NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2006-003

College of the North Atlantic

Summary: The Applicant applied to the College of the North Atlantic ("CNA") for access to certain e-mail records from within a group of e-mail records which had already been identified following an electronic records search in response to a previous access to information request by the Applicant's spouse. CNA responded to the request by providing access to a number of records and withholding others under sections 20 and 21 of the *Access to Information and Protection of Privacy Act ("ATIPPA").* The Applicant then filed a Request for Review asking the Office of the Information and Privacy Commissioner to review CNA's decision to withhold some of the records, and also expressing concerns about whether CNA had understood the request and had responded in an open, accurate and complete manner. No informal resolution was achieved, and after the matter was referred to the formal stage, the Applicant forwarded evidence to the Commissioner that there were additional records responsive to this request which had not been provided. Two further searches by CNA during the course of this Review resulted in a number of additional records being provided to the Applicant. The Commissioner noted a number of issues in relation to electronic searches and made several recommendations, including an audit of CNA's e-mail system in order to fully determine its search capabilities, as well as training for staff engaged in conducting such searches. One additional e-mail record was also recommended for release.

Statutes Cited: *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, as am, ss 3, 7, 9, 10, 12, 13, 16, 20, 21. *Freedom of Information and Protection of Privacy Act*, C.C.S.M., c. F175, s 13.

Authorities Cited: Newfoundland and Labrador OIPC Report 2005-006; Ontario OIPC Orders M-909, PO-1954.

I BACKGROUND

[1] The Applicant submitted an access to information request to CNA with the following request:

> *I am requesting all personal records which reference* [*Applicant*] *or any part of that name or reference me as the spouse of* [*Applicant's spouse*] *from a specific group of e-mails. The specific group of e-mails is identified by* [*CNA Solicitor*] *in correspondence dated May 13, 2005 to* [*Applicant's spouse*], *Re: Access to Information Request. In particular I am referring to the e-mails in excess of 4300 which were the results of a search requested by* [*Applicant's spouse*].
>
> *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 not requesting all records that reference* [*Applicant's spouse*]. *What I am requesting is where a record referencing me also contains a reference to* [*Applicant's spouse*], *that the reference to* [*Applicant's spouse*] *not be severed. I am attaching a letter from* [*Applicant's spouse*] *granting CNA permission to release these records.*

[2] CNA initially responded to the Applicant in correspondence dated 14 October 2005 advising the Applicant that

> *…all e-mails available for disclosure to you or* [*Applicant's spouse*] *have already been provided. I can have someone undertake the exercise of manually sorting through the 4300 e-mail messages to identify those you have specified, but you would likely find what you are looking for quicker and for much less cost by sharing your disclosed records with each other.*

[3] This was followed by an e-mail exchange on 21 October 2005 between the Applicant and the CNA Coordinator in which the Applicant corrected the CNA Coordinator's interpretation of the request. The Coordinator acknowledged that he had misread the request, and issued a new letter of response with an apology dated 21 October 2005.

[4] Subsequent to this, the CNA Coordinator sent a letter to the Applicant dated 9 November 2005 accompanied by the disclosure of a number of the requested records. He advised the

Applicant that the request had been granted in part, and that 35 e-mail records were being withheld under two exceptions as outlined in the *ATIPPA*:

> *20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal*
>
> *(a) advice or recommendations developed by or for a public body or a minister; or*
>
> *21. The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is subject to solicitor and client privilege.*

[5] The Applicant then forwarded a Request for Review to this Office, stating that

> *I am asking that you review CNA's decision to refuse access to some of the records which I have requested. As well, based on correspondence with CNA's Information and Privacy Coordinator and based on the information which was released, I am not confident that my request was understood and that CNA has responded in an open, accurate and complete manner*.

[6] Attempts to resolve this Request for Review by informal means were not successful. On 4 January 2006 the Applicant and CNA were notified that the file had been referred to the formal investigation process.

II PUBLIC BODY SUBMISSION

[7] On 12 January 2006 the CNA Coordinator forwarded a brief formal submission outlining the College's position on this review. In it, he indicated that "I responded to this request in a manner I believed to be thorough and complete," and that this resulted in a number of records being forwarded to the Applicant. He notes that it was only during the formal review process that "it was discovered that an error had been made in the search criteria used to locate a portion of these records." The CNA Coordinator states that once this error was corrected, a new search was completed, which resulted in a further disclosure of records to the Applicant, as well as some

records which were withheld under sections 20 and 21. These withheld records were provided to this Office for review.

