October 17, 2006 **2006-014**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2006-014

College of the North Atlantic

Summary: The Applicant applied to the College of the North Atlantic ("CNA" or the "College") for all records comprised of communications to or from five individuals employed by CNA containing references to the Applicant's name within a specified time period. The College denied access to all records responsive to the Applicant's request, relying on sections 5(1)(b), 13, 22(1)(h) and (p) and 30 of the *Access to Information and Protection of Privacy Act*. The Applicant subsequently filed a Request for Review with this Office. During informal resolution efforts, the College decided to release a number of records to the Applicant, including all of the records for which section 13 had been claimed, but overall those efforts were unsuccessful in resolving the matter. The Commissioner determined that sections 5(1)(b) and 22(1)(h) and (p) did not apply to the records as CNA had claimed, with the exception of a few brief excerpts of the record which the Commissioner determined can be withheld under section 22(1)(p). The Commissioner also determined that CNA had correctly applied section 30, although some additional personal information was recommended by the Commissioner for severance. As a result, the Commissioner recommended that all the material which CNA had withheld under sections 5(1)(b) and 22(1)(h) and the vast majority of the material withheld under section 22(1)(p) be released, however he also recommended that additional information be withheld under section 30 above and beyond what had been claimed by CNA.

Statutes Cited: *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, as am, ss. 5(1)(b), 13, 16(1)(b), 22(1)(h)(p), 30, 64(1); *Interpretation Act*, RSNL 1990, c. I-19 as am ss. 3 and 27; *Freedom of Information and Protection of Privacy Act*, CCSM 1997, c. F 175; *Freedom of Information and Protection of Privacy Act* SS 1990-91, c. F – 22.01; *Freedom of Information and Protection of Privacy Act* R.S.B.C. 1996, c. 165.

Authorities Cited: *Minister of National Revenue v. Coopers & Lybrand*, 92 D.L.R. (3d) 1, 1978 CarswellNat 257 (eC); *Polten v. University of Toronto 8 O. R. (2d.) 749, 59 D.L.R. (3d.) 197); Burke v. Canada (Immigration & Employment Commission) 1990 CarswellNat 165;* Newfoundland and Labrador OIPC Reports 2005-002, 2005-007, 2006-011; British Columbia Orders 321-1999, 00-16.

Other Sources: *Principles of Administrative Law*, 4th ed., Thomson Carswell: Ontario, 2004

Government of British Columbia's *Freedom of Information and Protection of Privacy Policy and Procedures Manual* *http://www.mser.gov.bc.ca/privacyaccess/manual/toc.htm*;

Government of Manitoba's *Freedom of Information and Protection of Privacy Act Resource Manual* *http://www.gov.mb.ca/chc/fippa/manuals/resourcemanual/index.html*

I BACKGROUND

[1] On 7 March 2006, the Applicant submitted the following access to information request to the College of the North Atlantic ("CNA" or the "College") under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*"):

> *Any and all communications (email, memos, letters, electronic recordings, etc.) to and from the following persons wherein my name or reference to my name, including* [*Applicant's full name, first name or last name*] *appear*.
>
> *The persons include:* [*names of six individuals*]. *All are or were employed by the College of the North Atlantic except* [*name*] *who is employed by the Government of Newfoundland and Labrador* [*department*].

[2] CNA sent a letter dated 9 March 2006 to the Applicant acknowledging receipt of this request, which was quickly followed by a letter dated 10 March 2006 in which CNA refers to an e-mail communication with the Applicant and indicates that this new letter is to confirm the wording of an amended access request, as follows:

> *Any and all communications (email, memos, letters, electronic recording, etc) to or from the following persons wherein my name or reference to my name including* [*Applicant's full name, first name or last name*].
>
> *These persons include* [*names of five individuals*] *of College of the North Atlantic.*
>
> *The date range for these communications is April 1, 2004 to present day inclusive.*

[3] CNA then forwarded to the Applicant a letter dated 5 April 2006 in which CNA extended the time limit for responding to the request by 30 days, citing section 16(1)(b) of the *ATIPPA* as follows:

> *16. (1) The head of a public body may extend the time for responding to a request for up to an additional 30 days where*
>
> *(b) a large number of records is requested or must be searched, and responding within the time period in section 11 would interfere unreasonably with the operations of the public body;*

[4] CNA also advised the Applicant in the same letter that they expected to respond sooner and would make every effort to do so as soon as possible. The Applicant was also informed that the search had been conducted using the Applicant's first and last names as keywords, and asked the Applicant to advise if this was not acceptable.

[5] In a letter dated 28 April 2006 CNA informed the Applicant that access to "each of the responsive records" had been refused in accordance with the following sections of the *ATIPPA*:

> *13. The head of a public body may refuse to disclose a record or part of a record where the request is repetitive or incomprehensible or is for information already provided to the applicant.*
>
> *5. (1) This Act applies to all records in the custody or under the control of a public body but does not apply to*
>
> *(b) a note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity;*
>
> *22. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to*
>
> *(h) deprive a person of the right to a fair trial or impartial adjudication;*
>
> *(p) harm the conduct of existing or immanent legal proceedings.*
>
> *30. (1) The head of a public body shall refuse to disclose personal information to an applicant.*

[6] The Applicant then forwarded a Request for Review to this Office, received on 5 May 2006, stating that the College has refused to disclose any of the records responsive to his request, and he requests that I undertake a review of the College's decision in this regard.

[7] Attempts to resolve this Request for Review by informal means were not successful, although the College agreed to release a number of additional records to the Applicant as a result of discussions during the informal stage. On 21 June 2006 the Applicant and CNA were notified that this matter had been referred to the formal investigation process and each party was given an opportunity to provide written representations to this Office under authority of section 47 of the *ATIPPA*. Both parties chose to provide submissions, which are summarized in this Report. The

additional records which CNA agreed to release were forwarded to the Applicant by CNA with correspondence dated 19 July 2006.

II PUBLIC BODY'S SUBMISSION

[8] CNA forwarded a formal submission to this Office on 6 July 2006. This submission addressed each of the four sections of the *ATIPPA* which were applied by CNA in its initial response to the Applicant.

[9] In its submission, CNA first reviews the request filed by the Applicant, and explains that as a result of this search there were 412 pages of responsive records, which were initially withheld from the Applicant in their entirety. Following informal resolution efforts, however, CNA notes that the vast majority of these records were actually released, with only "21 of the records" being withheld. (CNA is referring not only to single pages, but in some cases groups of pages comprising a single document, so the total number of pages which were fully or partially withheld is over 150.)

[10] CNA then addresses each of the sections of the *ATIPPA* it had applied. In referencing section 13, CNA explains that this section had been used when the record fell into one of four categories:

- *The record was addressed to the applicant, emailed to the applicant, from the applicant or copied to the applicant.*
- *The record was received by the college from or sent from the college to the applicant or their representative.*
- *The document was signed by the applicant.*
- *The record was disclosed to the applicant in a previous access to information request.*

[11] CNA indicates in its submission that a decision was made during informal resolution efforts that all records which were initially withheld by CNA under section 13 would instead be released to the Applicant. These were among the records released to the Applicant on 19 July 2006.

[12] CNA also claimed section 5(1)(b) in relation to a number of the responsive records. As noted above, section 5(1)(b) states that the *ATIPPA* does not apply to "a note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity." CNA states in its submission that all of the individuals named in the Applicant's request either served on a "harassment committee […] or are now part of the team dealing with impending legal proceedings." CNA says its decision was based on its interpretation of the definition of "judicial or quasi-judicial capacity" found in paragraph 24 of my Report 2005-007. The College's reference to my Report is actually part of a quotation I took from Part 1, Section 3 of the Government of British Columbia's "Freedom of Information and Protection of Privacy Policy and Procedures Manual," Volume 1, available at http://www.mser.gov.bc.ca/privacyaccess/manual/toc.htm. The portion quoted by CNA in its submission is as follows:

> *A person is acting in "**judicial or quasi**-judicial capacity" if he or she is required to:*
>
> - *investigate facts, hear all parties to the matters at issue, weigh evidence or draw conclusions as a basis for their action;*
> - *exercise discretion of a judicial nature; and*
> - *render a decision following the consideration of the issues rather than simply making a recommendation.*

[13] CNA says that the individuals whose records are subject to the Applicant's request "were, during the period in question, acting on the committee to determine if harassment had taken place," and therefore the records in question should be excepted from disclosure based on section 5(1)(b). CNA further states the following in relation to these individuals:

> *They were tasked to investigate the facts, hear testimony and ultimately render a decision that had serious impact on all those involved. Given the gravity of the matter discretion and confidentiality were essential in this process. As for the members of the team dealing with the ongoing legal matter involving the applicant, these individuals are investigating the facts of this matter so as to make an informed decision on how to proceed on behalf of the college. Their results are not recommendations and have serious implications for CNA.*

[14] CNA also claimed sections 22(1)(h) and 22(1)(p) in relation to some records, which says:

> *22. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to*
>
> *(h) deprive a person of the right to a fair trial or impartial adjudication;*
>
> *(p) harm the conduct of existing or immanent legal proceedings.*

[15] CNA says in its submission that

> *Records withheld under this section deal directly with CNA's position in an ongoing labour relations matter. Disclosure of this information would seriously compromise CNA's right to a fair and impartial adjudication on this matter. Legal proceedings are under way and release of this information would undermine the CNA position.*

In relation to 22(1)(h) of the *ATIPPA*, CNA says that the College is considered to be a "person." CNA then refers to section 27 of the *Interpretation Act*:

> *27. (1) In an Act or regulation the expression*
>
> *(t) "person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person;*

[16] CNA also quotes the definition of "person" found in Duhaime's Online Legal Dictionary:

> *Person: An entity with legal rights and existence including the ability to sue and be sued, to sign contracts, to receive gifts, to appear in court either by themselves or by lawyer, and generally, other powers incidental to the full expression of the entity in law. Individuals are "persons" in law unless they are minors or under some kind of other incapacity such as a court finding of mental incapacity. Many laws give certain powers to "persons" which, in almost all instances, includes business organizations that have been formally registered such as partnerships, corporations, or associations.*

[17] CNA says that the foregoing establishes that the College is a person under the law, and it is applying section 22(1)(h) "so as to protect this right to fair and impartial adjudication in the impending arbitration and continued legal proceedings […]."

[18] CNA also applied section 30 to some records, which requires a public body to refuse to disclose personal information. CNA says that records withheld under section 30 "dealt with personal matters of individuals other than the applicant with no reference made to the applicant."

III APPLICANT'S SUBMISSION

[19] The Applicant forwarded a brief submission which was received by this Office on 5 July 2006 in which he reviews the circumstances which led him to file his request for information with CNA, as well as some of the particular information he hopes will be forthcoming as a result of this review.

IV DISCUSSION

[20] I will address each section of the *ATIPPA* applied by CNA separately as follows:

- Non-Application of the *ATIPPA* (Section 5)
- Disclosure Harmful to Law Enforcement (Section 22)
- Personal Information (Section 30)

Although CNA initially applied section 13 in withholding records from the Applicant, CNA determined during informal resolution efforts brokered by this Office to release all records to the Applicant which had been withheld on that basis. I will not therefore address whether CNA has correctly used this provision of the *ATIPPA*.

Non-Application of the *ATIPPA* (Section 5)

[21] Section 5 of the *ATIPPA* lists various categories of records to which the *ATIPPA* does not apply. Due to the nature of section 5, it is essential to first determine whether any records can be considered to fall under its ambit before addressing exceptions to access, because if I find that a provision of section 5 applies to a given record, the record is not open to further consideration by this Office. CNA has argued that section 5(1)(b) applies to certain records responsive to the Applicant's request. Section 5(1)(b) is as follows:

> *5. (1) This Act applies to all records in the custody or under the control of a public body but does not apply to*
>
> *(b) a note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity;*

[22] In support of its position that certain records responsive to the Applicant's request are excluded from the provisions of the *ATIPPA* based on section 5(1)(b), CNA states in its submission that the records protected under section 5(1)(b) were generated by individuals who were either serving in a quasi-judicial capacity on a Harassment Review Committee, or are somehow involved in making determinations regarding CNA's "ongoing legal matter involving the applicant […] so as to make an informed decision of how to proceed on behalf of the College. Their results are not recommendations and have serious implications for CNA."

[23] While it is evident from the records which individuals were serving on the Harassment Review Committee, CNA provided no elaboration as to how the remainder of the individuals whose records are being withheld by CNA under section 5(1)(b) are acting in a quasi-judicial capacity. I will therefore focus primarily on the role of the Harassment Review Committee in order to determine whether any records created by members of that Committee can be considered outside the scope of the *ATIPPA.*

[24] First of all, I believe it would be useful to outline some of the criteria to be used in making this determination. In my Report 2005-007 I considered case law which attempts to set out such criteria:

20 In dealing with this issue I would first turn to the Supreme Court of Canada. In Minister of National Revenue v. Coopers & Lybrand, 92 D.L.R. (3d) 1, 1978 CarswellNat 257 (eC), the Supreme Court of Canada set out a criteria for determining whether a matter is judicial or quasi-judicial. At paragraphs 14 to 16, Dickson, J. said:

> *14 It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.*
>
> > *(1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?*
> >
> > *(2) Does the decision or order directly or indirectly affect the rights and obligations of persons?*
> >
> > *(3) Is the adversary process involved?*
> >
> > *(4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?*
>
> *15 These are all factors to be weighed and evaluated, no one of which is necessarily determinative. Thus, as to (1), the absence of express language mandating a hearing does not necessarily preclude a duty to afford a hearing at common law. As to (2), the nature and severity of the manner, if any, in which individual rights are affected, and whether or not the decision or order is final, will be important, but the fact that rights are affected does not necessarily carry with it an obligation to act judicially. In Howarth v National Parole Board, [1976] 1 S.C.R. 453, a majority of this Court rejected the notion of a right to natural justice in a parole suspension and revocation situation. See also Martineau and Butters v Matsqui Institution Inmate Disciplinary Board, [1978] 1 S.C.R. 118.*
>
> *16 In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those directly or indirectly affected thereby: see Durayappah v. Fernando, [1967] 2 A.C. 337. The more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-judicial process.*

[25] As I noted in my Report 2005-007, the concept of quasi-judicial capacity has been further developed with the notion of the "duty to be fair," as outlined by David Jones, Q.C. and Anne de Villars, Q.C., in *Principles of Administrative Law* (4th ed., Thomson Carswell: Scarborough, 2004). They argue that the gap between quasi-judicial powers and powers that are merely administrative in nature has been narrowed by the "duty to be fair," while maintaining an important distinction between decision-making and non-decision making functions. At pages 90 and 91 the authors state:

> *…Although it was previously thought that no procedural safeguards were required for the exercise of merely administrative powers, administrative law has now developed the "duty to be fair" in the method used to exercise even a merely administrative power. Accordingly, the distinction between quasi-judicial and merely administrative powers has become much less important.* ***Nevertheless, it is probably accurate to state that the further one moves from the judicial model of decision-making, the less are the procedural requirements involved in adopting a "fair" procedure for the exercise of a statutory power delegated to someone who is not a judge****.*
>
> (Emphasis added)

[26] CNA has also relied on some of the material in paragraph 24 of my Report 2005-007, specifically, my use of the British Columbia Policy and Procedures Manual:

> *24 I also looked to a number of definitions of "judicial or quasi-judicial capacity." Although I am not bound by it, I found that the most useful definition, and the one that most accurately reflects the above-noted references, was provided by the Government of British Columbia in its Freedom of Information and Protection of Privacy Policy and Procedures Manual, Volume 1, available at http://www.mser.gov.bc.ca/privacyaccess/ manual/toc.htm. In Part 1, Section 3 of this Manual "judicial or quasi-judicial capacity" is described as follows:*
>
> > *Generally, quasi-judicial boards and tribunals are under a duty to act in accordance with the rules of natural justice (Dictionary of Canadian Law). A person is acting in "**judicial or quasi**-judicial capacity" if he or she is required to:*
> >
> > - *investigate facts, hear all parties to the matters at issue, weigh evidence or draw conclusions as a basis for their action;*
> > - *exercise discretion of a judicial nature; and*

- *render a decision following the consideration of the issues rather than simply making a recommendation.*

[27] I indicated in my Report 2005-007, and I reiterate, that I am not bound by this particular definition. While I find it useful, I am inclined to first focus on a point raised in the first two examples above. In paragraph 14 of *Minister of National Revenue v. Coopers and Lybrand*, it appears that an integral part of the consideration in determining whether or not a matter qualifies as quasi-judicial involves "determining whether a decision or order is one **required by law** to be made on a judicial or quasi-judicial basis" (emphasis added). Even in the opinion of authors Jones and de Villars quoted above, when discussing whether a matter can be considered quasi-judicial or not, the discussion appears to be predicated on the fact that it involves "the exercise of a **statutory power** delegated to someone who is not a judge" (emphasis added). Aside from the other criteria set out in *Minister of National Revenue* and the criteria set out in the *B.C. Policy and Procedures Manual*, I believe it is essential to consider whether the procedure which resulted in the responsive records in this case was a procedure which was undertaken by CNA under a statutory mandate.

[28] Generally speaking, in researching the use of equivalent provisions to 5(1)(b), the cases in other jurisdictions often involve boards and tribunals whose specific function is established by statute and involves duties such as holding hearings, weighing evidence, determining facts, and rendering decisions. Some educational bodies may exercise this type of function, when such functions are conferred by statute. For example, legislation establishing a university may confer a quasi-judicial function relating to an academic appeals process (see, for example *Polten v. University of Toronto* 8 O. R. (2d.) 749, 59 D.L.R. (3d.) 197). Clearly, such a function is quite central to the role and purpose of the university. Also, in *Burke v. Canada (Immigration & Employment Commission)* 1990 CarswellNat 165, a decision of the Immigration and Employment Commission in relation to an application for benefits was determined to have been a decision made on a judicial or quasi-judicial basis because the Commission made such decisions under the authority of the *Labour Adjustment Benefits Act*, which conferred the authority to decide such matters. Again, the role of the Immigration and Employment Commission in determining such matters was clearly established in that *Act*, and the process for

an individual to apply for benefits to the Commission is clearly set out therein as well. The statutory obligation of the Commission to decide such matters, as well as all of the characteristics of the process followed by the Commission appear to have assisted the learned judge in issuing his decision in that case.

[29] While I do not completely discount the notion that a person acting as an adjudicator might in certain circumstances be acting in a quasi-judicial capacity, CNA has not presented convincing evidence of this. Even if I were to agree that this particular Adjudicator was indeed acting in a quasi-judicial capacity, there is only one page among all of the records which involves the Adjudicator, and it is a signed letter from him to the CNA President indicating his final decision. The record is not exempted from the *ATIPPA* under section 5(1)(b), because that section exempts draft decisions of persons acting in a judicial or quasi-judicial capacity rather than final decisions.

[30] In a supplementary submission dated 8 September 2006 in response to some questions posed by this Office during the investigation phase, CNA clarified the authorship of some of the records, and also provided copies of the CNA Operational Policy and Procedure on Harassment, which sets out a process for the investigation of harassment allegations. Although the policy says that the Harassment Review Committee will investigate and "determine whether harassment did or did not occur," it is clear that this policy was not followed, in that the Harassment Review Committee instead played the role of investigator and simply gathered the evidence, and an Adjudicator was brought in to make a decision. CNA also supplied a related Board Policy on Harassment, which outlines policy but is very brief on procedure. CNA also supplied copies of relevant sections of the Collective Agreement. CNA did not elaborate, and it is unclear how the Collective Agreement may or may not have come into play in determining the process it undertook in relation to the harassment allegations. CNA also included a copy of the provincial *Human Rights Code*. It is unclear why this was provided. Perhaps CNA attempted to model its process on the *Human Rights Code*, but clearly CNA has no formal authority to undertake an investigation under the *Human Rights Code*, which authority rests with the provincial Human Rights Commission.

[31] After considering all of these factors, lacking sufficient evidence to the contrary, I cannot conclude that this process was anything more than an internal, employment-related disciplinary investigation. No direct connection or argument has been made by CNA to establish a statutory basis for the process in order to show that the Adjudicator, or any other party, was acting in a quasi-judicial capacity.

[32] Another important factor to be considered is the purpose for excluding judicial and quasi-judicial records from the *ATIPPA*. On page 9 of the British Columbia Information and Privacy Commissioner's Order No. 321-1999, Commissioner Flaherty noted that

> *The purpose of section 3(1)(b) appears to be to create an exclusion from the scope of the Act which extends deliberative secrecy to personal notes, communications, and draft decisions of those engaged in a judicial and quasi-judicial capacity.*

Section 3(1)(b) of British Columbia's *Freedom of Information and Protection of Privacy Act* is that province's version of section 5(1)(b) of the *ATIPPA*.

[33] British Columbia Order 00-16 further elaborates on this aspect in the course of delineating the nature of what type of records can and cannot be considered quasi-judicial. In relation to the content of the records created by the British Columbia Labour Relations Board, Commissioner Loukidelis noted that "in my view, Board communications informing Board members, and staff, of the constitution of a particular panel are not records of a person acting in a quasi-judicial capacity," because "such communications do not engage the deliberative processes that are protected by s. 3(1)(b)." Commissioner Loukidelis also stated that neither would "an agenda for a policy conference, or advance notice of such a conference," constitute a record to be considered a "personal note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity."

[34] Commissioner Loukidelis then goes on to state what type of records would by excluded from the British Columbia *Freedom of Information and Protection of Privacy Act*, if one were to determine that a quasi-judicial process were under way:

> *By contrast, a memorandum, e-mail or other personal communication from one panel member to another about the panel's substantive deliberations on the merits of an application before the Board, in my view, falls under s. 3(1)(b). A draft decision written by a panel member is obviously covered by s. 3(1)(b), since the section explicitly covers "draft decisions." Further, a memorandum or other communication from a panel member to a Board lawyer or other staff member – ie, to someone who is not a Board member – about the merits of an issue in a particular application before the Board, would also be a "personal note" or "communication" of a person acting in a quasi judicial capacity. The response to such a communication would not be excluded under s. 3(1)(b), although any notes to file written by a panel member who received the response would be excluded. (The staff member's response might, depending on the circumstances, be protected under s. 13(1) or another of the Act's exceptions.)*
>
> *The end result is that deliberative secrecy is afforded to the Board by s. 3(1)(b), but the scope of that secrecy depends on the nature of each record and the context in which it exists. It bears emphasizing that although some records will not be excluded from the Act's ambit under s. 3(1)(b), they may still be excepted from disclosure under one or more of the Act's exceptions to the right of access.*

[35] As noted above, many of the records for which section 5(1)(b) is being claimed are those relating to the activities of the Harassment Review Committee. The Collective Agreement provided to me by CNA references "personal harassment," as does the CNA Operational Policy and Procedure on Harassment. This Policy and Procedure document defines personal harassment and sets out a procedure for dealing with complaints of harassment. This procedure involves setting up a Harassment Review Committee, and it sets out the role and function of the Committee. Section 3.3.4 of the document outlines the creation and functions of such a Committee. The Committee is appointed by the President, consisting of three members plus a chair "to review the complaint." The Committee has to request a written response from the respondent, and must review the response along with the written complaint. The Committee then must initiate an "Investigative Process" which must involve meeting with the complainant and respondent (separately or together) and any other relevant parties. The parties are entitled to representation or accompaniment. At the completion of the "Investigative Process," the "Personal Harassment Review Committee will determine whether harassment did or did not occur including the extent of the harassment if applicable," and the President is to convey this decision to the parties. The document says that the Committee's decision is final. If it is

determined that harassment has occurred, it is up to the President to impose any discipline, "subject to the applicable Collective Agreement, the College code of discipline, or the Personnel Administration procedures."

[36] Despite all of this, and regardless of whether the work of this particular committee would, in ordinary circumstances, be considered to be of a quasi-judicial nature, CNA has advised me that the process outlined in the above noted policy was not followed. It was changed

> *… at the request of the applicant, to include an adjudicator. The adjudicator was Mr.* [*adjudicator*]. *Mr.* [*adjudicator*] *reviewed all the interview materials and the work completed by the committee and presented the decision to the President who would then take appropriate action. The committee's role was to conduct the interviews and carry out the fact finding. Mr.* [*adjudicator*] *reviewed all their work and presented the final decision.*

[37] I should note that this statement, which I believe correctly characterizes the process undertaken by CNA, contradicts the description of the Committee's role which was forwarded to this Office by CNA on 6 July 2006, which stated that the Committee did in fact have a decision-making role. It is clear that this Committee was not acting in a quasi-judicial capacity, because it was acting in a purely investigatory role, with no authority to render a decision.

Disclosure Harmful to Law Enforcement (Section 22)

[38] CNA has claimed two discretionary provisions within section 22, the first being that

> *22. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to*
>
> *(h) deprive a person of the right to a fair trial or impartial adjudication;*

[39] As noted above, CNA contends that CNA is the "person" whose right to a fair trial or impartial adjudication could be negated if certain information were released. I disagree with the idea of reading CNA as a "person" under the *ATIPPA.* Although the *ATIPPA* defines "public

body," it does not define "person." A public body is defined in section 2 of the *ATIPPA* as follows:

> *2. (p) "public body" means*
>
> *(i) a department created under the Executive Council Act , or a branch of the executive government of the province,*
>
> *(ii) a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown,*
>
> *(iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister,*
>
> *(iv) a local public body,*
>
> *and includes a body designated for this purpose in the regulations made under section 73, but does not include,*
>
> *(v) the office of a member or an officer of the House of Assembly,*
>
> *(vi) the Trial Division, the Court of Appeal or the Provincial Court , or*
>
> *(vii) a body listed in the Schedule;*

[40] Clearly, CNA is a public body as defined under the *ATIPPA*. In the same section of the *ATIPPA*, personal information is also defined:

> *(o) "personal information" means recorded information about an identifiable individual*

[41] This definition goes on to provide examples of personal information, all of which reference an "individual" person, as opposed to a corporate one. While this definition relates to "personal information" as opposed to "person," I think it provides some indication as to how public bodies and "persons" were meant to be considered differently by the legislature when the *ATIPPA* was passed. Another indication of this is the fact that, given the submission of CNA in relation to the definition of "person" as found in the *Interpretation Act*, some public bodies qualify as persons, while others would not enjoy this additional protection. If I were to accept CNA's argument,

CNA would be considered a person for the purposes of section 22(1)(h) because it is an incorporated body. Applying the same assumption, a government department which is not a person under the *Interpretation Act* because it is not a corporation, consequently, would not be able to rely on the same provision of the *ATIPPA*.

[42] It is difficult to imagine that the legislators, in creating the *ATIPPA*, would design an exception in such a way that one category of public body would be able to rely on it and another would not, thus creating a double standard. Be that as it may, I believe that the legislators intentionally used the word "person" so as not to deny protection under this subsection to an incorporated entity which is not also a public body. It is an every day occurrence for trials and hearings to take place where one or more of the parties may be an incorporated entity. Section 22(1)(h) is there to equally protect the rights of all parties in such cases, with, I believe, one logical exception. Given the fact that the term "public body" is clearly defined in the *ATIPPA*, I do not believe the intention of the legislature was for this exception to apply to incorporated entities which are also public bodies. In addressing this claim of CNA to protect records under section 22(1)(h), I must take a purposive approach to interpreting the *ATIPPA*. As noted in section 3(1), public bodies are guided by the specific purposes of the *ATIPPA*, to which other parties are not subject:

> *3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
>
> *(a) giving the public a right of access to records;*
>
> *(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;*
>
> *(c) specifying limited exceptions to the right of access;*
>
> *(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and*
>
> *(e) providing for an independent review of decisions made by public bodies under this Act.*

[43] Under authority of section 3(1), public bodies must provide access to records, with limited and specific exceptions. When necessary, public bodies can rely on the mandatory and discretionary exceptions found in the *ATIPPA* to deny access to such records. A corporation which is not a public body, but which could be harmed if certain records were to be disclosed through a request under the *ATIPPA*, must rely on the wise administration of the *ATIPPA* by public bodies in order to directly utilize such exceptions. It is for this reason that exceptions such as 22(1)(h) are important in protecting the rights of such entities, as well as individuals. Once again, if it were to be accepted that incorporated public bodies could rely on this exception while unincorporated public bodies could not, this would set up a scenario within the *ATIPPA* whereby an unincorporated public body (such as a government department, which is clearly not a person) could not rely on this exception, while CNA and other incorporated public bodies could.

[44] In defining "public body" in the *ATIPPA*, I believe the legislature sought to set out the rights and obligations of all such entities under the *ATIPPA*, such that when the *ATIPPA* states that a public body shall do this or shall not do that, it is clear to which entities those provisions refer. To have a scenario whereby an artificial line is drawn providing protection to some public bodies but not to others seems to me to contradict the purpose of setting out such a definition.

[45] In further support of this position, I now refer to the first two subsections in the application section of the *Interpretation Act*:

> *3. (1) This Act extends and applies to every Act and every regulation enacted or made, except where a provision of this Act*
>
> *(a) is inconsistent with the intent or object of the Act or regulation;*
>
> *(b) would give a word, expression, or clause of the Act or regulation an interpretation inconsistent with the context or interpretation section of the Act or regulation*

This provides a clear opportunity to balance the specific provisions of the *Interpretation Act* with the spirit and intent of a particular piece of legislation. Given the purposes of the *ATIPPA* as set out in section 3 and the definitions in section 2, as well as the language of section 3 of the *Interpretation Act*, I think it is clear that an interpretation of the term "person" which would

allow certain public bodies greater scope to protect records from disclosure than other public bodies is clearly inconsistent with the intent and object of the *ATIPPA*. I therefore do not accept CNA's attempt to use section 22(1)(h) of the *ATIPPA* in relation to these records.

[46] The other part of section 22 which CNA has relied on is the following:

> *22. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to*
>
> *(p) harm the conduct of existing or immanent legal proceedings.*

[47] Manitoba has a similar provision in its *Freedom of Information and Protection of Privacy Act*:

> *25. (1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*
>
> *(n) be injurious to the conduct of existing or anticipated legal proceedings.*

[48] Another similar provision can be found in Saskatchewan's *Freedom of Information and Protection of Privacy Act*, but with a very significant difference:

> *15. (1) A head may refuse to give access to a record, the release of which could:*
>
> *(d) be injurious* ***to the Government of Saskatchewan or a government institution*** *in the conduct of existing or anticipated legal proceedings.*
>
> (Emphasis added)

[49] The wording of the Manitoba provision, as with the one found in the *ATIPPA*, refers to some reasonably anticipated harm to the actual conduct of the legal proceedings, as opposed to harm to one of the parties, or to the public body involved. The provision in Saskatchewan's legislation refers to a harm which might befall the government or government institution in the conduct of those legal proceedings. To clarify, I do not believe that section 22(1)(p) of the *ATIPPA* is meant to protect public bodies from harm, as indicated in Saskatchewan's legislation, but to protect the conduct of the existing or immanent hearing itself.

[50] Although I am not bound by it, the Government of Manitoba's *Freedom of Information and Protection of Privacy Act Resource Manual* provides further useful clarification on the interpretation of their section 25(1)(n), which is equivalent to section 22(1)(p) of the *ATIPPA*:

> *Clause 25(1)(n) permits the head of a public body to refuse to disclose information that could reasonably be expected to be injurious to the conduct of existing or anticipated legal proceedings. This exception contains a 'reasonable expectation of harm' test.*
>
> *"Injurious" means hurtful or harmful to the conduct of legal proceedings.*
> *The "conduct" of legal proceedings is the management, direction, carrying on of legal proceedings.*
>
> *A "legal proceeding" is any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration; any proceeding authorized or sanctioned by law, and brought or instituted for the acquiring of a right of the enforcement of a remedy.*
>
> *To rely on this exception, the head must present arguments about how or why the disclosure of the requested information could injure the conduct of legal proceedings. The mere fact that a legal proceeding has been or may be commenced will usually not be enough to justify relying on this exception.*

[51] Another consideration in relation to both 22(1)(h) and (p) is the requirement to prove that records qualify for exception under one of those provisions. Section 64(1) outlines the onus of the public body in this regard:

> *64. (1) On a review of or appeal from a decision to refuse access to a record or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record.*

[52] In my opinion, CNA has largely failed to discharge its onus under section 64(1) in applying either 22(1)(h) or (p). There are only a few small excerpts which I am willing to consider in relation to section 22(1)(p). I will address this in more detail later in this section, but first I find it necessary to remind CNA that choosing an exception is only one part of the process. In order to rely on this discretionary exception, CNA must also prove that releasing the records would result in a reasonable expectation of probable harm. This test is well established in case law, as I have indicated in previous Reports such as 2005-002, and 2006-011. In my Report 2005-002, I noted

the following in relation to sections 23 and 24 of the *ATIPPA*, to which the same standard of proof applies:

> *21 As such, I must first look to the test of harm and determine if any or all of the records would lead to harm as anticipated by sections 23(1) and 24(1) and as articulated by Executive Council. The Federal Court of Appeal in Canada Packers Inc. v. Canada (Minister of Agriculture), (1988) 53 D.L.R. (4th) 246, 1988 CarswellNat 667 (F.C.A) (eC) at paragraphs 19 and 20, has said:*
>
> > *19 What governs, I believe, in each of the three alternatives in paras. (c) and (d) is not the final verb ("result in", "prejudice" or "interfere with") but the initial verb, which is the same in each case, viz.* ***"could reasonably be expected to."*** *This implies no distinction of direct and indirect causality but only of what is reasonably to be expected and what is not. It is tempting to analogize this phrasing to the reasonable foreseeability test in tort, although of course its application is not premised on the existence of a tort.*
> >
> > *20 However, I believe the temptation to carry through the tort analogy should be resisted, particularly if Wagon Mound (No. 2), supra, is thought of as opening the door to liability for the mere possibility of foreseeable damage, as opposed to its probability. The words-in-total-context approach to statutory interpretation which this Court has followed in Lor-Wes Contracting Ltd. v. R. (1985), [1986] 1 F.C. 346, 85 D.T.C. 5310, [1985] 2 C.T.C. 79, (sub nom. Lor-Wes Contracting Ltd. v. Minister of National Revenue) 60 N.R. 321, and Cashin v. Cdn. Broadcasting Corp. (1988), 86 N.R. 24, 88 C.L.L.C. 17, 019 (Fed. C.A.) requires that we view the statutory language in these paragraphs in their total context, which must here mean particularly in light of the purpose of the Act as set out in section 2.* ***Subsection 2(1) provides a clear statement that the Act should be interpreted in the light of the principle that government information should be available to the public and that exceptions to the public's right of access should be "limited and specific." With such a mandate, I believe one must interpret the exceptions to access in paras. (c) and (d) to require a reasonable expectation of probable harm.***
>
> (*Emphasis added)*

[53] In my Report 2006-011, I further elaborated on the threshold required by the courts in relation to proving a reasonable expectation of probable harm in order to successfully employ provisions such as those found in section 22 of the *ATIPPA*:

> *17 The Information and Privacy Commissioner of British Columbia has spoken extensively on the use of a reasonable expectation of harm test. In Order 02-50 he adopted the conclusion of the Supreme Court of Canada in Lavigne v. Canada (Office of the Commissioner of Official Languages), 2002 SCC 53, 2002 CarswellNat 1357. At paragraph 58 Gonthier J. stated that "[t]here must be a clear and direct connection between the disclosure of specific information and the injury that is alleged." While the Supreme Court of Canada reached this conclusion in the Lavigne case in the context of section 22(1)(b) of the federal Privacy Act, I believe it is quite pertinent to the case at hand and is an appropriate standard to apply when determining whether or not a reasonable expectation of harm exists in the context of an exception under the ATIPPA.*
>
> *18 In dealing specifically with the potential harm to the financial or economic interests of a public body, the British Columbia Commissioner in his Order 02-50 referenced a number of Court cases, including Canada Packers Inc. On reviewing the pertinent case law he summarized as follows:*
>
> > *137 Taking all of this into account, I have assessed the Ministry's claim under s. 17(1) by considering whether there is a confident, objective basis for concluding that disclosure of the disputed information could reasonably be expected to harm British Columbia's financial or economic interests. General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1). That exception must be applied on the basis of real grounds that are connected to the specific case. This means establishing a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information.…There must be cogent, case-specific evidence of the financial or economic harm that could be expected to result.*
>
> *Section 17(1) of British Columbia's Freedom of Information and Protection of Privacy Act is, in all material respects, equivalent to section 24(1) of the ATIPPA.*

[54] As noted above, in its formal submission, CNA indicated that records withheld under section 22

> *…deal directly with CNA's position in an ongoing labour relations matter. Disclosure of this information would seriously compromise CNA's right to a fair and impartial adjudication on this matter. Legal proceedings are underway and release of this information would undermine the CNA position.*

A simple statement to this effect, as is evidenced by the decisions noted above, is usually not sufficient for a public body to rely on these provisions of the *ATIPPA*. The records in this Review range from e-mails and other correspondence of the individuals named in the Applicant's request to lengthy handwritten notes recording the statements of the complainant, respondent, and witnesses in the harassment investigation. Some of these records were created prior to the conclusion of the Applicant's employment relationship with CNA, while some were created subsequent to it, and the subject matter of the records varies accordingly. CNA's simple statement cannot capture the entirety of such a diverse set of records in attempting to establish a reasonable expectation of probable harm in relation to section 22.

[55] Section 15(1)(h) of British Columbia's *Freedom of Information and Protection of Privacy Act (FOIPPA)* is in all material respects the same as section 22(1)(h) of the *ATIPPA*. Although I am not bound by it, the Government of British Columbia's *FOIPPA Policy and Procedures Manual* comments on the correct application of section 15(1)(h) are equally applicable to this situation:

> *In relying on this exception, the head must present specific arguments about how or why the disclosure of information could deprive a person of the right to a fair trial. The commencement of a legal action is not enough to apply this paragraph.*

[56] As noted above, Manitoba's *Freedom of Information and Protection of Privacy Act Resource Manual* also makes a similar point in relation to 25(1)(n), which is the equivalent to section 22(1)(p) of the *ATIPPA*. CNA has largely failed to convince me that either of the relied upon provisions of section 22 apply to the responsive records. I will, however, accept that section 22(1)(p) applies to a few brief passages of the record, where, despite CNA's failure to make a significant case in support of its position, the harm of releasing these few sections is sufficiently self-evident. I can say without reservation that a decision of this nature on my part will be a rare one, and not one that CNA should count on in the future.

Personal Information (Section 30)

[57] Section 30 is a mandatory exception which requires a public body to withhold personal information unless it falls under one of the exceptions in 30(2):

> *30. (1) The head of a public body shall refuse to disclose personal information to an applicant.*
>
> *(2) Subsection (1) does not apply 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 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 remuneration 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 traveling at the expense of a public body;*
>
> *(k) the disclosure reveals details of a license, 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; or

(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 assistance levels.

[58] CNA relied on section 30 in withholding some brief excerpts from the records. The information withheld by CNA under this exception generally involves comments by individuals relating to their own personal lives, which are found in the same e-mail as information about the Applicant. The employee's comments about their personal lives have been correctly severed by CNA.

[59] Due to the mandatory nature of section 30, I have also recommended that some additional information be withheld on the basis of section 30, as outlined below. Some of this material includes names, opinions, and other identifying information about individuals who are not employed by CNA, as well as the opinions of individuals named in the Applicant's request which were about persons other than the Applicant.

V CONCLUSION

[60] I have generally rejected the exceptions relied upon by CNA, but I have recommended that parts of the record be withheld on the basis of sections 30 and 22(1)(p). As noted above, section 30 is a mandatory exception, meaning that if records are found to fall within the ambit of this provision, a public body has no choice but to withhold such records. I have also accepted that a few brief passages can be withheld on the basis of section 22(1)(p). Specifically, the following pages contain excerpts which should be severed on the basis of section 30: pp. 38, 43, 45, 65, 66, 67, 68, 71, 72, 79, 215, 216, 218, 219, 227, 232, 237, 243, 246, 248, 249, 250, 251, 252, 253,

325, 326, 340, 341, 348, 349, 350, 356, 357, 360, 384, and 395. In addition, pages 325, 326, 340, and 341 contain information which can be severed by CNA based on section 22(1)(p). Furthermore, pages 301, and 351 to 355 contain pages which do not refer to the Applicant and are not responsive to his request. These pages should not be disclosed to the Applicant. I will provide to CNA along with this Report a copy of the records with my recommendations for severance highlighted.

[61] Although I agree that much of the information CNA had withheld under section 30 was correctly withheld, I believe that some additional information should be withheld under section 30, as I indicated elsewhere in this report.

[62] In relying so heavily on sections 5(1)(b) and section 22(1)(h) & (p) in relation to these records, CNA has chosen to determinedly hammer away at a square peg in a round hole. Section 3 of the *ATIPPA* says that the public has a right of access to records subject to limited and specific exceptions. As noted above, section 64(1) of the *ATIPPA* places the onus on the public body to prove that one or more exceptions apply to a given record if the public body wishes to withhold the record. CNA has largely failed to do that in relation to these records.

[63] Given CNA's history with this Office and the previous Reports which I have issued, I must say that I am somewhat troubled by CNA's performance on this particular Review, right from the Applicant's initial access request to the issuance of this Report. It is difficult to understand how CNA could have initially reviewed the Applicant's request for access and determined that out of over 400 pages of records, not one could be released. It was only after the Applicant filed a Request for Review with this Office that any records were disclosed. For the most part, CNA relied upon the wrong discretionary exceptions, and failed to adequately demonstrate its case for the exceptions which it did use. CNA should improve its performance in the future in order to better comply with the spirit and intent of the *ATIPPA.*

VI RECOMMENDATIONS

[64] Under authority of section 49(1) of the *ATIPPA*, I hereby recommend that the College of the North Atlantic provide the Applicant with all of the records which I have recommended for release, severing only those portions which I have highlighted in a copy of the records which is being forwarded to CNA together with this Report.

[65] 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 Commissioner's Report to indicate the College's final decision with respect to this Report.

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

[67] Dated at St. John's, in the Province of Newfoundland and Labrador, this 17th day of October, 2006.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador