OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2011-015

September 26, 2011

College of the North Atlantic

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* ("the *ATIPPA*") to the College of the North Atlantic ("the College") for access to e-mail records containing references to herself and to another individual. The College disclosed a number of records, some of which it had severed claiming several exceptions to disclosure. The Applicant asked the Commissioner to review the severing. During the course of the informal resolution process a number of issues were resolved. However, it was discovered that the College had withheld records from the Applicant on the basis that since they had been sent to or from the Applicant, the Applicant could therefore be presumed to already have them. The fact that those records had been withheld was not communicated to the Applicant, nor to this Office. The Commissioner concluded that there was no basis under the *ATIPPA* for this manner of dealing with records that were sent to or from an applicant. The Commissioner also concluded that by failing to disclose its actions to either the Applicant or to this Office, the College had failed in its duty to assist the Applicant. The Commissioner therefore recommended that the College review its access to information policies and practices, remedy any deficiencies, communicate the results of the review to this Office, and take greater care in future to perform its duties in a manner consistent with the *ATIPPA*.

Statutes Cited: *Access to Information and Protection of Privacy Act,* SNL 2002, c. A-1.1, as amended, ss. 9, 13, 21, 72.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2006-003, 2007-003, 2007-009, 2007-013, 2009-001;

File # 12001.07.25

I BACKGROUND

[1] On June 14, 2007 the Applicant made a request for records under the *Access to Information and Protection of Privacy Act* (the *"ATIPPA"*) to the College of the North Atlantic ("CNA" or "the College") which read as follows:

> *I am requesting all records which reference me or* [another named individual] *from the group of records which were returned as a result of my February 12, 2006 request. I am requesting all records in their entirety for the period up to January 1, 2003. As an attempt to identify this group of records for you, I would note that this search included a search of 30 CNA employees' emails; returned over 10,000 records; it included a search of a group of emails which were archived in December 2003 belonging to CNA-Qatar employees and that you have referenced this as File PB/19/2006.*

The request was accompanied by a letter of authorization from the other named individual.

[2] The Applicant's previous request, referred to above and referenced by the College as file PB/19/2006, had been for all e-mail records containing the Applicant's personal information, from the mailboxes of 30 different individuals. As the Applicant indicated, an initial electronic search produced over 10,000 records. Because of the size of the responsive record, PB/19/2006 was never processed as a single request. Rather, by agreement between the parties, the Applicant made individual requests for smaller portions of the record, either for a limited time period or for the mailboxes of fewer individuals.

[3] The present request (CNA's file PB/84/2007) was somewhat different. First, it was for records referencing two individuals, not just the Applicant. However, it did not ask for any part of the PB/19/2006 search to be repeated, searching for references to both individuals. Rather, it asked for a sub-group of records, those which referenced either of the two individuals, from among the records already returned in the previous search. These differences had some significance, as will be discussed later.

[4] The College responded to the request on July, 16, 2007, stating that it was granting access to the requested records in part. Some of the information contained in the records was severed pursuant to various provisions of the *ATIPPA*, specifically section 13 (repetitive or incomprehensible request); section 20 (policy advice or recommendations); section 21 (legal advice); section 24 (disclosure

harmful to the financial or economic interests of a public body) and section 30 (disclosure of personal information). Altogether approximately 450 pages were released to the Applicant.

[5] The Applicant filed a Request for Review with this Office on August 16, 2007, requesting that the Commissioner review the severing and withholding of records and asking that all records, subject to appropriate severing, be released to her. Because of heavy workload in our Office at that time, this Request for Review was accepted and assigned to an investigator but did not become an active file until October 2008. A lengthy period of investigation followed, during which a number of issues were identified, some of which were resolved. However, it was ultimately not possible to resolve this Request for Review informally, and the matter was referred to the formal investigation process on September 23, 2009. Written submissions were received from both the Applicant and the College in November 2009.

Informal Resolution – Issues

[6] When a Request for Review is received by this Office, it is assigned to an investigator who first obtains a copy of the responsive record from the public body and then, pursuant to section 46 of the *ATIPPA*, begins the process of identifying the issues and attempting to resolve them informally to the satisfaction of the parties through a process of negotiation. In the present case, a large number of issues arose during the course of the informal resolution process. I will briefly describe each of those issues and the resolution (if any) achieved. I will then discuss the remaining unresolved issues, with reference to the submissions of the parties where appropriate.

(a) Work Product

[7] Many access to information requests are, as in the present case, requests for the applicant's own personal information. If the applicant happens to be an existing or former employee of the public body, many of the records turned up in the search will consist of records created or used by the applicant in the course of their work. These records may contain the applicant's name or other information relating to the applicant, but which is not "about" the applicant in the sense contemplated by the definition of personal information in subsection 2(o) of the *ATIPPA*. Rather, such information is "about" the work done by the individual who occupies a position and who

performs the functions of that position. In the course of dealing with a number of such requests, the College has developed a policy for dealing with work product information.

[8] First, it gathers all of the records which contain some reference to the applicant, for example by conducting an electronic search of e-mail accounts. Any work product records are then separated out. These work product records are treated as general information, not personal information, within the meaning of the *ATIPPA*. Under the rules set out in the *Act* and the Fee Schedule issued by the Minister, a person requesting access to his or her own personal information may not be charged a fee (other than the initial $5.00 application fee). However, if the information is general information the public body is entitled to charge a fee for locating, processing and copying the records. Therefore in such cases the College issues a fee estimate to the applicant. This is a means of partially defraying the costs of searching for and processing those records. During the course of dealing with a number of files prior to the present one, our Office accepted that this "work product" distinction, and the consequent policy of charging a fee for such records, was permissible under the *ATIPPA*. (See Reports 2007-003, 2007-009 and 2007-013.)

[9] The Applicant initially raised the concern that work product records had been withheld. The College explained, however, that at the time the search on this file had been conducted, it was still in the process of discussing, with this Office, whether the process outlined above was in conformity with the *ATIPPA*. Therefore no records of work product information were removed from this group of records. On the basis of that explanation and assurance from the College, this issue was resolved to the Applicant's satisfaction.

(b) Section 13

[10] Section 13 of the *ATIPPA* states:

> *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.*

[11] In the course of dealing with a number of previous access requests for e-mail messages, CNA had developed a particular method of dealing with e-mail threads. In the College's e-mail system, as with many others, when the recipient of an e-mail replies to it, the original message is included with

the reply. When the recipient of the reply in turn replies, both previous messages are included with that reply, and so on. A dialogue like that can easily become a thread extending to five or six pages or even more, in length. This amounts to a great deal of duplication in reproducing a record in response to an access request. More important, if there is information in any of the messages that must be severed in accordance with an exception to disclosure under the *Act*, the work of severing is also duplicated. This can add a great deal of time to the processing of the request, with a consequent increase in the cost. Furthermore, the same e-mail thread may be present in the e-mail accounts of other individuals to whom the thread was copied, and so the same message will be duplicated numerous times.

[12] CNA's initial solution to this problem was to sever duplicates of messages in the order in which they were found, on the basis that they had already been disclosed on a previous page, and thus disclosing them again would be "repetitive" within the meaning of section 13. The College instead replaced the removed pages with a notation stating "section 13."

[13] However, there was a serious problem with this method. Applicants reported now having to piece together the threads again from separate messages. Because only the newest message in each thread was visible, and because now it stood alone, it was sometimes impossible to tell whether a given message was in fact a response to an earlier one. The continuity of the record was therefore lost. This was not acceptable. After extensive discussions, our Office proposed an alternate method. In cases where an e-mail thread develops, if the thread is not long, and therefore there is not much repetition, the duplication should be ignored and all of the messages provided. Alternatively, the person dealing with the request could look for the **last** message in the chain, and provide that message to the Applicant in its entirety as a complete thread. All of the earlier versions could then be severed as being repetitive.

[14] The College agreed that in future it would adopt this proposal. In addition, the College wrote to the Applicant in the present case on June 19, 2009 outlining the new approach to the issue, and enclosing copies of e-mail threads which had previously been withheld using the earlier severing method.

(c) E-mail Attachments

[15] Another issue that arose in connection with the question of how to deal with the disclosure of e-mail threads was the question of how to deal with attachments to e-mail messages. The College initially took the view that a document delivered with an e-mail as an attachment should be considered a separate record. Therefore, where an applicant's request is for e-mails containing his or her own personal information (that is, e-mails within which there is some reference to the applicant) it is legitimate, in the College's view, to withhold the attachments. The Applicant took the opposite view, that attachments ought to be considered an integral part of the e-mail to which they are attached. This issue was not resolved to the Applicant's satisfaction and accordingly I will deal with it in a later section of this Report.

(d) Non-Responsive Records

[16] Because the access request in the present case was for e-mails only, not for other types of records, the College conducted the entire search electronically as a keyword search. The search criteria, or keywords, in this case consisted of the first names, and the first few letters of the last names, of the Applicant and the other named individual. (The first few letters, rather than the entire last name, were chosen in this particular case in order to ensure that instances of mis-spellings of the last names would be returned.) The records that were turned up in this initial search were then reviewed manually to weed out those in which the reference was actually to another person with the same first or last name, or another word that happened to begin with the same letters.

[17] The Applicant expressed concerns that the College had withheld e-mails that were properly responsive to her request, without notifying her that it had done so. The College took the position that all responsive records had been provided to the Applicant. It maintained that the only records that had been removed from the raw record resulting from the electronic search were strictly non-responsive in the true sense, such as records that referenced a different person with the same first name, or duplicates. For reasons that will be described further below, this did not satisfy the Applicant.

(e) Severing – section 21

[18] Section 21 of the *ATIPPA* reads as follows:

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

[19] The College had severed a number of pages of the responsive record in accordance with the above provision. As was customary in applying this exception in earlier cases, these e-mails were withheld in their entirety. However, our Office had recently issued a Report dealing in some detail with the issue of claiming solicitor-client privilege. Following the guidance of several recent court decisions, my predecessor held that while it was correct to withhold the content of communications regarding legal advice, it was not legitimate to go further and refuse to disclose the existence of the solicitor-client relationship, the names of the individuals or the dates of their communications.

[20] This question was discussed with the College during informal resolution and, as a result, the College agreed to disclose revised copies of the e-mails in question, now showing the information in the "to" "from" "c.c." and "date" locations in the message header. This issue was considered to be resolved on that basis.

(f) Severing – Section 20, 24 and 30

[21] The College had also severed certain passages in a number of documents in the responsive record in accordance with the exceptions to access in section 20 of the *ATIPPA* (policy advice and recommendations) section 24 (disclosure harmful to the financial or economic interests of a public body) and section 30 (personal information). Upon review of the record the investigator from this Office concluded that in those cases the severing had been done appropriately, and there were no further issues with those exceptions.

(g) "To/From/cc'ed" E-mails

[22] From the earliest stages of the informal resolution process the Applicant had expressed concerns that the College had withheld e-mails that were properly responsive to her request, without notifying her that it had done so. Some of the issues that arose in this regard have already been described above. The Applicant maintained, however, that after reviewing the records provided to her by CNA she was "more than confident" that there were records that were returned as a result of the February 12, 2006 request, containing references to her, that had not been provided in response to the current request.

[23] Initially the College took the position that all responsive records had been provided to the Applicant. It maintained that the only records that had been removed from the raw record resulting from the electronic search were strictly non-responsive in the true sense, such as records that referenced a different person with the same first name, or duplicates. The Applicant insisted, however, that she had in her possession a number of e-mails obtained from other sources, that contained her name and otherwise fitted within the search criteria, but which were not contained in the package of records provided to her as a result of this search. In particular, the Applicant stated that it appeared that the College was withholding e-mails that had either been written by the Applicant herself, or were addressed to or copied to the Applicant by one or another of the individuals listed in the February 12, 2006 request.

[24] A similar issue had arisen in 2006 in the course of investigating an earlier Request for Review involving the College and the present Applicant. In Report 2006-003 my predecessor recounted how, in the course of reviewing that request, it had been discovered that the College had separated out from the responsive record a group of e-mails that were sent to or from the Applicant, on the grounds that the Applicant was an employee of the College with an active e-mail account at the time of the request. The College had concluded that because the Applicant already had access to all e-mail messages sent to or by her, it could be presumed that the Applicant had possession of those records, and therefore they could be separated out and withheld pursuant to section 13 of the *ATIPPA*.

[25] My predecessor pointed out that the presumption that an applicant already possesses copies of e-mails was not especially strong, and in that particular case the Applicant had in fact advised the

College that because of technical difficulties she was unable to access most of the e-mails that had been in her mailbox. In his Report my predecessor made the following recommendation:

> *That in handling future access to information requests, if the College believes that an Applicant already has possession of some portion of the responsive records, the College should first contact the Applicant as per the duty to assist set out in section 9 of the ATIPPA in order to confirm whether in fact this is the case before refusing to provide such records under section 13.*

[26] In its April 28, 2006 response to that Report, the College declined to accept the above recommendation. It took the view that "...it is not necessary in all such circumstances to contact requesters, particularly where records exist to confirm that the information has already been provided."

[27] In the present case, when the Applicant raised this specific issue with us, our Office explicitly raised it with the College. In response, on June 11, 2009 the College advised that there existed a file of some 200 pages, consisting of e-mails that were otherwise responsive to the request, but were sent to or from, or copied to, the Applicant. This group of records (which became known as "to/from/cc"ed" e-mails) had not been provided to the Applicant as part of the responsive record. Furthermore, the College had not told the Applicant that this group of records was being withheld on the ground that they were already in the Applicant's possession. Similarly, these records were not provided to this Office in response to our request for all responsive records in the course of our Review. Our Office had also not been told, until June 11, 2009, that such a separate group of withheld records existed.

[28] After lengthy discussion with our Office, CNA decided to send the Applicant a CD consisting of the "to/from/cc'ed" e-mails that had been withheld from the Applicant. This was accompanied by a letter dated June 19, 2009 which read, in part, as follows:

> *CNA has a file of emails sent to you or received by you, which to date have not been disclosed to you. The reason for non-disclosure of these emails has been that you are still an employee of CNA with an active email account and therefore have access to these emails. However, after discussions with* [the OIPC] *CNA has decided to provide you with a copy of the file containing emails sent to you or received by you. This file is attached. Based on our discussions with* [the OIPC]*, we note that at the time we initially processed your request, this group of records should have been identified to you and any associated fee should have been requested from you. We apologize that this happened.*

[29] Predictably, the Applicant was not pleased to hear that this large number of e-mails responsive to her request had been withheld from her without notification for two years. The Applicant's dissatisfaction was compounded by the fact that through a clerical error the CD of "to/from/cc'ed" records was not actually enclosed with the cover letter, and was only sent out in mid-July.

[30] An even more serious concern was immediately raised by the Applicant. Over several years, both before and after the present access request, the Applicant had made several other requests to CNA, some of them for e-mail records. As I have already indicated above, this issue had arisen in a previous file, and had been the subject of a recommendation in a previous Report. The Applicant was concerned to know whether or not there were e-mail records in other requests that had been withheld in the same way.

[31] After a further series of discussions with this Office, the College agreed to perform an audit of other access requests from the Applicant to determine whether "to/from/cc'ed" messages had similarly been separated and withheld. This process took some time. In the end it was found that three other access requests from the Applicant fell into this category. On August 13, 2009 the College forwarded to the Applicant a CD containing "to/from/cc'ed" messages that had been withheld from one of those files. Finally, on April 16, 2010 a further CD was sent to the Applicant containing the missing e-mail messages from the remaining files.

(h) Other Missing Records

[32] Following the Applicant's review of the "to/from/cc'ed" messages contained on the CD sent by the College in July and August 2009 the Applicant continued to maintain that there were still responsive records withheld. In order to consider this, some further background is necessary.

[33] On September 18, 2007 the Applicant had made a separate request to the College, as follows:

> *I am requesting all attachments and the related email that contain my personal information or the personal information of* [another named individual] *from the email files of* [four named individuals]....

The College responded to that request, which was referenced in the College's files as PB/137/2007, in November 2007. As provided for by section 43 of the *ATIPPA* the Applicant filed an appeal of the College's response in the Supreme Court, Trial Division.

[34] As noted above, the College acknowledged, during the informal resolution process of the present case, that "to/from/cc'ed" records had been withheld from other requests of the Applicant. PB/137/2007 was one of them, and in due course the College, on August 13, 2009, sent the Applicant the e-mails previously withheld from that file.

[35] The Applicant, after review of the records disclosed to her, maintained that there were still records missing that ought to have been provided to her. This issue could not be resolved informally, and I will discuss it further below.

II SUBMISSION OF THE COLLEGE

[36] The written submission of the College contains observations and arguments on a number of issues arising out of this Request for Review, including comments about topics which were resolved during the informal resolution process. However, there were two issues not resolved which were the subject of submissions.

(a) Attachments

[37] As noted earlier, the question whether attachments to e-mails are to be considered part of the e-mail, and therefore part of the responsive record when an applicant requests access to e-mail, was not resolved. The College acknowledged that the Applicant requested e-mails "in their entirety." CNA maintained its position that in the examples in the present case, where the e-mail attachments in dispute themselves contained no reference to the Applicant, the better view is that the attachments are separate records and are not responsive. However, the College was willing to consider the release of the withheld attachments, subject to the severance of personal information.

(b) "To/From/cc'ed" E-mails

[38] The College's submission with regard to the "to/from/cc'ed" e-mail issue (which in principle had arguably been resolved, for the present file, in the informal resolution process) was expressed as follows:

> *CNA began this request operating under the assumption that the applicant had an active email account and that this ensured full access to any email sent or received by her. We also know from files maintained by this office that* [the other named individual] *has a copy of the entire contents of his email account. This account has been inactive for some time but the contents were released to him.*
>
> *Based on this, the emails copied to the applicant and received by her were considered unresponsive to the request. They were not included in the working copy of records. This is the copy of the records subject to the line by line review, severed accordingly and disclosed to the applicant. This is also the copy of records sent to your office.*
>
> *As you correctly pointed out during informal resolution, the belief that the applicant has access to certain records is not equal to disclosure. It also doesn't mean that these records are not responsive.*
>
> *CNA will move forward with similar situations in the following manner. Emails sent to or by the applicant will be separated out from the working copy. Based on the fact that the applicant already had full access to these email there will be no line by line review or severance. The group of records, converted to Adobe Acrobat format, will be provided on CD. All other responsive email will be included in the working copy of records for line by line review and appropriate severance.*
>
> *This group of records should have been identified to the applicant. CNA has identified similar groups of records for applicants in the past but has not done so consistently. CNA will take steps to ensure that in the future, all email sent to or by an applicant are provided to them.*
>
> *Finally, CNA did not identify this group of records to your office. Given that these were not considered part of the working copy of responsive records they were set aside and not provided to your office. This was an error on our part and we apologize for the inconvenience caused. In future the group of emails sent to or by an applicant will also be provided to your office in Adobe Acrobat format.*

III SUBMISSION OF THE APPLICANT

[39] The Applicant's submission began with a detailed summary of her February 2006 access request referred to as PB/19/2006. As noted earlier in this Report, that request was broken down into smaller requests which were dealt with individually. The present file was the final such request.