[8] It should be noted that subsequent to the receipt of both CNA's and the Applicant's formal submissions further issues were identified which are dealt with elsewhere in this Report.

III APPLICANT'S SUBMISSION

[9] The Applicant forwarded a submission on 20 January 2006 which raised a wide range of issues of concern in relation to this review and in relation to other issues from past access requests, some of which were subject to reviews conducted by this Office. The following represents a summary of the issues which are most relevant to this review.

[10] The Applicant has interpreted the problems encountered with this access request as a combination of carelessness and a willful attempt by CNA to deny access to records, starting with CNA's initial response:

> *I am concerned that CNA has chosen not to respond fully in its first response to my request. It appears that CNA attempts to only release an incomplete set of records in the first response, and waits to see if the applicants can make a case to the OIPC that more records exist. If the case is made successfully by the applicant then CNA will release more records; and the cycle continues. Based on the initial correspondence between myself and* [*CNA Coordinator*]*, it is obvious that CNA was careless dealing with my request. There are numerous other examples from this file and my previous file where care was not taken to understand my request… CNA can not meet its duty to assist if they do not take the time to understand the request.*

[11] One issue outlined by the Applicant is in relation to the search criteria utilized by CNA in undertaking an electronic search for the requested records. In this submission, the Applicant expressed some concern that this would not be an easy search, despite assurances to the contrary from the CNA Coordinator, and furthermore the Applicant expressed doubts as to whether this search could indeed be conducted accurately as an electronic search. For one thing, the Applicant assumed that the CNA Coordinator would use the first three letters of the Applicant's last name

as one of the search criteria. The CNA Coordinator did not take this approach however, on the basis that it would cast the net too wide to be of any use, because it would pick up all references to the Applicant's spouse as well, both of whom share the same last name, and it would not usefully narrow the field from within the group of approximately 4300 e-mails which served as the basis for the Applicant's request. The Applicant also expressed concern that depending on how literally CNA interpreted this request, doing a search for records which contain the word "spouse" may miss some records which use references such as "partner" or some other term for the marital relationship. By extension, the Applicant raises the notion that in order to undertake an accurate electronic search for this type of request, it would be necessary for CNA to use every possible synonym for the word "spouse," or at the very least to work with the Applicant in determining the search terms to be used.

[12] Another issue discussed in the Applicant's formal submission is the treatment by public bodies of e-mail attachments in access requests and reviews by this Office. The Applicant expresses some concern that an attachment may be "lost" in the process of searching for or reviewing records:

> *When a person who originates the email adds an attachment, the recipient receives that attachment. If the recipient forwards that email to a new recipient, the attachment remains intact in the email stream. However if the recipient replies to the email (as opposed to forwarding the email to a new recipient) the attachment is no longer included in the email series. As a series can consist of pages of replies or forwarding, the final email stream may show no record that there was an original attachment, particularly if a paper copy is reviewed, unless it is mentioned in the body of the email.*

[13] The Applicant's submission concludes with the following comments, which reference two previous reports issued by this Office in relation to CNA:

> *…I trust that requests made to other public bodies do not require this level of OIPC "policing" and extensive review on the part of the applicant. If a public body can not or will not comply with legislation then should not this situation be addressed before any further requests are handled? I find it difficult to accept that the applicant now needs to be accepting of the fact that records eligible for release from this public body may not be released and further that as an applicant I have no assurance that all eligible records have been supplied to the OIPC. If this public body were in full compliance with the recommendations coming from*

> *the first two reports then the situation I am now in, of having to do extensive research so as to identify further records, would not occur. As an applicant all I am requesting is information eligible for release and that the process of requesting that information is handled in an accurate, complete and timely manner by CNA; essentially following the legislation and recommendations of the OIPC.*

IV DISCUSSION

[14] As noted above, efforts to resolve this matter through informal means were not successful, and the file was moved to the formal investigation phase. At that juncture, a review by this Office of the e-mail records which had been severed by CNA revealed that those e-mail records had been severed properly, or in some cases were copies of e-mails which had been disclosed to the Applicant in a previous request, so there was no need for CNA to disclose them a second time.

[15] Two days after the parties were notified that the file was being moved to the formal investigation phase, the Applicant forwarded an e-mail to this Office accompanied by scanned copies of two e-mails which had been provided to the Applicant's spouse through a previous access request. According to the Applicant, one of the e-mails had been part of a package reviewed by this Office as part of a request for review filed by the Applicant's spouse, while the other had been disclosed directly to the Applicant's spouse electronically by CNA. The Applicant put forward the position that both e-mails should have been disclosed in response to this access request, now before me as the subject of this review. The Applicant then put the question to this Office: "could you please tell me what exception to disclosure applied such that these records could be released to [Applicant's spouse] but could not be released to me?"

[16] After further communications between this Office, CNA, and the Applicant, it became clear that there had been a problem with the search conducted by CNA in relation to this access request. The Applicant was advised by this Office that the two identified e-mail records had never been forwarded to this Office by CNA as part of this review. The Applicant then continued to search through the disclosure from his/her spouse's previous access request for e-mails which

should have been responsive to this access request. The Applicant identified a number of such e-mail records through this process. After completing a review of e-mails in his/her spouse's disclosure from a previous access request, the Applicant then forwarded to this Office a copy of 30 e-mail records which the Applicant believed should have been provided as part of this access request.

[17] During approximately the same time period, the CNA Coordinator reviewed the procedures used in his search for the records in question. He concluded that the search, conducted electronically, had not been done correctly. He indicated to this Office that the advanced search options which he had selected on the e-mail system had reverted to default settings without his knowledge, and therefore a number of e-mail records responsive to the request were not identified. After redoing the search, ensuring that the advanced search options were selected, the CNA Coordinator identified a number of additional records, some of which were designated for disclosure to the Applicant, but the majority of which were being withheld on the basis of one or both of the two exceptions to access which had previously been claimed. Those records which were designated by CNA for disclosure were forwarded to the Applicant.

[18] The records from this second search which were being withheld from the Applicant were provided to this Office by CNA for review. After reviewing these records, I determined that seven of them did not meet the standard of either of the two exceptions relied upon by CNA. CNA agreed to disclose those records to the Applicant prior to the issuance of this Report.

[19] Upon receipt of the records disclosed by the CNA Coordinator following his second search, the Applicant determined that only three of the newly disclosed records were among the 30 records he/she had previously identified to this Office from among those which had been released to the Applicant's spouse in a previous access request. This left 27 records which, in the opinion of the Applicant, should have been disclosed in response to this access request, but were not, even after a second search by the CNA Coordinator.

[20] The 30 records identified by the Applicant from among his/her spouse's disclosure were numbered up to 32 by this Office, because attachments have been numbered separately and

considered as separate records for the purpose of this review. Prior to forwarding these records to CNA for the Coordinator's comments as to why they were not picked up in the search, it was determined that some additional analysis of the records should take place at this Office. After cross-referencing these 32 records with those which had already been provided to the Applicant by CNA and those which had already been correctly withheld by CNA in response to this request, it was determined that 15 of the 32 records were either the same as e-mail records already provided or copies of records which CNA was correctly withholding based on the exceptions noted above. This left 17 records which the Applicant believed to be responsive to this request, but which had not been provided to this Office for review by CNA.

[21] Copies of the 17 e-mails in question were forwarded to CNA by this Office for comment as to why they were apparently neither released to the Applicant nor initially forwarded to this Office for review. Of those, CNA agreed to release one additional e-mail following receipt of correspondence from this Office. The CNA Coordinator maintained that 11 of the additional records were copies of records already in the possession of the Applicant while five were withheld on the basis of one or both of the two exceptions previously noted. Upon further review of the 11 records, I agree that the only material within those records which I would have recommended for release to the Applicant is already present within e-mail records previously released to the Applicant. This still leaves five records which had not been accounted for by CNA after two searches.

[22] My main concern with this situation was the fact that these five records were not previously disclosed to this Office for review, and I presented this to CNA for comment. In response to this concern, the CNA Coordinator then conducted an additional electronic search using revised search criteria. This was now the third search resulting from this access to information request. This search identified one of the five unaccounted for e-mails as well as four other e-mails which had not been found before. I have reviewed all five of these e-mails, and I agree that they are correctly withheld under the two exceptions noted.

[23] This still leaves four e-mail records from those identified by the Applicant from his/her spouse's disclosure from a previous access request, which the Applicant believes are responsive

to the current request. Two of the four e-mails are actually attachments to the other two e-mails. As noted above, the CNA Coordinator had originally determined that all four records should be withheld on the basis of the two exceptions noted. He states that in both cases the original e-mail is protected from disclosure, and therefore the accompanying attachment is protected as well. The two attachments are identical to one another, so practically speaking, this leaves three records. The CNA Coordinator amended his original position in an e-mail to this Office on 2 February 2006 in which he indicates that not only should the records be withheld on the basis of the noted exceptions, but the two e-mails to which the attachments are paired are not actually responsive to the request because they do not reference the Applicant. The attachments, however, do reference both the Applicant and the Applicant's spouse. I would agree that the two e-mails to which the attachments are appended are not responsive to the Applicant's request, however, the attachment itself should be released to the Applicant. This attachment has been identified to CNA by this Office as 10E/12E, both being identical copies. The CNA Coordinator advised this Office that this record was not identified because there is no way to search within attachments for key words in an electronic search. He indicated that if the e-mail to which the attachment is paired does not contain any of the terms used in the electronic search, there is no way to identify a responsive attachment using that procedure.

V RELEVANT PROVISIONS OF THE *ATIPPA*

[24] Section 3 of the *ATIPPA* sets out the purposes of the *Act*:

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

> *(e) providing for an independent review of decisions made by public bodies under this Act.*
>
> *(2) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.*

[25] Section 7 establishes a general right of access to records in the custody or control of a public body, subject to limited and specific exceptions:

> *7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *(2) The right of access to a record does not extend to information exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.*
>
> *(3) The right of access to a record is subject to the payment of a fee required under section 68 .*

[26] Section 9 of the *ATIPPA* sets out the responsibility of public bodies in terms of their duty to assist applicants:

> *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.*

[27] Section 10 pertains specifically to records in different or electronic form:

> *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.

(2) Where a record exists, but not in the form requested by the applicant, the head of the public body may create a record in the form requested where the head is of the opinion that it would be simpler or less costly for the public body to do so.

[28] Section 12 of the *ATIPPA* prescribes the way in which public bodies are to respond to access requests:

12. (1) In a response under section 11, the head of a public body shall inform the applicant

(a) whether access to the record or part of the record is granted or refused;

(b) if access to the record or part of the record is granted, where, when and how access will be given; and

(c) if access to the record or part of the record is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may appeal the refusal to the Trial Division or ask for a review of the refusal by the commissioner, and advise the applicant of the applicable time limits and how to pursue an appeal or review.

(2) Notwithstanding paragraph (1)(c), the head of a public body may in a response refuse to confirm or deny the existence of

(a) a record containing information described in section 22 ;

(b) a record containing personal information of a third party if disclosure of the existence of the information would disclose information the disclosure of which is prohibited under section 30 ; or

(c) a record that could threaten the health and safety of an individual.

[29] Section 13 of the *ATIPPA* deals with repetitive requests:

> *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.*

[30] Section 16 allows public bodies to extend the normal period of time allowed for providing access to a record under certain conditions. One of those conditions, as set out in paragraph (a), involves the applicant providing sufficient details to enable the public body to identify the requested record.

> *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*
>
> *(a) the applicant does not give sufficient details to enable the public body to identify the requested record*

[31] Section 20(1)(a) is a discretionary exception to the right of access set out in section 7:

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

[32] Section 21 (a) is a discretionary exception to the right of access set out in section 7:

> *21. The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is subject to solicitor and client privilege*

VI ANALYSIS

[33] Section 3 of the *ATIPPA* states that giving the public a right of access to records and making public bodies more accountable are among the purposes of the *Act*. Section 7 sets out the right of access to those records, with limited and specific exceptions.

[34] Section 9 of the *ATIPPA* is also relevant here. Part of the duty to assist as set out in that section is to respond in an "open, accurate, and complete manner." I do not believe that there was any intentional effort on the part of the College to hide records from the Applicant, but clearly their response was neither accurate, nor complete. This is partly an issue of adequacy of search.

[35] As I noted in my Report 2005-006 (also in relation to CNA), adequacy of search with regard to access to information requests has been dealt with by other jurisdictions in Canada. In Ontario Order M-909, the Inquiry Officer commented that

> *Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.*

This has been one such case where the Applicant was in a position to present a reasonable basis to conclude that some additional records exist which were not previously identified by CNA in its first search. This is simply because the Applicant's spouse had been given some records by CNA from a previous access request which the Applicant believed to also be responsive to this request, but which were not provided.

[36] The Inquiry Officer in Order M-909 also states that records searches "must be conducted by knowledgeable staff in locations where the records in question might reasonably be located." In this case, the search was for electronic records, so physical location is not applicable, but it is noteworthy that an error by the CNA Coordinator in using the search functions of the CNA e-mail program figure to some degree into why this review was necessary. Although the Coordinator has acknowledged his error, and errors sometimes happen despite the best of

intentions, it is important that reasonable efforts be made to train staff of public bodies in how to conduct electronic records searches. Even if the Coordinator does not have the particular training required, it is important for the Coordinator to be able to call upon someone within the public body with the necessary skills to undertake such a search.

[37] Also in Ontario, the Assistant Commissioner stated in Order PO-1954 that:

> *…in order to properly discharge its obligations under the Act, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.*

[38] In the case presently before me, CNA did not keep a complete list of the criteria (key words or combinations of words) used in undertaking the electronic search. For that reason, based on the available evidence, I am unable to say with any certainty whether there has been a reasonable effort to identify and locate the records in question.

[39] That being said, there are other important issues at play here. Even after the CNA Coordinator realized the error of his first search and then conducted a second search, he later had to conduct a third search. The necessity for this third search had nothing to do with any technical error made in using the search capabilities of the CNA e-mail program, but was instead related to the vagaries of undertaking a search which was not clearly defined.

[40] As noted earlier in the Applicant's submission, a request for records which reference the Applicant as the spouse of another individual is not necessarily a straightforward electronic records search. There are many potential synonyms, such as "wife," "husband," "partner," including slang and colloquial terms such as "missus" or "better half." No matter how exhaustive the public body may be in attempting to utilize every synonym, some possible references to the Applicant as the spouse of another individual may be missed. The CNA Coordinator has indicated that combinations of key words were used in the electronic search, and it was only by trying a new combination of terms that he was successful in identifying further e-mail records in his third search.

[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.

[42] The scenario here is a two way street, however. Applicants cannot be expected to determine the process used by a public body in undertaking a search, so it is not necessary for an Applicant to set out key words to be used in an electronic search when making the access request. Some searches can be conducted through either electronic or physical means, and it is the public body which must determine the most appropriate method. However, if the public body determines that an electronic search must be conducted, the Coordinator for that public body should contact the Applicant to explain what is involved, and that an electronic records search means that exact terms and combinations of terms must be used. Sometimes even alternate spellings can be necessary for commonly misspelled words and names. The Coordinator should solicit the input of the Applicant in defining the search criteria and a record should be kept of the criteria used.

[43] In the case at hand, it is clear that the Applicant and CNA had different opinions on the search criteria to be used, but it is not clear from the evidence before me that an effort was made by CNA to solicit the input of the Applicant in determining the criteria. In the final analysis, it is the public body which must determine the use of any additional search criteria in an electronic search which have not been specified by the Applicant in an access to information request. However, prior communication with the Applicant would ensure that the duty to assist has been

exercised, and it would also establish evidence of the adequacy of that search should such a matter become subject to a review by this Office.

[44] Parts of sections 12 and 13 of the *ATIPPA* are relevant to an issue which arose during the course of this review subsequent to the receipt of formal submissions by both parties. Section 12 requires a public body to indicate whether access to a record has been refused, and if so, the public body must indicate the reason for the refusal and the provision of the *ATIPPA* on which the refusal is based. Section 13 says that a public body may refuse to disclose a record or part of a record which has already been provided to an applicant.

[45] At issue are some e-mails which, on their face, were responsive to the Applicant's request, but which were not provided to the Applicant, or in some cases, were not provided to this Office initially. Some of these e-mail records had already been provided to the Applicant in a previous access request. This is a fairly straightforward scenario when applicants file more than one request within a short period of time and there is some overlap in search results. The problem encountered in this case, however, is different. (It should be noted that CNA has not made any attempt to withhold e-mail records on the basis that they had already been provided to the Applicant's spouse as a result of a previous access request by that individual.)

[46] CNA's position is that some e-mails which were identified through the electronic search were not supplied to the Applicant because they were e-mails which had been sent to or from the Applicant, or cc'd to the Applicant. These were in addition to those e-mails which were withheld under one of the two exceptions previously noted, and those e-mails which were not supplied to the Applicant this time because they had already been provided to the Applicant in a previous access request. CNA's rationale as explained by the Coordinator is that because the Applicant is a current CNA employee, all e-mails sent to or from the Applicant or cc'd to the Applicant would still be available on the Applicant's e-mail account, and therefore there is no obligation on the part of CNA to provide them again. Furthermore, he noted that the Applicant's access request did not specify that copies of e-mails sent to or from the Applicant or cc'd to the Applicant were being sought. The Coordinator indicated that CNA was relying on section 13 of the *ATIPPA* in making this decision, in that these records had already been provided to the Applicant by virtue

of the fact that they were still available on the Applicant's e-mail account as maintained by CNA.

[47] The Applicant took a different position on the matter, indicating that the Applicant's previous access request had specifically excluded e-mails sent to or from the Applicant or cc'd to the Applicant, while this one did not, so this request should have captured all e-mails requested regardless of the origin or destination of the e-mail. The Applicant also expressed the concern that if CNA intended to use section 13 as an exception to access, he/she should have been informed of this at the outset by CNA when CNA named the other two exceptions which were being applied. The Applicant feels that section 12 obligates CNA to indicate if access to a record is being refused, and the exception in the *ATIPPA* on which CNA is relying.

[48] Section 13 is not a formal exception to access under the *ATIPPA*. It is not included in Part III of the *Act*, entitled "Exceptions to Access." Exceptions listed in Part III are applied by public bodies in order to restrict access to a record. It is not possible for a public body to use section 13 to deny access to a record which is already in an applicant's possession. Applying section 13, then, does not explicitly engage a response to the applicant as set out by section 12, as is the case for the formal exceptions listed in Part III.

[49] However, just because there is no explicit requirement in the *ATIPPA* to notify applicants that section 13 is being applied does not mean that there is no onus on the part of the public body in cases where it is presumed that the applicant already has the information for which he or she has applied. This is particularly important where, in a case such as this one, the Applicant has received a response providing partial access, which outlines that some records will be forthcoming but others are being withheld under two exceptions in the *ATIPPA*. In this case, there was a further class of records which the CNA assumed the Applicant already had access to, namely those which were sent to or from the Applicant or were cc'd to the Applicant.

[50] It would be useful at this point to reference how this situation is handled in another jurisdiction within Canada. Section 13(1) of Manitoba's *Freedom of Information and Protection of Privacy Act* is very similar to section 13 of *ATIPPA*. It states:

> *13(1) A head of a public body may refuse to give access to a record or part of a record if the request is repetitive or incomprehensible or is for information already provided to the applicant or that is publicly available.*

[51] Interestingly, Manitoba's version adds a subsection 13(2), which specifies a response to the Applicant, as follows:

> *13(2) In the circumstances mentioned in subsection (1), the head shall state in the response given under section 11*
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> > *(a) that the request is refused and the reason why;*
> >
> > *(b) the reasons for the head's decision; and*
> >
> > *(c) that the applicant may make a complaint to the Ombudsman about the refusal.*

[52] Even though there is no explicit equivalent to Manitoba's subsection 13(2) in the *ATIPPA*, I see 13(2) as more of a prescriptive elaboration on the duty to assist found in section 9 of the *ATIPPA*, in terms of the obligation for public bodies to respond to an applicant "in an open, accurate and complete manner." So, while I cannot say that there is an explicit equivalent to Manitoba's subsection 13(2) for public bodies in this province to follow, I do feel that there is an onus which can be read into section 9 of the *ATIPPA*. Such an onus obligates public bodies to communicate with applicants when there are records responsive to a request which are not being provided to the applicant on the basis of an assumption that the records are already in the possession of that applicant.

[53] Such a practice would have been particularly valuable in the present matter, given that the Applicant informed CNA, during the course of the formal stage of this review, that due to an error on the part of CNA IT administrators, the Applicant no longer had access to most of the e-mails which had been sent to or from the Applicant or cc'd to the Applicant. As a result, the Applicant indicated that it was not correct to assume that these e-mails were currently accessible. Upon learning of this situation, the CNA Coordinator did assist the Applicant in contacting the correct person within CNA to help the Applicant recover these lost e-mails. The Applicant has

since advised this Office that while some of the old e-mails were recovered, a number remain lost and at this point are presumed unrecoverable.

[54] Among the concerns expressed in the Applicant's submission, one was the possibility of e-mail attachments being "lost." My view is that if an e-mail is replied to and the attachment is not included in that reply, then it is simply not there as part of the latter record. On the other hand, if an applicant has requested that e-mail records be searched and access given to all records with his or her name referenced in it, it doesn't matter how many times the attachment has been forwarded or if the accompanying e-mail message has been replied to or not. As long as the attachment exists in one originating e-mail message, it should be provided to the Applicant (subject to any exceptions to access relied upon by the public body). If it is not provided to the Applicant, it should be reviewed by this Office if we are requested to do so. In fact, it has been the practice of this Office thus far to consider attachments as separate records for the purpose of conducting reviews, because we have found that sometimes attachments have not always been provided to this Office physically attached to their accompanying e-mail. Even though we have both the attachment and the e-mail, it is not always clear which attachment comes with which e-mail, such that we have sometimes had no choice but to review them as separate records. Regardless, even if the accompanying e-mail message is justifiably withheld under an exception to the *ATIPPA*, under the principle of severance outlined in section 7(2), both the e-mail and the attachment must be reviewed by this Office upon receipt of such a request from an applicant.

[55] A bigger concern regarding attachments is that, as explained by the Coordinator in an e-mail to this Office on 6 February 2006, he was apparently unable to search text within attachments for key words using the e-mail system employed by the College. If this is the case, it would be impossible to conduct a complete search of e-mail records which include attachments. I think it is fair to assume that a reasonable person, in requesting a search of e-mail records, would intend that attachments to e-mails are part of that request. In this case, however, it seems that in order for an attachment which is responsive to an access request to be found in an electronic search, the e-mail to which it is attached must also be responsive in order for it to be identified, and then both the e-mail and attachment are reviewed by the Coordinator.

[56] Once again, this situation highlights a scenario which is relevant to the Applicant's request, but of which he/she has not been made aware. I think it is incumbent upon CNA to involve its information technology specialists to confirm whether it is the case that e-mail attachments cannot be searched by key words. If this is in fact the case, I would once again propose that the duty to assist as outlined in section 9 of the *ATIPPA* should be interpreted as requiring CNA to advise the Applicant that while an electronic search of the e-mail system can be conducted for terms within the e-mails themselves, that it is not possible to reliably search within attachments for those terms. If it is the case that searches cannot be done electronically within attachments, it would be appropriate to inform the Applicant of this fact. It must be borne in mind that e-mail attachments are records subject to the *ATIPPA*, and all reasonable methods of searching for such records must be explored, whether electronically or through some combination of electronic and manual searches.

[57] Section 10 of the *ATIPPA* is relevant here. Paragraph 10(1)(a) says in essence that electronic records must be produced where it can be done "using the normal computer hardware and software and technical expertise of the public body." Paragraph 10(1)(b) adds the caveat that public bodies must do so only when producing such a record "would not interfere unreasonably with the operations of the public body." There is a fine line here. If a public body were to claim that searching e-mail attachments could not be done with its normal hardware, software, and expertise, and/or producing such a record would interfere unreasonably with its operations, I believe we may open ourselves up to the danger that such records could be shielded from the *ATIPPA* simply by creating records only as attachments using programs which are not compatible with normal electronic searches. Although I do not suggest in the slightest that this was or is ever in any way reflective of CNA's approach to access to information, I would note that such a practice undertaken by any public body would be strenuously opposed by this Office, and may constitute an offence under section 72 of the *ATIPPA*.

[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. It is not clear to me at this point whether CNA has fully utilized these assets in performing this search.

[59] As noted earlier, sections 20(1)(a) and 21(a) of the *ATIPPA* were claimed by CNA at the outset of this request. This Office reviewed the material which was withheld by CNA after each of the three separate searches for responsive records undertaken prior to and during the course of this review. With the exception of attachment 10E/12E as noted above, these exceptions were applied correctly by CNA.

VII CONCLUSION

[60] Despite the issues raised in this Report, it should be noted that this matter involves not only the Applicant's request, but also explicitly references the results of a request by the Applicant's spouse, which is the target group of e-mail records for the Applicant's request. When thousands of e-mail records are involved and discretionary exceptions are being applied by a public body, consistency is a major challenge. In some cases, CNA may have chosen to release material requested by one spouse on one request which it could have justifiably withheld on the basis of a discretionary exception, while it may have chosen to properly withhold the same record in response to the other spouse's request based on the same discretionary exception. While this apparent discrepancy may lead to suspicion on the part of Applicants, there is nothing in how CNA makes those choices that violates the *ATIPPA*.

[61] The problem comes about when the discrepancies are there for other reasons related to adequacy of search or a failure of the duty to assist. This unusual situation of two different Applicants being able to compare notes from overlapping access requests has placed them in the

rare position of being able to present evidence to this Office which would normally not be available to individual applicants. This has resulted in a Report which has, I hope, highlighted some of the weaknesses and problems with electronic records searches, particularly involving e-mail records. Many of the e-mail programs in use today by public bodies were developed purely as communication tools, rather than records management systems, and are not ideally suited for handling access to information requests. The volume of e-mail generated by such bodies is far in excess of the amount of paper correspondence being sent and received, which now tends to be used for more formal communications. In fact, I would hazard a guess that many of the communications which take place over e-mail would at one time have been accomplished on the telephone or in person, perhaps never leading to the creation of a record.

[62] Be that as it may, e-mails (and their attachments) are records and are subject to the *ATIPPA*. Public bodies must therefore ensure that whatever capabilities are present in their e-mail systems to perform searches for access requests are used to their utmost degree. This involves trained personnel who are well versed in all the search capabilities of their e-mail system. It involves personnel maintaining a record of all search terms and parameters used in access requests so that they can support their actions should the matter come to this Office for a review. It also involves communication with applicants as part of the duty to assist, to ensure that electronic searches are clearly defined and reflect the applicant's intention as closely as possible. In some cases it may also involve a discussion with the applicant about the limitations of electronic searches, leaving open the possibility that an electronic search may not be able to accomplish the intended result. In such cases, perhaps some combination of an electronic and a physical search may be necessary in order to respond to an access request.

[63] Finally, I should emphasize that despite the many issues outlined above, I would not consider this to be a case of misconduct on the part of CNA. As I have indicated, however, a greater effort is required in some areas, and a re-examination of search procedures is strongly warranted. This Review has outlined a number of difficult issues, in some aspects of which there are few guiding precedents.

VIII RECOMMENDATIONS

[64] I find that the College of the North Atlantic has been deficient in fulfilling its duties under sections 7 and 9 of the *Access to Information and Protection of Privacy Act* with respect to the Applicant's request. I also find that of those records which were identified as a result of the searches undertaken by CNA in response to this access to information request, CNA has appropriately severed all records except record number 10E/12E.

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

1. That the College release to the Applicant record number 10E/12E;

2. That the College take all reasonable steps using the normal software, hardware and expertise at its disposal to recover and provide to the Applicant any e-mail account or accounts or portions thereof belonging to the Applicant which were lost or destroyed as a result of technical errors or mistakes;

3. That CNA keep a complete record of the steps used in conducting all future electronic searches, including a list of key words and combinations of words used in undertaking such searches;

4. 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;

5. That the College undertake an internal audit of its e-mail system in order to determine the full range of its normal operating capabilities with regard to e-mail searches, including the extent to which (if at all) e-mail attachments are searchable using key word electronic searches;

6. That in future the College identify to applicants the limitations, if any, involving electronic searches (for example, if it is determined following an audit that e-mail attachments may not be reliably searched using the normal hardware, software and expertise at the disposal of the College). Further, that the College use any reasonable means at its disposal to mitigate such limitations when responding to access to information requests; and

7. That the College ensure that persons involved in conducting electronic records searches for the purpose of responding to access to information requests receive adequate training in such matters.

[66] Under authority of Section 50 of the *ATIPPA*, I direct the head of the College to respond to these recommendations within 15 days after receiving this Report.

[67] Dated at St. John's, in the Province of Newfoundland and Labrador, this 14th day of March 2006.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador