OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2013-013

August 27, 2013

College of the North Atlantic

Summary: The Applicant requested, from the College of the North Atlantic, all records containing his personal information that had not previously been released to him. The College notified the Applicant that due to the broad scope of the request, it would not be responding to the request. The Commissioner found that section 10 applied to the electronic records, as given the broad scope of the search, producing the records would interfere unreasonably with the operations of the College. However, the *ATIPPA* as it existed prior to the 2012 amendments (under which this request was filed) contained no similar provision for paper records, and as such, there was no basis in that version of the *ATIPPA* upon which to refuse to search for and provide paper records. The Commissioner recommended that the College perform a search of paper records and provide the results of that search to the Applicant. This should be considered a new request (for the purpose of resetting timelines), commencing on the date of acceptance of the recommendation, if the College chooses to do so. The "old" *ATIPPA* would still apply, however, as the original request was filed prior to the passing of Bill 29.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A–1.1, as amended, s. 5; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss.8, 9, 10.

Authorities Cited: Newfoundland and Labrador OIPC Reports A-2009-001, 2006-015.

File #: 0020-060-12-032

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request on March 22, 2012 to the College of the North Atlantic ("CNA" or the "College"). The request sought disclosure of records as follows:

> *I am requesting all records containing my personal information which have not previously been released to me.*
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> *The ATIPPA defines "personal information" as:*
>
> *Part I*
>
> *2.*
> *(o) "personal information" means recorded information about an identifiable individual, including:*
> - *(i) the individual's name, address or telephone number,*
> - *(ii) the individuals race, national or ethnic origin, colour, or religious or political beliefs or associations,*
> - *(iii) the individual's age, sex, sexual orientation, marital status or family status,*
> - *(iv) an identifying number, symbol or other particular assigned to the individual,*
> - *(v) the individual's fingerprints, blood type or inheritable characteristics,*
> - *(vi) information about the individual's health care status or history, including a physical or mental disability,*
> - *(vii) information about the individual's education, financial, criminal or employment status or history,*
> - *(viii) the opinions of a person about the individual, and*
> - *(ix) the individual's personal views or opinions;*

[2] The chronology of events leading up to the filing of the Applicant's Request for Review are set out in the College's submission as follows:

> *…on April 5, 2012, the college wrote the applicant requesting clarification and any timeframe, keywords, and search subjects he felt would return the potentially responsive records he was interested in.*
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> *On April 19, 2012, the college extended the time frame for this request, in accordance with sections 16(1)(a) and (b) of the Act. While section 16(1)(a) of the Act authorizes an extension of the time limit based on the applicant's failure to provide sufficient details to enable a public body to identify*

the responsive records, the college also relied on Section 16(1)(b) in anticipation of the huge volume of potentially responsive records. The extended due date was May 22, 2012.

This extension letter also contained a reminder to the applicant of the need to clarify his request. This was the college's second attempt to clarify the applicant's request by asking the applicant to provide any timeframe, suggested keywords, and search subjects that would return the potentially responsive records he was interested in.

On April 24, 2012, the college's external legal counsel, Cox and Palmer, received an email from the applicant on this request. In the body of this email, the applicant had provided a response to the college's Access and Privacy Coordinator request for clarification. On April 27, 2012, Cox and Palmer emailed the applicant and noted that the proposed communication concerning this request should be sent directly to the college's Access and Privacy Coordinator as they had not been retained by the college to act in regards to this request and they would not be acting as the applicant's liaison with the college in regards to this request.

The college initiated its third attempt to clarify the applicant's request on May 4, 2012, and requested that the applicant provide any timeframe, suggested keywords, and search subjects. The college also noted that without these search criteria to define this request, the college would not be able to process it.

The applicant responded, via email on May 6, 2012, to the college's third attempt to clarify the request. The applicant attached the body of the email that was sent to Cox and Palmer on April 24, 2012, in addition to attaching a proof of authority from the applicant's spouse granting the college permission to release to him records containing any reference to his spouse. In this response, the applicant provided some suggested criteria including five search keywords and six search subjects. The applicant also made reference to the access to information request case files completed by the college's former General Counsel and Corporate Secretary. However, the college's former General Counsel and Corporate Secretary was not one of the six search subjects. The applicant went on to state "I will suggest search criteria however any suggested criteria is not meant to limit the scope of the request. The scope of the request remains as stated in my request as received by the College, 'all records containing my personal information which have not previously been released to me'.

> *Also, with the addition of his spouse's proof of authority, the applicant had expanded the scope of the original request. By including the records containing the personal information of his spouse, the applicant had significantly increased the volume of potentially responsive records.*
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> *The applicant asked the college to "please contact me concerning any questions which you may have of the search criteria which I have suggested". However, after three unsuccessful attempts to clarify this request with the applicant, and with only 16 days left on the response clock, the college concluded that it would not be able to process this request due, in part, to the failure of the applicant to provide sufficient detail about the information requested, in accordance with section 8(2) of the Act.*
> *On May 18, 2012, the college issued its final response to the applicant where this request was refused in accordance with sections 8 and 10 of the [ATIPPA]…*

[3] In a Request for Review received at this Office on May 31, 2012, the Applicant asked that this Office review the College's decision. Attempts to resolve this Request for Review by informal resolution were not successful, and by letters dated April 16, 2013 both the Applicant and the College were advised that the Request for Review had been referred for formal investigation pursuant to subsection 46(2) of the *Access to information and Protection of Privacy Act* ("*ATIPPA*"). As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47.

II PUBLIC BODY'S SUBMISSION

[4] The College provided a detailed submission outlining their position which is reproduced at length below:

> *…Before the college received this access to information request, this applicant had previously submitted over ninety access to information requests to the college, starting in 2003. And, as a former employee of the college the applicant is knowledgeable about the types of records the college maintains and is also knowledgeable about the Act and how to define an access to information request to enable the public body to identify the records being requested.*

The college contacted the applicant on three separate occasions in an attempt to clarify his request. The college maintains that it took reasonable steps in an attempt to clarify the applicant's request and the college's duty to assist was met by these three separate attempts to obtain clarification. Any of the other aspects of the duty to assist were impossible to achieve given the boundless nature of this Request, and the unwillingness of the applicant to define the scope, subject, and timeframe of this request.

The college is cognizant of its obligation "to respond without delay to an applicant in an open accurate and complete manner". This obligation exists where an applicant has worded the request so as to "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". There were no limits or boundaries defined by the applicant in which the college could determine that the search for potentially responsive records was carried out with a reasonable standard of accuracy and completeness. The college's response, therefore, could never be considered reasonable or complete. The college expressed this concern to the applicant three times before receiving his response that " ... the scope of the request remains as stated in my request as received by the College, "all records containing my personal information which have not previously been released to me"".

Please consider the following as examples of why the college feels this request is impossible to complete without some clear parameters and boundaries:

- *At the time of this request, the applicant had made over ninety access to information requests to the college. And, his spouse had made over thirty access to information requests to the college. All of these access to information request case files contain their personal information and would be considered responsive to this request. The applicant is clear on this in his email to the college, dated May 6, 2012, where he states "It is possible that responsive records from earlier searches have been placed in folders indicating that the record is non-responsive. It is my understanding that this was the case with records from searches where* [former CNA General Counsel] *vetted the results of the searches. I would suggest searching any folders which contain "nonresponsive" records which were assigned as nonresponsive by* [former CNA general counsel]*".*

- *The applicant and his spouse were employed at CNA-Qatar and his spouse is still employed by the college. All of the records containing their personal information in the control of the faculty and staff of CNA and CNA-Qatar with whom they worked or otherwise had contact with, would be considered responsive to this request.*

- *As employees of the college and CNA-Qatar, this access to information request would include their human resources files, payroll files, travel and expense files, leave requests, pay registers, tax reporting by the college to Revenue Canada, benefit administration records, pension records as well as the reporting done to GNL related to all these activities. As employees, they would also have produced work for the college, which would be considered responsive to this request.*

- *The applicant and his spouse are involved in several legal and quasi-judicial matters with the college. All records related to the matters involving the Public Service Commission, the Information and Privacy Commissioner, the Human Rights Commission, the Citizen's Representative, Newfoundland and Labrador Association of Public Employees (NAPE), the Royal Newfoundland Constabulary (RNC), and the Supreme Court of Newfoundland and Labrador would also be considered responsive to this request.*

- *This search "covers all records which may not be physically located with the College yet come under the "control" of the College" …*

- *The applicant has asked that the college consider all nine subsections of the definition of personal information, under section 2(0) of the Act, when completing this request. Search keywords would therefore also include his phone number, email address, home address, employee identification number, social insurance number, gender, age and any other personally identifying trait of the applicant known to the college.*

- *The applicant has been involved with the college in some capacity for over the last ten years. This search therefore has, at a minimum, a ten year timeframe.*

During the informal review process, the applicant remained unwilling to define the scope of the request. The applicant was willing to have the college undertake a massive search for some records based on the five key words, six search subjects, and a specific timeframe. However, the applicant continued in his refusal to give any indication that this would satisfy his request.

In fact, the applicant suggested that he would wait as long as necessary for a response to his request. The college cannot undertake such an unreasonable request. The college would be agreeing to complete a request with no clear boundaries and no limit in terms of time, people, and expense. The Act sets out thirty and sixty day timeframes for responding to a request. The college maintains that an access to information request should be specific enough to allow a public body to respond within these time frames. Eliminating the timeframe is contrary to the spirit and intent of the Act.

In summary, the college maintains that it has fulfilled its duty assist the applicant, as required by the Act.

(2) Does section 10 of the Act (access to records in different or electronic form) apply to the records/information?

As stated in the college's response to outstanding issue (1), the applicant submitted a boundless access to information request. As a result, there is an unknown volume of records, in both electronic and paper format that would have to be identified and searched in order to respond to this request.

The Act sets out a standard for access to records in different and electronic form. While the majority of the electronic records involved could be "produced using the normal computer hardware and software and technical expertise of the" college, their production would certainly "interfere unreasonably with the operations of the" college.

Using the electronic records of the college's General Counsel as an example, please consider the following:

- *Every e-mail sent to or by the college's General Counsel,* [name]*, contains the applicant's first name... An electronic search of email using the applicant's first name would, therefore, return every email ever sent to or by the college's General Counsel in the potentially responsive group of records.*

- *As General Counsel,* [name] *would have access to several secure network folders in addition to his own including ones for the President, the college's Board of Governors, the Qatar Project Office, Human Resources, Office of ATIPP, Enterprise Risk Management, and Records Management. The college's search capacity does not extend to search phrases. This means a search term such as "Director of Student Services" would have to be truncated to "Director Student Services" to avoid capturing every instance of "of" in the search field. The keyword of "student" alone will appear a significant number of times in the records of the college and return a massive group of potentially responsive records.*

Using the electronic records of the college's Access and Privacy Coordinator as an example, please consider:

- *There are over 3,300 emails containing the applicant's first name, received on or before March 22, 2012, in the college's Access and Privacy Coordinator email account.*

- *The college's Access and Privacy Coordinator maintains over ninety electronic case files relating to the applicant's access to information requests submitted to the college. The majority of these access to information request case files contain at least one request for a review by your office.*

- *The college's Access and Privacy Coordinator maintains over thirty electronic case files relating to the applicant's spouses access to information request submitted to the college. The majority of these access to information request case files also contain at least one request for a review by your office.*

> *These two examples represent a small sub-set of the electronic records that would have to be searched in order to identify potentially responsive records for the applicant's request. Considering only the 3,300 emails containing the applicant's first name, received on or before March 22, 2012, in the college's Access and Privacy Coordinator email account. This would result in a time estimate of over 110 hours (based on 2 minutes per page and 3,300 pages) to identify the responsive records, apply the redactions, and prepare the records for final review and release.*
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> *As this represents only a small sub-set of the potentially responsive electronic records, the college maintains that this constitutes unreasonable interference with the college's operations and that this is the sort of "unreasonable interference" which is anticipated by Section 10 of the Act.*

[5] In its conclusion, the College reiterates that the request is excessively broad and without bounds, making it impossible to respond with any reasonable standard of accuracy or completeness. The College further submits that it has complied with its duty to assist as per section 9 of the *ATIPPA* and that with respect to the electronic records, production of these records would certainly interfere unreasonably with the operations of the college.

III APPLICANT'S SUBMISSION

[6] The Applicant did not provide a formal submission.

IV DISCUSSION

[7] The issues to be addressed in this report are the applicability of section 8 to the request as worded by the Applicant and section 10 to the requested information. Also at issue is whether the College fulfilled its obligations under section 9 of *ATIPPA*, the duty to assist. As the request was made prior to the Bill 29 amendments coming into force, the "old" *ATIPPA* is applicable.

[8] Section 10 was considered in Report A-2009-001. In that Report, the Commissioner considered a request that encompassed over 119,000 e-mails. It was shown that at a rate of 500 e-mails per day, it would take the public body about 8 months to process the request. The Commissioner found that this was an unreasonable interference with the operations of the public body. The Commissioner stated as follows:

> *[3] During this period, the person or persons charged with reviewing and redacting the record would not be able to attend to other ATIPP requests or other work they may be tasked with. Other Applicants would therefore be disadvantaged. Access to information is a right guaranteed by section 7 of the ATIPPA and this right is guaranteed to everyone equally. It is also important to note that this time estimate does not include the time it would take to search for, locate and retrieve the actual e-mails.*
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> *[4] The Department indicated several times during the informal resolution process that it was more than willing to process the request if the Applicant could narrow the scope of information requested. It is also my understanding that the Department communicated this to the Applicant directly prior to the Request for Review reaching this Office.*
>
> *[5] Meaningful participation in the access to information process by both parties is essential if the process is to work properly. In the present case, the Department did not simply state that they would not provide the information. It offered to process the request if the Applicant could narrow the scope of his request, perhaps by subject matter, or time frame. The Applicant declined to do so. Even breaking the Applicant's request down into several smaller requests would have made it significantly more manageable because smaller requests submitted at delayed or staggered intervals would enable the Department to respond to each request within the legislated timeline. While there is nothing in the ATIPPA that requires this staggering of requests, this is my suggestion to the Applicant in the interests of fairness and reasonableness. In fact, had the Applicant done this when first suggested by the Department, he would likely have begun to receive the information shortly thereafter and might even have it all by the time of this Report. However, the request, as it stands, involves a considerable volume of material, and according to the estimation provided, there is no way the Department could possibly respond to the request within the legislated timelines, even allowing for the allotment of extra staff and the 30 day extension of time permitted by section 16 of the ATIPPA.*
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> *[6] I would like to emphasize the fact that each request for information must be assessed separately and on its own merits with respect to section 10. One applicant may have 10 access requests for a particular public body or 10 applicants may have one request each. A public body is only permitted to claim section 10 where an individual access request would interfere unreasonably with the daily operations of the public body. To purport to apply section 10 where the aggregate number of access requests interferes unreasonably with the operations of the public body would defeat the purpose of the legislation. If a public body were to find that it was unable to adequately respond to and process the volume of access requests received, then it would be appropriate to allocate additional resources to the processing of access to information requests. Claiming section 10 would not be appropriate in these circumstances, as this section only contemplates the burden each individual access request places on a public body.*

[7] In Report 2006-015, my predecessor quoted with approval the following passage from Crocker v. British Columbia (Information and Privacy Commissioner) 155 D.L.R. (4th) 220, 10 Admin. L.R. (3d) 308:

> [46] BC Transit submitted a considerable body of evidence about the nature and number of requests submitted by the Petitioners and the effect of those requests on its operation. The evidence demonstrated that a significant portion of the company's Information and Privacy resources were being expended responding to the Petitioner's requests and that their demands were also affecting the Customer Service department's ability to perform its other duties and responsibilities. The determination of what constitutes an unreasonable interference in the operations of a public body rests on an objective assessment of the facts. What constitutes an unreasonable interference will vary depending on the size and nature of the operation. A public body should not be able to defeat the public access objectives of the Act by providing insufficient resources to its freedom of information officers. However, it is the Commissioner, with his specialized knowledge, who is best able to make an objective assessment of what is an unreasonable interference. In this instance, the Commissioner had sufficient evidence to make an informed assessment of the negative impact of the Petitioner's requests on B.C. Transit.

[…]

[19] While I am hesitant to allow a public body to rely on section 10 to refuse to respond to a request, I must conclude that the time involved in responding to this request is also "excessive and beyond reasonable for a single request." In this case, the Department offered several times to respond to a revised or narrowed access request. During the informal resolution process, the Departmental ATIPP Coordinator asked me to stress to the Applicant that they were willing to respond, but that the request, as worded, encompassed such a large volume of records that to do so was just not feasible.

[9] In Report 2006-015, the Applicant applied to the public body for all records comprised of communications to or from six individuals employed by the public body containing references to the Applicant's name within a specified time period. After some initial searching, it became apparent that this would involve a search of over 15,000 records in order to determine which ones referenced the Applicant. It was determined that of these, over 6,000 were responsive to the Applicant's request. These records would then have to be reviewed and appropriately redacted prior to being released to the Applicant. However, prior to the review there was a process involved in producing a working copy of the records that had to be performed by the public body's IT staff. The public body estimated that in all, responding to this request would consume six weeks of dedicated staff time. My predecessor found that this was "excessive and beyond reasonable for a single request."

[10] Based on the evidence presented by the College, I have no trouble concluding that with respect to that portion of the Applicant's request that encompasses electronic records, "producing it would interfere unreasonably with the operations of the public body." However, there is no such provision that applies to the records that exist solely in hard copy that are covered by this request. As section 10 only specifically applies to electronic records, there is no basis in the "old" *ATIPPA* upon which to justify not providing paper records which are responsive to the access request. However, I note that if this request had been made subsequent to the amendments contained in Bill 29, there would have been other options. The College could have attempted to make a case to disregard the request based on one of the provisions is section 43.1(1) or alternatively, the College could have requested me to approve a decision to disregard the request given its limitless nature and the interference with the College's operations that would undoubtedly result.

[11] I would also like to note that the number of pages responsive to an access request cannot be taken as the sole guideline or threshold for determining when a request is unreasonable. Section 43.1 of the amended *ATIPPA* gives public bodies the ability to disregard requests for a number of reasons. However, while there are now more reasons for which an access request can be refused, section 16 of the *ATIPPA* was also amended to allow public bodies more time to complete requests that are larger in scope. Beyond the initial 30 day extension that public bodies can take to respond to access requests, public bodies can now also ask the Commissioner to allow them more time to respond where circumstances warrant. Therefore, public bodies are no longer bound to a maximum of 60 days in which to respond to an access request. I interpret this to mean that requests once considered unreasonable because of the inability to be completed within the 60 day time limit, will now be able to be completed, because the public body, if it avails of the new section 16 amendments, will not find itself in a deemed refusal position if it takes a longer period of time to request, as long as the time extension is in compliance with section 16.

[12] In its submission, the College has also addressed section 8 of the *ATIPPA* which states that the applicant must "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." The argument is that the Applicant has not provided sufficient details for the College to complete the request. However, section 8 only refers to the identification of records. In this case, the records will be fairly identifiable – they will contain the Applicant's name, or address or employee ID

number, or social insurance number etc. The problem is that these searches will take copious amount of time (given all the different identifiers that are potential search terms) and there may be thousands and thousands of records returned which will have to be read through and potentially redacted. In my opinion, identifying the records is not the issue, but the process of searching for them and reviewing them is beyond what could reasonably be expected. As such, I do not believe that the College can successfully argue that the Applicant has not made a request which would allow an employee familiar with the records of the public body to identify the records containing the information, however the time involved in identifying and reviewing the records is clearly problematic.

[13] The College further argues that without limits or boundaries, it is impossible for them to determine whether their search is reasonable, accurate or complete, which are some of their obligations under the duty to assist (section 9 of the *ATIPPA*). The College has attempted to work with the Applicant to narrow the scope of his request, but to no avail. While the Applicant has identified some specific places to search, the scope of the request remained the same – all records in the custody or control of the College that contain his personal information, which had not previously been released to him. The duty to assist encompasses three aspects: assisting the applicant in the early stages of making a request, conducting a reasonable search, and responding to the applicant in an open, accurate and complete manner. I do not believe that the College has failed in the first aspect. With respect to the second aspect, I believe the College has clearly demonstrated the great difficulty of completing a search for the records requested. Therefore, I also do not believe that the College has failed in this regard. With respect to the third aspect, the College immediately asked for clarification and narrowing of the request and once it was apparent that this would not be forthcoming, and that the search was not feasible, the College responded to the Applicant. Therefore, I do not think that the College has failed in any aspect of the duty to assist.

V CONCLUSION

[14] I appreciate the position the College is in and do not believe that this is a reasonable request. This is a unique situation where the Applicant's involvement with the College is quite extensive and varied, as outlined by the College above. The search required in order to respond to the Applicant's request is undoubtedly massive and, in my opinion, quite an unreasonable task, given the broad wording of the request. Section 10 gives the College the ability to not provide electronic records where producing them would interfere unreasonably with the operations of the College. That is clearly the case here and I do not hesitate in concluding that the Colleges is entitled to rely on section 10 to not provide electronic records.

[15] However, the old *ATIPPA* did not make any provision for disregarding a request where paper records were involved. As such, I can find no basis in the old *ATIPPA* upon which the College can rely to not search for and provide records that exist only in paper form which are responsive to the request. This has been remedied in the new *ATIPPA*. Section 10 remains as is, but section 43.1 was added to give public bodies the ability to disregard requests in certain circumstances. This section applies to "requests" and is not dependent on the type of records at issue.

[16] Further, the College is not entitled to rely on section 8 to refuse to respond to the request on the grounds that the Applicant's request is not sufficiently specific. Section 8 refers to the identification of records and not the identification of the scope of the search required. Records would be readily identifiable in this case because they would contain one of the Applicant's many identifiers known to the College.

[17] Finally, I find that the College, for the reasons set out above, has met its duty to assist as set out in section 9.

VI RECOMMENDATIONS

[18] Under the authority of section 49(1) of the *ATIPPA*, I recommend that the College perform a search of paper records and provide the results of that search to the Applicant. This should be considered a new request (for purpose of resetting timelines), commencing on the date of acceptance of this recommendation, should the College choose to do so. The "old" *ATIPPA* will still apply, however, as the original request was filed prior to the passing of Bill 29.

[19] Under the authority of section 50 of the *ATIPPA*, I direct the head of the College 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.

[20] Please note that within 30 days of receiving the 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*.

[21] Dated at St. John's, in the Province of Newfoundland and Labrador, this 27th day of August 2013.

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