[40] The Applicant stated that her intention in asking for records "in their entirety" was to receive copies of **all** the records (including the to/from/cc'ed emails) which were returned as responsive to the criteria, and to receive a complete copy of any record, not just the portion of the record in which either individual was referenced. The Applicant indicated that it would not be reasonable to withhold part of any record, given that the Applicant was requesting the "record" rather than information contained in the record.

[41] The Applicant's submission also referenced Report 2006-003, which I have referred to earlier, and confirmed that the College was aware that she did not have access to any messages in her own e-mail account prior to May 16, 2006.

[42] As noted earlier, the College provided the Applicant with a CD on August 13, 2009 which they have stated to be e-mail messages previously withheld from PB/137/2007. These emails are all to, from or copied to the Applicant or the other named individual. The Applicant believed that in fact they are all records that ought to have been provided as a result of the present request. In her submission the Applicant provided extensive argument on this point.

[43] The Applicant alleged that it is highly unlikely, if not impossible, that records which were found during the later search, in PB/137/2007 (in September 2007) would not have been found during the earlier search in PB/19/2006, and in June, 2007 in PB/84/2007 (the present request).

[44] The Applicant also argued that when CNA conducted the electronic search of the 30 individuals, in PB/19/2006, there was the potential for many of the emails to be returned as many as seven times, because they were cc'ed to seven other individuals. This, according to the Applicant, would have greatly diminished the likelihood that any one of these records was accidentally missed when CNA was in the process of severing the records. In her view, a person would make the same error several times in order to miss all of the copies of a message, and that this was extremely unlikely.

[45] The Applicant pointed to the fact that some e-mails ought to have been common to both searches, but were found only in one group of e-mails provided to the Applicant and not in the other, and concluded that it would be quite remarkable for the computer to return one of the e-mails and not the other.

[46] Similarly, the Applicant pointed to records that she has received in response to other requests, messages dated during the month of October 2002, which she argued ought to have been provided in response to the present request but were not. She argued that while there may be reasonable explanations why some of these records were not provided in response to this request, she is confident that CNA could not justify withholding the majority of them. The Applicant alleged that the College has chosen to deliberately withhold records from her that would be responsive to her request, and to do it in such a way that it was extremely difficult if not impossible to discover that it had been done. The Applicant alleged that in this respect the College had also misled this Office.

IV DISCUSSION

[47] Section 9 of the *ATIPPA* reads as follows:

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

[48] The duty to assist has been discussed in a number of Reports from this Office. In Report A-2009-011, which incidentally was also a matter dealing with College of the North Atlantic, I summarized the content of the duty to assist as follows:

> *[80] The duty to assist, then, may be understood as having three separate components. First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner.*

[49] The issues arising out of the above process that remain unresolved, or on which I believe further public comment is warranted, are as follows:

(a) How should a public body deal with e-mail attachments?

(b) How should a public body deal with e-mail threads?

(c) Did the College assist the Applicant in the early stages of the request?

(d) Did the College conduct a reasonable search for the requested records? In particular, are there missing records that should have been found?

(e) With regard to the "to/from/cc'ed" records, did the College respond to the Applicant in an open, accurate and complete manner, and

(f) Did the College deliberately withhold responsive records from the Applicant?

(a) Attachments

[50] I do not think it is necessary to spend any time in dealing with the issue of whether, as the Applicant suggests, attachments should always be treated, as a matter of principle, as part of the e-mails to which they are attached, because there is a different and much simpler way of resolving the matter. Sometimes a request may explicitly state that the applicant wants to be provided with attachments. Sometimes an applicant may explicitly ask for attachments to be excluded. On other occasions, an applicant may ask for attachments with certain content, such as the applicant's own personal information, and not others. Those cases are straightforward.

[51] However, in all other cases, when there has been a request for records which includes e-mails, the public body should quite simply fulfill its duty to assist the applicant by inquiring whether attachments are wanted. This may be particularly important in cases such as the present one, where the applicant requests all responsive e-mails "in their entirety" or uses some other form of words to indicate that it may be the applicant's assumption that e-mails include attachments. However, one of the main purposes of the *ATIPPA* is to make public bodies more accountable by providing people with access to records. Whether they get the records they are looking for should not depend on whether they use a certain form of words in the request.

[52] Previous Reports from this Office have elaborated on the content of the duty to assist the applicant contained in section 9 of the *ATIPPA*, including the duty to assist the applicant in the early stages of a request. It is particularly important that a public body communicate with the applicant, before beginning a search, and ensure that the request is clearly understood. There is absolutely no need to have ambiguity or uncertainty when a simple phone call to an applicant can resolve it.

[53] Still less is there any justification for making such a potentially significant decision as withholding attachments (or any other category of potentially responsive record, for that matter) without notifying the applicant. An applicant ought to be able to go through the access to information process with the confidence that he or she will be notified of every category of record

that is withheld. That in my view is an immediately obvious example of what is meant by the duty to respond to the applicant in an "open, accurate and complete manner."

(b) E-mail Threads

[54] Before leaving the subject of e-mail attachments, I want to deal with one of the consequences of severing e-mail threads. In this particular case, as reported above, the question of how to deal with the severing issue itself was discussed during the course of the informal resolution process, and the College as a result has adopted a different, more satisfactory policy. However, many e-mail programs are set up so as to not include attachments when the recipient replies to the message. In that situation, any method of dealing with e-mail threads must take that into account. If the public body chooses to adopt a policy of removing duplicate e-mails or threads, it must be extremely careful not to lose attachments inadvertently. If the requester wishes to have attachments included, then threads must be checked and any attachments found manually. Otherwise the search cannot be considered to be reasonably complete.

(c) "Missing Records" - Comparison of the PB/84/2007 and PB/137/2007 Searches

[55] The Applicant argues that a comparison of the PB/84/2007 (the present request) and PB/137/2007 (the request that was appealed to the Supreme Court) searches leads to the conclusion that there are still responsive records missing from the group provided to her in the present case.

[56] First, we must note at the outset that the file known as PB/137/2007 was not one that was reviewed by our Office. As stated previously, the Applicant made her appeal in that matter directly to the court, resulting in a number of important consequences. Our Office has never participated in the process of attempted resolution of the issues arising from that request – it was simply not before us. We have never been privy to the correspondence between the College and the Applicant about that file, we have never possessed a complete copy of the responsive record, and our Office has never had any jurisdiction to make decisions, draw conclusions or make recommendations about the issues that arose in that matter.

[57] Our Office did intervene as a party to the Supreme Court appeal in that matter, in accordance with section 61 of the *ATIPPA*. We did so for the limited purpose of putting forward our views on the interpretation of certain sections of the *ATIPPA*, particularly section 55. Our Office took no position on the other substantive issues between the Applicant and the College in the appeal.

[58] During the process of informal resolution of the present case, the College undertook to send to the Applicant copies of previously withheld "to/from/cc'ed" records from several other files, one of which was PB/137/2007. Because that action resulted from an informal resolution process that involved our Office, the College sent copies of those records to us, including a copy of the August 13, 2009 CD containing the "to/from/cc'ed" messages from PB/137/2007. That is the only portion of the responsive record from that file to which our Office has had access. Any background information, facts or conclusions about PB/137/2007 that have gone into the contents of this present Report have therefore not derived from any involvement of our Office, but have been gleaned from the publicly available 2010 judgment of the Court in that case.

[59] To return to the issue of the "missing records" it will be recalled that File PB/19/2006 was a search for records referencing only the Applicant. The 10,000 records returned as a result of that search would not, to begin with, contain all of the records referencing the other named individual. Such records would only have been captured by the search criteria where the other individual was referred to by his last name. Thereafter, during the course of the initial review of the raw record, any such records that referred **only** to the other individual, and not to the Applicant, would logically have been removed as non-responsive. As a result references to the second individual would only be found in records in which **both** individuals were mentioned.

[60] Therefore, the present search, which was for a small sub-group within the 10,000 records, and further limited by the short time period (from early 2002 up to January 1, 2003) would not be expected to find a large number of records referencing the other named individual. It might include some, but only to the extent that both individuals were mentioned in the same message. This may help account for the fact that few files referencing the other individual were found in this search, whereas in the PB/137/2007 search, the search terms were the first and last names of **both** individuals.

[61] The electronic search criteria for PB/19/2006 were the Applicant's first name and the first few letters of the Applicant's last name. These keywords were applied to records from the email files of 30 individuals, dated as early as May 2002 to February 2006. CNA did not have the search capability to electronically search attachments in 2006 when PB/19/2006 was conducted. The resulting messages in some cases might have contained attachments. However, given the College's past position on whether attachments are to be automatically included in response to the request, it would not be surprising to find, as we have in the course of other reviews, that attachments were only provided to applicants when they were specifically requested.

[62] All of the emails on the August 13, 2009 CD, stated to be in response to the request in PB/137/2007, have one or more attachments, and these messages are all from the mailboxes of the four individuals, which accords with that access request. In addition they are all to, from or copied to either the Applicant or the other named individual. This suggests that they are in fact the result of the **later** search, in September 2007, after CNA acquired the ability to search attachments, and **not** from the PB/19/2006 search. The PB/84/2007 search on the other hand, was performed on a subset of the PB/19/2006 record. Therefore it also would not have produced many attachments.

[63] The Applicant also argues that when CNA conducted the electronic search of the 30 individuals, in PB/19/2006, there was the potential for many of the emails to be returned as many as seven times, because they were cc'ed to seven other individuals. This, according to the Applicant, would have greatly diminished the likelihood that any one of these records was accidentally missed when CNA was in the process of severing the records. This, however, depends on the search technique used. By the time the search for the present file, PB/84/2007, was conducted, the College had acquired and applied new software. The new process does not search individual mailboxes. Rather, it searches a "journal" file on the server, which contains a permanent copy of every e-mail sent through the system, but does not necessarily keep duplicates such as messages copied to several recipients.

[64] Apart from the above considerations, there are other possible reasons why a record produced in one search may not be turned up in another search. In the case of searches performed on the College e-mail system prior to the adoption of the new software and the new policy on deleted e-mails, different College employees could exercise their own individual judgment on whether to keep

or delete e-mail messages. In particular, messages that may have been broadly copied to employees for their information but which necessitated no action on their part, may have been subject to deletion. That might help explain why a given message might be found in one mailbox but not in others. To take another example, searches conducted by different individuals may exhibit differences in the judgment calls made when deciding whether a particular record is responsive, or whether to apply a certain exception. Individuals also make mistakes, particularly when dealing with a large volume of records. Therefore it is not possible to conclude with certainty that a given message **must** have been found by both searches. As a result, the fact that it was not provided cannot be said with certainty to demonstrate deliberate withholding.

[65] It is important to remember that the obligation on the College, as with every public body, in conducting a search in response to an access request is to make every reasonable effort to conduct it accurately and completely. A search is to be conducted by a knowledgeable person, who is likely to know where the requested records would likely be found. In the present case, these were electronic searches. The evidence is that each search was overseen by an experienced individual, the Access and Privacy Coordinator, and carried out by experienced personnel in the College's IT Department. The standard against which a public body is to be held is reasonableness, not perfection. I cannot conclude that the College has failed to meet this standard in the way the search was carried out.

[66] However, this is not to say that the Applicant was being unreasonable in putting forward the argument that the College was deliberately withholding records to which she was entitled. It is understandable that the Applicant, given past experience, and given the revelations that were uncovered in the course of the informal resolution process of this and other requests, would believe that the College chose to withhold responsive records from her, and to make it difficult if not impossible to discover that it had been done.

(d) "To/From/cc'ed" E-mails

[67] Section 13 of the *ATIPPA* reads as follows:

> *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.*

[68] It will be recalled that on June 11, 2009 the College advised that there existed a file of some 200 pages, consisting of e-mails that were otherwise responsive to the request, but were messages sent by or to, or copied to, the Applicant. This group of records had not been provided to the Applicant as part of the responsive record. They had been withheld on the ground that they were already in the Applicant's possession. The legitimacy of this action had been grounded in the College's interpretation of section 13. Although these records were subsequently provided to the Applicant during the course of our investigation, and in this sense the issue might be regarded as resolved, it is incumbent on me to set out my observations and conclusions in this Report.

[69] This Office does not agree with the interpretation of section 13 initially put forward by the College. In our view, the phrase "already provided to the applicant" means: (a) given to the applicant; (b) by the same public body; and (c) in response to the same or a previous access request by the same applicant. The meaning of the phrase cannot be stretched to include information or records that the public body, knows, assumes or believes that the applicant already has, or "has access to." The purpose of this provision is to lift from a public body the burden of responding to duplicate requests. It is not intended to permit a public body to make decisions in response to access requests based on assumptions, or on possibly mistaken perceptions about applicants.

[70] The College had not told the Applicant that this group of records had been withheld, and so the Applicant had no opportunity to express any concern. For example, the Applicant might not have kept some e-mails sent to her, in which case the only source would be the sender's mailbox. As it turned out, for technical reasons the Applicant was unable to access e-mails prior to May 2006, and she had so informed the College – in 2006. Even if there were some theoretical justification for the interpretation of section 13 taken by the College, it evaporated completely in the face of those facts of which the College was long aware.

[71] Similarly, these records were not provided to this Office in response to our request for all responsive records in the course of our Review. It is fundamental to the success of the review process conducted by this Office under the *ATIPPA* that we are provided with **all** of the records that have been disclosed to an applicant, and **all** of the records that are responsive to the request, in order to determine for ourselves whether the decisions made by the public body to withhold or disclose records are the right ones.

[72] Worse, our Office had not even been told that such a separate group of records existed. In our view, even if the College's interpretation of section 13 was the right one, or even a plausible one, the existence of that group of records in question, and of the application or interpretation of section 13 by the College, ought to have been made known to us promptly as part of the College's response to our investigation. This is particularly so in view of the fact that in Report 2006-003, as recounted earlier, my predecessor had already recommended that the College contact requesters to notify them that they intended to withhold records that it believes the requester already possesses, and that in its response to that Report, the College declined to agree with the above recommendation. Clearly there was thereafter a duty on the College to notify this Office that this issue had arisen once again.

[73] Finally, the actions of the College in this present case are exacerbated by the fact that the College had, as it turned out upon further investigation by this Office, withheld similar groups of records not only from the present Applicant, in the course of responding to several other requests, but also from six other applicants, in a total of 19 separate access requests between 2006 and 2009.

[74] The points I made in regard to the issue of e-mail attachments, above, are wholly applicable to this issue as well, and I wish to reiterate them here. There is no justification for making such a potentially significant decision as withholding e-mail attachments, **or any other category of potentially responsive record**, without notifying the applicant. An applicant ought to be able to have confidence that he or she will be notified of every category of record that is withheld. That in my view is an immediately obvious example of what is meant by the duty to respond to the applicant in an open, accurate and complete manner. I therefore conclude that in this case, and in all of the 19 cases in which such records were withheld, the College failed in its duty under the *ATIPPA* to respond to an applicant in an open, accurate and complete manner.

[75] In the result, there was no possibility that this Request for Review was ever going to be resolved informally once the Applicant was notified that these "to/from/cc'ed" records had been systematically withheld. It simply served to reinforce the Applicant's belief that the College was deliberately withholding records that she was entitled to, and concealing that fact.

[76] It is clear that the College did deliberately withhold records from the Applicant. It is also clear that the College made a deliberate choice not to advise the Applicant, or this Office, of that fact.

However, it is also clear that the College had a rationale for doing so, namely, its interpretation of section 13 of the *Act*. As I have stated above, I do not find that interpretation of section 13 persuasive. However, I cannot go so far as to say that it is implausible that anyone could sincerely hold such a view. Therefore I am unable to attribute any improper motive to the College in doing what it did.

[77] Because I have no evidence that would cause me to determine that the College was motivated by improper considerations, I cannot conclude that the College has willfully misled this Office as the Applicant has alleged. Consequently I do not find that the actions of the College in withholding records from the Applicant, and failing to inform this Office, constituted obstruction under section 72 of the *ATIPPA*. However, by not providing those groups of responsive records to this Office and by failing to advise this Office of the fact that those records had been withheld from the Applicant, the College has undermined the statutory review process and prevented this Office from fulfilling its responsibilities under the *ATIPPA*.

[78] I have made reference, above, to the fact that in the course of this investigation, this Office discovered that the College had deliberately, systematically and in my view wrongly, withheld similar groups of records from a number of other applicants. It may be that I do not have the jurisdiction to re-open files that have been completed, either because the applicants have been satisfied to resolve the issues informally or because a report has been issued. Indeed, several of the files from which the College had withheld "to/from/cc'ed" records were files that had never come to our Office for review. That jurisdictional question is not at issue here and deciding it will have to await a case in which it is raised. I do not intend to discuss the details of each of those other cases here. However, under section 51 of the *ATIPPA* I have the power, and the obligation, to make recommendations to ensure compliance with the *Act*. Accordingly, during the course of the informal resolution process this Office requested that the College notify all of the other individual applicants from whom "to/from/cc'ed" records had been withheld, and offer to supply those records. This has been done.

V CONCLUSIONS

[79] In the course of dealing with the present Request for Review, I have set out the views of this Office on how the College, and by extension all other public bodies, should deal with e-mail attachments, e-mail threads and e-mail messages sent by or to, or copied to, an applicant.

[80] I have concluded that by deciding that e-mail attachments were not responsive, withholding them and failing to notify the Applicant that it had done so, the College failed to fulfill its duty to assist the Applicant in the early stages of dealing with the request.

[81] I have concluded that by failing to provide the Applicant with e-mail messages sent by or to, or copied to, the Applicant, and by failing to notify the Applicant that it had done so, the College failed in its duty to respond to the Applicant in an open, accurate and complete manner.

[82] I have also concluded that this failure on the part of the College applies to its handling of similar records in response to a large number of requests of other applicants.

[83] I have concluded that by not providing the above groups of responsive records to this Office and by failing to advise this Office of the fact that those records had been withheld from the Applicant, the College has undermined the statutory review process and prevented this Office from fulfilling its responsibilities under the *ATIPPA*.

[84] In view of the conclusions I have reached, I wish to make the following recommendations.

VI RECOMMENDATIONS

[85] Under the authority of section 49(1) of the *ATIPPA*, I hereby recommend, in relation to the present Request for Review, that the College of the North Atlantic release to the Applicant any attachments to responsive e-mails that the Applicant still wishes to have, if the College has not already done so, in accordance with the offer to do so made by the College in its formal written submission.

[86] Under the authority of section 49(1) of the *ATIPPA*, I hereby recommend, in relation to future access requests, that the College of the North Atlantic:

(1) conduct a review of the policies and practices it has developed for the handling of access to information requests, including changes that may have already been made as a result of this Review, in order to determine whether, and in what respects, such policies and practices may not accord with the principles, goals and requirements of the *Access to Information and Protection of Privacy Act;*

(2) take whatever steps are necessary to remedy any and all such deficiencies immediately;

(3) communicate the outcome of that review, when completed, to this Office; and

(4) henceforth take greater care to perform its duties under the *Access to Information and Protection of Privacy Act* in a manner that is consistent with the duty to assist an applicant, and consistent generally with the principles, goals and requirements of the *Act.*

[87] Under the 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 its final decision with respect to this Report.

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

Dated at St. John's, in the Province of Newfoundland and Labrador, this 26th day of September 2011.

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