OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2012-003

January 19, 2012

College of the North Atlantic

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* ("the *ATIPPA*") to the College of the North Atlantic ("the College") for access to e-mail records containing her personal information and that of another individual. The College denied the request on the grounds that the responsive records had already been provided in response to a previous request. The Commissioner found that for the greater part of the time period covered by the request, the same search had been conducted in response to a previous request, and responsive records provided. That search had been reviewed by the Supreme Court and was found to have been conducted reasonably and completely. The Commissioner concluded that he was bound to accept the findings of the Court. For the remainder of the time period covered by the present request, the Commissioner was satisfied that no responsive records exist. The Commissioner concluded that the College was justified in denying the Applicant's request, and therefore made no recommendation.

Statutes Cited: *Access to Information and Protection of Privacy Act,* SNL 2002, c. A-1.1, as amended, ss. 13, 43.

Authorities Cited: Newfoundland and Labrador OIPC Report A-2011-015; *McBreairty v. College of the North Atlantic*, 2010 NLTD 28.

File # 0020-060-10-011

I BACKGROUND

[1] On April 12, 2010, the Applicant submitted a request for access to information under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*" or "the *Act*") to College of the North Atlantic ("CNA" or "the College") which read as follows:

> *I am requesting all attachments and the related email including but not limited to emails and attachments that contain my personal information or the personal information of* [another named individual] *from the archived emails files of:*
>
> [CNA "Employee A"]
> [CNA "Employee B"]
>
> *This request includes but is not limited to the archived files created December 2003. I have attached a letter of consent from* [the other named individual].

[2] On May 10, 2010, CNA wrote to the Applicant advising that the request was refused on the ground that it was repetitive under section 13 of the *ATIPPA*. Section 13 reads as follows:

> *13. The head of a public body may refuse to disclose a record or part of a record where the request is repetitive or incomprehensible or is for information already provided to the applicant.*

The College explained that the e-mail accounts for both of the individuals named in the request had already been searched in response to previous requests from this Applicant for references to her personal information or the personal information of the other named individual.

[3] On May 18, 2010 the Applicant submitted a Request for Review to this Office asking that the OIPC review the decision of the College, and in particular that CNA provide an explanation of the actual search conducted. The Applicant asserted that, contrary to what was stated in the response from the College, certain sources of e-mail messages could not have been searched.

[4] A period of investigation followed, during which a number of issues were identified. However, it was ultimately not possible to resolve this Request for Review informally, and the matter was referred to the formal investigation process on March 3, 2011. Written submissions were received from the College in May 2011.

II SUBMISSION OF THE COLLEGE

[5] In its written submissions the College reviewed the steps that had been taken in response to the Applicant's initial request for access to information. The College explained how it had determined what specifically the Applicant was requesting, how the request had been compared to previous requests, and how it concluded that the responsive records had already been provided in response to previous searches. The College submitted that its decisions and actions in responding to the request were appropriate, and that it had fulfilled its duty to assist the Applicant.

III APPLICANT'S SUBMISSION

[6] No additional written submissions were received from the Applicant. Therefore the investigation and this Report have been completed based on correspondence previously received from the Applicant, in particular a lengthy document enclosed with the Request for Review.

IV DISCUSSION

[7] The access request in this matter was made on April 12, 2010, and was for e-mail messages, including attachments, containing the personal information of the Applicant and that of another named individual, from the archived files of two named CNA employees, who I have referred to above as "Employee A" and "Employee B." The request specified no starting date or end date. The time period covered by the request, therefore, must be considered to have begun on the day each of those employees started at the College and was assigned an e-mail account. The time period must be considered to have ended on the day on which the request was received by the College, that is, April 12, 2010.

[8] It must be noted that the request was not for **all** relevant records from the e-mail accounts of the two employees. Rather, it was for records from **archived** e-mails. This requires some background explanation.

[9] E-mail archiving is a systematic approach to saving and protecting the data contained in e-mail messages. Every e-mail message takes up space on an e-mail system's hard drive. As the volume increases, operations such as sending, receiving or searching use more system resources. If older data is moved to a separate storage medium, the system can maintain an acceptable level of performance. Archived e-mails and attachments remain accessible. An equally important function of an archive is the protection and preservation of e-mail messages, both for backup and disaster recovery, and for the maintenance of a permanent, searchable, business record.

[10] At CNA a central archiving capability was not added to the system until April 2007. Prior to that date, individual e-mail users were able to simply delete messages from their own e-mail files, and if those messages were not duplicated anywhere else in the system they were lost. It was also difficult to search attachments. On April 16, 2007 a program called Extender (now called Source One) was added to the system. From that date onward, every incoming or outgoing message, including any attachments, was copied and stored permanently on a separate server. All existing e-mails residing in the system on that date were similarly imported to Extender.

[11] A further complication, however, is that the Extender feature was added only to the CNA Newfoundland and Labrador e-mail server. Since 2003, CNA has operated a campus of the College in Doha, Qatar ("CNA-Q"). In December of that year it was decided to put CNA-Q e-mail on its own separate server in Qatar. When this change was made, all of the e-mail accounts of staff who had moved to Qatar, and all of the messages contained in them, were transferred to the CNA-Q server.

[12] For back-up and security purposes, prior to the transfer to the CNA-Q server the contents of these e-mail accounts were copied to a set of CD's. Those CD's, now kept in secure storage in the Access and Privacy Coordinator's office, have become known as the "December 2003 archive," although technically they are not an archive but simply a permanent copy of a volume of e-mails. Once Extender was introduced in 2007, any e-mail from this period that needed to be searched could be imported from the CD's to Extender, where key word, account or date searches can be efficiently performed on both e-mails and attachments.

[13] At the time the access request in the present matter was made in April 2010, the Newfoundland server had a permanent archiving program (Extender) but the Qatar server still did not. Any e-mail searches to be performed on CNA-Q e-mail accounts were hampered by an inability to search attachments. Therefore, when necessary, copies of e-mails from the CNA-Q server were imported to the Newfoundland server so that they could be searched using Extender.

[14] Finally, at CNA-Q, up to the time of the April 2010 request, individual e-mail account holders (including the named individuals, "Employee A" and "Employee B" who during at least part of the relevant period were employed at the Qatar campus) have had the ability to create their own e-mail archives, and also to delete e-mails from their accounts. Archives created in this fashion remain on the same server but in a separate location, and would have to be searched separately. As for deleted e-mails, it is possible that some, but not all, might be preserved on the CNA-Q server's disaster recovery backup tapes. Those tapes are not intended to be searchable and, in fact, are not easy to search.

[15] When the access request in the present matter was received by the College, the Access and Privacy Coordinator observed that the wording of the request was very similar to several previous requests for information by this Applicant. Therefore the Coordinator conducted a review of those previous requests, to determine whether the requested records had already been searched and whether the College had already released the responsive records to the Applicant, subject to appropriate redaction. CNA concluded that the records responsive to the present request had already been provided to the Applicant and, therefore, this search was repetitive.

[16] Section 13 of the *ATIPPA*, as set out above, allows a public body to refuse to disclose a record where the request is repetitive. The issue for review in the present case, then, is whether in fact the same files have already been properly searched and the responsive records provided to the Applicant, as claimed by the College, or whether the College cannot show that such a complete search has previously been conducted, as claimed by the Applicant. I have concluded that the College is right, for the reasons that follow.

[17] The College has provided evidence that it has done a complete search and provided the responsive records to the Applicant. The College has carried out two separate inquiries. One was the

search conducted by the College in response to a previous access request by this Applicant, with the file number PB/137/2007, dated September 18, 2007. The other was the preliminary inquiry carried out by the College in response to the present access request.

[18] That previous matter, PB/137/2007, was never dealt with by this Office as a Request for Review. Rather, after receiving the decision of the College dated November 21, 2007 in response to the access request, the Applicant appealed directly to the Supreme Court, Trial Division on December 19, 2007, under the provisions of subsection 43(3) of the *ATIPPA*. Section 43 reads as follows:

> *43. (1) A person who makes a request under this Act for access to a record or for correction of personal information may ask the commissioner to review a decision, act or failure to act of the head of the public body that relates to the request.*
>
> *(2) A third party notified under section 28 of a request for access may ask the commissioner to review a decision made about the request by the head of the public body.*
>
> *(3) Notwithstanding subsection (1), a person who makes a request under this Act for access to a record or for correction of personal information may, within 30 days after the person is notified of the decision, or the date of the act or failure to act, appeal directly to the Trial Division under section 60.*
>
> *(4) A person who has appealed a decision directly to the Trial Division shall not ask the commissioner to review a decision under this Part, but another party to the request may do so.*
>
> *(5) The commissioner may refuse to review a decision, act or failure to act where an appeal has been made to the Trial Division.*

[19] As can be seen, section 43 provides a choice to an applicant who is unsatisfied with the decision of a public body in response to an access request. Under subsection (1) the applicant may make a request for review to this Office. Alternatively, under subsection (3) the applicant may bypass this Office and appeal directly to the Supreme Court, Trial Division. These alternatives are mutually exclusive, as is clear from subsection 4.

[20] Since there was no Request for Review filed with this Office, our Office has never participated in any process of attempted resolution of the issues arising from that request. We have never been privy to the correspondence between the College and the Applicant about that file, we have never

possessed a copy of the responsive record, and our Office has never had any jurisdiction to make decisions, draw conclusions or make recommendations about the issues that arose in that matter. Any background information, facts or conclusions about PB/137/2007 that have gone into the contents of this present Report have therefore not derived from any involvement of our Office, but have been taken directly from the publicly available 2010 judgment of the Court in that case, or from the information provided directly to this Office by the College during the course of the present review.

[21] The College carried out the search in response to the PB/137/2007 access request on November 13, 2007. The request in that matter read as follows:

> *I am requesting all attachments and the related email that contain my personal information or the personal information of* [another named individual] *from the email files of:*
>
> [a named employee]
> [Employee "A"]
> [a named employee]
> [Employee "B"]
>
> *I am attaching a letter from* [the other named individual] *granting CNA permission to release records pursuant to this request.*

[22] First, it can be seen that the access request in PB/137/2007 was for the same **kind** of records as in the present request, that is, records containing the personal information of the Applicant or of another named individual (that same individual was named in both requests). Second, the earlier request was broader that the present request, since it was not just for archived e-mails, but was for **all** e-mails and attachments from the files of certain individuals. Obviously, a search for "all e-mails" would necessarily include archived e-mails. Finally, of the four named employees whose e-mail accounts were to be searched in the previous request, two were the **same employees** named in the present request. It is readily apparent that if the two searches were carried out in accordance with the requests, the search in PB/137/2007 would have produced a group of e-mail records and attachments that would have included all of the records asked for in the present request – at least for the period ending on the date of the previous search, November 13, 2007.

[23] The Applicant, however, has argued that the search conducted by the College in response to her earlier request in PB/137/2007 was deficient in a number of ways.

[24] I have obtained and reviewed the Court decision in PB/137/2007, which is a published decision cited as *McBreairty v. College of the North Atlantic, 2010 NLTD 28*. The appeal dealt with a number of issues, among which were the following:

- whether the correct names were searched;
- whether the search was for both archival and current e-mails;
- whether the College searched both e-mails and attachments;
- whether the search covered both personal information and work product information;
- whether e-mails sent to, from or copied to the Applicant were included;
- why no e-mails were found from the e-mail account of "Employee B";
- why no e-mails were found subsequent to April, 2007.

Many, if not all of these issues are identical to the issues raised by the Applicant in the present Review. It is instructive to examine how the Court dealt with these issues in the PB/137/2007 hearing.

[25] I have reviewed the findings of the Court on those issues, as related in its decision. I note first that the Court confirmed that the standard to be met by a public body in responding to an access request is not perfection, but all reasonable effort. After examining the evidence before it and hearing the arguments of the parties, the Court found that the College had made every reasonable effort to respond to the Appellant's request of September 18, 2007 in an open, accurate and complete manner as required by section 9 of the *ATIPPA*.

[26] I note also that the Court found that the correct names were searched, both as to the e-mail accounts to be searched and as to the search terms used. The Court found that the College had instructed the IT staff to search both current and archived files, and that they had done so. The Court also found that the search included both e-mails and attachments. The Court further found that there was no "work product" category of e-mail set aside. The Court accepted the evidence of the College that at the time of that search, the College had not yet adopted the practice of separating work product from other information and charging fees for it.

[27] The Applicant has suggested that the so-called “December 2003 archive” to which I have referred earlier was not searched in response to the PB/137/2007 request. It is not clear from the Court decision whether that particular store of e-mails was accounted for in the course of the Court hearing, since although the Court found that both current and archived files were searched, there is no explicit reference to the “December 2003 archive” in the decision. Accordingly, during the course of the informal resolution process in the present case, the College was asked to specifically answer that question, and it confirmed that a search of the December 2003 CD’s had been carried out as part of the search in PB/137/2007.

[28] The Court further found that the search included e-mails sent to or from or copied to the Applicant. This issue of the College’s previous practice of withholding so-called “to/from/cc’ed” e-mails from applicants is discussed at length in my Report A-2011-015, and I will not repeat my findings and conclusions here. It will suffice to say that although a group of such records apparently was initially withheld from the records provided to the Applicant in response to the PB/137/2007 request, the Court found that, on August 13, 2009, prior to the hearing of the appeal, those records had been provided to the Applicant without any information having been severed or withheld.

[29] The Court was satisfied that the College had conducted a reasonable search for the e-mail records of “Employee B” and that none were found. The Court further concluded that this was most likely because there was no longer an e-mail account, “Employee B” having left CNA in 2006.

[30] The Court confirmed that in the PB/137/2007 search, of the group of e-mails provided in response to the request, none were dated later than April 16, 2007. The College’s explanation to the Court, in brief, was that the Applicant, the other named individual and “Employee B” had all left CNA-Q several years prior to that request. The Court concluded that this was the most likely explanation for the lack of records after April 2007, rather than any deficiencies in the College’s search methods or diligence.

[31] The Appellant in the course of the PB/137/2007 hearing produced a number of e-mails or attachments she claimed ought to have been included by the College as part of the responsive record, and argued that this demonstrated that the search was deficient. The Court found that there were other possible reasons why an e-mail might not have been found. For example, an individual

whose e-mail accounts were searched may have deleted that message, but it might have been found in the e-mail account of a different employee on another occasion. The Court confirmed that the standard against which a search is to be measured is reasonableness, not perfection.

[32] The Court concluded that the College had made all reasonable efforts to respond to the PB/137/2007 request in as complete a manner as possible. The Court therefore found that the College did not breach the duty to assist the Applicant, and denied the Applicant's request to have the search repeated.

[33] Since that search covered the identical ground that would have to be covered by the search in the present matter, I conclude that an adequate search in response to the current request has already been carried out, covering the period up to November 13, 2007, the date of the search in PB/137/2007.

[34] For the second part of the search period, from November 13, 2007 to April 12, 2010, the date of the present request, I am informed by the College that there are no archived files to be searched for either individual. For "Employee B" there were no e-mails at all created during that period, since he left the employ of CNA in 2006. For "Employee A" I am advised that, while that individual continued in the employ of the College and worked at the CNA-Q campus between November 13, 2007 and April 12, 2010, and continued to have an e-mail account during that period, she had created no e-mail archive files up to the date of the present access request. Therefore there are no archived files to be searched for this individual either. As a result, I am satisfied that for this portion of the time period covered by the present request, no responsive records exist.

[35] The Applicant has written at length to argue that the decision of the Court in PB/137/2007 was wrong. This argument is based on allegations of false or misleading statements made by CNA during the course of the hearing. The Applicant is asking this Office to accept those allegations, to agree that her arguments are correct, to conclude that the decision of the Court was incorrect and to recommend that the search be repeated.

[36] However, this Office is not a court of general jurisdiction, much less a Court of Appeal. The jurisdiction of this Office is found in the *Access to Information and Protection of Privacy Act,* and in the

Public Inquiries Act. Under neither of these statutes does this Office have the jurisdiction or authority to interfere with, question or ignore the decisions of any court, including the factual findings and conclusions. Consequently we must accept the factual findings and conclusions of the court in PB/137/2007 that I have referred to above.

[37] Subsection 43(4) provides that a person who has appealed a decision directly to the Trial Division, as the Applicant has done in the matter of PB/137/2007, is not entitled to also ask the Commissioner to review it as well. The reason for this provision is obvious. If it were possible for an applicant to have a decision simultaneously reviewed by the Court and by this Office, there is the very real possibility of conflicting or inconsistent results. If an applicant who was unsatisfied with a decision of the Court could subsequently have that same matter reviewed by this Office, it would undoubtedly be regarded by the Court as an abuse of process. Yet that is, in effect, what the Applicant is asking this Office to do in the present case, by asking for a recommendation that essentially the same search be repeated. That was the exact remedy requested by the Applicant in her appeal to the Trial Division in PB/137/2007, and it has already been denied by the Court.

[38] In summary, I have no jurisdiction to make findings of fact or draw conclusions that are different from those reached by the Court. Rather, I must accept and give effect to the Court's findings and conclusions. If the Applicant is convinced that the court decision was improperly obtained, or in error in any way, her remedy is to seek legal advice in regard to that issue.

V CONCLUSION

[39] I have concluded that I am bound to accept the findings of the Supreme Court, and therefore I have concluded that the records responsive to the present request are the same records that have already been provided to the Applicant in response to a previous request, for the period up to November 13, 2007. For the period between that date and the date of the present request, I am satisfied that no responsive records exist. Therefore the College was justified in refusing to disclose any records to the Applicant in response to the present request, under the authority of section 13 of the *ATIPPA,* because all responsive records have already been provided.

VI RECOMMENDATIONS

[40] In view of the conclusions I have reached above, there is no need for me to make any recommendation under paragraph 49(1)(a) of the *ATIPPA*.

[41] Although I have made no recommendation, under the 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 this Report.

[42] In addition, I hereby notify the Applicant, in accordance with subsection 49(2) of the *ATIPPA*, of the right to appeal the decision of the College of the North Atlantic to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60. The Applicant must file any appeal within 30 days after receiving a decision of the College referenced above.

[43] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of January 2012.

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