



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-023

October 7, 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 all emails and attachments that reference the Applicant and Applicant’s Spouse from the email files of a CNA Employee. CNA disclosed some responsive records and withheld others citing sections 23 (disclosure harmful to intergovernmental relations or negotiations), 24 (disclosure harmful to the financial or economic interests of a public body), and 30 (disclosure harmful to personal privacy), and asserting that some portions of 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 redactions. The Commissioner determined that CNA had not properly applied redactions to portions of the records and that other portions are within the custody and control of CNA, recommending that CNA release additional records to the Applicant.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, sections 5, 23, 24, and 30.

Authorities Relied On:

NL OIPC Reports A-2020-021, [A-2020-013](#), and [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 May 14, 2013 the Applicant made an access to information request to the College of the North Atlantic (“CNA”), which was narrowed on May 30, 2013 as follows:

All emails that were sent to, from or copied to [CNA Employee]’s College of the North Atlantic email account between September 1, 2002, and September 1, 2003, that contain the keywords [variations on the Applicant and Applicant’s Spouse’s name].

- [2] CNA initially provided disclosure of some responsive records to the Applicant, but refused access to the remaining responsive records. The Applicant was not satisfied with CNA’s response and filed a complaint with this Office.
- [3] As this access to information request and complaint occurred in 2013, the legislation at that time was the *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1 (“ATIPPA”). Therefore, this previous version of the current legislation will be used in this Report and any reference to sections will be sections of that Act.
- [4] During the course of informal resolution, several of the issues initially raised by the Applicant in the complaint to this Office were addressed in full or in part, and additional disclosure of portions of the responsive records was provided to the Applicant by CNA. However, some of the redactions made by CNA remained at issue; namely the application of sections 20, 23, 24 and 30 on a number of pages of responsive records. Given that some of these redactions involved the issues of “local hires” and “custody and control” that were then part of another legal proceeding involving CNA and the interpretation of “employee” under the legislation, the file was placed in abeyance pending the outcome of that case.
- [5] Following the court of appeal decision in that matter, informal resolution was unsuccessful and the complaint proceeded to formal investigation in accordance with section 46(2) of *ATIPPA*.

II PUBLIC BODY'S POSITION

- [6] In its formal submission to this Office, CNA agreed to release additional records to the Applicant. This Office confirmed these records have been disclosed. It noted the age of the records disqualifies the exception to disclosure under section 20 of *ATIPPA*, and therefore it withdrew its arguments concerning section 20 but continued to withhold some portions of the responsive records citing sections 23, 24, and 30 of *ATIPPA*. Its arguments were in relation to outstanding portions of three groupings of records – group A (portions of 331 pages); group B (portions of 5 pages), and group C (portions of 78 pages).
- [7] In its submission in relation to group A, CNA maintained that sections 23 and 24 were applicable to portions of the outstanding records, noting that, “the release of some of this information would result in harm to the intergovernmental relations with the state of Qatar as well as the financial and economic interests of the college.” Additionally, CNA released the name of an employee in the subject line of an email thread within this grouping of records, but argued the email content itself cannot be released as it, “contains the personal information of the named employee which, if released, would be an unreasonable invasion of privacy.” Finally, CNA released the name of the locally hired employee on one page of this grouping of records, but continued to withhold the academic credentials in accordance with section 30 of *ATIPPA*.
- [8] With regard to group B, CNA released some of the information previously redacted, but maintained that some information must still be withheld in accordance with section 30 of *ATIPPA*, “because it is the personal health information of employees and their family members.” Additionally, CNA argued sections 23 and 24 are applicable to portions of two pages of this group of records as “release of this information would result in the same harm outlined above.”
- [9] In relation to group C, CNA released 19 pages in full, but continued to maintain sections 23 and 24 are applicable to the remaining records, stating the release, “would result in harm to the intergovernmental relations with the state of Qatar as well as the financial and economic interests of the college,” and therefore must continue to be withheld.

[10] More broadly in regard to sections 23 and 24 of *ATIPPA*, CNA submitted and relied on the Comprehensive Agreement between itself and the State of Qatar, alleging the College of the North Atlantic – Qatar (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. CNA explained that while it is an educational body of the government of Newfoundland and Labrador as set out in section 2(d) of *ATIPPA*, that under the Comprehensive Agreement it is the contractor. It went on to submit that CNA is, “in a position where it has bare possession of records which belong to the State of Qatar...but may only use these records as set out in the Comprehensive Agreement,” and, “failure to do so could result in a breach of the contract.” It highlighted section 10.2.1 of its Comprehensive Agreement with CNAQ:

In the event that 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.

[11] CNA went on to note that it has, in the past, released records through misinterpretation of the terms of the Comprehensive Agreement, but that, “release of records which we have no authority to release cannot be remedied,” and it has, “been very fortunate that the State of Qatar has continued in the Comprehensive Agreement partnership”.

[12] CNA further asked this Office to consider the negative impact release of these records could have on intergovernmental relations, submitting that the relationship it has 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.” It went on to argue that, “the loss of our relationship with the State of Qatar would be damaging to the financial position of the college and the province,” and, “going forward we anticipate that this contract will be extended and worth potentially millions of dollars in revenue over the next decade.” It noted that since the beginning of the contractual agreement in 2001 the college has received, “over 100 million dollars in revenues.”

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

III APPLICANT'S POSITION

[14] The Applicant's position is that CNA has not properly applied the redactions in withholding portions of the responsive records, and that the additional records should be disclosed.

IV ISSUES

[15] The issues to be decided in this Report are as follows:

1. Do sections 23, 24 and 30 of *ATIPPA* apply to group A of the responsive records;
2. Do sections 23, 24 and 30 of *ATIPPA* apply to group B of the responsive records;
and
3. Are the responsive records in group C in CNA's custody or under its control under *ATIPPA*, and do sections 23 and 24 of *ATIPPA* apply to them?

V DECISION

[16] Sections 23, 24 and 30 of *ATIPPA* are as follows:

23.(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm the conduct by the government of the province of relations between that government and the following or their agencies:

- (i) the government of Canada or a province,*
- (ii) the council of a local government body,*
- (iii) the government of a foreign state,*
- (iv) an international organization of states, or*
- (v) the Nunatsiavut Government; or*

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.

(2) The head of a public body shall not disclose information referred to in subsection (1) without the consent of

- (a) the Attorney General, for law enforcement information; or
 - (b) the Lieutenant-Governor in Council, for any other type of information.
- (3) Subsection (1) does not apply to information that is in a record that has been in existence for 15 years or more unless the information is law enforcement information.

24.(1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose

- (a) trade secrets of a public body or the government of the province;
 - (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;
 - (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
 - (d) information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;
 - (e) scientific or technical information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee of priority of publication;
 - (f) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body, or considerations which relate to those negotiations;
 - (g) information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body; or
 - (h) information, the disclosure of which could reasonably be expected to be injurious to the ability of the government of the province to manage the economy of the province.
- (2) The head of a public body shall not refuse to disclose under subsection (1) the results of product or environmental testing carried out by or for that public body, unless the testing was done

- (a) *for a fee as a service to a person, a group of persons or an organization other than the public body; or*
 - (b) *for the purpose of developing methods of testing.*
- 30.(1) *The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.*
- (2) *A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where*
 - (a) *the applicant is the individual to whom the information relates;*
 - (b) *the third party to whom the information relates has, in writing, consented to or requested the disclosure;*
 - (c) *there are compelling circumstances affecting a person's health or safety and notice of disclosure is mailed to the last known address of the third party to whom the information relates;*
 - (d) *an Act or regulation of the province or of Canada authorizes the disclosure;*
 - (e) *the disclosure is for a research or statistical purpose and is in accordance with section 41;*
 - (f) *the information is about a third party's position, functions or salary range as an officer, employee or member of a public body or as a member of a minister's staff;*
 - (g) *the disclosure reveals financial and other details of a contract to supply goods or services to a public body;*
 - (h) *the disclosure reveals the opinions or views of a third party given in the course of performing services for a public body, except where they are given in respect of another individual;*
 - (i) *public access to the information is provided under the Financial Administration Act;*
 - (j) *the information is about expenses incurred by a third party while travelling at the expense of a public body;*
 - (k) *the disclosure reveals details of a licence, permit or a similar discretionary benefit granted to a third party by a public body, not including personal information supplied in support of the application for the benefit;*

- (l) *the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, not including
 - (i) *personal information that is supplied in support of the application for the benefit, or*
 - (ii) *personal information that relates to eligibility for income and employment support under the Income and Employment Support Act or to the determination of income or employment support levels;**
- (m) *the personal information is about an individual who has been dead for 20 years or more; or*
- (n) *the disclosure is not contrary to the public interest as described in subsection (3) and reveals only the following personal information about a third party:
 - (i) *attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip, or*
 - (ii) *receipt of an honour or award granted by or through a public body.**
- (3) *The disclosure of personal information under paragraph (2)(n) is an unreasonable invasion of personal privacy where the third party whom the information is about has requested that the information not be disclosed.*
- (4) *A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where
 - (a) *the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;*
 - (b) *the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation;*
 - (c) *the personal information relates to employment or educational history;*
 - (d) *the personal information was collected on a tax return or gathered for the purpose of collecting a tax;**

- (e) the personal information consists of an individual's bank account information or credit card information;*
 - (f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;*
 - (g) the personal information consists of the third party's name where
 - (i) it appears with other personal information about the third party, or*
 - (ii) the disclosure of the name itself would reveal personal information about the third party; or**
 - (h) the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.*
- (5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether*
- (a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;*
 - (b) the disclosure is likely to promote public health and safety or the protection of the environment;*
 - (c) the personal information is relevant to a fair determination of the applicant's rights;*
 - (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people;*
 - (e) the third party will be exposed unfairly to financial or other harm;*
 - (f) the personal information has been supplied in confidence;*
 - (g) the personal information is likely to be inaccurate or unreliable;*
 - (h) the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant; and*
 - (i) the personal information was originally provided to the applicant.*

Application of Sections 23, 24, and 30 to Group A of the Responsive Records

[17] After reviewing the records in question this Office agrees with CNA's application of section 30 to withhold the email content relating to a named employee as these records do contain personal information of the named employee that would constitute an unreasonable invasion of privacy if released, and none of the circumstances of 30(2) apply. Similarly, this Office agrees with CNA's application of section of 30 to withhold the academic credentials of another employee for the same reason.

[18] However, this Office does not agree with CNA's application of sections 23 and 24 in relation to portions of this group of records. CNA's arguments in support of its application lacked specificity and were more general in nature, failing to properly demonstrate how each redacted portion, if disclosed, would result in financial, economic, intergovernmental or negotiation harm or met the definitions of information that may be withheld under those sections. Merely stating disclosure would produce harm is not evidence of such, and the fact that records have been released in the past without consequence seems to be evidence that there is no harm to intergovernmental relations. Given CNA failed to provide sufficient arguments and evidence, and this Office's review of the records in question could not ascertain how release would come within sections 23 and 24 of *ATIPPA*, this Office finds that the sections do not apply and those portions of this group of records should be released.

Application of Sections 23, 24, and 30 to Group B of the Responsive Records

[19] After reviewing the records in question this Office agrees with CNA's application of section 30 to withhold information that would, if disclosed, reveal the personal health information of employees and their family members.

[20] However, as with the group A records, this Office does not agree with CNA's application of sections 23 and 24 in relation to portions of this group of records because it again failed to provide sufficient evidence that disclosure of these records would result in financial, economic, intergovernmental or negotiation harm or met the definitions of information that may be withheld under those sections. Additionally, a review of these records suggests the portions redacted would likely have been known publicly or at least by the Applicant, as they

include the recipients of an email invitation, of which the Applicant's Spouse was one, as well as the name of the individual hosting the invited reception provided in both the email as well as an attached poster promoting the event. This further calls into question how disclosure could result in any harm. Given CNA failed to provide sufficient arguments and evidence, and this Office's review of the records in question could not ascertain how release would be contrary to sections 23 and 24 of *ATIPPA*, this Office finds that the sections do not apply and those portions of this group of records should be released.

Application of Sections 23 and 24 and "Custody and Control" of group C of the Responsive Records

[21] As with the group A and B records, this Office does not agree with the majority of CNA's application of sections 23 and 24 in relation to portions of this group of records because of the lack of specificity of its arguments and failure to provide sufficient evidence to support its claims. Additionally, the content of the majority of records contained in the redactions put forth by CNA in this group of records appears to be substantially similar to the content of other records in this group that it has released during its formal submissions. CNA failed to identify how the majority of the records attract the application of section 23 and 24 of *ATIPPA* while other records in this group do not. The alleged harm is not apparent in comparison to other records that CNA has released. A small portion of the responsive records found at pages 201-204 of this group do however meet the requirements of section 23 and therefore can be withheld.

[22] The issue of custody or control has been reviewed in depth in Reports A-2020-013, A-2014-012 and A-2020-021.

[23] Section 5 of *ATIPPA* outlines the issue of custody and control as follows:

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

[24] 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.

[25] In Report A-2020-021 this Office assessed this issue in relation to CNA and near identical arguments that it presented in that complaint to this one. 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*.

[26] Report A-2020-021 highlighted how a determination on custody or control requires an examination of the relationship between CNA and CNAQ, and how that relationship has been reviewed by 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*. That Report cited a number of paragraphs from the Court of Appeal commenting on the obligations of CNA and the relationship between CNA and CNAQ in upholding the applications judge's decision in rejecting the premise that CNA and CNAQ are separate and distinct legal entities and finding the business plan reaffirmed the basic concept of the CNAQ operation being that of a campus of CNA. Given that, Report A-2020-021 found it would be reasonable to conclude that CNA, as a public body, encompasses CNAQ for the purposes of *ATIPPA*.

[27] This Office applied the list of non-exhaustive factors that must be considered when assessing custody and control and the two-part test for control outlined in Reports A-2020-013 and A-2014-012 to CNA and CNAQ in Report A-2020-021. CNA's "bare possession" argument was rejected with this Office finding the Qatar operation is a campus of CNA, the CNA Board of Governors retains sole responsibility for the overall governance and administrative oversight of the Qatar campus, and therefore CNA has ultimate control over the records. Given this, CNA would have authority over the records, and as a public body under *ATIPPA*, disclose them via an access to information request pursuant to its obligations under the *ATIPPA*.

[28] Even if we were to accept CNA's position that the Qatar Campus is not a CNA campus, the responsive records were created or obtained by CNA in its official capacity and in carrying out its role and mandate. As such, those records are within the control and custody of CNA because they relate to a matter in which CNA is officially involved, i.e. the operation of a College campus in Qatar, and CNA already possesses a copy of those records.

[29] It is therefore determined that the requested records are under the custody and control of CNA. As CNA failed to provide sufficient arguments and corroboration, and this Office's review of the records in question could not ascertain how release would constitute harm as outlined in sections 23 and 24 of *ATIPPA*, this Office finds that the sections do not apply and the majority of those portions of this group of records should be released. The exception is four pages which fit the description of section 23 and should continue to be withheld.

VI CONCLUSION

[30] The records CNA applied section 30 of *ATIPPA* to redact are properly withheld as disclosure would reveal personal or personal health information that would be harmful to personal privacy. The records for which CNA applied sections 23 and 24 of *ATIPPA* to withhold should be disclosed (with the exception of four pages in group C) to the Applicant as CNA has not properly applied the redactions, nor has it successfully convinced this Office portions of the responsive records are not under its custody and control.

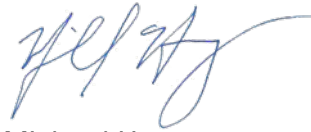
VII RECOMMENDATIONS

[31] Under the authority of section 49(1) of *ATIPPA*, I recommend that CNA release all additional records as specified and outlined in the attached Appendix.

[32] 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.

[33] 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*.

[34] Dated at St. John's, in the Province of Newfoundland and Labrador, this 7th day of October, 2020.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador

Appendix A

This Office recommends CNA release the following records in full to the Applicant:

Group A: pages 46, 59, 62-63, 65-66, 69-70, 73 -74, 87, 91, 96, and 101.

Group B: pages 44 and 45.

Group C: pages 173-179, 183-185, and 192-194.