the Applicant appear to agree that it *was* the position of CNA that the Applicant's spouse owed money to CNA for travel benefits, the difference being that CNA now says that the Applicant's spouse no longer owes the money. The Applicant believes that there must be additional paper trails, such as accounting records, approvals, authorizations, etc which establish the initial rationale and existence of the debt from an accounting standpoint. The Applicant has argued that additional records, particularly accounting records, should exist. CNA has stated that there were no accounting entries made for the particular liability referenced in the Applicant's request.

[55] It is not my role to determine whether CNA has complied with accepted accounting practices in recording each liability in accounts receivable, and duly noting any transfer of liability from one person to another. Even if I were to find that there was a failure to adequately account for certain transactions, this does not lead to a corresponding finding of any failure on the part of the College in relation to its duties under the *ATIPPA*. I am satisfied that CNA has conducted a thorough search in relation to the Applicant's request, and based on the evidence available to me, I am of the opinion that there is no reasonable likelihood of additional records being found which would satisfy the Applicant.

[56] I have discussed issues relating to adequacy of search in several previous Reports, including Reports 2005-003, 2006-006, 2006-009, and most recently in Report 2007-016, which involved a similar issue. Although the Applicant has not specifically asked me to consider whether CNA met its duty to assist, the duty of a public body to respond accurately and completely is part of the duty to assist as set out in section 9 of the *ATIPPA*. When the Applicant persists in arguing that more records should exist in addition to those found in a search, the Applicant is in fact challenging the accuracy and completeness of that search. Section 9 is as follows:

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.

[57] The question of “delay” will be dealt with below in the context of the Applicant’s complaint about CNA’s extension of time under section 44. In terms of the accuracy and completeness of a response, my comments in Report 2007-016 were as follows:

[23] Certainly, the requirement to respond in an open, accurate and complete manner would place an onus on any public body to do a thorough search for responsive records. Any Review of a response which states that there are no responsive records must therefore involve an assessment of whether that conclusion was drawn only after a complete and accurate search was conducted. I have addressed this issue in several previous Reports. One example is Report 2006-009, in which I stated as follows:

[17] In this case, the Department is asserting that the record being sought simply does not exist. 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. As I noted in my Reports 2005-003 and 2006-006, 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.

In my opinion, the Applicant has not provided a reasonable basis to conclude that records relating to this electrical permit 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.’” I accept that this was the case in this instance.

[24] Although Ontario Order M-909 referenced in the above quotation does not specifically reference the duty to assist, it establishes a similar onus on the public body to show that a reasonable search has taken place. Furthermore, if a public body can show that it has done such a search, there is also some onus on the Applicant to provide some reasonable basis that would contradict that result, thus concluding that records may in fact exist.

[58] In the present case, the Applicant appears to have anticipated that CNA might have trouble finding the particular records, or perhaps believing his assertion that they exist, because he

included within the text of his request a quotation from an affidavit by CNA's former General Counsel which he felt supported his belief in the existence of the records. CNA conducted its search in full awareness of the Applicant's reason for believing that additional records should exist, and it has provided ample evidence that a thorough search was conducted, and from all indications I believe an accurate one as well. That being said, during my investigation, my staff ensured that additional efforts were made to locate any further records, or even any evidence that further records might exist. During that time, CNA cooperated with this Office in conducting additional searches in case more responsive records might be found, however none were found.

[59] One further angle which was also investigated by this Office was the statement by CNA in its formal submission in response to the Request for Review that "as a result of a different grievance process it was agreed that [Applicant's spouse] should not be held responsible for cost of the business class tickets. CNA considered this matter resolved." It appears that CNA threw in this brief reference in an effort to support its argument that not only do no further records exist, but in its view this whole issue was resolved and concluded some time ago. I asked CNA for evidence of this grievance resolution, and I was provided with a copy of a memorandum of understanding ("MOU") dated March 2006. There is no specific reference in the MOU to the issues pertaining to this Report. After some investigation by this Office, it is my conclusion that the wording of the MOU is ambiguous, and the parties (CNA on the one hand and the Applicant and his spouse on the other) seem to believe that the MOU signifies different things. There is no specific reference in the MOU to the issues relevant to this Report, and I am therefore unable to come to any conclusion about the MOU, except that it does not lead me to conclude that further records exist. The MOU is somewhat of a red herring in this investigation, but I felt that the statement by CNA that the matter had already been resolved needed to be investigated, in case it yielded further clues as to the potential existence of other records. I will also add here that while I have my own opinions as to what the MOU may or may not refer to, it is not my role to adjudicate employment disputes between parties, so I will not comment further on it, except to say that I did not rely on it in coming to any of my conclusions in this Report.

[60] In addition to the Applicant's request that I review CNA's decision to withhold certain records, as well as his belief that additional records should exist, he also asked that I investigate

his complaint about the extension of time. Section 44(a) allows me to investigate such complaints:

44. The commissioner may investigate and attempt to resolve complaints that

(a) an extension of time for responding to a request is not in accordance with section 16

[61] Section 44 refers to section 16, which is as follows:

16(1) The head of a public body may extend the time for responding to a request for up to an additional 30 days where

(a) the applicant does not give sufficient details to enable to public body to identify the requested record;

(b) a large number of records is requested or must be searched, and responding within the time period in section 11 would interfere unreasonably with the operations of the public body; or

(c) notice is given to a third party under section 28.

(2) Where the time limit for responding is extended under subsection (1), the head of the public body shall notify the applicant in writing

(a) of the reason for the extension;

(b) when a response can be expected; and

(c) that the applicant may make a complaint under section 44 to the commissioner about the extension.

[62] On 27 November and 30 November 2006 CNA issued two different letters to the Applicant referencing its decision to extend the time limit for a response by 30 days. One letter referred specifically to section 16(1)(a), the other to section 16(1)(b). In my opinion, either or both of these reasons were valid reasons to extend the time frame given the difficulty between the parties in determining final search criteria, as well as the breadth and scope of records to be searched.

[63] The issue I must focus on, however, is whether CNA responded within the 30 day extension period. This raises interesting issues for a public body operating in a foreign jurisdiction where some factors beyond its control may affect its ability to respond quickly to access requests.

[64] I will first begin by noting some mitigating factors which support CNA's position that any delay beyond the 30 day extension could not be helped. The first of these factors is that even though the original request was received by CNA on 10 November 2006, the process of working with the Applicant to determine and refine the search criteria continued until the last adjustment was made by the Applicant on 8 December 2006. This means that almost the entire first month was absorbed in this process. To CNA's credit, despite this uncertainty, it began the search for records on 28 November 2006, rather than continue to wait. It then ordered further searches after the Applicant's last adjustment to the search criteria.

[65] A second mitigating factor in CNA's favour is that its ability to search records at its Qatar campus may have been impacted by holidays declared by the Qatari government and also by vacation schedules which are booked well in advance due to the complexities of overseas travel requiring an exit visa when leaving Qatar. CNA stated in correspondence dated 14 February 2008 in response to questions posed by this Office that CNA was without qualified staff with the necessary security clearance to conduct a search for records at the Qatar campus during all of December 2006 and part of January 2007.

[66] A further mitigating factor here also involves CNA's good faith in working with the Applicant to determine and refine the search criteria. CNA referenced section 8(2) in early correspondence with the Applicant by way of explaining that CNA needed further detail from the Applicant in order to have enough information to begin a search. As noted above, the final criteria were not set until 28 days into the 30 day time limit. Despite these difficulties, CNA extended the time limit for a response under section 16 by an additional 30 days, rather than attempting to use section 8(2) of the *ATIPPA* to shut down the Applicant's request and ask him to resubmit it. Section 8(2) is as follows:

8(2) A request shall be in the form set by the Minister responsible for this Act and shall provide sufficient details about the information requested so that an

employee familiar with the records of the public body can identify the record containing the information.

[67] I will not comment here as to whether I would approve or disapprove of an effort by CNA to refuse to respond to the Applicant's request on the basis of section 8(2). However, the fact that CNA continued, in good faith, to work with the Applicant in refining the search criteria, even though that process reduced the total number of days available to conduct the search, is another mitigating factor in defense of CNA's position. This decision by CNA favoured the Applicant, and appears to have been an effort on CNA's part to fulfil its duty to assist. If CNA had rejected the request and the Applicant was forced to resubmit it, he certainly would not have received his response any sooner, and in fact, may have received it later.

[68] Despite noting these mitigating factors, I must conclude, however, that CNA did not meet its statutory obligations with regard to its efforts to respond within the 60 day extended time frame, because access to the records was not provided within that period. This statutory obligation is set out in section 11(2):

11(2) Where the head of a public body fails to respond within the 30 day period or an extended period, the head is considered to have refused access to the record.

[69] In other words, CNA is deemed to have refused to provide access once the 60 days have elapsed. While I appreciate the challenges faced by CNA in responding to this request in a timely manner, a public body is limited to the reasons set out in section 16 when it comes to extending its response time beyond 30 days, and the absolute maximum is a 30 day extension, for a total of 60 days. Both portions of CNA's response (dated 10 January and 24 January 2007) are beyond the 60 day limit. CNA acknowledged receipt of the access request on 10 November 2006, which puts the 60 day limit at 9 January 2007.

[70] Another observation worth considering is the fact that CNA did not begin its discussion with the Applicant about the need to refine the search criteria until 10 days after the request was received. Although this may be a matter of hindsight in one respect, on the other hand it was a distinct possibility from the beginning that a search at CNA-Qatar might be necessary, and the

fact that there would be very limited operations at CNA-Qatar during the month of December was known well in advance, at least by management at CNA-Qatar. Whether or not it would have made a difference, had CNA begun this discussion with the Applicant several days sooner, cannot be determined with certainty.

[71] Furthermore, it should be noted that even the records housed in Newfoundland and Labrador were not sent to the Applicant until the 61st day after the request was made. This appears to have been due to a mistake in calculation of the due date, which CNA had determined (after applying the 30 day extension) to be 10 January 2007. It is also clear to me that CNA knew well in advance of the scheduled “down time” at its Qatar campus due to holidays during December and January, which should have given them an opportunity to assess how they would be able to comply with access requests during that time. Similarly, CNA likely knew well in advance when employees involved in records searches would have their holidays scheduled. Planning in advance for the absence of certain employees and perhaps designating and training a replacement in such times would serve as another opportunity for CNA to continue to comply with the *ATIPPA*, even during holidays and other breaks.

[72] Also on this point, CNA’s argument that no one was available to conduct the search may not be as strong as it initially appeared. In response to further questions from this Office, CNA later seems to have qualified its statements somewhat. It appears that while there was a single CNA management level employee who retained the security clearance necessary for the search, the conduct of the actual search would normally be delegated to a non-CNA (i.e. College of Technology) employee. CNA still maintains that the management level employee needed to be present to oversee the search, and that this employee was not available during December, however this employee was involved in an e-mail exchange about the search on 14 December 2006, and despite being on leave or holidays appears to have been present in Qatar at that time. Furthermore, while the person to whom the search was delegated required the involvement of the management employee with respect to security clearance issues, the person conducting the search would be expected to do so without any further assistance from the management employee. While the person conducting the search was also absent for most of the time from 1 December 2006 to 7 January 2007, CNA now indicates that he was at work for several days in

December. Neither of these two individuals still works at CNA-Qatar, and it is unclear to me whether the search could have been conducted earlier had the management employee been able to grant access to the server, or whether the management employee could have conducted the search himself at some point.

[73] There is no doubt that the *ATIPPA* can represent, at times, an inconvenience, or even a challenge for public bodies who find themselves struggling to meet statutory deadlines. It is apparent to me, however, that the 30 day time frame in section 11, in addition to the 30 day extension provided for in section 16, were meant to give public bodies the necessary time to respond to access requests. These time frames are designed to account for holidays, weekends, and other interruptions which may interfere with the search and retrieval of requested records, while still giving the public body enough time to meet its statutory deadlines. While I doubt very much that the legislators anticipated the declaration of a lengthy national holiday by a Qatari Emir when the time frames were set out, as a public body, CNA remains obligated to fulfil its requirements under section 11(2) of the *ATIPPA*. It may therefore be wise for CNA to consider the circumstances which led to the delay in its search and subsequent response in order to ensure that it is better prepared to fulfil those requirements should a similar situation arise in the future involving holidays and staff vacations.

V CONCLUSION

[74] Whether the decision to assign the liability to the Applicant's spouse first came from one person or another at CNA is not something for me to be concerned with in this Review. When it comes to the question of whether additional records exist or not, CNA was required to demonstrate to me that it conducted a reasonable search. All indications are that CNA did indeed conduct a reasonable search.

[75] The Applicant appears to have filed this request for the purpose of forcing CNA to unequivocally clarify its position as to the assignment of liability, or, practically speaking, to determine which spouse allegedly owes money to CNA for executive class airfare. The

Applicant is attempting to argue the point that he and his spouse cannot both be liable for the same expense. Even if this is a legitimate argument, pursuing it through an access to information request limits the issue to the specific context of the existence or non-existence of records or the thoroughness of a search. This has necessarily required a great deal of time and effort by all parties, but unfortunately does not appear to have had the desired result for the Applicant and his spouse. All this Office can do is facilitate access to records to which an Applicant is entitled, but if the records themselves do not exist, cannot be found despite a thorough search, or do not contain the desired answers, the Applicant will have to find another approach.

[76] As noted previously, the Applicant quotes within the text of his access request the Reply of the Board of Governors of CNA to a human rights complaint by the Applicant's spouse, with a view to demonstrating that an assignment of liability for benefits did occur. This quote shows that the College was, at the time, pursuing reimbursement of travel expenses from the Applicant's spouse. While this might imply that a corresponding accounting record should exist, it appears from my investigation that such a record may never have been created. At the very least, I accept CNA's position that it has conducted a thorough search, and no such record has been found. If it is of any assistance to the Applicant, I can at least state that nothing within the records which were withheld under the exceptions to access claimed by CNA contains the information which the Applicant believes must exist.

[77] Finally, I believe I have already commented fully in relation to the issue of CNA's use of a time extension and its subsequent failure to respond within that extended time period, and I will therefore conclude that matter in the final section of this Report.

VI RECOMMENDATIONS

[78] I find that the College has acted appropriately in relation to its decisions about severing and withholding records. I also find that the College has demonstrated that it has conducted a reasonable search for the requested records.

[79] I further find that the Applicant's complaint about the extension of time is not well founded, because the College has demonstrated that the extension of time was necessary as per the requirements of section 16(1)(a) and (b). Despite this conclusion, and even in consideration of the special challenges faced by the College in relation to its operations in a foreign jurisdiction, it is clear that the College did not meet its statutory obligations under section 11(2) of the *ATIPPA* when it failed to respond within the extended 60 day time frame.

[80] In relation to CNA's failure to respond within the extended 60 day time frame, I hereby issue the following recommendation under authority of Section 49(1) of the *ATIPPA*:

1. That the College ensure that measures are put in place at its Qatar campus to allow it to comply with the time frames set out in the *ATIPPA*, even during extended holiday periods or other reasonably anticipated interruptions in campus operations.

[81] 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 College's final decision with respect to this Report.

[82] Please note that within 30 days of receiving a decision of the College 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*.

[83] Dated at St. John's, in the Province of Newfoundland and Labrador, this 28th day of February, 2008.

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