**November 20, 2006** **2006 - 015**

# NEWFOUNDLAND AND LABRADOR

# OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

## REPORT 2006 - 015

## 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 six individuals employed by CNA containing references to the Applicant's name within a specified time period. The Applicant specified that the records requested were those which form part of an electronic archive created by CNA in December 2003. The Applicant also included a letter of consent from his spouse giving permission to disclose to him any references to his spouse within the responsive records. The College denied access to all records responsive to the Applicant's request, relying on sections 8, 10 and 13 of the *Access to Information and Protection of Privacy Act*. The Applicant subsequently filed a Request for Review with this Office. The Commissioner determined that CNA acted appropriately in refusing to respond to the Applicant's request on the basis of section 10. The Commissioner also determined that there was no basis for CNA to rely on section 8, and the Commissioner further determined that he was not in a position to assess the College's reliance on section 13 without having access to a complete working copy of the records, as well as the ability to compare those records to records previously disclosed to the Applicant by CNA. The Commissioner recommended that CNA take more care in the future to respond on a timely basis to questions and concerns raised by applicants during the process of responding to an access request.

**Statutes Cited:** *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, as am, ss. 8, 9, 10, 13.

**Authorities Cited:** Newfoundland and Labrador OIPC Reports 2005-003; *Crocker v. British Columbia (Information and Privacy Commissioner)* 155 D.L.R. (4th) 220, 10 Admin. L.R. (3d) 308.

## I BACKGROUND

[1] On 26 May 2006 the College of the North Atlantic ("CNA" or the "College") received the following request from the Applicant under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*"):

> *I am requesting all email records or attachments from a specific group of records that reference* [*Applicant*] *or any part of my name.*
>
> *This request is for all records contained in the archives created December 3, 2003 for the following Qatar employees:* [*list of six CNA employees*]. *These archives were identified by* [*CNA employee*] *as a group of archives created for Qatar employees.*
>
> *I am also requesting that any of the records eligible for release to me which reference* [*Applicant's spouse*], *that the information regarding* [*Applicant's spouse*] *not be severed. I am attaching a letter from* [*Applicant's spouse*] *granting CNA permission to release these records.*

[2] On 9 June 2006 CNA responded, acknowledging receipt of the request, but also notifying the Applicant that the 30 day time limit had been extended for an additional 30 days due to the large number of records returned in the search. Over the subsequent several weeks, a series of correspondence was exchanged between the Applicant and CNA, in which CNA stated its position that the request was too large to process without undue interference in the College's operations. In this series of correspondence, CNA attempted to have the Applicant modify his request so that the responsive records were fewer. The Applicant, in response, rejected CNA's position and proposed alternate solutions which were not acceptable to CNA. The result of this impasse was that on 20 July 2006, CNA issued a letter to the Applicant refusing the entirety of the Applicant's request based on sections 8(2) and 10(1) of the *ATIPPA*. On 27 July 2006 CNA forwarded further correspondence to the Applicant in which CNA added section 13 as an additional reason for refusing access to the requested records.

[3] On 24 July 2006 the Applicant forwarded a Request for Review to this Office in relation to CNA's refusal of his access request. This matter was not resolved informally, and on 15 August 2006 the Applicant and CNA were notified that this file had been referred to the formal

investigation process and each was given the 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.

## II PUBLIC BODY SUBMISSION

[4] CNA's formal submission on this matter was received by this Office on 29 August 2006. CNA says in its submission that it received the Applicant's access request on 26 May 2006. Correspondence dated 9 June 2006 indicates that CNA extended the period of time for a response by 30 days, based on section 16(1)(b), which states:

> *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 a public body;*

[5] CNA says in its submission that it was apparent after an initial search that there was a large number of records involved. As a result, CNA says that

> *…on three occasions, the Applicant was asked to amend his request to narrow the search criteria. Specifically, the Applicant was asked at one point to amend his request to include only the emails (no attachments). Attempts to compromise on the search criteria were unsuccessful. On June 26th, the Applicant categorically refused to amend his request, stating in an email to* [name]*, the Information Officer "I will not be amending my request".*

[6] In relation to the Applicant's concerns about the search process, CNA reports in its submission that "the Applicant contacted the College by email on June 19th, 22nd and 26th suggesting ways in which the College could electronically search emails and attachments." CNA says that the College's IT department has confirmed that the method suggested by the Applicant was the one actually used by the College. CNA says that this information was forwarded to the Applicant by e-mail and in a letter dated 14 July 2006, as was CNA's assessment that based on

this method, "it would take an estimated two weeks of time just to conduct the initial search of the emails (no attachments)."

[7] CNA says that the Applicant also contacted the College by e-mail on 17 July 2006 "asking for explanations and updates" in relation to his request. CNA says that it forwarded a letter of response to the Applicant dated 31 July 2006, a copy of which was provided to this Office in CNA's submission.

[8] CNA indicated that the Applicant's electronic search criteria were as follows: (1) the first name of the Applicant; (2) the first name of the Applicant's spouse; and (3) the first three letters of the last name shared by the Applicant and his spouse. CNA reported in its submission that using the Applicant's criteria, CNA's initial electronic search would involve 6,420 e-mails and 8,919 attachments, for a total of 15,339 records, based on the number of records in the archives of the six CNA employees named in the Applicant's request.

[9] In explaining the amount of time and resources required to undertake this search, CNA says that one IT staff person took two dedicated weeks to search the 6,420 e-mails using the three electronic search criteria listed above, resulting in 5,232 e-mails. CNA says that 1,124 of these e-mails contained at least one attachment, for a potential total of as much as 6,356 responsive records (5,232 e-mails and at least 1,124 attachments).

[10] CNA indicate that at this point in the process, a combination of manual and electronic work was required. CNA described the process as follows:

> *After this initial search, College IT staff would have to search at least 1124 attachments using the search criteria requested by the Applicant in order to identify further responsive records. After that, College staff would again have to manually go through all the resultant responsive records (5232 emails and unknown number of attachments) in order to identify duplicate responsive records, records which had already been given to the Applicant, records containing personal information belonging to third parties and records which fall under the exemptions for disclosure under ATIPPA.*
>
> *We think it is important to note as well that, although we speak in terms of number of records, each record may be one or several pages long, as would each*

*attachment. The actual number of pages of material which would have to be reviewed would be higher.*

[11] CNA offered a further, more detailed description of this process in an e-mail to this Office during the course of this investigation:

> *For each of the 1124 emails containing attachments our IT support person performs a routine similar to this:*
>
> *1. Open the email*
> *2. Save the attachment to a temporary search folder.*
> *3. Rename appropriately if a file with that name already exists (so that it can be associated to the proper email)*
> *4. Repeat 2 and 3 for all attachments on that email*
>
> *After all the attachments have been saved the Windows search tool is used to find the files containing one or more of the search keyword. The last step is to trace the attachment file back to the email it belongs to and move this email to a directory of responsive emails.*

[12] CNA says that this process created the file which was then forwarded to CNA's Access and Privacy Coordinator for use as a "working copy." The Access and Privacy Coordinator would then have to undertake a further review of those records. CNA described this part of the process in an e-mail to this Office during the course of this investigation:

> *1. All search folders are combined into one.*
> *2. Items are sorted by subject line then date (all emails with a given subject are listed in chronological order)*
> *3. Each email in a series is read for the following:*
>
> > *a. Is the person referred to the applicant? For example is this email about* [*John Smith*] *or* [*John Jones*].
> > *b. Is this email a copy of an email already in the responsive folder?*
> > *c. Has this email subject forked off to separate conversation?*
>
> *4. Depending on the result of 3 the email is moved to either the responsive, redundant or wrong person folder as appropriate.*
> *5. Repeat 3 and 4 with all emails in the combined folder.*
>
> *The sort of the raw pst file received from IT is a very time-consuming process. Once the duplicate, "wrong person" emails are eliminated the resultant folder of emails is converted to an Adobe PDF file. Page numbers are added using Adobe*

> *Acrobat. This file is printed once and saved as "Originals". The originals are photocopied to become the working copy (Note that any responsive paper documents are added in after the last page of the Adobe file).*

CNA stated that this process is a precursor to the line-by-line review which is necessary in order to determine which, if any, exceptions apply to each page of the responsive records.

[13] In relation to the first part of the process, as described above, CNA indicated that, before the Access & Privacy Coordinator could review the records, an IT staff person first

> *spent two dedicated weeks responding to the Applicant's request (1) identifying the named individuals inboxes in the archive, (2) identifying the responsive emails (with their attachments) and (3) copying these emails and attachments into a file for further review.*

[14] CNA also noted in its submission that it had advised the Applicant in correspondence dated 31 July 2006 that the second part of the process undertaken by the Access & Privacy Coordinator was expected to take "an additional four weeks," occupying both the Access and Privacy Coordinator and another employee for that period. CNA says that this estimate is based on its experience with other large searches which also required significant time and resources.

[15] CNA says in its submission that this time estimate "is not dependent on any limitations of our current computer system." CNA says that it is comprised of the time staff would need to

> *… manually check the records not only to see if they fell within the criteria identified by the Applicant but also to make sure that they did not violate others' rights, were exempt from disclosure, were redundant, etc. These records would also have to be checked against other previous requests to make sure that they had not already been provided to the Applicant.*

CNA also contends that, due to the search terms which it was necessary to use in the electronic search (the Applicant's first name, the Applicant's spouse's first name, and the first three letters of their last name), there would be a large amount of duplication at first, which would be time consuming to sort and remove. CNA says that no update of their computer system would have any effect on the overall time and effort required to process this request. CNA says that any request that would require two dedicated weeks of time by one IT staff person, and another four

dedicated weeks of its Access and Privacy Coordinator along with another staff person would be disruptive to CNA's operations. As an example of this disruption, CNA says that if it had fully processed this request, its Access & Privacy Coordinator would have been fully occupied and "unable to respond to any other requests or attend to any other duties in her office," and that the other staff involved would similarly be unable to carry out their usual duties during that period.

[16] CNA says its reliance on section 13 in addition to sections 8 and 10 is based on its assessment that the Applicant had filed previous requests which were "nearly identical" to the current request.

[17] CNA concluded its submission by reiterating its position on the following points:

> *In conclusion, the Applicant: (1) was apprised early in the process that his original request would result in an unmanageable number of records; (2) that the process he proposed for searching records was the one that the College used in the normal course of events; and (3) was given several opportunities to amend his request such that the resultant number of responsive records would be manageable without causing undue interference with the operations of the College.*
>
> *It is unfortunate that the Applicant and the College could not come to an agreement on this request but the College maintains that it has discharged its duty to assist the Applicant in its efforts to come to a mutually acceptable solution. It was the decision of the College that further processing of the Applicant's request would result in undue interference with the College's operations in that it would have a detrimental effect on the ability of the College to respond to other access requests while processing the Applicant's request, in addition to preventing another staff member from carrying out all the duties of his or her position while he or she assisted the Information Officer in processing the Applicant's request. The College also noted that the Applicant's request in effect was substantially the same as three previous requests in that it concerned records which had already been searched, processed and provided to the Applicant as a result of those requests.*

**III APPLICANT'S SUBMISSION**

[18] The Applicant's formal submission was received by this Office on 6 September 2006. The Applicant requested that I consider both his written submission and copies of correspondence between him and CNA, which he had attached.

[19] In his submission, the Applicant notes that his request was refused in its entirety, which he feels is unjustifiable. He then refers to the purpose of the *ATIPPA* as outlined in section 3:

> ***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;*

[20] The Applicant says that CNA's refusal to grant access to the requested records is contrary to section 3 of the *ATIPPA*:

> *The refusal by CNA to grant access to the requested records does not make CNA more accountable to the public. This refusal is in fact the opposite of accountability; it is a total disregard of the right of access as contained in the legislation.*
>
> *One of the specific purposes of the act is to give access to personal information. This is exactly the type of information which I have requested; my personal information. When a public body acknowledges that personal information exists and yet refuses access then the purpose of the act is thwarted and the accountability of that public body is really non existent.*

[21] The Applicant also alleges that CNA has failed in its duty to assist the Applicant. In support of his position on this aspect of his Request for Review, the Applicant refers to e-mail and other correspondence between he and CNA. The Applicant indicates that this correspondence demonstrates his "attempts to get the most basic of information, and the lack of a clear response from CNA," regarding his concerns. The Applicant provided a copy of an e-mail which he had sent to CNA on 17 July 2006, expressing considerable frustration with this. In his e-mail, he

references earlier e-mails he had sent to CNA on 19 and 26 June 2006 asking specific questions to which he received no answer.

[22] The Applicant then addresses the sections used by CNA in refusing access to the records. In relation to section 8(2), the Applicant says he is in full compliance:

> *I have fully complied with this section. The request was on the proper form. The requested information was plain in that I clearly noted what information I was looking for; I identified the email archives and the person's name associated with the archive. I have never been informed by CNA that there was a problem in identifying the requested information within a record. As far as the search criteria used, as I have noted in previous correspondence to* [*CNA Access & Privacy Coordinator*]*, this is the criteria CNA recommended.*

[23] The Applicant then addresses CNA's use of section 10(1). Once again, the Applicant feels that CNA has not appropriately applied this section of the *ATIPPA* to this particular request. The Applicant says that "CNA has performed similar searches to this one using the normal hardware and software of the organization," and that CNA has, or should have the necessary technical expertise to carry out the search, based on CNA's status as a college of technology. The Applicant suggests that, if anything, the standards for technical expertise should in fact be higher than for other public bodies.

[24] The Applicant further argues that his request was clearly defined, even more so than other searches performed by CNA:

> *I did not ask for all personal information at CNA (although that would be a reasonable request), I asked for the records from very specific sources; six persons, from a very specific location; the archives created on December 03 2003. I believe that my request as far as defining a search field was quite specific and tightly controlled. It is difficult to believe that this search has or would unduly interfere with the operations of CNA.*

[25] The Applicant states that CNA "continually asked that the search criteria be limited." He says he responded to these requests in e-mails to the College. Specifically, he argues that the criteria came from the CNA Access & Privacy Coordinator, and says that changing the criteria,

which is essentially his name, would make the search meaningless. The Applicant also expressed frustration about what other ways his request could be amended. He indicated that he "only included six names in the search, and [he fails] to see how this could be cut any further."

[26] The Applicant then submits that CNA, in correspondence dated 14 July 2006, proposed a revision to the search criteria "which is essentially my original criteria without any reference to the attachments." The Applicant then says that in correspondence dated 31 July 2006, his entire request was refused, including the idea of just searching the e-mails alone. The Applicant questions the purpose of CNA suggesting revised search criteria on 14 July, if even that revision was later apparently rejected by CNA. He also notes that in the same 31 July 2006 correspondence, CNA made the following offer: "We also invite you to resubmit your request with narrowed criteria which will produce a more manageable number of records." The Applicant says that CNA helped to determine the initial criteria which it later rejected, then required him to come up with new criteria, but never advised him what criteria would be acceptable to it.

[27] In copies of e-mail correspondence written by the Applicant and forwarded to CNA during and subsequent to the request period, it is clear that the Applicant also questions the process used by CNA in conducting its search. In correspondence dated 24 July 2006, (written subsequent to the CNA's 20 July 2006 letter refusing access), the Applicant raises doubts and concerns about CNA's explanation of the process for searching and reviewing the records. In his e-mail to CNA on 4 August 2006 he directly questions CNA's position on the amount of time required to fully process his request and proposes that the process should not take as long as CNA says it would.

[28] The Applicant also expressed his concern about what he characterizes as a changing and inconsistent position from CNA as to what part of the request had already been processed by the time the entire request was refused:

> *… at different times CNA has indicated that the search of the emails is completed and all that is now required is that those identified records be reviewed as to release. The activity on this file by CNA, as to what has actually been searched is most confusing as it appears that most of the electronic searching is completed. The 30 day extension was requested by CNA on June 09 2006 because of the*

> *results of the search, "This extension of time is necessary because of the large numbers of records returned in the search", yet CNA after that date maintains that doing the search of the emails is not possible unless I drop my request for attachments, as stated in June 15 correspondence "This request can not be completed unless we search emails without searching attachments" Then that position changes, stating that even searching just the emails is not possible (July 31).*

[29] The Applicant also expressed frustration with several facets of CNA's overall approach. One issue he identified is that he had proposed to CNA that CNA could take a longer period of time than normally allowed to process part of the request. He indicated that this was refused by CNA.

[30] The Applicant notes in his submission that his request was denied partly on the basis of section 10 of the *ATIPPA*. The Applicant says that he relied on my Report 2006-003 when he refused to drop his request for attachments as proposed by CNA. In his submission, the Applicant quoted from my Report 2006-003 in which I discuss the concept of unreasonable interference with the operations of a public body in relation to section 10. (I will refer directly to the passage quoted by the Applicant later in this Report.)

[31] The Applicant says that he has "repeatedly asked CNA to identify what they have done (since [OIPC Report 2006-003]) to mitigate the limitations of their system." The Applicant went on to comment on his assessment of CNA's compliance with the *ATIPPA*:

> *I am not asking that CNA stop normal operations in order to handle my request. However at some point one must take into consideration that CNA is a public body which has a great deal of expertise in information technology. This is an institution which is or should be on the forward edge of records management. This is not a new situation for CNA to be in; a position of not complying with a request under ATIPPA and claiming technical difficulties related to records management. The OIPC in reports dated November 2005 and March 14 2006, noted the problems experienced by CNA in electronic search and retrieval. It is somewhat disconcerting in September of 2006 to have CNA claim that the entirety of my request can not be addressed due to electronic search and retrieval problems. I would note as well that the President of CNA has declined the recommendation of the OIPC to perform an audit of the email system.*
>
> *Early on, CNA indicated that they were conducting a review in order to come into compliance with the ATIPPA and other legislation. Yet there seems to be very little progress in information retrieval. This difficulty will persist until CNA takes its responsibility under the ATIPPA seriously and fully appreciates that access to*

*the records held by a public body is first and foremost a right of the individual, not just an inconvenience for the institution.*

[32] The Applicant commented in his submission about the use by CNA of section 13 of the *ATIPPA*. The Applicant acknowledges that even though there is a large degree of overlap in the names of employees searched with a previous access request he had made, he says that the request itself is not repetitive because he is seeking access to e-mails within a particular group, which might overlap somewhat, but not entirely, with his previous request. This group is a set of e-mail archives created in December 2003. He indicated that he had no wish to receive additional copies of records which have already been provided to him, and accepted that CNA would withhold such records from any disclosure to him as a result of his current request. The Applicant also noted that in correspondence to him of 27 July 2006, CNA indicated that a "large part" of the request was repetitive. The Applicant indicated that, if this is the case, CNA should still be required to supply records to him which did not fall into that category.

[33] The Applicant concludes his submission by reiterating that on 2 August 2006, he e-mailed CNA to say that he was "requesting a proposal from CNA as to how this request can be completed. Given that you defined the criteria the first time; I am requesting that you state what criteria would be acceptable to CNA in order to process my request." The Applicant says he received no reply to this request, but indicated that he remains "willing to work with CNA in moving ahead this issue and securing the records responsive to [this] request."

## IV DISCUSSION

[34] I will address each section of the *ATIPPA* cited by CNA as follows:

- Making a Request (Section 8)
- Access to Records in Different or Electronic Form (Section 10)
- Repetitive or Incomprehensible Request (Section 13)

[35] Section 8 sets out the basic parameters for making an access request to a public body. CNA focuses on one aspect of this section, namely, section 8(2) which states as follows:

> *8.(2) A request shall be in the form set by the minister responsible for this Act and shall provide sufficient details about the information requested so that an employee familiar with the records of the public body can identify the record containing the information.*

[36] In relation to its submission regarding section 8(2), CNA quotes from my Report 2006-003. Although my Report 2006-003 did not actually reference section 8, but rather sections 9 and 16, CNA evidently feels that my comments are relevant to section 8 as well. The entire paragraph, from which CNA drew its quotation, is as follows:

> *41 This is where section 9, the duty to assist, comes in again. In many cases, an electronic records search might be quite straightforward, but when there are a number of possible search terms and combinations of search terms, there should be a process of defining and limiting the search criteria involving both the Applicant and the public body. In the case of an electronic records search such as this, where there is some question as to what search criteria to use, it is incumbent upon the public body to contact the Applicant to try to fine tune the search in question by defining the search criteria. In my opinion, the legislators, in drafting the ATIPPA, envisioned some circumstances in which there was an onus on the Applicant to cooperate in such a process. Section 16(1)(a) allows the public body to extend the time limit for a response "if the applicant does not give sufficient details to enable the public body to identify the requested record." Clearly, it is important that the applicant give sufficient details to enable the public body to perform a search for records, even if no extension of time is warranted.*

[37] Section 8(2) places two obligations on the Applicant. One is to make his or her request "in the form set by the Minister." There is no indication here that the Applicant failed to do this. The other obligation on the part of the Applicant is to "provide sufficient details about the information requested so that an employee familiar with the records of the public body can identify the record containing the information." Again, I think the Applicant has clearly identified the records he is seeking. The electronic search criteria proposed were, I think, the minimum inputs necessary in order to carry out the requested search. My comments from Report 2006-003 were specifically in reference to the electronic search criteria, not the wording of the

actual request. I think the electronic search criteria were straight forward. The Applicant used his first name, his spouse's first name, and the first three letters of their last name.

[38] The actual wording of the request itself was also clear. The Applicant wants copies of e-mails from the archives of six CNA employees which contain his name, and if an e-mail containing his name also contains his spouse's name, not to sever her personal information. I see no basis upon which to conclude that an employee of CNA could not identify such a record.

[39] In my view, the primary issue to be determined involves section 10, which is as follows:

> *10.(1) Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where*
>
> *(a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and*
>
> *(b) producing it would not interfere unreasonably with the operations of the public body.*

Clearly, the *ATIPPA* sets out an obligation for public bodies to produce a record where the information is in electronic form, as long as two conditions are met. CNA has not presented any argument to indicate that the responsive records cannot "be produced using the normal computer hardware and software and technical expertise of the public body." CNA has instead relied upon its contention that producing the record, as requested by the Applicant, would indeed "interfere unreasonably with the operations of the public body."

[40] I believe CNA's argument has some merit here. In following the correspondence between the parties, it appears as though CNA first approached this request as they would any other one, but it was only when they began to process it that the magnitude of the task became evident. As I have stated in my Report 2006-003, the hurdle which must be cleared by a public body to claim section 10 must be set fairly high because of the potential barrier to access which the use of that section could create. This passage was also quoted by the Applicant in his formal submission on the matter currently before me:

> *58 It should also be emphasized that paragraph 10(1)(b) only provides public bodies with the ability to limit their efforts in responding to access requests for electronic records which "unreasonably" interfere with their operations. I think it is understood that the whole concept of access to information involves some degree of interference with the normal operations of public bodies, but that this interference is warranted and justified in the name of the higher public good which is established as the basis for legislation such as the ATIPPA. For this reason, I would see the bar as being set fairly high in order to prove that responding fully to a request for electronic records would constitute an unreasonable level of interference. It is therefore important that public bodies are aware of and can utilize the full extent of capabilities of the "normal computer hardware, software and technical expertise" at their disposal.*

[41] The Information and Privacy Commissioner for British Columbia has produced a number of decisions which touch on the concept of unreasonable interference with the operations of a public body. These decisions are in relation to section 43 of the British Columbia *Freedom of Information and Protection of Privacy Act*, which reads:

> *43. If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 that, because of their repetitious or systemic nature, would unreasonably interfere with the operations of the public body.*

[42] Although the *ATIPPA* contains no equivalent provision, in the matter before me, I am guided generally by a survey of the decisions of the British Columbia Commissioner in relation to what constitutes an unreasonable interference with the operations of a public body. Such decisions are subject to judicial review, and in one such decision, *Crocker v. British Columbia (Information and Privacy Commissioner)* 155 D.L.R. (4th) 220, 10 Admin. L.R. (3d) 308, Coultas J. makes the following remarks at paragraph 46:

> *BC Transit submitted a considerable body of evidence about the nature and number of requests submitted by the Petitioners and the effect of those requests on its operation. The evidence demonstrated that a significant portion of the company's Information and Privacy resources were being expended responding to the Petitioner's requests and that their demands were also affecting the Customer Service department's ability to perform its other duties and responsibilities. The determination of what constitutes an unreasonable interference in the operations of a public body rests on an objective assessment of*

> *the facts. What constitutes an unreasonable interference will vary depending on the size and nature of the operation. A public body should not be able to defeat the public access objectives of the Act by providing insufficient resources to its freedom of information officers. However, it is the Commissioner, with his specialized knowledge, who is best able to make an objective assessment of what is an unreasonable interference. In this instance, the Commissioner had sufficient evidence to make an informed assessment of the negative impact of the Petitioner's requests on B.C. Transit.*

[43] I should note that the British Columbia Commissioner's Authorization (dated 31 October 1996) which was the subject of the *Crocker* decision is in relation to two applicants who were working in concert to make access requests. This formed part of the "systematic" nature of the requests which the Commissioner determined in his Authorization led to an unreasonable interference with the operations of BC Transit. The *ATIPPA* only allows public bodies, under section 10(1)(b), to ultimately refuse access to records based on unreasonable interference with their operations if the request was for information in electronic format. Section 16 allows the public body to extend the time limit for a response by an additional 30 days based on unreasonable interference with its operations, but section 16 is not specific to electronic records, nor does it allow further delay or ultimate refusal of access. Also, in contrast with British Columbia's section 43, section 10(1)(b) of the *ATIPPA* can only be claimed by a public body in relation to one access request at a time, not a pattern of multiple access requests over a longer period. Even though CNA refers in its submission to other requests by this Applicant, and indeed to the Applicant's spouse having made similar requests, any determination in this Review as to what constitutes an unreasonable interference with the operations of a public body must be made in relation solely to the single request which is the subject of this Review.

[44] Even so, given the evidence presented by the Applicant and the College, I still concur with the position of CNA that a full response to the Applicant's request would indeed present an undue interference with the College's operations. Even if the Applicant's request was the only one facing CNA, which it is not, I would agree that six weeks of dedicated staff time is excessive and beyond reasonable for a single request.

[45] That being said, I find that there has been a lack of clarity in some of the communications between the Applicant and CNA. The subject of the communication to which I refer is CNA's

refusal to "separate" two parts of the access request at the behest of the Applicant. To reiterate, CNA refused the Applicant's request in a letter dated 20 July 2006 under sections 8 & 10 of the *ATIPPA*, adding section 13 in a letter to the Applicant dated 27 July 2006. It was only in CNA's letter to the Applicant dated 31 July 2006 that CNA advised the Applicant that it would not agree to the Applicant's previous e-mail proposal that CNA first process his request for e-mails, and then "if necessary, you can assess what resources will be required in order to search the attachments." The Applicant proposed in an e-mail of 19 June and 26 June 2006 that CNA respond to his request for the e-mails alone within the time prescribed by the *ATIPPA*, but that some other arrangements could be made for CNA to process and provide access to the attachments to those e-mails. CNA correctly, but belatedly, responded in its 31 July 2006 letter to the Applicant:

> *We note that the Act does not allow us to respond to formal requests in a piecemeal fashion. If you were indeed formally amending your request to include only the e-mails (without attachments), then we would have expected you to categorically state that you were indeed amending your request. However, we are in receipt of correspondence from you that, to the contrary, you were not amending your request.*

[46] In this, CNA is absolutely correct. Unfortunately, I see nothing in the submissions and copies of correspondence between the parties which has been forwarded to me to suggest that the Applicant was advised of alternate approaches to this situation, other than outright refusal of his request. Yes, CNA suggested in correspondence to the Applicant dated 14 July 2006 that he limit his request to just the e-mails, rather than e-mails and attachments, but no explanation or assurances were provided that amending his request in this way was not a permanent decision implying that he could never request the attachments at a future date. The Applicant appears to have reached this conclusion in an earlier e-mail to CNA, where he says he refuses to "relinquish any request for the attachments in order to access e-mail records." The Applicant clearly had in mind the idea of letting CNA deal with one batch at a time, but apparently did not understand that CNA was not in a position, within the context of the *ATIPPA*, to make arbitrary decisions about extending its response time for certain aspects of his request over a longer period than the *ATIPPA* allows. CNA appears to have made no effort in its recorded communication with the Applicant to correct the Applicant's apparent notion that amending his request would mean he

could not request the attachments at a later date in another request. Some form of explanation, perhaps along with a more detailed proposal from CNA, might have prevented this matter from coming before me, and would certainly have been more in line with the duty to assist, as set out in section 9 of the *ATIPPA*:

> *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.*

[47] As a postscript to this, I also note that CNA later changed its position again, after it refused the Applicant's request. In its correspondence of 31 July 2006 CNA also reneged on its earlier proposal to just process the request for e-mails, leaving aside the attachments. In its letter of that date, CNA advises the Applicant that even if he had agreed to formally amend his request to include just the e-mails without the attachments, CNA believes that even this "would unduly interfere with the operations of the College." Seeing as the Applicant had not agreed to formally amend his request, and also in consideration of the fact that this comment from CNA came after the entire request had already been rejected, I am reluctant to issue a recommendation on it. My Report is focused on reviewing the decision of CNA to refuse the Applicant's request. CNA's refusal decision was dated 20 July 2006, and as a result the matter before me is CNA's refusal of the entire request, e-mails and attachments combined.

[48] As noted earlier, in a letter dated 27 July 2006 CNA also added section 13 as an additional reason for its refusal to provide access to the responsive records. Section 13 reads:

> *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.*

[49] I think it is plausible that there would be some information which had already been provided to the Applicant given the overlap in the Applicant's request with another request which he had previously filed. Whether that would form the majority of the information or the minority is uncertain. It is clear, however, that the Applicant acknowledges the potential duplication in his submission, and has no quarrel with CNA's right to withhold information which had already

been provided. It is not clear to me, however, that the current and previous requests would duplicate one another precisely, and there may very well be some new information which is relevant to the Applicant responsive to the more recent request. That being said, I am not in a position to assess this aspect in detail, for the simple reason that CNA is ultimately relying on the notion that even responding to and reviewing the records to assess the degree of duplication (among other things), would unduly interfere with its operations. As a result, CNA has not performed this task, and has not provided me with the responsive records, nor have I required them to do so for the purposes of this Review. In a case of this nature, I would think that a true assessment of any reliance on section 13 cannot be undertaken when a public body has also claimed sections 8 and 10, thus refusing to fully process the request, unless it is obviously apparent from the wording of the request that it would produce a set of records which is identical to a set of records which was already provided to the Applicant. As a result, I will not issue a recommendation in relation to section 13.

[50] I should conclude with a note about the overall level of communication between the Applicant and CNA. It appears to have been notably lacking, as expressed by the Applicant in an e-mail to CNA dated 17 July 2006. In it, the Applicant reiterates points he had previously raised in e-mails dated 19 and 26 June 2006 to which he had received no response. I note that CNA, in its correspondence to the Applicant, did make efforts to respond to the Applicant's questions, but there appears to have been some questions which were not addressed by CNA, leading to significant frustration on the part of the Applicant. In one passage of his 17 July 2006 e-mail, he notes that a staff member of my Office, when contacted by the Applicant prior to CNA's final decision on his request, (and consequently prior to this Office accepting a Request for Review), had urged both he and CNA to work together to try to resolve this matter in the interests of all concerned:

> *Nearly 60 days after my request I have had no answers from CNA to my questions. CNA has not made a reasonable proposal regarding attachments. While* [*OIPC Investigator*]*, in his July 11th correspondence has encouraged both parties to continue to communicate, such communication is most difficult when I am required to address the same questions to CNA numerous times with no response.*

## V CONCLUSION

[51] Even though I accept CNA's reliance on section 10 in support of its refusal to provide access to the requested records, I should note, as referred to earlier in the decision by Coultas J., that such decisions are very much case specific. I do not believe that anything in this Report in terms of numbers of hours spent by staff or numbers of records involved should be relied upon by any public body as an explicit threshold in order to rely on section 10 in refusing an access request. This decision is not made lightly, and I would caution any public body that I would expect this to be a relatively rare determination on my part.

[52] Better communication might have allowed both parties to avoid this entire situation. Several months have now passed since the Applicant's original request, and I cannot help but think that the College and Applicant could have worked out an agreement for the Applicant to submit smaller, more limited requests on perhaps a monthly basis, perhaps having two or three of the named CNA employee's archives searched in separate requests, with the entire group of attachments searched in a further request. Such an approach may have resulted in the Applicant receiving the requested records by now. The Applicant expressed frustration at CNA refusing the request on the one hand and not providing sufficient alternatives on the other. The one option CNA did present was essentially rejected by the Applicant when the Applicant refused to amend his request. However, as I noted above, this option apparently would have eventually been rejected by CNA anyway, so it appears that this was never a viable option, even if CNA initially offered it in good faith. Overall, despite the great many points made in the correspondence between both parties, not enough effort on either side was focused on finding a compromise.

[53] In terms of better communication, I place the onus primarily on CNA in relation to its duty to assist, as set out in section 9. I have no doubt that a significant amount of effort went into dealing with this request, however, I also note that CNA did not respond to a number of the points and questions raised by the Applicant in various e-mails he sent to the College during the process, until after the Applicant's request was ultimately refused.

## VI RECOMMENDATIONS

[54] I find that CNA acted appropriately in relying on section 10(1)(b) to refuse the Applicant's request in its entirety, and I therefore issue no recommendation with respect to the responsive records. I find that CNA had no basis upon which to rely on section 8(2) in refusing the Applicant's request in its entirety, and I also find that there is insufficient data upon which to arrive at a firm conclusion in relation to CNA's use of section 13. With respect to CNA's failure to respond fully to some of the Applicant's questions until after the College had issued a decision refusing access to the entire request, I hereby issue the following recommendation under authority of Section 49(1) of the *ATIPPA*:

1. That the College take more care in the future to ensure that it responds in a timely manner to questions posed by applicants as per the duty to assist as set out in section 9 of the *ATIPPA*.

[55] 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 College's final decision with respect to this Report.

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

[57] Dated at St. John's, in the Province of Newfoundland and Labrador, this 20th day of November, 2006.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador