OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2010-008

June 9, 2010

College of the North Atlantic

Summary: The Applicant applied to the College of the North Atlantic (the "College") under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to records relating to amendments to an agreement between the College and the State of Qatar involving the establishment of a campus of the College in Qatar (the "*Comprehensive Agreement*"). The College denied access relying on the exceptions to disclosure set out in sections 20 (advice and recommendations), 21 (legal advice), 22 (disclosure harmful to law enforcement), 24 (disclosure harmful to the financial or economic interests of a public body), and 30 (disclosure of personal information). The Commissioner determined that the College was entitled to refuse access to certain information based on sections 20, 24 and 30 but could not rely on the section 22 exception to deny access to information and the Commissioner recommended release of that information. The Commissioner recommended that the College reconsider its decision to withhold on the basis of section 21 information contained in an analysis of the *Comprehensive Agreement* conducted by the College's external legal counsel. The Commissioner made a finding that the College did not respond to the Applicant in an open, accurate and complete manner resulting in a failure to meet the duty to assist imposed on it by section 9. The Commissioner recommended that the College provide the Applicant with a Fee Estimate of cost of conducting a reasonable search for any remaining records responsive to the Applicant's request.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as amended, ss. 2(e), 9, 20, 21, 22(1)(l), 24 and 30; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, s. 16.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2007-010, 2007-015, A-2008-004, A-2009-007, A-2009-010, A-2009-011 and A-2010-002; British Columbia OIPC Order No. 325-1999; Ontario OIPC Order P-944; Nova Scotia Review Officer Report FI-08-06; ***Solosky v. The Queen,*** [1980] 1 S.C.R. 821.

I BACKGROUND

[1] In accordance with the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request dated October 26, 2008 to the College of the North Atlantic (the "College"), seeking disclosure of records as follows:

> *I am requesting a copy of* ***all*** *amendments to the Comprehensive Agreement to Establish a Campus of the College of the North Atlantic in Qatar including but not limited to amendments to the Business Plan. This request is for all amendments which have not previously been released to me. This would include* ***but not limited to*** *a copy of all amendments that have been reduced to writing and signed by the parties or amendments that have been otherwise duly executed.*
>
> *Further, I would note that some amendments which have been released were reduced to writing but were not signed by the parties in accordance with article 12.11 of the Comprehensive Agreement. In addition to the above request I am requesting the signed copies if they exist.*
>
> [Emphasis in original]

[2] The *Comprehensive Agreement to Establish a Campus of the College of the North Atlantic in Qatar* (the "*Comprehensive Agreement*") is an agreement entered into between the State of Qatar and the College. The agreement is 22 pages in length and contains 12 Articles. Article 12.11 of the agreement provides:

> *12.11 Entire Agreement: Amendments*
>
> *This Agreement embodies the entire agreement between the Parties as to the subject matter thereof, and the Parties shall not be bound by or be liable for any statement, representation, promise, inducement or understanding of any kind or nature which has not been set forth herein. No changes, amendments or modifications of the terms or conditions of this Agreement shall be valid unless reduced to writing and signed by the Parties. To the extent that any provision of this Agreement may be affected by changed circumstances, the Parties agree to negotiate any corresponding amendment in good faith.*

[3] The *Comprehensive Agreement* also contains 4 Appendices as follows:

Appendix 1: Business Plan

Appendix 2: Schedule of Contractor Obligations

Appendix 3: Start-up Budget

Appendix 4: Ten-Year Budget.

[4] The access request which forms the basis of this Request for Review is the fourth similar request by the Applicant to the College for records in relation to amendments to the *Comprehensive Agreement.*

[5] The first of the four access requests was received by the College on June 14, 2007 and was the subject of Report A-2008-004 from this Office. In that Report, I agreed with the College's interpretation of the Applicant's access request and then suggested that the Applicant make a new access request which would ask for all amendments to the *Comprehensive Agreement*, including those that were formal amendments and those that were informal changes and variations in policy and practice, but which were not formally approved. The Applicant followed my suggestion and made a new access request.

[6] On May 15, 2008 the College received another access request for records relating to amendments to the *Comprehensive Agreement.* In response to this access request, the College issued a Fee Estimate on May 29, 2008, indicating that the total estimated cost to process the Applicant's request would be $7275.00. The Applicant filed a Fee Complaint with our Office in relation to this Fee Estimate.

[7] Subsequently, the College agreed to waive the fee in correspondence to the Applicant dated July 8, 2008:

> *… Over the past two weeks this office has made inquiries about the scope of the search required to ensure an open accurate and complete response can be made to your request. Regrettably, it is estimated that it will take four people, approximately four weeks to complete the reasonable search necessary to provide you with the records you are seeking. CNA must therefore stand by the original fee estimate.*
>
> *As indicated above CNA recognizes concerns with the records management around the changes to the comprehensive agreement. To address these CNA is undertaking a compliance exercise which should result in a complete list of all amendments to the Comprehensive Agreement. CNA estimates that this will be completed before the end of this year. At that time CNA is willing to provide you with a copy of all records responsive to your request at no fee.*
>
> [Emphasis added]

[8] In a subsequent letter dated August 21, 2008, sent in relation to the May 15, 2008 request, the College advised the Applicant as follows:

> *On May 29, 2008 CNA issued a fee notification to you. This fee was based on the time and effort involved in completing the necessary search to respond to your request within the timeframe set out in the ATIPPA.*
>
> *Since that time CNA has begun the necessary search as part of a separate compliance exercise. That being the case CNA will waive any fee associated with this request.*

[9] On November 12, 2008 the College issued a Fee Estimate to the Applicant in relation to the access request which is the subject of this Request for Review. The estimated fee to complete this access request was $475.00. The Applicant filed a Fee Complaint with this Office in relation to that Fee Estimate. As a result of consultation with this Office the College again agreed to waive the fee and indicated that the requested information would be provided to the Applicant at no charge following the completion of the compliance exercise. In correspondence dated January 28, 2009, the College advised the Applicant as follows:

> *On November 12, 2008, a fee notification was issued. Please be advised that this fee is now waived and CNA will proceed with your request.*

[10] In correspondence dated February 10, 2009 the College granted the Applicant's request in part, denying access to certain records on the basis of section 20 (policy advice or recommendations), section 21 (legal advice), section 22 (disclosure harmful to law enforcement), section 24 (disclosure harmful to the financial or economic interests of a public body) and section 30 (disclosure of personal information).

[11] In a Request for Review dated February 12, 2009 and received in this Office on February 20, 2009, the Applicant asked for a review of the decision of the College with respect to the access request and asked this Office to bring to the attention of the head of the College a failure to fulfill the duty to assist the Applicant.

[12] During the informal resolution process the College agreed to release additional information responsive to the Applicant's request. However, in correspondence dated July 20, 2009 the College advised the Applicant as follows:

> *Please be advised that CNA has discontinued the clause by clause review of the Comprehensive Agreement to establish a campus of the College of the North Atlantic in Qatar.*

> *As we went through the initial phase of the record compilation/archiving exercise (as described by* [*the Vice-President – Qatar Project*] *in the May 29, 2008 letter) it became apparent that the return on investment for the completion of a similar review of the CA Appendices was simply not there. We concluded that it would take six months or more to complete and cost tens of thousands of dollars if not more.*
>
> *The documents created in the initial phase of this compliance exercise were completed by external legal counsel. CNA therefore maintains that these are subject to solicitor-client privilege. CNA refuses disclosure of these documents based on Section 21(a) of the ATIPPA . . .*

[13] Attempts to resolve this Request for Review by informal means were not successful and by letters dated August 3, 2009 both the Applicant and the College were advised that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the *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

[14] The College provided my Office with a written submission in correspondence dated September 18, 2009. The College indicated in that submission that some of the information in the records provided to the Applicant was redacted pursuant to sections 20, 21, 22, 24 and 30. Apart from section 21, the College has not provided any argument or evidence to support its reliance on those sections.

[15] In its submission the College provided background information in relation to the Applicant's request and stated: "We note once again that this is the fourth request filled by the applicant for these records." The College also pointed out that one of the previous requests was the subject of Report A-2008-004 issued by this Office on May 8, 2008.

[16] In its submission the College provided further background information by indicating that the College was contacted by this Office with certain concerns regarding one of the Applicant's previous access requests for information regarding amendments to the *Comprehensive Agreement*:

> *. . . CNA was asked by the Commissioner to address these concerns. On May 29, 2008 … the Vice President – Qatar Project at that time, responded to the Commissioner. In his letter,* [*the Vice-President – Qatar Project*] *outlined the in-depth analysis the CNA-Qatar project team was planning. It was hoped that the analysis would isolate deviations from the original Comprehensive Agreement and match it with the supporting documentation. This process would yield a complete listing of the changes and why they had occurred.* [*The Vice-President – Qatar Project*] *respectfully offered the records and analysis to the applicant at no charge when it was completed.*
>
> [*The Vice-President – Qatar Project*] *estimated that this process would take five months. This was clearly inaccurate as it proved to be significantly more time consuming and costly process than anticipated. The estimated time frame in the May 29, 2008, letter was made on the best information* [*the Vice-President – Qatar Project*] *had available to him at the time but the actual process had not begun and the full scope of the project was not known. The PB/214/2008 request was filed shortly after the five month period original estimate had expired. CNA was not in a position to meet the original timeline.*
>
> *As indicated in our letter of May 14, 2009, the compliance exercise discussed by* [*the Vice-President – Qatar Project*] *was abandoned. It had been determined that the completion of the exercise would require at least another six months of work and could potentially cost the college tens of thousands of dollars. The return on investment was not there.*
>
> *There was an initial document created at the start of this project was created* [*sic*] *by external legal counsel and CNA maintains that this document is subject to solicitor client privilege.*
>
> *. . .*
>
> *We note that the comprehensive agreement is a contract between CNA and the State of Qatar. The document in question was created by our external legal counsel and was provided to the College in confidence. It was meant as a starting framework for the compliance exercise. The comments made under the individual clauses of the comprehensive agreement are made by the external legal counsel and are intended to guide the College in determining compliance with this particular agreement.*
>
> [Emphasis added]

[17] I would normally discuss such matters in my discussion of the issues but for the purposes of clarification I note that the letter dated May 29, 2008 from [*the Vice-President – Qatar Project*] referred to by the College in its submission was sent to this Office and copied to the Applicant. In that letter [*the Vice-President – Qatar Project*] made the following comments:

> *This being said, for reasons that are entirely unrelated to the ATIPP legislation, the Qatar Project team is in the process of initiating such a record compilation/archiving exercise. ... We anticipate that it will take one employee at least 2-3 months to complete the process. We further estimate that the analysis required to determine whether each of the documents/records captures a deviation from the language in the agreement will take at least another 2 months. Again, we plan to carry out this exercise but we do not anticipate that it will be complete until sometime in late 2008.*

> *My respectful submission is that it would be in any applicant's best interest to allow the Qatar Project team to carry out this exercise as planned and of its own volition. The records and analysis could then be provided at no charge to an applicant.*
>
> [Emphasis added]

[18] The College supported its position that the documents created by its external legal counsel during the compliance are subject to solicitor and client privilege by stating as follows:

> *CNA accepts the test for solicitor-client privilege as set out by your office in Report 2007-015. The three parts of the test are:*
>
> *(i) there must be a communication between a solicitor, acting in his or her professional capacity, and the client;*
> *(ii) the communication must entail the seeking or giving of legal advice; and*
> *(iii) the communication must be intended to be confidential by the parties.*
>
> *We note that the comprehensive agreement is a contract between CNA and the State of Qatar. The document in question was created by our external legal counsel and was provided to the College in confidence. It was meant as a starting framework for the compliance exercise. The comments made under the individual clauses of the comprehensive agreement are made by the external legal counsel and are intended to guide the College in determining compliance with this particular agreement.*

[19] The College also commented on the Applicant's request that this Office bring to the attention of the head of the College a failure to fulfill the duty to assist:

> *Your office has also been asked to point out to CNA a failure to fulfill its Duty to Assist the applicant. Again, CNA believes that we have acted in accordance with the ATIPPA. We use the Commissioner's report number 2007-009 as the standard for measuring how well we fulfill the Duty to Assist. In this request we have assisted the applicant as necessary to make her request, we have completed a reasonable search and have responded in an open, accurate and complete manner.*

III APPLICANT'S SUBMISSION

[20] The Applicant's written submission was received in my Office on September 22, 2009.

[21] The Applicant made the following comment regarding the College's refusal to provide some of the records responsive to her access request:

> *. . . Further, they have not provided any amendments to the Schedule of Contractor Obligations or Start-up Budget, both of which were amended significantly during my time at CNA-Q. Further, CNA has failed to honour the commitment made to the Commissioner to provide the "records and analysis at no cost* [*sic*] *the applicant."*

[22] The Applicant made the following further comment regarding the indications of the College that it would provide to the Applicant the "records and analysis at no cost to an applicant":

> *As you are aware, CNA has now indicated that they will not be honouring their commitment to the Commissioner to provide the records and analysis to me at no cost and they are relying on section 21 to withhold this information. I won't even get into the whole concept of claiming privilege over records gathered by legal counsel as that is well within your expertise to determine. However, I can't imagine that when* [*the Vice-President – Qatar Project*] *made that commitment to the Commissioner in May 2008 and when that commitment was renewed in January 2009, that he was unaware that all or part of the record compilation / archiving exercise would be completed by a lawyer. I put it to you … that the commitment on the part of* [*the Vice-President – Qatar Project*] *to the Commissioner to provide the records and analysis to me at no cost was nothing more than a delay of the inevitable plan to refuse access to my request.* [*The Vice-President – Qatar Project's*] *commitment was, from start to finish, an attempt to mislead the Commissioner.*

[23] The Applicant on her Request for Review form asked this Office to bring to the attention of the head of the College a failure to fulfill the duty to assist the Applicant imposed upon the College by section 9 of the *ATIPPA*. Additionally, the Applicant in her submission states:

> *I have asked the OIPC to determine whether or not CNA has misled the Commissioner because I believe that CNA has repeatedly misled the OIPC in relation to my request for access to the Comprehensive Agreement including but not limited to the Business Plan. CNA's pattern of behaviour in providing false and misleading information in relation to* ***the existence of amendments and the substance of the amendments*** *– which we now know to be over a billion dollars in amendments - constitute the misleading of the Commissioner, which is an offence under the Act.*
>
> [Emphasis in original]

[24] Also, the Applicant indicates that she wishes a review of the severing of information done by the College:

> *In relation to CNA's inappropriate severing of records which have been provided to your Office, which include amendments to the appendices, I request that you deal with me justly and honestly as an individual applicant with the same right of access as every other citizen in the province and make recommendations accordingly.*

IV DISCUSSION

Duty to Assist

[25] The duty to assist an applicant is set out in section 9 of the *ATIPPA* as follows:

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

[26] I outlined the three components of the duty to assist in Report A-2009-011 at paragraph 80 as follows:

> *. . . First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner.*

[27] I wish to discuss the third component of the duty to assist and determine whether the College has responded to the Applicant in an open, accurate and complete manner.

[28] The College made a commitment to this Office and to the Applicant that it would provide to the Applicant the "records and analysis" from its compliance exercise at no cost to the Applicant. The College now states that it will not be completing that exercise and that any records and analysis produced to date during that exercise are subject to solicitor and client privilege. The Applicant has expressed her frustration at the College's position by stating:

> *. . . the commitment on the part of* [*the Vice-President – Qatar Project*] *to the Commissioner to provide the records and analysis to me at no cost was nothing more than a delay of the inevitable plan to refuse access to my request.* [*The Vice-President – Qatar Project's*] *commitment was, from start to finish, an attempt to mislead the Commissioner.*

[29] My predecessor discussed the duty to assist in Report 2007-010 where he stated at paragraph 42:

> *[42] . . . The duty to assist, in my view, involves dealing with applicants with due care and diligence, even when those dealings may occur after a Request for Review has been filed, and this Office is involved in brokering an informal resolution. It is essential to the basic purpose of the ATIPPA that applicants can count on public bodies to fulfil their commitments, particularly in such an essential element as providing access to the pages of a record which they have agreed to provide. Failure to do so undermines confidence in the entire process.*

[30] It is clear to me that the College in this case did not deal with the Applicant with the required "due care and diligence" and has failed to honour commitments made to the Applicant and to this Office. I, like my predecessor, believe that the failure of the College in this case to act with the requisite due care and diligence and to honour its commitments "undermines confidence in the entire process." While I may not go as far as the Applicant in her assessment that the actions of the College were "nothing more than a delay of the inevitable plan to refuse access to my request", I do understand the Applicant's frustration. The Applicant received commitments from the College that she could have all records responsive to her request upon completion of the compliance exercise. She is now being told that the compliance exercise will not be completed and that any records produced during the exercise are subject to solicitor and client privilege.

[31] The Applicant in these circumstances is suspicious of the College's motives. In my view this was an understandable reaction by the Applicant, for as I stated in Report A-2009-011 at paragraph 87:

> *[87] Similarly, a public body is required to respond to an applicant in a complete manner. . . .Any time a public body is not accurate and complete in its dealings with an applicant, it raises the quite natural suspicion in the mind of the applicant and others that there is something the public body is attempting to hide.*

[32] I find that the College has not responded to the Applicant in an open, accurate, and complete manner and has thereby failed to fulfill its duty to assist the Applicant as it is obligated to do by section 9 of the *ATIPPA*.

Section 20 (policy advice or recommendations)

[33] Section 20 provides as follows:

> *20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
>
> *(a) advice or recommendations developed by or for a public body or a minister; or*
>
> *(b) draft legislation or regulations.*

[34] I discussed the meaning of the phrase "advice or recommendations" in Report A-2009-007 at paragraph 14:

> *[14] . . . I have reached the following conclusions on the meaning of the phrase "advice or recommendations" found in section 20(1)(a):*
>
> 1. *The statement by my predecessor in Report 2005-005 that "the use of the terms 'advice' and 'recommendations' . . . is meant to allow public bodies to protect a suggested course of action" does not preclude giving the two words related but distinct meanings such that section 20(1)(a) protects from disclosure more than "a suggested course of action."*
>
> 2. *The term "advice or recommendations" must be understood in light of the context and purpose of the ATIPPA. Section 3(1) provides that one of the purposes of the ATIPPA is to give "the public a right of access to records" with "limited exceptions to the right of access."*
>
> 3. *The words "advice" and "recommendations" have similar but distinct meanings. The term "recommendations" relates to a suggested course of action. "Advice" relates to an expression of opinion on policy-related matters such as when a public official identifies a matter for decision and sets out the options, without reaching a conclusion as to how the matter should be decided or which of the options should be selected.*
>
> 4. *Neither "advice" nor "recommendations" encompasses factual material.*

[35] As indicated, the College has claimed the section 20 exception but has not provided any argument or evidence in its submission to supports it reliance on this exception.

[36] I have discussed in previous reports the consequences when a public body fails to present any argument or evidence to meet the burden imposed on it by section 64 of the *ATIPPA*, which requires the public body to prove that an applicant has no right of access to a record or part of a record. In Report A-2009-007, I stated at paragraph 18:

> *I will note here that the Department has not provided a written submission in this matter and, therefore, there is an "absence of evidence to discharge the burden of proof." As a result, I have been put in the position that I can only find that section 20(1)(a) is applicable in the "clearest circumstances" where it is clear to me on its face that the information reveals advice or recommendations. In those circumstances where the application of section 20(1)(a) is not clear, absent any submission or explanation from the Department, I will have to find that it is not applicable.*

[37] As a result, I have to review the information for which section 20 has been claimed and decide whether this is one of the "clearest circumstances" in which it is clear to me on its face that

disclosure of the information would reveal advice or recommendations developed by or for the College.

[38] The College has relied on the exception in section 20 to deny access to pages 84 to 100 of the College's *Annual Plan: 2007-2008* for the Qatar campus. On these pages under the heading "New Position Rationales" there is an outline of the rationale for the creation of a number of new positions in various faculties of the campus in Qatar. My review of the information on these pages leads me to the conclusion that the "clearest circumstances" test has been met and this information if disclosed would reveal advice or recommendations. Therefore, the College was entitled to refuse access to the information on pages 84 to 100 on the basis of section 20.

[39] I note that the College has also relied on paragraph 24(1)(c) to refuse access to some of the information on pages 84 to 100. I will deal with the reliance of the College on this exception in my discussion of section 24 below.

[40] The College has also relied on the exception in section 20 to deny access to pages 101 to 103 of the College's *Annual Plan: 2007-2008* for the Qatar campus. On these pages under the heading "Rationale for New Expenditures" there is an outline of the rationale for the increase of expenditure for a number of areas of operation for the campus. As with the previous pages, my review of the information on these pages leads me to the conclusion that the "clearest circumstances" test has been met and this information if disclosed would reveal advice or recommendation. Therefore, the College was entitled to refuse access to the information on pages 101 to 103 on the basis of section 20.

[41] I note that the College has also relied on section 24 to refuse access to the information on pages 101 to 103. I will deal with the reliance of the College on this exception in my discussion of section 24 below.

Section 21 (legal advice)

[42] Section 21 dealing with legal advice provides as follows:

> *21. The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is subject to solicitor and client privilege; or*
>
> *(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.*

[43] In Report 2007-015 my predecessor discussed the three criteria established by the Supreme Court of Canada in *Solosky v. The Queen* that must be met in order for information to be subject to solicitor and client privilege. This Office has in subsequent Reports adopted those three criteria which are as follows:

(i) there is a communication between a solicitor and client,
(ii) which entails the seeking or giving of legal advice, and
(iii) which is intended to be confidential by the parties.

[44] The record for which the solicitor and client privilege exception has been claimed is a clause by clause analysis of the *Comprehensive Agreement* conducted by the College's external legal counsel with comments on the various clauses in the agreement. It should be noted that the analysis was completed only in relation to the *Comprehensive Agreement* itself and not conducted in relation to the Appendices to the *Comprehensive Agreement*.

[45] I have reviewed the document prepared by external legal counsel for the College and I find that the comments made by legal counsel are subject to solicitor and client privilege. However, the solicitor and client privilege exception set out in section 21 is a discretionary one. Therefore, it is also necessary for the College to have considered more than merely whether the information is technically covered by the exception.

[46] I discussed the process to be followed by a public body when it is considering a refusal of access to information based on a discretionary exception in Report A-2009-010 at paragraphs 28 and 34:

> *[28] Canada's Information Commissioner's Office (see The "GRIDS", Office of the Information Commissioner of Canada, November 2006, online at http://www.infocom.gc.ca/grids/pdf/grids-e.pdf) has made comments to this effect as well*:
>
> *[…]It is simply not enough for a government institution to broadly categorize the requested information as subject to a discretionary exception; rather the head must*

> *consider whether, in the light of the object and purpose of the statute and the exception per se, if the information should be disclosed even though the exception applies.*
>
> …
>
> *[…]It must also be used in a manner which is in accord with the conferring statute (i.e., in exercising his discretion, the head must be governed by the principles that information should be available to the public and that exceptions to access should be limited and specific). Accordingly, it is incumbent upon the institutional head to have regard to the policy and object of the Access to Information Act when exercising his or her discretion.*
>
> *[…]the discretionary exceptions require the head of a government institution to determine whether harm is likely to result from release of information that falls within the exception. If no harm is apparent, a government institution should release the information in keeping with the spirit and intent of the Act. On occasion, government institutions may wish to release the information even though it technically qualifies for exception. This could happen in cases where the benefits of disclosure outweigh the harm or where a combination of factors makes the harm negligible.*
>
> . . .
>
> *[34] Therefore, while it is certainly the obligation of the public body to make its own determination as to whether an exception applies, I am of the view that it is within the Commissioner's mandate to examine a public body's reasons for invoking a discretionary exception in order to determine if the exercise of discretion was properly considered. Despite the fact that a discretionary exception may apply to particular information, if the information to which the exception applies will not undermine the purpose for which the exception was created, then the Commissioner may recommend that a public body reconsider its exercise of discretion.*

[47] The British Columbia Information and Privacy Commissioner discussed the process that should be followed when a discretionary exception is under consideration in Order No. 325-1999:

> *In inquiries that involve discretionary exceptions, public bodies must be prepared to demonstrate that they have exercised their discretion. That is, they must establish that they have considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception. The following discussion - taken from pp. 4 and 5 of section C.4.4. of the Policy and Procedures Manual issued by the Provincial Government - is useful on this point:*
>
> *In exercising discretion, the head considers all relevant factors affecting the particular case, including:*
>
> - *the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;*
> - *the wording of the discretionary exception and the interests which the section attempts to balance;*
> - *whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;*

- *the historical practice of the public body with respect to the release of similar types of documents;*
- *the nature of the record and the extent to which the document is significant and/or sensitive to the public body;*
- *whether the disclosure of the information will increase public confidence in the operation of the public body;*
- *the age of the record;*
- *whether there is a sympathetic or compelling need to release materials;*
- *whether previous orders of the Commissioner have ruled that similar types of records or information should or should not be subject to disclosure; and*
- *when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.*

Just to be clear, these considerations are relevant to the exercise by the head of a public body of discretion under any of the Act's discretionary exceptions to the right of access. It should also be emphasized that the Policy and Procedures Manual is not necessarily the definitive or only source of considerations of this kind. It is, however, a useful compendium of some of the considerations that may be relevant to a public body's exercise of discretion under the Act.

[48] The Ontario Information and Privacy Commissioner in Order P-944 considered how a public body should proceed in deciding whether to withhold information on the basis of a discretionary exception. In that Order, the Ontario Commissioner stated at pages 6 to 7:

. . . To address this issue, I will briefly review the process that the head of an institution must follow before deciding to apply a discretionary exemption to a particular record.

Previous orders have established that a head must exercise his or her discretion in full appreciation of the facts of the case and after having considered both the legal principles established for the exercise of discretion and the purposes of the Act.

In deciding whether to apply a discretionary exemption to a particular record, the head will typically consider the contents of the document, the significance of the record to the institution and the circumstances in which the document was created. . . .

[49] The Nova Scotia Freedom of Information and Protection of Privacy Review Officer discussed how a public body should exercise its discretion under section 16 of that province's *Freedom of Information and Protection of Privacy Act* in Review Report FI-08-06. Section 16 is in all material aspects equivalent to section 21 of the *ATIPPA*. The Review Officer stated at page 14:

I turn now to the question how the public body should exercise its discretion under s. 16 of the Act. Generally speaking, Courts have given a broad and liberal interpretation to the solicitor-client

> *privilege and, therefore, public bodies too often rely on s. 16 exemption without any further explanation.*
> . . .
> *One of the four long-standing principles of privilege is that the public body must be able to demonstrate that injury or harm will result from disclosure. . . .*

[50] The Nova Scotia Review Officer continued on page 16 by stating:

> *What is expected under the Act is that the FOIPOP Administrator, as the designate for the head of the public body, will make a decision based on the legal principles regarding the right to access information, the purposes of the Act including, in particular, ensuring fairness in government decision-making, and all of the relevant circumstances surrounding the creation of the Record. . . .*

[51] The Review Officer continued her discussion of the solicitor and client exception and stated her findings on pages 19 to 20 as follows:

> *Some may argue that where the right to disclosure of information intersects or is in competition with a competing confidentiality right such as the right of a client to claim solicitor-client privilege that the preference should be to maintain confidentiality. I have concluded, however, that had the Legislative Assembly intended for the solicitor-client privilege exemption to always be paramount, the exemption would not have been made discretionary but rather mandatory. But s. 16 of the Act is discretionary so clearly the Legislative Assembly anticipated that public bodies would have to find a balance between the need for confidentiality inherent in the privilege and the right to access.*
> . . .
> *4. Solicitor-client privilege involves a confidential communication in the context of a longstanding legally sanctioned and protected relationship that deserves respect. However, in the context of access to information legislation, solicitor-client privilege has been included in the statute in the form of a discretionary exemption leaving it open to public bodies to release the information where the circumstances call for openness. It is not sufficient under the scheme of the Act for a public body to simply cite the exemption in s. 16 solicitor-client privilege without giving reasons as to how it has exercised its discretion. Included in those reasons must be an indication of what harm would result from its release.*
>
> *5. Solicitor-client privilege belongs to the client, which in this case is Transportation, and it is an option for the FOIPOP Administrator or the head of Transportation to make a determination under s. 16 of the Act as to whether or not to waive the privilege and grant the Applicant access to the requested information.*

[52] Following her discussion of the exercise of discretion in relation to the solicitor and client privilege exception, the Nova Scotia Review Officer stated the first of her two recommendations on page 20:

> *1. The FOIPOP Administrator reconsider its decision and exercise its discretion by deciding whether to waive privileged information by recognizing that no demonstrable harm would result, being cognizant of the local public interest and recognizing that such full disclosure would be consistent with the Act's purpose to ensure fairness in government's decision-making . . .*

[53] Applying the principles outlined above to the circumstances of this case I find that the College was obligated when considering whether to rely on section 21 exception to determine first of all whether the information in the analysis conducted by external counsel was subject to solicitor and client privilege. Once it was determined by the College that it was, the College should then have proceeded to the next stage in the process and determined what, if any, harm would result from releasing all or some of the information to the Applicant.

[54] In making its decision in the second stage the College should have been mindful of all the circumstances of the case, including a consideration of the following:

(i) whether there are any sympathetic or compelling reasons to release the information (such as the previous commitments made by the College regarding the release of the information);
(ii) whether the disclosure of the information will increase the public confidence in the operation of the College;
(iii) whether the disclosure will ensure fairness in the College's decision-making process; and
(iv) whether the benefits of disclosure outweigh any potential harm caused by disclosure.

[55] Consequently, I have determined that the College has withheld information on the basis of section 21 but has failed to demonstrate that it considered whether in the circumstance releasing all or some information would have resulted in harm.

Section 22 (disclosure harmful to law enforcement)

[56] The College has denied access to certain information on the basis of paragraph 22(1)(l) which reads as follows:

> *22. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to*
>
> . . .
>
> *(l) reveal the arrangements for the security of property or a system, including a building, a vehicle, a computer system or a communications system;*

[57] The College has relied on paragraph 22(1)(l) to refuse access to information found on page 48 of the College's *Annual Plan 2006-2007* for the Qatar campus. On page 48 under the heading "Department of Information Technology Operations" there is a discussion of "New Issues Identified: Network and Desktop Support". My review of the information severed on this page does indicate that the information deals with a "computer system" or a "communication system". However, my interpretation of paragraph (l) leads me to the determination that it is not sufficient in order to deny access to information that it be about a computer or communication system; the information must also "reveal the arrangements for the security of property or a system". None of the information severed on page 48 deals with security arrangements of property or a system. Therefore, I conclude that the College is not entitled to deny access to this information on the basis of paragraph 22(1)(l).

[58] I will indicate that there may also be evidence and argument which the College could have presented in an effort to convince me that access to some of the severed information on page 48 could be denied on the basis of section 20 or section 24. The College has not put forth any such evidence or argument and the "clearest circumstances" test is not met in relation to either section 20 or section 24. As a result, I find that the College is not entitled to deny access to any of the information severed on page 48 and this information should be released to the Applicant.

Section 24 (disclosure harmful to the financial or economic interests of a public body)

[59] Section 24 provides in part as follows:

> *24. (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of the province or the ability of the government to manage the economy, including the following information:*
>
> *(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 undue financial loss or gain to a third party; and*
>
> *(e) information about negotiations carried on by or for a public body or the government of the province.*

[60] I recently discussed section 24 in Report A-2010-002 at paragraph 52:

> *[52] It is important to note that section 24 of the ATIPPA is a discretionary provision: it permits but does not require the public body to withhold information that falls within the section, and then only if the required test is met. It is the responsibility of the public body to demonstrate, on a balance of probabilities and through detailed and convincing evidence, that there is a reasonable expectation of probable harm from disclosure of specific information. There must be a clear and direct causal link between the disclosure of the information specified and the harm alleged. That link must be based on evidence, not merely speculation or argument. The evidence must be convincing, not just theoretically possible. The alleged harm must be specific. The public body must demonstrate the nature of the harm that is expected to result and how it is likely to result, and it must show the harm to be probable, not merely possible.*

[61] In Report A-2010-002 I indicated there may be situations where it is evident to an experienced reviewer that a discretionary exception such as that found in section 24 would in fact apply to some of the information in the record even where the public body has failed to comment on that section in its formal submission to this Office. I stated at paragraphs 65 to 66:

> *[65] . . . In previous cases placed before this Office for review, there have been circumstances where it was apparent to the experienced reviewer that a discretionary exception would in fact apply to some of the information in the record, despite the failure of the public body to meet the required burden of proof. In Report A-2009-007, dealing with a situation in which the public body had claimed a discretionary exception (in that case section 20 – advice and recommendations) but had failed to address that section in its submissions, I commented as follows, at paragraph 18:*
>
> > *I will note here that the Department has not provided a written submission in this matter and, therefore, there is an "absence of evidence to discharge the burden of*

> *proof." As a result, I have been put in the position that I can only find that section 20(1)(a) is applicable in the "clearest circumstances" where it is clear to me on its face that the information reveals advice or recommendations. In those circumstances where the application of section 20(1)(a) is not clear, absent any submission or explanation from the Department, I will have to find that it is not applicable.*
>
> *[66] In the present case, upon review of the responsive records, there are certain identical e-mail exchanges, amounting to about two-and-one-half pages in each of the records, which I have concluded meet the requirements of section 24. Because of the nature of the information it is not possible for me to describe it in detail without disclosing it. Suffice it to say that the record itself contains clear and convincing evidence that points directly to the likelihood of injury to the interests of the Department and the government if this particular information were to be disclosed. I am therefore satisfied that this is one of the "clearest of circumstances" in which the disclosure of this information could reasonably be expected to harm the financial or economic interests of the government of the province.*

[62] The College has refused access to records containing budgetary information on the basis of section 24 but in its formal submission it simply states that some records were redacted pursuant to that section without further comment or elaboration. Obviously the College has not met the burden imposed upon it by section 64. Therefore, I have to review the information for which section 24 has been claimed and decide whether this is one of the "clearest circumstances" in which the disclosure of the information could reasonably be expected to harm the financial or economic interests of the College.

[63] In Report A-2008-004 (which dealt with one of the previous access requests by the Applicant for records relating to amendments to the *Comprehensive Agreement*) I discussed a refusal of access by the College on the basis of section 24. In that Report, I outlined background information provided by the College in relation to its campus in Qatar at paragraph 9:

> *[9] CNA then proceeded to summarize, as background to its use of section 24, its operations in Qatar. CNA explained that CNA-Qatar is different from its campuses in this province. There, CNA is in effect a contractor, providing services to the State of Qatar by operating a post-secondary institution in that country. Its relationship with the State of Qatar is governed by the Comprehensive Agreement referenced in the Applicant's request. CNA receives compensation for operating the CNA-Qatar campus, which is a significant revenue generator for CNA. CNA says that it is operating in a competitive environment, and needs to maintain a competitive edge in order to successfully maintain its operations in Qatar following the expiry of the current Agreement. This involves the provision of optimal service at a price equal to or better than its competitors. Furthermore, the disclosure of certain information, according to CNA, could result in increased costs and therefore lower revenue to CNA. Even though CNA agreed to exercise its discretion to release*

> *most of the information from the amendments to the Comprehensive Agreement, for the foregoing reasons it decided to continue to apply section 24 to some information in two of the amendments.*

[64] In reaching my conclusion in Report A-2008-004 I relied on the background information provided by the College in relation to its operations in Qatar and stated at paragraphs 21 and 24:

> *[21] . . . Earlier in this Report, I summarized CNA's position regarding its use of section 24, wherein its argument is essentially based on the fact that it is operating in a competitive environment. CNA does not wish to reveal to competitors certain costs of providing services to the State of Qatar in operating a College in that country, because such information could be of direct benefit to a competing organization who may wish to compete with CNA upon the expiry of CNA's contract with the State of Qatar.*
>
> . . .
>
> *[23] My conclusion on this point will be brief . . ..In examining the information in the record, after reviewing CNA's argument in favour of section 24, and in consideration of the above cited case law, I accept that CNA has established that the disclosure of the small amount of information severed would amount to a "reasonable expectation of probable harm" to the financial or economic interests of CNA. On that basis I do not intend to make a recommendation of further disclosure from the responsive record.*

[65] In this review, I have come to a similar conclusion as I did in Report A-2008-004. Having reviewed the information for which section 24 has been claimed and being cognizant of the fact that the College operates in a competitive environment in relation to its operations in the State of Qatar, I conclude that this is one of the "clearest circumstances" in which it is evident that the discretionary exception found in section 24 would in fact apply to some of the information in the responsive record. It is apparent to me that the disclosure of that information could reasonably be expected to harm the financial or economic interests of the College.

[66] There is a small amount of information for which section 24 has been claimed that does not meet the "clearest circumstances" test. On pages 84 to 100 of the College's *Annual Plan: 2007-2008* for Qatar campus under the heading "New Position Rationales" there is an outline of the rationale for the creation of a number of new positions in various faculties of the campus in Qatar. The College has denied access to the information on these pages on the basis of paragraph 24(1)(c) which allows a public body to refuse access to plans that relate to its management of personnel or the administration of the public body.

[67] While it is clear to me that the information on pages 84 to 100 contains a plan that relates to the management of personnel, it is not apparent to me that the disclosure of this information could reasonably be expected to harm the financial or economic interests of the College, as required by section 24. Since the College has not provided in its submission any argument or evidence to prove that access to these pages should be denied on the basis of paragraph (c) of subsection 24(1), I am unable to make such a finding. However, I have concluded above that the College is entitled to deny access to this information on the basis of the exception in section 20.

[68] Another portion of the responsive record that is not covered by the "clearest circumstances" test in relation to section 24 is found on pages 101 to 103 of the College's *Annual Plan: 2007-2008* for Qatar campus. As indicated above, on these pages under the heading "Rationale for New Expenditures" there is an outline of the rationale for the increase of expenditure for a number of areas of operation for the campus. The College has denied access to the information on these pages on the basis of section 24. It is not apparent to me that the disclosure of this information could reasonably be expected to harm the financial or economic interests of the College, as required by section 24. Since the College has not provided in its submission any argument or evidence to prove that the disclosure could result in the harm required by section 24, I am unable to make a finding that the information on pages 101 to 103 is excepted from disclosure by that section. However, I have determined above that the College is entitled to deny access to this information on the basis of the exception in section 20.

Section 30 (disclosure of personal information)

[69] The College has claimed that some of the information requested by the Applicant is subject to the mandatory exception in subsection 30(1) which provides as follows:

> *30. (1) The head of a public body shall refuse to disclose personal information to an applicant.*

[70] Personal information is defined in paragraph 2(o) as including an individual's name.

[71] The College has relied on subsection 30(1) in relation to the names of a number of individuals that the College has referred to as "local hires". The College has explained that "local hires" are

individuals hired directly by the State of Qatar and paid by the State of Qatar. These "local hires" are support and clerical staff at the Qatar Campus.

[72] I accept that these "local hires" are not employed by the College. Nor are they covered by the extended definition of employee set out in paragraph 2(e) of the *ATIPPA*, which provides:

> *(e) "employee", in relation to a public body, includes a person retained under a contract to perform services for the public body;*

I conclude that the "local hires" are not retained under a contract with the College and, while the College may gain some benefit from the services provided by the "local hires", the services are performed for the State of Qatar, not for the College.

[73] Therefore, in the circumstances as described, the College was required to withhold the names of the "local hires" under subsection 30(1) because they constitute personal information of identifiable individuals within the meaning of paragraph 2(o) of the *ATIPPA*.

Fee Estimate

[74] The College in responding to the Applicant's various access requests for records relating to amendments to the *Comprehensive Agreement* has provided different estimates as to the time needed to complete the search, the scope of the search and the cost of the search. The College indicated in correspondence to the Applicant on July 8, 2008 that it would "take four people approximately four weeks to complete the reasonable search necessary to provide you with the records you are seeking." The College provided the Applicant with two Fee Estimates: one for $7275.00 and the other for $475.00. In relation to the compliance exercise, the Vice-President – Qatar Project initially estimated that it would take 5 months. The College in its submission indicated that "[t]his was clearly inaccurate as it proved to be significantly more time consuming and costly process than anticipated."

[75] I note that the College in its correspondence to the Applicant dated July 8, 2008 stated: "CNA recognizes concerns with the records management around the changes to the comprehensive agreement."

[76] The College has now abandoned the compliance exercise which was to provide the Applicant with records responsive to her request at no cost.

[77] In the circumstances, the College should now provide the Applicant with a new fee estimate outlining the cost to the College of conducting a reasonable search for any remaining records that are responsive to the Applicant's access request. I will indicate that this Office takes the view that any search costs that are a result of poor records organization by the public body should not be charged to the Applicant.

V CONCLUSION

[78] I conclude that the College has failed to meet its duty to assist the Applicant by not responding to the Applicant in an open, accurate and complete manner. The College failed to exercise due care and diligence and failed to honour its written commitments to the Applicant and to this Office.

[79] I have reached the conclusion that the College was entitled to deny access to certain information on the basis of the exceptions set out in sections 20, 24, and 30.

[80] I have concluded that information contained in the clause by clause analysis conducted on the *Comprehensive Agreement* by the College's external legal counsel is protected by solicitor and client privilege. However, the College in exercising its discretion as to whether to withhold that information on the basis of the section 21 exception failed to consider whether in all of the circumstances it should release some or all of that information.

[81] I conclude that the College is not entitled to deny access to information on the basis of paragraph 22(1)(l).

[82] I have concluded that the College should provide the Applicant with a new fee estimate outlining the cost to the College of conducting a reasonable search for any remaining records that are responsive to the Applicant's access request.

VI RECOMMENDATIONS

[83] Under authority of section 49(1) of the *ATIPPA*, I hereby make the following recommendations:

1. That the College release to the Applicant the information on page 48 of the College's *Annual Plan for 2006-07* for which it has claimed the section 22 exception.

2. That in future access requests the College be mindful of its duty to assistant applicants by responding to the applicants in an open, accurate and complete manner, in particular that the College honour its commitments to release information to applicants.

3. That the College reconsider its decision and exercise its discretion by deciding whether to waive privilege in relation to the information contained in the analysis conducted on the *Comprehensive Agreement* by its external legal counsel. In this reconsideration, the College should bear in mind any compelling reasons for releasing the information, including the commitments made by the College to release that information. The College should also be mindful of increasing public confidence in the operation of the College, of ensuring fairness in the College's decision-making process, and of whether the benefits of disclosure outweigh any potential harm caused by the disclosure.

4. The College provide the Applicant with a new fee estimate outlining the cost to the College of conducting a reasonable search for any remaining records that are responsive to the Applicant's access request.

[84] Under authority of section 50 of the *ATIPPA* I direct the head of the College of the North Atlantic to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the College of the North Atlantic with respect to this Report.

[85] Please note that within 30 days of receiving a decision of the College of the North Atlantic under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*.

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

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