NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2007-009

College of the North Atlantic

Summary: The Applicant applied to the College of the North Atlantic ("CNA") for access to any and all e-mail records containing a reference to him which had not already been disclosed to him in a previous request. This previous request included a specific group of e-mails. CNA responded by saying that there were no additional e-mail records to be disclosed as all relevant e-mails had already been disclosed to him. The Applicant presented evidence that this may not be the case, by informing CNA of certain responsive e-mails he had acquired through another means which he said should have been disclosed to him in its search, but were not. CNA responded by claiming section 13, saying that the Applicant clearly already had those particular e-mails. During informal resolution efforts, CNA agreed to release a number of additional e-mails as proposed by the Commissioner's Office. As a result, the Commissioner issued no recommendation to release further e-mail records. The Commissioner declined to review the Applicant's fee complaint, and he also determined that there was no basis for the Applicant's complaint about CNA's use of a 30 day extension. The Commissioner did, however, find that CNA had failed in its duty to assist the Applicant, and issued a recommendation in that regard.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A 1.1, as am. ss. 9, 13, and 16.

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-001 and 2005-006.

Other Resources: *Access to Information and Protection of Privacy Act* Policy and Procedures Manual, Access to Information and Protection of Privacy Coordinating Office, Department of Justice, updated September 2004, available at http://www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf.

I BACKGROUND

[1] On 23 March 2006 the College of the North Atlantic ("CNA" or the "College") received the following request under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*"):

> *I am requesting all e-mail records and attachments that reference* [*Applicant*], *or any part of that name, or any reference to me that would in context be seen as referring to me.*
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> *This request is for all records contained in the group of e-mails identified by* [*name*], *General Counsel CNA in his May 13 2005 correspondence to me as "in excess of 4300 e-mails." This group of 4300 e-mails was identified by* [*CNA General Counsel*] *while conducting a search responsive to my January 14 2005 and as amended March 18 2005 request.*
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> *This request for a search of the same 4300 e-mails is necessary because of evidence that there are records existing in the group of 4300, responsive to my request, which were not supplied to the applicant and in some cases not supplied to the OIPC for review. I am requesting all records, responsive to this March 20 2006 request, which were not released pursuant to the January 14 2005 and as amended March 18 2005 request. The evidence, indicating that records pursuant to my January 14 2005 and as amended March 18 2005 request were not supplied to the applicant or the OIPC, is such that a complete search of the entire group of 4300 is warranted.*

[2] On 19 May 2006 CNA issued a letter of response to the Applicant, indicating that its search "did not produce any new records for disclosure." The Applicant then proceeded to file a Request for Review with this Office, received on 2 June 2006. The Applicant requested that I review the following:

> *1. The notification from CNA, advising me that the time limit for responding to the request had been extended for 30 days, was not received by me within the original 30 day time period.*
> *2. There are records responsive to my request which I believe have not been provided to me.*
> *3. There has been a failure to assist the applicant.*

[3] The Applicant also indicated on his form that he wanted me to investigate the fees associated with the request, but no reference was made by the Applicant to fees in the above description of

his complaint, nor in his formal submission. There was, however, a piece of correspondence dated 29 May 2006 from CNA to the Applicant in which certain records were referenced as having been previously subject to a fee estimate dating from the Applicant's 2005 request. This fee was never paid, and consequently the records in that group were not disclosed to the Applicant at the time of his 2005 request. The Applicant did not file a fee complaint in relation to his 2005 request. In relation to this current Review, the entire group of approximately 4300 e-mails, including those which had previously been subject to the 2005 fee assessment, were reviewed by this Office. All records recommended by this Office for release during informal resolution discussions were released by CNA without a fee. I will therefore decline to review the Applicant's fee complaint.

[4] The Applicant's first request in relation to this material was the one referenced in his current request, noted above. This first request resulted in my Report 2005-001, which, among other things found that CNA did not respond to the Applicant or to this Office within the time period set out in the *ATIPPA*. That report did not, however, involve a review of the e-mail records. The Applicant filed a subsequent Request for Review with this Office, asking that we undertake a review of the e-mail records, as well as other records involved in his initial request. The matter involving the e-mail records was resolved on an informal basis, while the remaining issues were dealt with in my Report 2005-006. During that review, a smaller proportion of the 4300 records, those which CNA deemed to be responsive to the request, were forwarded to this Office for review. The total number of records involved at that time was far less than the total of 4300, because CNA was not obliged to provide duplicate copies and other non-responsive records (which comprised a significant proportion of the 4300 records) to this Office for Review. The informal resolution which was agreed upon at that time was based on an informal analysis of the records which were provided to this Office along with discussions between this Office and CNA, as well as discussions between this Office and the Applicant.

[5] As outlined above, the Applicant later came forward in 2006 with a request involving the entire set of 4300 records. The set of 4300 records which was the subject of the 2006 request is comprised of the total result of CNA's 2005 electronic search (including duplicate and non-responsive records). The 2006 request is now the subject of this Review.

[6] In the days prior to and following the Applicant's move to file a Request for Review on 2 June 2006, this Office undertook a series of discussions with both the Applicant, and separately, with CNA, with the goal of determining whether there was a basis for this Office to accept for review a matter which had previously been resolved through informal resolution. During that period, the Applicant was able to provide to this Office sufficient likelihood that records responsive to his initial request had not been provided to him, nor to this Office for review back in 2005 when he filed his initial request and subsequent Request for Review. As a result, this Office notified CNA in a letter dated 6 June 2006 that we would be proceeding with a Review into this matter.

[7] Since that time, informal resolution efforts were undertaken, which involved this Office reviewing the entire group of 4300 records, and as noted above, proposing to CNA, within the context of those efforts, that a large number of additional responsive records be released to the Applicant. CNA agreed to do so, and in March 2007 those records were forwarded to the Applicant. The Applicant declined to accept this resolution, however, because of his concerns about the entire process followed by CNA. He requested that the matter proceed to the formal stage of the Review process, culminating in this Report.

II PUBLIC BODY'S SUBMISSION

[8] The College began its submission by noting that it has disclosed to the Applicant all the records recommended for release by this Office. CNA also reflected that "the review of these records required a very significant amount of time and effort and now that both of our offices have completed the task we look forward to closure on this matter."

[9] CNA then proceeded to recount the background to the genesis of this particular matter, beginning with the Applicant's initial request in 2005, through to its response to the Applicant's subsequent request of 2006. CNA notes that its response to the Applicant's 2006 request, which it forwarded to the Applicant on 19 May 2006, was that their search of the 4300 records "did not produce any new records for disclosure."

[10] CNA then presented its perspective on the search conducted in relation to the 2006 request, also referred to as the current request. CNA says that this process began with its receipt of the 2006 request from the Applicant on 23 March: "in an effort to fulfil this request CNA began the search for responsive records with an unsorted, clean, electronic copy of the 4300 records…" The records were then sorted, still in electronic form, by manually dragging and dropping items from the main folder to subfolders.

[11] CNA says that after undertaking this process, the records in the responsive (or "Resp") subfolder were compared to the responsive records released as a result of the 2005 request. CNA says that there were "fewer items in the current Resp subfolder than had been released as a result of the 2005 request. All items not in the current Resp subfolder, but released as a result of the 2005 request, were moved to the current Resp subfolder." In response to this discrepancy, CNA says that it

> *…involved records this office felt attracted privilege. However, given that the previous coordinator saw fit to release them this office decided to defer to the previous coordinator's judgment and moved them to the Resp subfolder. Having done so, the responsive group of records was exactly the same as the previous search and therefore no new records were found for disclosure.*

[12] CNA then went on to discuss its perspective on some correspondence which had been forwarded to it by the Applicant in reply to CNA's response to his 2006 request in which CNA said that there were no new records for disclosure. CNA notes that in correspondence to it dated 28 May 2006 the Applicant "went into some detail about the 2005 Request and expressed surprise that there were no new records for disclosure." CNA further notes that the applicant included a table of 18 emails, sorted by the date, time, subject and "to/from/cc" information. These e-mails were deemed by the Applicant to be responsive to his request, and CNA was asked by the Applicant to explain why they had not been provided to him either as a result of his 2005 or 2006 requests.

[13] CNA provided its explanation in relation to 13 of the 18 e-mails, and committed to investigate the other five items within "ten business days." CNA says that "this projected response proved to be unnecessary based on the email received from the applicant on May 30,

2006. In this email the applicant outlined the contents of the emails." CNA sent a letter to the Applicant on 1 June 2006 "reiterating that no new records were found which were responsive to the request and further that the his [sic] email of May 30th clearly indicated that he had been provided with the records he was requesting in his March 20th request."

[14] According to its submission, CNA then cited section 13 of the *ATIPPA*, which 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.*

[15] CNA then responded to a request from this Office (forwarded to CNA during our formal investigation) that CNA address the fact that there were a large number of records which this Office considered to be responsive to the 2005 request which were provided to me during the 2006 Review, which were not provided to this Office during the 2005 Review. CNA outlined several factors which from its perspective account for this scenario, the first being the fact that different individuals were involved in assessing the records in 2005 than those who assessed the records in 2006, and there may have been some records which one person thought were responsive while another would consider them not responsive to the request. CNA says that some lessons learned by the individuals involved in the 2005 request in relation to the application of sections of the *ATIPPA* to the records had to be re-learned by those who were involved with the 2006 request. CNA refers to this as "*ATIPPA* sophistication," and says

> *As an organization we have made significant progress in our understanding of ATIPPA and are constantly attempting to become more efficient when it comes to administering requests, dealing with the review process and generally creating an organizational culture in keeping with the spirit and intent of the ATIPPA.*

[16] CNA also referred to the vast number of "redundant" e-mail threads (extra copies of e-mails which would have been sent to more than one recipient), as well as those which turned up the wrong person (ie, someone with a name similar to the Applicant). These were not sent to this Office during the 2005 Review, but they were sent to this Office during the 2006 Review due to a specific request from this Office. CNA says that all of the "redundant" and "wrong person" e-

mails were contained in separate binders when they were forwarded to this Office along with the other e-mails which make up the entire group of approximately 4300 e-mails.

[17] CNA also notes that for the 2006 request, the Applicant presented a letter from his spouse during informal resolution efforts in March of 2007 giving permission for CNA to disclose any references to her which may have been found in e-mails which relate to the Applicant. CNA says this accounted for some additional disclosure of records to the Applicant which had previously been placed in a "wrong person" folder when the 2005 request was processed. As it was not considered responsive information in 2005, it was not provided to this Office for Review at the time.

[18] CNA acknowledged technical difficulties experienced in responding to the Applicant's 2005 request involving hardware and software used to sort and print the records. In its processing of the 2005 request, CNA says that "there were, for example, problems with printing large groups of e-mails." CNA says it now uses a different software package to number pages and print e-mails, and this system allows any errors to be easily identified. Although "other issues" arose during the 2006 Review process in relation to printing e-mails with this particular software, CNA says that there were "significant improvements" over the 2005 process. CNA also noted that it lacked the ability to search or print attachments when the 2005 request was processed, but this was remedied in advance of the 2006 request. CNA says that this resulted in additional responsive records being supplied to this Office for review which had not been reviewed in 2005.

[19] CNA also referred to its categorization of some records as "personal information" versus others which it found to be "work product." CNA says that the Applicant checked the box on his application form stating that he was requesting "my own personal information," and therefore CNA, for the 2006 request, "separated items based on whether or not they were personal. Anything referencing the Applicant in a work-related capacity was considered to be not responsive." CNA also noted that there was a group of e-mails separated out of the results of the 2005 request as well, which were deemed to be work product, and therefore not personal information, and consequently not responsive to the request. CNA notes that the applicant did not pay for these records, and therefore they were not provided to him. CNA says that the same

approach was taken to both the 2005 and the 2006 requests, and that the Applicant was reminded in writing of the existence of the group of records set aside in his 2005 request which contained references to the Applicant, but were subject to a fee because they were deemed to be work product as opposed to the personal information of the Applicant. The records which were provided to this Office during the present review included this set of records which was considered by CNA to be "work product." Because they were not considered to be responsive to the Applicant's request at the time, they had not been provided to this Office for Review in 2005.

[20] CNA stated its understanding that there are four bases for this formal Review, and it addresses each in turn. Further, CNA stated its belief that its reliance on section 13 of the *ATIPPA* is not among the bases for this review, because in its assessment, the Applicant did not ask the Commissioner to review that particular aspect of how the College responded to his request. CNA says that it therefore makes no submission on that matter.

[21] Of the four bases which CNA acknowledges, the first CNA refers to in its submission is in relation to the Applicant's comment in his Request for Review form indicating that "there are records responsive to my request which I believe have not been provided to me." CNA says that this must refer to the box checked by the Applicant on the same form which requests that the Commissioner review a decision, act or failure to act by the head of a public body.

[22] CNA says that, as noted in its correspondence to the Applicant dated 19 May 2006, there were "no new records found which were responsive to the request." Further, the College indicated that the Applicant had already been provided with copies of other records which the Applicant listed in some detail as being responsive, but which the Applicant says were not provided to him after his 2005 nor his 2006 request. As a result, CNA cited section 13 of the *ATIPPA* in its response to the Applicant.

[23] CNA also stated in its submission that the addition of the Applicant's spouse's records (following provision of at letter of permission by the Applicant's spouse in March 2007), accounts for the entirety of the difference between the records which were provided to the

Applicant in the 2005 request as compared to the results of the Review of records in relation to his 2006 request:

> *the Applicant has ultimately received more records under this request than he did under the 2005 Request because in March 2007, the Applicant's spouse gave her permission for her personal information to be released to the Applicant. The College did not have any such permission from the applicant's spouse during the 2005 Request and had withheld those records citing section 30 of the ATIPPA. In addition, the College did not have any such permission from the applicant's spouse when it sent the May 19th and June 1st replies to the current request and at that time, it also withheld the records containing the spouse's personal information citing section 30 of the ATIPPA. However, the later release of records containing the spouse's personal information is the only difference in response between the 2005 Request and the current request.*

[24] CNA also submits that the Applicant's 2006 request "repeats a portion of the 2005 request." CNA further suggests that I have essentially reviewed the same records twice with the Applicant's 2006 Request for Review:

> *Moreover, the Commissioner has already dealt with the Applicant's assertion that the College has failed to provide the Applicant with records responsive to this request when it dealt with the 2005 Request in Review 2005-006. The Commissioner was specifically tasked by the Applicant with reviewing the same group of 4300 emails in that review. The Commissioner reviewed both the records given to the Applicant as a result of his 2005 Request and the severance of those records and pronounced himself satisfied on both counts.*

[I must note here that this statement highlights a fundamental error on the part of CNA in relation to the history of this particular matter which I will address in the discussion portion of this Report.]

[25] CNA forwarded some detailed comments in support of its position regarding the Applicant's allegation that he was not notified of a thirty day extension of time within the original thirty day time period. CNA says that it was not provided with any details about the exact date when the Applicant alleges he received the letter extending the time period, therefore, it is a difficult issue to address. In summary, CNA says that its letter was sent prior to the expiration of 30 days, and as such CNA has complied with the *ATIPPA*. Alternately, CNA submits that even if I were to

find that CNA had not complied with the *ATIPPA* by ensuring that notification of the extension was received by the Applicant within the thirty day time period, "the Applicant did not suffer any unfairness or prejudice thereby," and asked that I determine that the Applicant's complaint on this matter was unfounded. Based on my analysis of this issue which follows in the discussion section of this Report, I believe much of CNA's argument is not necessary, and I will not reproduce it here.

[26] CNA then proceeded to address the Applicant's complaint, as indicated in his Request for Review form, which alleged that the College had failed in its duty to assist the Applicant. CNA says that no specific allegation was leveled by the Applicant in his Request for Review form, so it can only make assumptions on this allegation, and its submission is based on those assumptions.

[27] CNA footnoted a number of Commissioner's Reports from other jurisdictions as well as other sources in outlining its interpretation of the duty to assist. CNA divides the duty to assist into two categories:

> *(1) (a) the duty to make every reasonable effort to assist an applicant in making a request and (b) the duty to respond to the applicant in an open, accurate and complete manner; and (2) the duty to conduct a reasonable search for records responsive to the applicant's request.*

[28] CNA says its research indicates that "the standard by which to judge whether a public body has fulfilled its duty to assist is 'reasonableness,' not perfection," and "the 'reasonableness' of the public body's actions in fulfilling its duty to assist is fact-specific."

[29] In relation to its points 1(a) and (b), CNA refers to the *ATIPPA Policy and Procedures Manual* produced by the Department of Justice *Access to Information and Protection of Privacy* Coordinating Office (the "Manual"). CNA says the Manual requires Access and Privacy Coordinators of public bodies to "assist applicants in various ways, including 'explaining the Act, helping them to narrow their requests, directing them to other sources of information." CNA says that "in short, the duty to assist an applicant in making a request can involve assisting

the applicant in the mechanics of making the request, identifying appropriate criteria and suggesting who might hold records which might fit the applicant's criteria, among other things."

[30] CNA comments that "this applicant has to date filed 26 requests" for information with CNA, and "many of these requests have required clarification of criteria surrounding the requests. This request was notable in that the criteria were clear from the start and there was no need to assist the applicant in that manner." CNA says that

> *the duty to respond in an 'open, accurate and complete' manner is generally interpreted to mean that the public body, when making its response to the applicant's request is to (i) tell the applicant whether or not it is granting access to the records; (ii) identify records which are being withheld and provide reasons for withholding the records; (iii) inform the applicant of his or her right to review, and in general, give the applicant a complete picture of the public body's response to his or her request including reasons.*

[31] CNA notes the series of correspondence which took place between it and the Applicant, in which it "promptly acknowledged the Applicant's request and follow-up correspondence, made every effort to answer the questions posed by the Applicant in follow-up correspondence, and responded to the Applicant's request within the response time allotted by the *ATIPPA*." CNA says that its actions in this regard "were those which would be viewed as reasonable by a fair and rational person," and in so doing, CNA suggested that it had fulfilled its duty to assist the Applicant.

[32] The second part of the duty to assist as put forth in CNA's submission involves the duty to conduct a reasonable search. CNA says that the fact that the Applicant limited his request to a specific, already identified group of 4300 e-mails meant that CNA could limit its search to the group and did not need to conduct a search of other records outside that group. CNA says that it has described in its submission the method it used to identify and sort the records as per the Applicant's request.

[33] CNA notes that the Applicant further qualified his request by stating that he wished to access "only those records which had not been supplied as a result of the earlier request." Further, CNA

says that it "compared the records released as a result of the earlier request with those which were deemed responsive to this request in order to identify records which had not already been supplied to the applicant." CNA says that this exercise yielded no records which fit the Applicant's criteria. CNA says that it has fulfilled its duty to assist the Applicant with respect to its efforts to conduct a reasonable search for records responsive to the Applicant's request.

III APPLICANT'S SUBMISSION

[34] The Applicant indicated in his formal submission that he requested this Review based on his position that he has "no reasonable assurance that CNA has provided all records responsive to my request." The Applicant acknowledges that there may be records which were missed as a result of "mistakes or oversights, which one would expect to normally be part of a request such as this where a large set of records is involved." However, the Applicant believes that in this case there were "deliberate actions" on the part of CNA which resulted in responsive records not being released.

[35] The Applicant says that there were important issues which arose during the pursuit of his request, but he indicates that the focus of his submission is on his attempt to secure the records which were responsive to his request. The Applicant then proceeded to outline some of the background to his present (2006) request, beginning first with the details of his 2005 request and the subsequent handling of that request by CNA, and how that request was concluded. I will not reiterate those details, as the decision by this Office to accept a review of the Applicant's 2006 request speaks for itself. In other words, in reviewing the Applicant's 2006 request, I accept that there appeared to be significant problems with the 2005 request, which necessitated this Office agreeing to look at the entire set of approximately 4300 records, not just those which CNA had deemed responsive in 2005.

[36] The Applicant, in this portion of his submission, continued to propose various theories as to why some of the records responsive to his 2005 request were either not disclosed to him or to the OIPC for review. The Applicant proposes that CNA deliberately hid some e-mail records, or

deliberately categorized responsive records as non-responsive, due to the fact that the Applicant was going through a grievance procedure with CNA.

[37] The Applicant says that in January of 2006 he supplied copies of four e-mails to this Office, which were responsive to his 2005 request, and were in his opinion "eligible for release," yet were not released to him at that time. The Applicant says that these particular e-mails were obtained by him through another request which overlapped some of the same records covered by his 2005 request.

[38] The Applicant notes that when he brought his concerns about these e-mails to this Office, our analysis was that two of the four responsive e-mails had not even been provided to this Office by CNA for Review in response to the Applicant's 2005 request and subsequent Request for Review. Of this, the Applicant comments:

> *Essentially on this file CNA was operating outside of and in defiance of the provisions of the ATIPPA. I had no confidence that all the records recommended for release from the 4300 had indeed been released or even more disturbing, I had no confidence that all of the emails deemed to be responsive records had even been supplied by CNA to the OIPC.*

[39] Following this, the Applicant decided to proceed with his 2006 request to CNA, which is the subject of this Review. As noted above, his request was for all records referencing him which had not been previously released to him from the group of 4300. The Applicant says that his request

> *was straightforward and represented an opportunity for CNA to review the processes used in the former search, and deal honestly with the fact (well established at this point) of the missing emails. CNA chose a different approach; one of delay and denial.*

[40] The Applicant notes that CNA responded to his request on 19 May 2006 by stating that "the search of these records did not produce any new records for disclosure." The Applicant noted that the use of the term "for disclosure" caused some concern for him, because in his opinion, it would have been a more transparent response to say that there were no additional responsive

records found. The Applicant felt that this left the door open to the notion that perhaps CNA was saying that no new records should be disclosed, rather than whether additional responsive records were identified.

[41] The Applicant then recounted in correspondence to CNA dated 29 May 2006 some of his doubts about whether CNA had disclosed to him all of the records to which he is entitled, whether in his 2005 or his 2006 request. He listed a number of other e-mails which he had acquired from another Applicant whose request contained some overlap of responsive e-mails. These were e-mails which the Applicant felt were clearly responsive to his request, and were disclosed to the other Applicant. He also referenced the similar e-mails which he had already brought to the attention of this Office. The Applicant also indicated that some of the e-mails he brought to the attention of CNA were disclosed to him by CNA as a result of other access requests he had filed, but he believed them to be responsive to both his 2005 and 2006 requests, and believes he should have received them at that time. He indicated in his submission that this letter to CNA was meant to show that there were still problems with the handling of records from the group of 4300, and therefore that there could have been other missing e-mails of which he was not even aware.

[42] The Applicant says that CNA's letter of response to his 29 May 2006 correspondence was

> *confusing, gave inaccurate information and requested that I send to CNA the additional emails which CNA could not account for. It was unfortunate that CNA was requesting from the applicant the emails that were in the possession of CNA, responsive to my request yet not released. These emails had been identified to CNA. Apparently, CNA was willing only to deal with the emails that I could identify as missing; and was not forthcoming in conducting a real search or proper investigation as to why this situation was taking place. There was no acknowledgement that the representative emails supplied to the OIPC and to CNA, pointed to the possibility that other records may be missing as well. In her correspondence* [*CNA Access and Privacy Coordinator*] *incorrectly labeled some emails as not containing personal information.*

[43] The Applicant concluded after receiving this correspondence that CNA was standing by its most recent search of the records. He also noted that CNA indicated in its correspondence that it would respond further within ten business days to some of his questions which they were unable

to answer. The Applicant chose not to wait for this further response, however, as he filed his Request for Review with this Office on 2 June 2006.

[44] The Applicant notes that this Review resulted in his receipt of a piece of correspondence from CNA in March 2007 indicating that it was supplying additional records to him as per recommendations by this Office. The Applicant says he received over 1000 additional e-mails from this disclosure. The Applicant emphasized in his submission that he would like an explanation for why he did not get some of the records to which he believes he was entitled, either in response to his 2005 or 2006 request, which were later disclosed to him during informal resolution efforts as part of this Review. The Applicant also listed some specific questions in this regard, in the hope that this Review will result in greater accountability on the part of the public body.

IV DISCUSSION

[45] In a sense, this matter has been ongoing in one form or another since the access provisions of the *ATIPPA* were first proclaimed into law in January 2005. The Applicant's first Request for Review became my Report 2005-001. In previous reports I have tried to delve into every detail, recounting the gist of each communication between CNA, the Applicant, and this Office, of which there have been many. In this Report, I have determined that there is limited benefit in doing so, as the results speak for themselves. Essentially, the Applicant's issue is that there were records responsive to his earlier request to which he was entitled which he never received, and that this Office also did not receive back in 2005 when this matter first came to me for Review. In order to address this, the Applicant requested access to the approximately 4300 records which resulted from the College's electronic records search for e-mails responsive to his initial request. At the time, when this matter first came to me for Review in 2005, the College provided roughly a quarter of this number of records to me for Review. The remainder, I was told, were duplicates, or were not responsive to the initial request. This is acceptable practice, as there is no requirement under the *ATIPPA* for any public body to provide duplicate copies or non-responsive records to me for Review.

[46] However, when the Applicant came back to me to request a Review of this matter in 2006, he was able to demonstrate to me a significant likelihood that some records responsive to his Request had not been provided to him as a result of his request in 2005. When these records were brought to our attention, this Office was also able to determine that certain responsive records had also not been provided to this Office for Review back in 2005. The Applicant was able to do this largely as a result of being provided with copies of records by another Applicant, which were responsive to the requests of both Applicants.

[47] CNA's position is that a new search was conducted of the 4300 e-mails in response to the Applicant's 2006 request, but no new records were identified for disclosure. In its submission, CNA says that subsequent to issuing its response, it was advised by the Applicant of evidence to suggest that additional responsive e-mail records should exist (accompanied by the Applicant's description of the e-mails). CNA then took the position that this proved that the Applicant already had possession of those particular e-mails, so there was no basis for the College to undertake another search of the records. CNA said in a letter to the Applicant dated 1 June 2006 that because the Applicant clearly now had possession of the e-mails which he was indicating had not been provided to him as a result of his 2005 request, CNA "considers your application as a request for information already provided to you and will not be taking further action on this file." CNA relied on section 13 of the *ATIPPA* in taking this position, which states:

> *13. The head of a public body may refuse to disclose a records or part of a record where the request is repetitive or incomprehensible or is for information already provided to the applicant.*

[48] It is clear from correspondence sent by the Applicant to the College that the Applicant's purpose in informing CNA about certain responsive e-mails which had not been received by the Applicant in response to his 2005 request was to alert CNA that there was a problem, and to ask CNA to fix that problem.

[49] CNA instead placed the Applicant in an untenable position. In order to establish a basis for saying that a reasonable search has not been completed, the Applicant must present a reasonable

basis to believe that responsive records exist which have not been disclosed. I dealt with the issue of "adequacy of search" in my Report 2005-006, in which I noted the following:

> *[65] 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*
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> > *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.*
>
> …
>
> *[66] Also in Ontario, the Assistant Commissioner stated in Order PO-1954 that:*
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> > *The Act does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, 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.*
>
> …

[50] In this instance, the Applicant presented a reasonable basis upon which to conclude that additional responsive records may have existed in relation to his 2005 request which were not disclosed to him, nor to this Office for the subsequent review, also in 2005. In my Report 2005-006 I stated my feeling that CNA now understood what was required in terms of a reasonable effort. Unfortunately, in the case of this particular review, I believe CNA made an error in judgment in failing to adequately address the problems identified by the Applicant.

[51] Although the College claimed section 13 in its follow-up response to the Applicant, CNA has indicated in its submission that it has interpreted the Request for Review in such a way as to leave its decision to use section 13 outside of the scope of this Review. CNA says in its submission that

> *The applicant did not ask the Commissioner to review the College's use of section 13 of the ATIPPA in making its response to his request and we make no submissions on that matter.*

[52] The Applicant specifically ticked the box on his form which asked that I review "a decision, act or failure to act" on the part of the College, and in his specific comments, he asked me to review the basis for his belief that "there are records responsive to my request which I believe have not been provided to me." First of all, in responding with section 13, CNA essentially said to the Applicant that CNA is refusing to disclose the requested records, because CNA believes the Applicant already has them. That is a decision on the part of CNA. The Applicant has asked me to review that decision. I have previously issued Reports in relation to the use of section 13 by public bodies, and I do not see any basis upon which to accept that a decision by a public body to rely on section 13 of the *ATIPPA* needs a special category of its own in order for this Office to undertake a review, particularly when the Applicant's language and intent were clear.

[53] The fact that the matter was informally resolved in 2005 does not prevent CNA from acknowledging the evidence put forth by the Applicant and conducting a further review based on his 2006 request to ensure that all records to which the Applicant is entitled were disclosed to him. I realize that CNA has set out in its submission how it went about doing its search and sort process as a result of the Applicant's 2006 request. However, after receiving CNA's response, the Applicant was able to put forward some evidence which made its search results questionable. CNA claimed at the time that it could justify many, but not all, of the items which weren't disclosed to him. CNA undertook to explain the remainder of those e-mails within ten business days, but this process was eclipsed by this Review.

[54] Rather than focusing on the small sub-group of e-mails identified by the Applicant, I accepted that the evidence presented by the Applicant at least established a basis for me to undertake this Review, and in that process I chose instead to focus on the entire 4300 e-mail records. The Applicant essentially was able to show that the informal resolution that was attained in 2005 was based on incomplete information, in that the records which were received by this Office at the time did not contain all of the records which I have now found to be responsive as a result of my review of the Applicant's 2006 request.

[55] CNA says in its submission that I reviewed "the same group of 4300 records" in my review of this matter in 2005. That is incorrect. As noted above, the group of approximately 4300 e-mail records resulted from an electronic search, which also contained duplicate and non-responsive records. CNA was not obligated in 2005 to provide to me copies of records which it determined were duplicates or non-responsive records. Instead, I reviewed a smaller proportion of the records, which were all of the records CNA certified at the time as being responsive to the request. I noted in my Report 2005-006 that I was satisfied with the results of that process, because after I reviewed the records as part of our informal resolution efforts, CNA agreed to release all those which had previously been withheld which I determined did not qualify for an exception by CNA under the *ATIPPA*. It is important to note that this particular Review (of the Applicant's 2006 request) asked CNA for access to all of the 4300 records containing a reference to him which had not previously been provided to him. That means that my current review covers all 4300 records, not just those which CNA deemed in 2005 to be responsive. It is clear from my current Review that the end result has meant that there were responsive records which were not provided to this Applicant, nor to this Office as part of the 2005 Review, which should have been. CNA says that "the Commissioner … pronounced himself satisfied," with the results of the 2005 Review. It is important for CNA to recognize that this satisfaction relied on an assurance from CNA that I had been provided with all responsive records at that time, which my current Review has led me to conclude was not the case.

[56] On the other hand, in terms of the records responsive to the Applicant's 2006 request, it is important to note that this Office has now reviewed all of the approximately 4300 records involved in this file during our efforts at informal resolution. A large number of additional records were proposed for release by this Office as a result of that informal resolution process. The College agreed to release all of the records as per our proposal. Despite this, the Applicant felt that there were significant issues at play in this Review which would warrant a Commissioner's Report.

[57] This brings me to the "duty to assist," which is one of the items which the Applicant asked me to Review. I take no issue with the College's understanding, described in its submission, of what constitutes the duty to assist, but I question whether it was fully executed in this case. I

have no problem in accepting the College's assertion that "reasonableness" rather than "perfection" is the standard by which a public body should be judged in this regard. The duty to assist is set out in section 9 of the *ATIPPA* 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.*

[58] One problem I note here is that in its initial response to the Applicant's 2006 request, dated 19 May 2006, CNA simply states that the search of the records did not produce any new records for disclosure. Later, in its submission to this Office, CNA explains that a portion of the records were set aside because they were "work product" e-mails, rather than personal information. CNA appears to have assumed that the Applicant did not want work product records because he ticked the "personal information" box on his application for access, but the wording of his request is clearly much broader, requesting all records which contain any reference to him at all. If CNA noted this contradiction, then there was a need for clarification of the Applicant's request. It is clear to me that the wording of the Applicant's request was clear and unambiguous. If CNA perceived a conflict with the wording and the ticked box, there was an onus on CNA to confirm with the Applicant whether he wanted both personal information and work product e-mails or not.

[59] Certainly, many of the e-mails from among the 4300 are "work product," rather than personal information. However, as CNA notes, this Applicant has filed numerous requests for similar types of information. Only in his first request were any records withheld on that basis, and a fee estimate issued. Many of his other requests contained similar wording, many involving the same type of e-mail records. After processing so many similar requests without charging a fee or considering some e-mails as "work product," to arbitrarily set aside e-mails as being non-responsive on the basis that they are "work product," without either issuing a fee estimate or clarifying the request with the Applicant prior to the issuance of its 19 May 2006 response to the Applicant was, in my view, not an action in keeping with the duty to assist.

[60] I am not going to go into a discussion in this Report on the nature of work product versus personal information, as the point is now moot, given that CNA, during informal resolution efforts, released all of the e-mails suggested by this Office for release. I am only commenting on this in the context of the duty to assist, and in that regard I will reiterate that if the Applicant checks a box on his request form which CNA feels is in some contradiction with the actual wording of his request, I think it would be reasonable to clarify the Applicant's request at that stage.

[61] The second part of the duty to assist, as described by CNA in its submission, involves the duty to conduct a reasonable search. I have already set out my position above in relation to CNA's use of section 13 in response to evidence provided by the Applicant that some responsive records may not have been identified and disclosed to him. Once again, I must conclude that the search undertaken by CNA was not adequate to identify all responsive records. Whether this was due to human error in the search process, or decisions on the part of CNA as to whether certain records were responsive or not, or some combination of the two, is difficult to determine, but based on my review of the responsive records, I believe it may be a combination of both factors.

[62] This brings me to the first of CNA's proposed reasons why responsive e-mails were forwarded to me in relation to the 2006 Review which were not provided to me in response to the 2005 Review. CNA's first argument is based on "*ATIPPA* sophistication," in other words, the *ATIPPA* was brand new when the Applicant made his request in 2005. With such a massive request, and an entirely new process, CNA was up against a challenge. My Reports 2005-001 and 2005-006 show that CNA had some trouble handling this challenge. CNA says that it learned some lessons from that process, but a change in personnel meant that some of those lessons had to be re-learned as a result of the Applicant's 2006 request. I accept that this kind of request does pose a certain challenge, and that employee turnover can have this effect. This does not, of course, relieve CNA of its responsibility under the *ATIPPA*, but it does offer part of a rational explanation as to why things turned out as they did.

[63] The second reason proposed by CNA as to why some e-mails responsive to the Applicant's request were provided to me in this Review, but not in relation to the 2005 Review is that it did

not provide extra copies of the same e-mail, nor did it provide e-mails which were about other people with names similar to the Applicant, which were returned during the electronic search. I acknowledge that this accounts for a large proportion of the difference between the numbers of records reviewed by this Office in relation to each Review, and this factor is for the most part legitimate, except for the fact that in reviewing the records, we found that quite a number of responsive e-mails were found in binders labeled by CNA as "wrong person," which in fact contained references to the Applicant.

[64] The third reason put forth to explain the discrepancy appears to be the primary one proposed by CNA, because CNA says in its submission that this reason accounts for "the only difference in response between the 2005 request and the current request." This difference, according to CNA is accounted for by the fact that during the informal resolution process, in consultation with this Office and the Applicant, the Applicant forwarded a letter of permission from his spouse authorizing the disclosure of records from the 4300 which also referenced her. In my opinion, this accounted for the release of some additional records, but not all. On the contrary, we reviewed a number of records in this current Review which were responsive to the Applicant's request, which were not provided to this Office for review in 2005, and which, regardless of any subsequent release of records referring to the spouse, should, in my opinion, have been released to the Applicant as a result of his 2006 request.

[65] The fourth reason proposed by CNA to account for this discrepancy is technical difficulties. CNA says in its submission, as noted above, that there were printing errors experienced when processing the Applicant's 2005 request. CNA says, however, that a different software package was in place during the 2006 request process, which meant that there were significant improvements over the results from 2005. CNA says that this accounted for additional responsive records being identified and supplied to this Office for Review in 2006 which were not provided for Review in 2005. This may very well have accounted for some of the discrepancy, however, it does not excuse the fact of this discrepancy in relation to CNA's response to the Applicant's 2006 request.

[66] The final reason put forth by CNA to account for the difference between the records provided to this Office for Review in 2005 versus 2006 has to do with how it determined whether or not a record was responsive. Again, this goes back to the concept of "work product" e-mails versus personal information, which I discussed above in relation to the duty to assist. I have already outlined my position on this particular matter, but I offer some comments on CNA's position here.

[67] CNA says that it began from a clean version of the 4300 records when it responded to the Applicant's 2006 request. CNA has also confirmed to me in regard to the small group of 210 e-mails that it withheld from the Applicant in response to the 2005 request pending payment of a fee (which the Applicant never paid), that this group was included among the entire group of 4300 e-mails when the 2006 search was conducted. Interestingly, from the numbers provided by CNA, a different total was reached for that category in terms of "work product" e-mails, also referred to by CNA as "not personal." Even so, as noted above, no fee estimate was issued to the Applicant. The only reference to a fee estimate was in correspondence from CNA to the Applicant on 29 May 2006 in which it said that some of the e-mails identified by the Applicant as responsive but not disclosed in 2005 were in fact part of this group of 210 e-mails, for which a fee estimate was issued. According to CNA's formal submission, only 13 items were identified as work product, and therefore not personal information, in its processing of the 2006 request. This group of "work product" e-mails was a much larger number in the 2005 request – 210 e-mails according to a fee estimate issued by CNA on 8 July 2005. This should have been enough to justify a new fee estimate in its response of 19 May 2006, rather than making the assumption that the Applicant was not seeking those e-mails. Even if I were to accept CNA's position that it was justified in withholding "work product" e-mails as non-responsive, it is clear to me that there were a number of e-mails which were not provided to the Applicant nor to this Office in 2005, and which were withheld from the Applicant in 2006, which would not qualify as "work product." In any case, I did not consider "work product" when reviewing the records, because I found the Applicant's intention to be abundantly clear in the wording of the Applicant's 2006 request, and in his Request for Review form, and related correspondence.

[68] Despite offering these various theories as to why this discrepancy may have occurred, the College, in its submission, put forth the position that it stands by its initial response to the Applicant's 2006 request. The College says that it did a search of the 4300 records in response to the Applicant's 2006 request, and determined that no additional records should be disclosed.

[69] All e-mails to which the Applicant is entitled in relation to his 2006 request have now been provided to him as a result of the informal resolution efforts undertaken by this Office during the course of this Review. This process involved a complete review by this Office of the group of approximately 4300 e-mail records. It is possible that some of these had already been acquired by the Applicant in other similar requests in the interim, but we were able to confirm, by comparison with our records from the 2005 request, that a number of responsive records were not provided to this Office for review in conjunction with the Applicant's 2005 request. Many of these additional e-mails may have been accounted for by the various rationales proposed by CNA. Certainly, a large proportion of them were indeed e-mails about persons other than the Applicant, or duplicate copies of responsive e-mails. To reiterate, however, it is my conclusion that there were some e-mails which should have been provided to this Office in 2005 which were not, and consequently, there were e-mails which were responsive to the Applicant's 2006 request which were not provided to him at either juncture. Based on my proposal to CNA during the informal resolution stage of this Review that certain additional records be released to the Applicant, and CNA's acceptance of that proposal, it is my understanding that all such e-mails have now been provided to the Applicant.

[70] The third issue raised by the Applicant is in relation to CNA's use of the thirty day extension provision found in the *ATIPPA*. In its notification letter, dated 20 April 2006, CNA relied on section 16(1)(b), which is as follows:

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

[71] While the Applicant did not address this issue in any detail in his submission, CNA did go to some lengths to defend the timing of its notification of the extension, namely, its position that its letter of notification was provided to the Applicant within a reasonable period of time and not in contravention to any provision of the *ATIPPA*. The College says that it received the Applicant's application for access on 23 March 2006. The College sent a letter dated 20 April 2006 to the Applicant advising him that it was extending the response time by thirty days as per section 16(1)(b). The College indicated in its submission that the due date (the end of the first thirty days) for this request was 22 April 2006, which was a Saturday. In fact, according to page 3-26 of the Department of Justice *Access to Information And Protection of Privacy Act Policy and Procedures Manual*, "if the 30 day period ends on a Saturday, Sunday or statutory holiday, the time for responding is extended to the next day that is not a Saturday, Sunday or statutory holiday." This means that the actual due date was 24 April 2006. The Applicant has confirmed that he received the letter extending the time limit on that day. The only error here was the College's error in designating the due date to be a Saturday, and advising the Applicant of the incorrect due date. Other than that, the College acted in compliance with the *ATIPPA*.

[72] In terms of the actual rationale for the thirty day extension, I think the number of records and the time it would take to go through them would easily meet the conditions for an extension as described in section 16(1)(b) of the *ATIPPA*.

V CONCLUSION

[73] It cannot be precisely determined, in hindsight, why certain responsive records were not disclosed to the Applicant, nor to this Office for review, in relation to the Applicant's 2005 request. Some combination of the reasons proposed by the parties in their submissions may be at play, but I am not going to assign blame here in relation to what happened in 2005, which has already been covered in two Reports. The bottom line is that after this Office reviewed all 4300 records, we found far more records which should have been provided, first to this Office for review in 2005, but in some cases also to the Applicant, not only in response to his 2005 request, but also in response to his 2006 request, which is the subject of this Review.

[74] CNA has described how its search was undertaken following the Applicant's 2006 request, and how all of the records were placed in different categories. The experience of this Office in reviewing the records is that numerous records were actually miscategorized. Responsive records were found in groups where only non-responsive records should have been. Records relating to the Applicant were found in groups where only "wrong person" records should have been found. I do not know whether these sorting errors account for all of the mistakes made by CNA, but in the end, the point is academic. After receiving our recommendations during informal resolution efforts, CNA agreed to release all of the records to which this Office indicated that the Applicant should be entitled under the *ATIPPA*. Despite these findings, I have no basis upon which to support the Applicant's allegation that there was a deliberate attempt by CNA to affect the outcome of a grievance hearing by suppressing responsive e-mail records.

[75] In regard to the complaint about the fees and the 30 day extension, I find that the Applicant's complaints are not well founded. However, I find that despite the massive undertaking involved in searching through the group of 4300 records, and despite the efforts of CNA, which were significant, there were specific failures of the duty to assist, which I have outlined above.

[76] Regarding the College's decisions in relation to the actual records, I find that CNA did err when it responded to the Applicant by saying that there were no new records for disclosure, however, this was rectified when additional records were disclosed to the Applicant during the informal resolution process. Therefore, it is not necessary for me to make a recommendation in that regard. Accordingly, I hereby notify the Applicant, in accordance with section 49(2) of the *ATIPPA*, that he has a right to appeal the decision of the College to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60. The Applicant must file this appeal within 30 days after receiving a decision of the head of the College as per paragraph 78 of this Report.

VI RECOMMENDATION

[77] I hereby issue the following recommendation under authority of Section 49(1) of the *ATIPPA*:

> That the College make every reasonable effort to assist an applicant in making an access to information request and to respond without delay to an applicant, in an open, accurate and complete manner, as required by section 9 of the *ATIPPA*.

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

[79] Dated at St. John's, in the Province of Newfoundland and Labrador, this 6th day of July, 2007.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador