



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-021

September 30, 2020

College of the North Atlantic

Summary:

The College of the North Atlantic (“CNA”) received an access to information request under the *Access to Information and Protection of Privacy Act* (“ATIPPA”) for the Joint Oversight Board (“JOB”) minutes. CNA refused access to the JOB minutes, asserting that the records were not in the custody or under the control of CNA. A complaint was filed with this Office asking the Commissioner to review the refusal. The Commissioner determined that the JOB minutes are within the custody and control of CNA and recommended that CNA disclose them to the Applicant subject to any other applicable exceptions.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, section 5.

Authorities Relied On:

NL OIPC Reports [A-2020-013](#); [A-2014-012](#).

[McBreairty v. College of the North Atlantic](#), 2016 NLTD(G) 138;
[College of the North Atlantic v. McBreairty](#), 2020 NLCA 19.

I BACKGROUND

[1] On April 15, 2013 the Applicant made an access to information request to the College of the North Atlantic (“CNA”) as follows:

Copies of all JOB (joint oversight board) minutes and from January 2011 to the present. Note: The bylaws of the JOB indicate that the JOPB [sic] is to be public as are its minutes. Therefore I request that thes [sic] be provided and sent electronically at no cost to me.

[2] CNA refused to provide a copy of the JOB minutes and instead advised the Applicant how he could go and view the records. The JOB is a governance organization of the College of the North Atlantic Qatar (CNAQ). The Applicant wanted a copy of the records. Ultimately CNA refused access to the records claiming they were not in its custody or under its control.

[3] The Applicant was not satisfied with CNA’s response and filed a complaint with this Office. The file was placed in abeyance pending the outcome of a court proceeding involving CNA and the interpretation of “employee” under the legislation.

[4] As this access to information request and complaint to this Office occurred in 2013, the legislation at that time was the *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1. As such, this previous version of *ATIPPA* will be used in this Report and any reference to sections will be to sections of that Act.

[5] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 46(2) of *ATIPPA*.

II PUBLIC BODY’S POSITION

[6] CNA argued that the JOB Minutes are not within its custody nor under its control and therefore they cannot be provided to the Applicant.

[7] CNA claimed that CNAQ is not a public body of the Government of Newfoundland and Labrador or under *ATIPPA* and that it is owned and controlled by a government of a foreign state, the State of Qatar.

[8] CNA explained that as a contractor, CNA provides services to CNAQ as outlined in the Comprehensive Agreement. CNA relied on section 12.1.2 of the Comprehensive Agreement:

12.1.2 Confidential Information

In the course of their performance under this Agreement, the Contractor may have access to and may acquire and/or generate confidential information belonging to Qatar. The Contractor and each person or agent to whom the Contractor provides access to confidential information shall keep all confidential information supplied by or on behalf of Qatar or generated by the Contractor or any agent thereof in connection with this Agreement in the strictest of confidence. This obligation of confidentiality shall survive any termination or expiration of this Agreement.

[9] As the contractor, CNA argued that while it has bare possession of the records, they belong to the State of Qatar. CNA advised that it could not provide or disclose a copy of the requested information to the Applicant without breaching the Comprehensive Agreement. CNA relies on 10.2.1 of the Comprehensive Agreement:

In the event the Contractor should commit a material breach of its obligations under this Agreement and fails to remedy the breach within 30 days after receipt of written notice of such breach, Qatar shall be entitled to terminate this Agreement immediately upon written notice to the Contractor.

[10] CNA stated that the loss of its relationship with the State of Qatar would be damaging to its financial position as well as the financial position of the province. Furthermore, CNA wanted our office to consider the impact that release of these records could have on intergovernmental relations since it advised that the relationship with the State of Qatar is very prestigious and has resulted in great benefit not only to CNA's staff and students but to all Newfoundlanders and Labradorians. CNA indicated that a violation of the contract with the State of Qatar could result in the termination of the contract or jeopardize the potential for future renewals. CNA did not claim any exceptions under *ATIPPA* in relation to these statements.

[11] CNA explained that the JOB was established to provide oversight for the CNAQ project and that the JOB acts as a Board of Directors and is governed by the JOB by-laws.

[12] CNA advised that clause 4.16 of the JOB by-laws defines the process by which the JOB meeting minutes are to be made available to the public. CNA advised that the JOB minutes shall be available for inspection by the public by appointment with the Secretary of the JOB, located in Qatar.

[13] Overall, CNA argued that it does not have authority over the requested records therefore it cannot provide a copy to the Applicant.

III APPLICANT'S POSITION

[14] The Applicant's position is that CNA is a public institution and the JOB minutes should be released.

[15] The Applicant advised that the JOB minutes were released in the past and argued that the JOB states that the minutes are open to public viewing.

[16] The Applicant believes that the JOB minutes are public and that CNA should provide written copies of the JOB minutes as requested.

IV ISSUES

[17] The issue to be decided in this Report is as follows:

1. Are the JOB Minutes in CNA's custody or under its control under *ATIPPA*?

V DECISION

[18] The issue of custody or control has been reviewed in depth in Reports A-2020-013 and A-2014-012.

[19] Section 5 of *ATIPPA* outlines the issue of custody or control as follows:

5(1) This Act applies to all records in the custody of or under the control of a public body...

[20] Section 5 sets out an important threshold question. In order to be subject to *ATIPPA*, the records need only be in either the custody or control of a public body. The terms custody and control, while not defined, have been given a broad and liberal interpretation.

[21] CNA argued that it does not have the authority to assert control over the records because these records are under the custody and control of CNAQ and the state of Qatar and that CNAQ is not a public body under *ATIPPA*.

[22] In order to determine custody and control the relationship between CNA and CNAQ must be examined. This relationship has been reviewed in both the Supreme Court Trial Division in *McBreairty v. College of the North Atlantic* and at the Court of Appeal in *College of the North Atlantic v. McBreairty*.

[23] The Court of Appeal commented on the obligations of CNA and the relationship between CNA and CNAQ at paragraphs 10-15 as follows:

[10] Mr. Hutchings' description of the relationship between CNA and CNA-Q did not fully comport with the Comprehensive Agreement to which he referred. This agreement was entered into between CNA and the State of Qatar to govern their relationship relative to the establishment and operation of "world class technological programs that will receive Canadian and international accreditation." Amongst other things, it outlined the nature of the services that CNA was obligated to provide to the State of Qatar with respect to the operation.

[11] Of interest at this point is the recital in the agreement that referred to a detailed business plan

... for the establishment, management and operation of a branch campus of CNA to be known as the "College of the North Atlantic in Qatar" (the "College");

[12] The rest of the agreement sets out in considerable detail the obligations of CNA with respect to the establishment, management and operation of "the College", which is identified in the recital as "a branch

campus of CNA". On its face, therefore, the agreement purports to contemplate CNA operating a branch campus in Qatar in much the same way in which it operates numerous campuses in the province of Newfoundland and Labrador. In fact, in the business plan which is attached as an appendix to the agreement and incorporated by reference therein, this concept of operating a branch campus is emphasized by the following language dealing with "Governance, Structure and Systems":

As with other campuses of College of the North Atlantic, the CNA Board of Governors through the President of CNA will govern the Qatar Campus.

(Emphasis added)

[13] Although the business plan also later recognizes that the governance structure of the Qatar campus is "somewhat anomalous" because certain functions such as specifying academic programs and setting enrolment targets (but nothing with respect to employment issues) were to be delegated to a Joint Oversight Board, the plan nevertheless reaffirms the basic concept of the Qatar operation being that of a campus of CNA:

While CNA's Board of Governors retains sole responsibility for the overall governance and administrative oversight of the Qatar campus, as it does with any other CNA campus, the comprehensive agreement contractually empowers the Joint Oversight Board ("JOB") to perform ...

(Emphasis added)

[14] Later in the business plan, under the heading "Legal Considerations" the following occurs:

... usually it is the Board that is formally constituted as the legal corporate personality of the institution. That is, it is actually the governing body and only the governing body that has the capacity to sue and be sued. In the case of the Qatar campus, the legal personality continues to vest in CNA's Board of Governors.

(Emphasis added)

[15] Certainly one inference to be drawn from these provisions is that, contrary to Mr. Hutchings' assertions, the Qatar operation and CNA were not intended to be "separate and distinct legal entities"; rather, the Qatar operation was to be established, managed and operated as an integrated campus of CNA. Mr. Hutchings confirmed in his viva voce evidence that credentials issued to students who studied in CNA-Q were credentials issued

by CNA just as if the students had been studying at one of the other CNA campuses.

[24] The Court of Appeal upheld the applications judge's decision in rejecting the premise that CNA and CNAQ are separate and distinct legal entities. Furthermore, the Court of Appeal found that the business plan reaffirmed the basic concept of the CNAQ operation being that of a campus of CNA.

[25] The Trial Division concluded that the comprehensive agreement governs the relationship between CNA and CNAQ at paragraph 180:

[180] I find the evidence is not clear, convincing and cogent on a balance of probabilities to support the manner of operations between the parties to the Comprehensive Agreement as described by Mr. Hutchings in his testimony. I also find the written Comprehensive Agreement dated in or about 2001 governs the relationship between the College and the State of Qatar with Article 2.1.10 making the College as the Contractor responsible for recruiting, employing and managing all administrative personnel, faculty and staff for the campus.

[26] Based on these decisions from the Courts, it would be reasonable to conclude that CNA, as a public body, encompasses CNAQ for the purposes of ATIPPA.

[27] Turning back to the issue of custody and control, Reports A-2020-013 and A-2014-012 outlined a list of non-exhaustive factors that must be considered when assessing custody and control. Additionally, the two-part test for control was covered in detail in these two reports.

[28] The two-part test for control is first, do the contents of the records relate to a departmental matter and second, could the public body reasonably expect to obtain a copy of the records upon request.

[29] CNA argues that it only has bare possession of the requested records. However, based on the Court's determination that the business plan reaffirms the basic concept of the Qatar

operation being that of a campus of CNA, the logical conclusion is that CNA has ultimate control over the records in question.

[30] The business plan states that the CNA Board of Governors through the President of CNA will govern the Qatar Campus. While the Comprehensive Agreement contractually empowers the JOB to perform specific governance functions, the CNA Board of Governors retains sole responsibility for the overall governance and administrative oversight of the Qatar campus.

[31] Based on this, CNA has authority over the records. CNA is a public body under *ATIPPA*, and has ultimate authority for the overall governance of the Qatar Campus. Reviewing the test for control, the JOB minutes would relate to a departmental matter and CNA would have the right to request and obtain a copy of the records. Even if I were to accept CNA's position that the Qatar Campus is not a CNA campus, CNA is indisputably a member of the JOB, and the JOB minutes are a record of decisions of that body. As such, the minutes are within the control and custody of CNA because they would relate to a matter in which CNA is officially involved as a party (the JOB), and as a member of the JOB, CNA can expect to obtain a copy of such records.

[32] While in its submissions, CNA claimed that disclosure could have an impact on intergovernmental relations (section 23) and damage to its financial position (section 24), it did not actually cite those exceptions to this Office nor, of course, did it cite those exceptions to the Applicant. It initially advised the Applicant that access to the requested records was governed by article 4.16 of the bylaws of the JOB and then through the complaint process CNA argued that the records were not in its custody or control. We are not making a recommendation at this juncture on whether or not sections 23 and 24 of *ATIPPA* apply.

[33] It is determined that the requested records are under the custody and control of CNA.

VI RECOMMENDATIONS

- [34] Under the authority of section 49(1) of *ATIPPA*, I recommend that CNA review the JOB minutes for any appropriate exceptions and disclose the minutes to the Applicant with any appropriate redactions.
- [35] As set out in section 50 of *ATIPPA*, the head of CNA must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 15 days of receiving this Report.
- [36] Please note that within 30 days of receiving the decision of CNA 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 *ATIPPA*.
- [37] Dated at St. John's, in the Province of Newfoundland and Labrador, this 30th day of September, 2020.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador