



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2010-009

June 9, 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 documents relied upon by an employee of the College in making certain statements. The Applicant alleged that the documents she received in response to her request were not responsive and asked the Commissioner to review the College’s response to her request and whether the duty to assist had been met. The Commissioner determined that the College had responded appropriately to the Applicant’s request and had complied with its duty to assist under section 9, including through its assessment of whether the records located appeared responsive to the request.

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 A-2009-011 and A-2010-003.

Other Resources Cited: Newfoundland and Labrador, Access to Information and Protection of Privacy Office, *Access to Information ATIPP Act: Part I-III, Policy and Procedures Manual* (St. John’s: Department of Justice, 2008), online:<http://www.justice.gov.nl.ca/just/info/access_policy_and_procedures_manual.pdf>

I BACKGROUND

- [1] On January 12, 2009, the Applicant filed the following application for information under the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) with the College of the North Atlantic (“CNA” or the “College”):

I am requesting the following information:

1. [The] *Manager of Strategic Staff with the Public Service Commission, in the process of conducting an investigation into the job competitions in which I was an applicant wrote the following handwritten note on an email dated September 26, 2006 (which is attached). That note presents as being signed by [the Manager of Strategic Staff]. The occasion for the note is [the Manager of Strategic Staff]’s conversation with [the] Human Resources Manager for the CNA-Qatar project. The transcription of that note is as follows:*

Explanation provided by [the Human Resources Manager]. [The Applicant]’s initial 3 year contract has expired. As this was not considered a hard-to-fill position she was not extended. She was not eligible to ‘re-apply’ as you have to be back in Canada for at least a year following your 3 year contract. [Signed Manager of Strategic Staff].

It appears that [the Human Resources Manager] gave [the Manager of Strategic Staff] specific information that I was not eligible to ‘re-apply to the Qatar campus’ as I was required to be back in Canada for at least a full year before being permitted to reapply.

I am requesting all records including but not limited to all emails, memos, letters, reports, hand written notes, and other forms of records which [the Human Resources Manager] relied on in providing the above explanation to [the Manager of Strategic Staff]. This would include but not be limited to all emails, memos, letters, reports, hand written notes, and other forms of records. This request includes but is not limited to my own personal information.

2. *In the process of responding to [the Manager of Strategic Staff] during an investigation into specific job competitions, [the Human Resources Manager] made the following statement in her March 6, 2008 email (which is attached):*

*CRA approved specific positions and individuals for a further two years. Further, we continue to go through this process every year with CRA to get extensions for certain positions/incumbents to stay beyond their initial three year contract to a maximum of five years. (We’re currently doing this now). Again, not everyone who wants to stay may **in accordance with CRA regulations.***

***Given the tax regulations,** if someone stayed when we hadn’t sought or obtained approval from CRA, all the above noted benefits would become taxable.*

*I am requesting all records including but not limited to all emails, memos, letters, reports, hand written notes, and other forms of records which [the Human Resources Manager] relied on when she advised [the Manager of Strategic Staff] that ‘not everyone who wants to stay may be offered **in accordance with CRA regulations.**’ This would include but not limited to the CRA regulations which [the Human Resources Manager] referenced. This request includes but it is not limited to my own personal information.*

[Emphasis in original]

- [2] On February 13, 2009, CNA provided the Applicant with two documents that were found to be responsive to her request. The first was an advance income tax ruling (“ATR”) dated April 2, 2002, given by the Canada Customs and Revenue Agency (the “CRA”) to the College. The second was an ATR dated November 9, 2004, given by the CRA to the College. As explained on the CRA’s website, an ATR “is a written statement the CRA gives to a taxpayer indicating how the CRA will interpret and apply specific provisions of income tax law to a proposed transaction that the taxpayer is seriously contemplating.”
- [3] The Applicant subsequently filed a Request for Review which was received by this Office on March 20, 2009. She requested that this Office review a decision, act or failure to act by the head of the public body and that this Office bring to the attention of the public body a failure to fulfill the duty to assist the Applicant. The Applicant’s submission, discussed in greater detail below, was essentially that the documents provided to her by the public body were, in fact, not responsive to her access application.
- [4] Efforts were made through this Office to resolve this matter informally. During the informal resolution stage, CNA provided this Office with seven additional documents that it stated were “relevant” to the Applicant’s access request. This Office proposed that these documents be provided to the Applicant and the College did so on August 28, 2009. Six of the seven documents were publicly available through the CRA and essentially provided background and explanatory information on the tax consequences of working abroad and on how residency status affects how one’s income is taxed by CRA. The seventh document was a memo written by a private accounting firm for Canadians employed at the College’s campus in Qatar (“CNA-Q”). This document also discussed the tax consequences of working abroad and residency issues that these employees should consider. The College indicated that this memo was available to all staff at the CNA-Q campus,

though there was no evidence provided that the Applicant had ever received the document while she was employed at CNA-Q.

[5] It should be noted that the College at no time stated that these additional seven documents were “responsive” to the Applicant’s request. The College characterized these documents as “relevant” to the request as they provided some background information to the issues raised in the request. The Access and Privacy Analyst from this Office took a similar view of the documents, and recommended that they be released on this basis. As the additional seven documents were not, in my opinion, provided to the Applicant as “responsive” documents but instead more as background information that was relevant to her request, I have not addressed these documents in greater detail in my discussion below. Instead, I have focused on the two ATRs that were found by the College to be responsive.

[6] Attempts at informal resolution were not successful and on March 8, 2010 this Office notified each party that the matter was being referred for formal investigation. Formal submissions were filed by both parties on March 26, 2010.

II PUBLIC BODY’S SUBMISSION

[7] The College’s submission is that the records it originally sent to the Applicant were responsive to her request and that it conducted a reasonable search for the requested records. As stated in CNA’s formal submission, while the records provided “may not have been the records the applicant anticipated receiving, they were all that was found to be responsive.”

[8] With respect to the Applicant’s position that the information she received did not address the issues that she had raised in her application for access, CNA stated:

This office cannot speak to matters of human resources or tax requirements. It is our responsibility to conduct a reasonable search for records based on the wording of the request presented by our applicant. In this instance the search focused on the individual identified by the applicant in the request. Through consultation with the HR Manager a total of nine documents were found and later provided to the applicant.

[9] In terms of the search itself, the College first noted that the Applicant's access application referred specifically to records relied on by a particular HR Manager, and explained that the records search therefore focused on records in the custody of that individual. According to CNA, this HR Manager cooperated fully with the search.

[10] On the issue of the duty to assist, CNA stated its actions had complied with all three components of the duty as set in OIPC Report A-2009-011. At paragraph 80 of that Report, I explained the duty to assist as follows:

[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...

[11] With respect to the first component of the duty to assist, the College stated that there "were no issues with the wording of the request which would prompt us to request clarification. CNA proceeded with conducting the request. CNA has therefore satisfied the first component of the duty to assist."

[12] With respect to the second component, CNA submitted that it had completed a reasonable search. In support of this submission, CNA outlined that a search had been conducted of the records of the HR Manager named in the Applicant's access request. Discussions between the College's Access and Privacy Coordinator and the HR Manager were also held via phone and in person to "ensure records responsive to the request were isolated within the time frame for the request."

[13] With respect to the third component, CNA submitted that all records that were found to exist were released without redaction to the Applicant. It was further noted that during the informal review process, "copies of other regulations and interpretations of regulations were identified." These were also provided to the Applicant, though the College did note that "these documents are available online and/or commonly distributed to employees of CNA-Qatar." In summary on this point, CNA stated that its manner of response was "consistent with the spirit and intent of the

ATIPPA. It was open, accurate and complete. CNA has therefore satisfied the third component of the duty to assist.”

III APPLICANT’S SUBMISSION

- [14] The Applicant takes a very different view from that of the College.
- [15] As part of her submission, the Applicant included some background information regarding some of the potential income tax implications of working as a Canadian employee at the CNA-Q campus. This information is helpful in better understanding the context of the access request.
- [16] The College operates a campus in the State of Qatar. Many of the employees at the Qatar campus are Canadian citizens. In April of 2002, the CRA granted the College an advance tax ruling that confirmed that the Qatar campus of CNA would constitute a “special work site.” The effect of this was that certain benefits provided to CNA-Q employees by the State of Qatar (including cost-free accommodations and airline tickets for travel home) would not have to be included as income by those employees on their tax returns and would thus not be taxable. The CNA-Q employees would be able to claim the special work site status for the duration of their contracts with CNA-Q. Without the special work site status, these benefits would have to be included (and therefore taxed) as income for the duration of the employees’ contracts with CNA-Q.
- [17] In November 2004, a second advance tax ruling was granted that was supplemental to the April 2002 advance tax ruling. This advance tax ruling extended the special worksite status designation for some CNA-Q employees whose contracts at CNA-Q had been extended, thus allowing these employees to continue to be able to claim the special worksite status and as a result not have to pay tax on their benefits.
- [18] The Applicant’s submission is that neither of the ATRs are responsive because (in the Applicant’s view) they could not have been relied upon by the HR Manager in making certain statements regarding the eligibility of the Applicant to apply for a position with CNA-Q. This is because the CRA does not and cannot control who CNA-Q hires.

[19] In short, the Applicant does not agree that she has been provided with the documents that she requested. As stated by the Applicant in her formal submission:

I don't believe that I have received any record which [the HR Manager] could rely on in order to advise that I had to be back in Canada for at least a year before I was eligible to re-apply for a position at the Qatar campus. I don't believe that I have received any record which [the HR Manager] could rely on in order to advise that according to CRA regulations, not everyone who wants to stay may be offered continued employment. I have never seen any CRA regulation that requires a Canadian employer to refuse to employ a Canadian resident.

IV DISCUSSION

[20] The Applicant has requested that this Office review the action or failure to act of the College and to determine whether the duty to assist the Applicant has been met in this case. For the purposes of this Report, I have considered the decision of the College to release the two ATRs as part of my overall analysis of the College's overall duty to assist.

[21] Before reviewing the actions of the College in greater detail, I wish to make two preliminary comments. The first is that it is generally not the responsibility of this Office to verify the correctness or accuracy of statements made by employees of a public body where those statements form part of the responsive record to an application for access. In this particular case, it is not our role to determine whether the statements made by the HR Manager can be supported by the documents that have been provided to the Applicant.

[22] The second comment is an extension of the first, and applies specifically to the unique circumstances of this case. The request for information in this matter was not for a readily identifiable record. Instead, it was for a record *relied* upon by the HR Manager in making specific statements. It would be difficult, if not impossible, for anyone except for the HR Manager to know whether the records provided are, in fact, responsive because only the HR Manager can know for certain what her thought process was when making the statements. It is the role of our Office to assess the actions of the College in responding to the access request, within this particular context.

[23] This situation is unlike the one that I recently reported on in Report A-2009-011, which also involved a claim by an applicant that records released pursuant to an access request were not responsive. In that case, I found that the applicant had not been provided with the records that he had requested. The Applicant had sought access to a particular document (a section of a policy manual) that had been referred to by an employee of a public body during testimony in a court hearing. The Applicant was provided with records, but they did not match what he had requested. I agreed that the Applicant had not been provided with the document that had been referenced during the testimony and further that it was reasonable to conclude that the records probably did not exist. In that Report, the Applicant sought a specific record and it was a relatively straightforward question as to whether what he received was what he had requested. It was possible to examine the record and determine fairly conclusively that it was not in fact what the Applicant had requested.

[24] In this matter, however, the question is less straightforward. It is not possible to examine the record and determine conclusively that it is what the Applicant is seeking because, as noted above, only the HR Manager can know this for certain. The investigation of this Office must therefore focus not simply on the records that have been released, but on the actions taken by the public body in response to the access request.

[25] As I indicated above, the question of whether the records that have been released to the Applicant are in fact responsive is best addressed as part of the analysis of whether the College has met its duty to assist the Applicant. The duty to assist is set out at section 9 of the *ATIPPA*:

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

I outlined the three components of the duty to assist above at paragraph 10, and will now address each of them in turn.

The Public Body Must Assist the Applicant in the Early Stages of Making a Request

[26] I agree with the College's submission that there is no reason to take issue with the College's actions with respect to the first aspect of the duty to assist. The College followed appropriate

procedure when it accepted the access request, and there were no issues with the wording of the request that required any further clarification from the Applicant.

The Public Body Must Conduct a Reasonable Search for the Requested Records

[27] In Report A-2009-011, I discussed the standard that a public body must meet in its duty to assist the applicant and stated at paragraph 70 that “the standard against which the duty to assist is measured is reasonableness, not perfection.” With respect to the second aspect of the duty, it is my view that the College conducted a reasonable search for the requested records. As outlined by the College in its formal submissions, a copy of the Applicant’s request was provided to the HR Manager for the Qatar project on January 16, 2009. This was an appropriate step to take since the Applicant’s request referred to statements made by this individual. The HR Manager was asked to review the request and forward any records matching the request to the Access and Privacy Coordinator.

[28] In late January 2009, the College’s Access and Privacy Coordinator met with the HR Manager to further clarify the request and assist the HR Manager in isolating the responsive records. The records found to be responsive by the HR Manager were faxed to the Access and Privacy Coordinator on February 13, 2009 and released to the Applicant on that same day. Again, I find that these were all appropriate actions taken by the College.

[29] In my view, the initial steps taken by the College in its search for the records were reasonable. Access and Privacy Coordinators are often required to seek assistance from other employees of the public body in locating responsive records for the applicant, and this was properly done in this case. As I stated at paragraph 24 of Report A-2010-003, I must determine “if the search was conducted by knowledgeable staff in locations where the records might reasonably be located.” I find that the search in the present case met these requirements.

[30] The search for records, however, includes more than the locating of the records. It also includes the preliminary assessment by the Access and Privacy Coordinator of whether those records are responsive. The *Access to Information Policy and Procedures Manual*, published by the Access to Information and Protection of Privacy Coordinating Office of the Department of Justice, sets out at

section 3.10 (“Preliminary Assessment of the Request”) what an Access and Privacy Coordinator must do once the records have been located. It states as follows by way of introduction:

After the nature and extent of the application have been considered (including any necessary discussion with the applicant) and the records have been located and reviewed, the Coordinator should make a preliminary assessment.

[31] It then goes on to list a number of questions that need to be addressed by the Access and Privacy Coordinator before proceeding. The first I believe is particularly relevant to this matter, and asks: “Does it appear that all relevant records have been located and do they appear to satisfy the application?”

[32] The importance of this question is that it does not ask whether the records *do* satisfy the application. It asks whether the records *appear* to satisfy the application. It reminds us that the decision of an Access and Privacy Coordinator cannot be taken as a conclusive statement that the documents are in fact responsive to a request. Instead, the decision must be taken as an exercise of the Access and Privacy Coordinator’s assessment of the records, and it is the role of this Office to assess the reasonableness of that judgment.

[33] I noted above that the access to information request in this matter was unique in that it did not ask for a particular document, but instead asked for documents “relied upon” by an individual when making a statement. I explained that it would likely be difficult, if not impossible, for anyone except the HR Manager to know whether or not the records provided are in fact responsive to the Applicant’s request and that this is an important factor to consider in determining whether or not the Access and Privacy Coordinator conducted a reasonable search. It is necessary to determine if her conclusion that the records appeared to satisfy the application was a reasonable one.

[34] Under the circumstances of the present matter, it is my view that it was reasonable for the Access and Privacy Coordinator to conclude that the records located did appear to be responsive to the access request. Again, it must be borne in mind that the Access and Privacy Coordinator had to determine not whether the records supported the statements made by the HR Manager, or were in fact relied upon by the HR Manager, but whether it *appeared* that the records were those relied upon by the HR Manager. In concluding that it was reasonable to find that the records were responsive, I

note that they were provided to the Access and Privacy Coordinator directly by the HR Manager, who obviously was in the best position to know what information had been relied upon. This is in keeping with my earlier comment at paragraph 29 that the search must be “conducted by knowledgeable staff in locations where the records might reasonably be located”. In addition, the two ATRs originated from the CRA and addressed the issue of employment at CNA-Q. While the documents were not, strictly speaking, CRA regulations (as requested by the Applicant), I do not think it was unreasonable for the Access and Privacy Coordinator to conclude that they appeared to be the records relied on by the HR Manager. The records were not so clearly unrelated to the statements made as to give the Access and Privacy Coordinator any reason to question whether they had been relied on by the HR Manager.

[35] Overall, it is my view that the College conducted a reasonable search and that the steps taken by the Access and Privacy Coordinator to locate the documents and in making the determination that they were responsive were also reasonable.

The Public Body Must Respond to the Applicant in an Open, Accurate and Complete Manner

[36] The College has, in my view, also complied with this aspect of the duty to assist. The Applicant was provided with all the documents that were found to be responsive to her request. No redactions were made. There is no evidence that the College attempted to mislead the Applicant in any way with respect to her application for access. While I can appreciate that the Applicant may be frustrated with the documents that she received, I find that the College’s actions in processing and considering her request were reasonable, and this in turn led to a response by the College to the Applicant that was open, accurate and complete.

[37] I therefore find that the College has met its duty to assist imposed on it by section 9 of the *ATIPPA*.

V CONCLUSION

[38] The Applicant's request was for records relied upon by the HR Manager at the College's Qatar campus in making certain statements relating to the employment of the Applicant. Upon receiving the request, the College conducted a search in the appropriate location with the involvement of the appropriate individual: the HR Manager referenced in the access request.

[39] The nature of the Applicant's request was such that it would likely be impossible for anyone except for the HR Manager to know conclusively what documents were responsive. With this in mind, the College's Access and Privacy Coordinator acted reasonably in concluding that it appeared that the documents were responsive to the Applicant's request.

[40] The College responded to the Applicant in an open, accurate and complete manner. The Applicant was provided with full access to the two documents that were determined to be responsive.

[41] As I have concluded that the College has met its duty to assist as set out in section 9 of the *ATIPPA*, it is not necessary to make any recommendation under the *ATIPPA*.

[42] Notwithstanding the fact that 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 with respect to the Report.

[43] 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*.

[44] Dated at St. John's, in the Province of Newfoundland and Labrador, this 9th day of June, 2010.

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

