



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  

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NEWFOUNDLAND AND LABRADOR

## Report A-2013-015

October 21, 2013

### College of the North Atlantic

**Summary:** The Applicant requested, from the College of the North Atlantic, approved budget documents for the years 2008, 2009, 2010, 2011, 2012 from CNA-Qatar. The College declined to provide the records, claiming sections 23(1) (a) and (b) (disclosure harmful to intergovernmental relations) and section 24(1) (a), (b) and (g) (disclosure harmful to the financial or economic interests of a public body) of the *ATIPPA*. The Commissioner found that the College, by not providing any formal submission in support of its position, had not met the burden of proof under section 64(1) and recommended that the records be provided to the Applicant.

**Statutes Cited:** *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as amended, ss.23(1), 24(1), 64(1).

**Authorities Cited:** Newfoundland and Labrador OIPC Reports 2007-004, 2005-002, 2006-006, A-2008-012, A-2013-008, 2010-002.

## I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) the Applicant submitted an access to information request on December 7, 2012 to the College of the North Atlantic (“CNA” or the “College”). The request sought disclosure of records as follows:

*Each year at the JOB CNA submits a budget that is approved by the JOB and the State of Qatar. I request copies of these budgets for each of the following School year[s]. As these budgets are submitted through the CNAQ President’s Office and are part of the official Annual Plan documentation they are readily available.*

*Please provide the approved budget documents for the years of 2008, 2009, 2010, 2011, 2012 I would like electronic copies of the records please and would also request that they be emailed to me electronically.*

- [2] The College denied access to the records on December 19, 2012, citing sections 23(1)(a) and (b) (disclosure harmful to intergovernmental relations) and section 24(1) (a), (b) and (g) (disclosure harmful to the financial or economic interests of a public body) of the *ATIPPA*.
- [3] In a Request for Review received at this Office on December 19, 2012, the Applicant asked that this Office review the College’s decision. Attempts to resolve this Request for Review by informal resolution were not successful, and by letters dated July 26, 2013 both the Applicant and the College were advised that the Request for Review had been referred for formal investigation pursuant to subsection 46(2) of the *Access to information and Protection of Privacy Act* (“*ATIPPA*”). As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47.

## II PUBLIC BODY’S SUBMISSION

- [4] The College declined to provide a submission.

### III APPLICANT'S SUBMISSION

- [5] The Applicant did not provide a formal submission with respect to the applicability of sections 23 and 24 to the requested information.

### IV DISCUSSION

- [6] The issues to be addressed in this report are the applicability of sections 23 and 24 to the information requested by the Applicant.

- [7] Section 23(1) of the *ATIPPA* states as follows:

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

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

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

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

- [8] Section 24(1) states as follows:

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

- (a) trade secrets of a public body or the government of the province;*
- (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;*
- (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;*

- (d) *information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;*
- (e) *scientific or technical information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee of priority of publication;*
- (f) *positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body, or considerations which relate to those negotiations;*
- (g) *information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body; or*
- (h) *information, the disclosure of which could reasonably be expected to be injurious to the ability of the government of the province to manage the economy of the province.*

[9] Section 64(1) of the *ATIPPA* places the burden of proving that an exception applies to requested records squarely on the public body. The College, in this case, has made no formal submission with respect to the applicability of these sections to the records in issue. While the College offered some explanation for their application of these sections to the requested information during the informal resolution stage, this explanation cannot be referred to here, as discussions that occurred during the informal resolution stage are confidential.

[10] As my predecessor discussed in Report 2007-004, the *ATIPPA* does not set out a level or standard of proof that has to be met by a public body under subsection 64(1) in order to prove that an applicant has no right of access to a record. After a review of reports from other jurisdictions and relevant case law from the courts, our Office has concluded that the standard to be met by the public body under this section is the civil standard of proof. This means that the public body must prove on a balance of probabilities (in other words, that it is more likely than not) that the applicant has no right to the record or part of the record.

[11] Section 24 was at issue in Report A-2010-002. In that Report, I stated as follows:

*Section 24 of the ATIPPA has been considered by this Office on a number of occasions. In Reports 2005-002, 2006-011 and 2007-005 my predecessor referenced a number of reports from this Office and from the Information and Privacy Commissioners of other provinces and decisions of the appellate courts dealing with similar language. In my view the essence of the issue is fairly and*

*succinctly captured by the following passage from Order 02-50 of the British Columbia Information and Privacy Commissioner in which he reviewed and summarized the pertinent case law as follows:*

*137 Taking all of this into account, I have assessed the Ministry's claim under s. 17(1) by considering whether there is a confident, objective basis for concluding that disclosure of the disputed information could reasonably be expected to harm British Columbia's financial or economic interests. General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1). That exception must be applied on the basis of real grounds that are connected to the specific case. This means establishing a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information....There must be cogent, case-specific evidence of the financial or economic harm that could be expected to result.*

*Subsection 17(1) of British Columbia's Freedom of Information and Protection of Privacy Act is, in all material respects, identical to subsection 24(1) of the ATIPPA.*

- [12] Also as noted in Report A-2010-002, Section 23 contains two distinct exceptions to disclosure. The first, paragraph 23(1)(a), requires the public body to prove a reasonable expectation of probable harm to a specific intergovernmental relationship. The second, paragraph 23(1)(b), requires the public body to show that the information in question was "received in confidence" but does not require proof of harm. These two exceptions have been discussed in detail in previous reports (see for example Reports 2005-002, 2006-006 and A-2008-012) and need not be repeated here.
- [13] Further both sections 23(1) and 24(1) use the phrase "could reasonably be expected". The meaning of this phrase in relation to causing harm was explored extensively in Report A-2013-008. While only section 23(1)(a) requires harm, the use of the phrase "could reasonably be expected" in sections 23(1)(b) and 24(1) likewise requires detailed and convincing evidence to show why the exception applies and thus, the information withheld.
- [14] Given the lack of evidence put forward by the College to support the application of either sections 23 and 24 to the requested information, I will not speculate about how or why these sections may apply. The applicant has requested the approved budget documents from a public body from 2008 to 2012, inclusive. On its face, it is difficult to accept that budget documents of a public institution should not be released. Given the fact that there was no submission at all by the College to support its position, it is clear that the College has not met the burden of proof.

## V CONCLUSION

[15] Given that the College has failed to satisfy the burden of proving that the exceptions to access apply, as set out in section 64, it is my conclusion that neither section 23 nor section 24 is applicable to the requested information and as such, it should be released to the Applicant.

## VI RECOMMENDATIONS

[16] Under the authority of section 49(1) of the *ATIPPA*, I recommend that the College provide the requested records to the Applicant.

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

[18] Please note that within 30 days of receiving the decision of the College 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*.

[19] Dated at St. John's, in the Province of Newfoundland and Labrador, this 21<sup>st</sup> day of October 2013.

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