October 24, 2007 **2007-014**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2007-014

College of the North Atlantic

Summary: The Applicant applied to the College of the North Atlantic ("CNA") for access to certain e-mail records. CNA responded by citing section 10(1)(b) and section 8(2) of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*"). CNA later dropped its reliance on section 8(2) after the Applicant questioned its relevance to the request, but maintained its reliance on section 10(1)(b) because it said that the volume of records to be searched was so large as to interfere unreasonably with its operations. The Applicant then amended his request, to reduce the number of records to be searched. CNA responded by saying that there were no records responsive to the amended request. The Applicant filed a Request for Review with the Commissioner's Office and provided evidence that responsive records did exist. CNA then did a further search, found the responsive records, and confirmed that an error had been made. CNA subsequently provided the Applicant with copies of the responsive records, while withholding some information on the basis of sections 20, 21, 22, 24 and 30 of the *ATIPPA*. During informal resolution efforts, CNA agreed to release all additional records which were proposed for release by the Commissioner's Office. After the additional records were released by CNA, the Applicant decided not to resolve the matter informally and asked the Commissioner to proceed with a Report. It was also discovered during the course of this Review that CNA had been in error about the number of records involved for which it had claimed section 10(1)(b), although CNA maintained its position that the number of records was still too high. The Commissioner agreed that CNA was justified in its use of section 10(1)(b), despite its earlier error. The Commissioner also found that CNA was not correct when it stated to both the Applicant and to the Commissioner that it had previously checked and confirmed the number of records which prompted its claim of section 10(1)(b). The Commissioner further determined that the CNA had failed in its duty to assist, because it did not respond to the Applicant within a reasonable standard of accuracy.

Statutes Cited: *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, as am, ss 2, 5, 8, 10, 20, 21, 22, 24, 30, 49(1), 50, 60; *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996 C. 165, s 6(1); *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 10(1).

Authorities Cited: Newfoundland and Labrador OIPC Reports 2005-006, 2006-003, 2006-013 and 2007-010; British Columbia OIPC Orders 00-51, 00-15, 00-26, 00-32, 01-42, 01-43, 01-44, 01-45; Alberta OIPC Orders F2003-09, F2003-15.

I BACKGROUND

[1] On 5 October 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 records, including but not limited to e-mails, attachments, reports, letters, meeting notes that reference me and/or* [*Applicant's spouse*] *in any way or contain any personal information. I am requesting records which are in the custody of CNA, whether or not the individuals named in this request are employees of CNA, or not employees of CNA.*
>
> *The dates for this request are April 1, 2005 to October 4, 2006 inclusive. Specific to the requested e-mails I am requesting records to, from or copied to, including attachments.*
>
> *This request is for records with reference to the following persons:*
>
> [*list of eight named individuals*]

A letter of permission from the Applicant's spouse was provided to CNA with the request form.

[2] The Applicant's initial request was followed by a series of correspondence between CNA and the Applicant in which a number of issues were raised, a response was provided by CNA and later amended, and various disagreements arose between the parties in relation to the request. On 22 November 2006 the Applicant amended his request as follows:

> *I am narrowing my search parameters to request the e-mails of* [*three named individuals*] *for the time period of April 1, 2005 to October 4, 2006.*

[3] On 1 December 2006 CNA responded to the Applicant's amended request, advising the Applicant that no responsive records were found.

[4] On 11 December 2006 a Request for Review was received at this Office from the Applicant as follows:

> *I am requesting that the OIPC review the decision made by CNA that no records exist responsive to my request. I have included in this submission e-mail records*

> *that would appear are responsive to my request. In addition to the attached e-mails it seems quite unlikely that there would be no records responsive to this request in this particular time period. I would assume that the declaration by CNA that no records exist would rule out the possibility that records are being withheld citing a specific exception under the ATIPPA, and that all locations have been searched including backups.*
>
> *Further, I am requesting that the OIPC investigate the failure to assist the applicant. I have addressed questions to* [*CNA Access & Privacy Coordinator*] *regarding the large number of records (as referenced by* [*CNA Access & Privacy Coordinator*]*) responsive to my request. The response from CNA, while not providing an answer, has however raised more questions as to how many records exist.*

[5] CNA later acknowledged errors in its search for the responsive records, and the search was conducted again following receipt of the Applicant's Request for Review. A significant number of records were identified as a result of that search. On 8 January 2007 CNA forwarded a set of responsive records to the Applicant, withholding and severing some information based on sections 20, 21, 22, 24 and 30. On 16 January 2007 a copy of all records responsive to the Applicant's request, including those which were severed or withheld, was provided to this Office for review.

[6] As a result of informal resolution efforts, CNA agreed to provide all records to the Applicant which were proposed for release by this Office. This resulted in additional records being forwarded to the Applicant on 13 April 2007. Despite this, due to the many concerns raised by the Applicant about the process which had been followed by CNA in responding to his initial request and subsequent amended request, and about how the searches were conducted, the Applicant did not wish to accept an informal resolution, and instead requested that I issue a Report on this particular matter.

[7] Both parties were notified of this in a letter dated 10 May 2007, at which time they were given the opportunity to provide formal submissions. Both CNA and the Applicant chose to provide submissions, which are summarized in this Report.

II PUBLIC BODY SUBMISSION

[8] The College began its submission with a brief summary of the background to this particular matter. CNA commented at the outset that it has already disclosed to the Applicant all records proposed for release by this Office during informal resolution efforts. CNA also recounted many of the issues raised in the various exchanges of correspondence between the Applicant and CNA.

[9] CNA indicated that after receiving the Applicant's initial request, it sent correspondence to the Applicant on 16 October 2006 citing sections 8(2) and 10(1)(b) of the *ATIPPA*, and requesting that the Applicant amend his request, on the basis that responding to the request in its original form would constitute an "unreasonable interference with College operations."

[10] CNA says that the letter also advised the Applicant that CNA would be unable to search the e-mail inbox of one of the individuals named in the Applicant's request, because that individual was not a College employee, but rather an employee of the State of Qatar (College of Technology). CNA then referred to the definition of "employee" as found in section 2(e) of the *ATIPPA*.

[11] CNA then referred in its submission to a letter dated 3 November 2006, sent to the Applicant by the CNA General Counsel and Corporate Secretary in response to a question raised by the Applicant in his e-mail to CNA dated 20 October 2006 about CNA's use of section 8(2) of the *ATIPPA*. CNA had claimed in its 16 October 2006 response to the Applicant that "section 8(2) places the onus on the applicant to provide sufficient details about the information requested in order that an employee of the College could identify the records requested." In its letter of 3 November 2006, the CNA General Counsel stated that the Applicant's request did in fact meet the requirements set out in section 8(2). CNA did not comment in any detail as to why it had previously held the position that the Applicant's request did not meet the standard set out in section 8(2), neither in its correspondence to the Applicant nor in its submission.

[12] CNA then referenced another letter dated 3 November 2006 which it sent to the Applicant. CNA says that this letter addressed two concerns raised by the Applicant, the first being its use

of section 16 to extend the time limit for a response. The second issue CNA says it addressed with that letter is CNA's position on searching the records of someone who is not a CNA employee. CNA stated the following in its 3 November 2006 letter to the Applicant (which it mistakenly referred to in its submission as the 16 October 2006 letter):

> *ATIPPA does not allow us to go to the State of Qatar to search their employee's records. If a record is transmitted between* [*State of Qatar employee*] *and CNA and is kept by CNA it is a record in our custody and control and is included in our search. We are not refusing to release records in our custody.*

[13] CNA says that it received an e-mail from the Applicant on 22 November 2006, "nearly six weeks after CNA wrote the Applicant asking for narrowed search criteria," containing an amended request which narrowed the scope of information to the e-mail records of three individuals, within the same time period as his original request.

[14] In its submission, CNA lamented the length of time it took to work with the Applicant, noting that it took 36 days to finally negotiate the specifics of the request. CNA says that in accordance with my recommendation in Report 2006-015, CNA responded to the Applicant's questions and concerns in a timely manner. CNA also notes that this Applicant had filed a number of previous requests, and further states that

> *It is regrettable that such a sophisticated user of the ATIPPA would require so long to clarify criteria. Had this been more swiftly done, CNA may have been able to avoid the confusion that led to the unfortunate conclusion of this matter.*

[15] CNA then outlined the process undertaken to carry out the search for the records requested by the Applicant. CNA says that its IT group was asked to undertake the search on 6 October 2006. CNA says that a response was received from a Technical Analyst with its Newfoundland IT operation, listing results for the persons named in the search. Of the eight individuals named, the inboxes of four of them were found to contain a total of 953 e-mails referencing the Applicant within the time period specified in the Applicant's request. There were a further 3,967 e-mails with attachments found in the archives of the same four individuals within the time period responsive to the Applicant's request, for a total of 4,920 responsive and "potentially"

responsive records. These were considered to be "potentially responsive" by CNA, because the Applicant had requested that attachments also be searched, yet CNA did not at that time have the ability to do an electronic search of attachments, so these would have to be searched manually. Therefore, CNA considered any attachment to be potentially responsive, as each one would have to be searched manually in order to identify any references to the Applicant.

[16] It should be noted that while the IT Group found 3,967 attachments in total for four individuals, the Applicant was advised in correspondence of 16 October 2006 that the e-mail archive belonging to one of the same four individuals contained over 12,000 attachments which would have to be searched manually. How this came about is described in the College's submission as explained by the CNA Access & Privacy Coordinator ("CNA Coordinator"):

> *On October 13, 2006* [*CNA employee*], *one of the individuals named in the request, responded to the notice sent by this office regarding the search indicating that I had his full cooperation but cautioned that his email archives contained over 12,000 emails with attachments in total. The number of emails and attachments presented some confusion as* [*CNA employee*] *was referring to the total number of emails and attachments in his archives rather than the number of emails and attachments in his email box which fit the time frame in the criteria.*

[17] At the same time as the Coordinator was in receipt of this comment from that individual, she was also in possession of a result from the Technical Analyst who performed the search of CNA-NL e-mail archives indicating that there were 641 responsive e-mails in the account of the same CNA employee, as well as 1,869 attachments in that individual's e-mail account falling into the time period specified in the Applicants request. In an e-mail dated 3 November 2006, in response to the Applicant's concern that the figure of 12,000 attachments was an improbably high one, CNA advised the Applicant that in addition to the 12,000 attachments, there were also 2,098 e-mails with attachments in the e-mail accounts of three other individuals named in the request. The figures for the total number of e-mails directly referencing the Applicant were not provided at that point. These three, plus the one who was mistakenly determined to have 12,000 attachments in the requested time frame, were the four individuals (out of eight names requested by the Applicant) who CNA believed at that point to be in possession of e-mail records responsive to the Applicant's request.

[18] Despite the discrepancy between the number of e-mail attachments directly reported by one individual (12,000) versus the number found by the CNA-NL Technical Analyst (1,869), CNA says that the total number of electronic records which would have had to be reviewed manually "was excessive and the review of this number of records would interfere with the College's operations." Weeks after CNA's letter of 16 October in which it essentially refused the Applicant's request, asking instead that the Applicant amend his request, the "former Wide Area Network Administrator for CNA-Qatar" on 7 November 2006 informed the CNA Access and Privacy Coordinator that no records matching the Applicant's 5 October 2006 request had been found at CNA's location in Qatar.

[19] CNA says that following receipt from the Applicant of an amended request (which CNA refers to as revised "search criteria") on 22 November 2006, "IT staff were again contacted to confirm the numbers presented in October." This amended request, as noted above, involved searching the records of three individuals out of the eight previously listed by the Applicant. CNA says that a response was received from the Technical Analyst at CNA-NL on 27 November 2006 stating that there were no results, because the archives in Newfoundland for those three people were created on 5 March 2004, which would contain no e-mails later than that date, and therefore no e-mails responsive to the Applicant's request. The CNA Technical Analyst did, however, also state that the e-mail addresses of two of the three named individuals were "e-mail address redirects," which would mean that an e-mail sent to either of them would be redirected to their Qatar mailboxes, and would not be saved on the CNA-NL server.

[20] CNA says in its submission that despite this factor, there was a problem in obtaining a response from CNA-Qatar to the Applicant's amended request. CNA says that CNA-Qatar closed at the end of November due to the Asian Games taking place at that time in Qatar, "and most administrative staff and faculty had left Doha on pre-arranged holidays." CNA says that on 1 December 2006, after receiving no response from CNA-Qatar "and finding it unlikely that the College would receive any response before the deadline of December 6th, CNA responded to the request and reported that no records were found."

[21] CNA says that on 15 December 2006 it received the Applicant's Request for Review from this Office, and in order to respond to the issues raised by the Request for Review, CNA contacted its Information Technology group to request

> *…a fuller description of the search they completed, the set up of the mailboxes for which they reported no archives and if no records were found where, as indicated by the material provided by the applicant, records were expected to be found, the reason why the records were not found.*

[22] CNA says that on 20 December 2006 the former Wide Area Network Administrator at CNA Qatar responded to the request "with a link to an archive containing 1600 e-mails which required a full line by line review prior to release to the Applicant." According to CNA's submission, this person was only able to explain to CNA at the time that he thought the information had already been sent.

[23] CNA says that on 21 December 2006 the Applicant was informed that records had now been identified, and further that the records would be reviewed and released to him before 15 January 2007. CNA says that on 8 January 2007 a severed set of records was sent to the Applicant, and that in March 2007 a further package of records was released to the Applicant as a result of informal resolution discussions with this Office.

[24] CNA then commented in its submission on a particular e-mail received from the Applicant on 5 December 2006, in which the Applicant expressed his displeasure with CNA's 1 December 2006 response to his request, as well as other answers given to him by CNA in response to his previous e-mail communications with the College. CNA says that one of the issues raised by the Applicant in his e-mail was what he felt was an inadequate response to his queries about the figure of 12,000 e-mails which had been put forth in CNA's letter of 16 October 2006.

[25] CNA says it responded to the Applicant's e-mail with a letter dated 8 December 2006 in which it reiterated its previous response on the issue, but

> *…also acknowledged that CNA should have let the applicant know that we did take his assertion that some mistake had been made in the search had been taken*

> *seriously and we had in fact asked the IT staff to double check their results. At that time we had no way of knowing that the third request to check the search results would reveal records not found previously.*

[26] CNA then proceeded in its submission to provide extensive commentary about the duty to assist, as outlined in section 9 of the *ATIPPA*. CNA says that the Applicant requested the review based on his belief that CNA failed in its duty to assist. CNA states that the duty to assist encompasses two areas: whether the public body has assisted the applicant in that it has responded openly, accurately and completely and whether the public body has conducted a reasonable search for the records requested by the applicant.

[27] CNA says in its submission that a public body has fulfilled its duty to assist

> *… when it has conducted a search in all those places in which a reasonable person would expect a public body to search for records. The standard is not perfection but rather, what is reasonable. A public body has met its duty to assist when it responds openly, accurately and completely to the inquiries and requests of the applicant. For example, it clearly identifies why and how records being provided to the applicant have been severed or withheld entirely or communicates with the applicant to clarify criteria.*

[28] CNA says that the facts surrounding the public body's interaction with an applicant and its actions in response to an applicant's request will largely determine whether or not a public body has met its duty to assist. In this case, CNA says that

> *… the College at all times was prompt in its responses to the applicant and in assisting the applicant to agree on criteria which would lead to a successful access to information request. For example, rather than refusing the original request outright as it would interfere with the operations of the College (such determination being made on prior experience with the numbers of records found during a preliminary search), the College worked with the applicant to clarify and narrow the criteria such that the number of potential responsive records would be reasonable.*

[29] CNA says that it notified the Applicant of the need for a time extension as soon as it became apparent that it was warranted. As noted above, CNA also emphasized that

> *… the actions of the applicant himself also bore out the need for an extension as he delayed responding to the College's request for narrower criteria until nearly six weeks after the request was made—some two weeks before the expiry of the extended deadline. Despite this delay occasioned by the applicant, the College was able to respond within the extended time frame.*

[30] CNA then proceeded in its submission to focus on factors which it believes demonstrate the reasonableness of the steps taken in its search process. CNA says that it asked its IT support group to search its servers in this province as well as at CNA-Qatar. CNA says that the individuals named in the search were also contacted directly and asked to search their records. As a result, CNA says that it

> *… conducted a search in all those places where records responsive to the applicant's request would be located and that it conducted a search in all those places which a reasonable person would consider such records to be located. It also submits that these searches were conducted by the appropriate trained staff and that those persons who had knowledge of where responsive records might be located were contacted and asked to conduct a search.*

[31] CNA then comments on a particular error which it acknowledges, which involved one IT support staff person (the former Wide Area Network Administrator), who

> *… conducted his original search and made his report based on his assumptions of what had already been provided to the* [CNA] *Access to Information Office. He did not inform the* [CNA] *Access to Information Officer that he had done so. This mistake was compounded when the IT staff person became unavailable for follow-up due to two weeks of campus down-time dictated by the Qatari government in order to hold the Asian Games. Only when the IT support staff were asked for further explanation as a result of the review, were the responsive records discovered. Once discovered, the applicant was quickly notified and given a date by which the records would be provided to him, the records were processed and provided within two weeks to the applicant.*

[32] While CNA acknowledges this error, it maintains that this mistake is not a failure of the duty to assist set out in section 9 of the *ATIPPA*. CNA lists several Commissioner's decisions from British Columbia, as well as citing directly two decisions from the Alberta Information and Privacy Commissioner, which I will quote directly from the College's submission:

More specifically, we refer the Commissioner to paragraphs 36-39 of Order F2003-09 [*sic – the case cited below is actually F2003-15*], *a decision of the Alberta Privacy Commissioner. In this situation, responsive records were discovered during the review of the public body's actions in dealing with the applicant's requests, despite the search conducted beforehand. The applicant had also made several overlapping requests to the public body and records provided as a result of a later request were not provided in an earlier, overlapping, request. The Alberta Privacy Commissioner wrote:*

> *[36] The Public Body concedes that some documents were located in later searches that had not been found in earlier ones (but it says it provided these documents when they were found, and with respect to some of them, apologized for the omissions). It also acknowledges that involvement of the Information and Privacy Commissioner's Office at some points resulted in the provision of some information that had previously been severed. It acknowledges that a succession of officials handled the Applicant's file, making it harder to manage the file, and harder for the Applicant to know with whom she was dealing.*
>
> *[37] However, the Public Body contends that the steps it outlined show that it was flexible in dealing with the Applicant relative to appointment times and scope of her requests, and that it made every reasonable effort to assist her.*
>
> *[38] The Applicant remains dissatisfied with the Public Body's response.*
> *….*
> *[39] None of the Applicant's specific complaints about the Public Body's actions persuade me that it failed in its duty to assist her under section 10(1) of the Act. I find that the Public Body met this duty.*

We also refer the Commissioner to Order F2003-009, another decision of the Alberta Privacy Commissioner. In this case, responsive records were discovered nearly six months after the original request. The records were promptly turned over to the applicant. Again, the Alberta Privacy Commissioner found that the public body had conducted a reasonable search and fulfilled its duty to assist despite the fact that its search did not turn up all records at first.

> *[27] The Public Body complied with the January 22, 2002, access request in a timely fashion. Many documents were disclosed to the Applicant by February 21, 2002. The Applicant was not satisfied with the results and sought the assistance of this office, which was involved from March 2002, onwards. In late June 2002, the Public Body found a package of documents that related to the Applicant's January 22, 2002, request in the desk of a Dean who had been away at the time of the search. The Public Body promptly admitted the error, apologized to the Applicant, processed the documents, and released records to the Applicant.*

> …
> *[29] I find that the initial search was, on the face of it, inadequate. This is evident from the fact that a subsequent search of the Dean's desk resulted in the discovery of further responsive records. Those records, however, were copies of records already discovered during the substantive search by the Public Body.*
>
> *[30] If records are going to be stored in people's desks they should not expect privacy in the event of a search under the Act. Therefore, the absence of an employee should not be used as justification for an incomplete search for responsive records. Applicants are not legally burdened to assist public bodies by suggesting where to search, but it makes sense that they do when they can. In the matter before me, once the error was discovered, the Public Body responded in a timely, forthright way.*
>
> *[31] Taken on the whole, I am satisfied that a proper search was eventually done. Therefore I will not order a further search. Apart from this incident, I see no substantive evidence that the Public Body failed in its duty under section 10 from January 22, 2002, onwards. I find the Public Body met its duty to assist.*

It is the College's submission that its actions in undertaking the search, sort and review of records responsive to this request were those which would be viewed as reasonable by a fair and rational person and in so doing, it has fulfilled its duty to assist the applicant with respect to its duty to conduct a reasonable search for records responsive to the applicant's request.

III APPLICANT'S SUBMISSION

[33] The Applicant began his submission by outlining what he felt were the main issues in this review, which he characterized as follows:

- *Failure to assist the applicant*
- *An attempt to mislead*
- *Attempted withholding records*
- *Accuracy and competency involved in the searches*
- *Accountability*

[34] The Applicant then proceeded to address some of the specific problems he faced in handling CNA's response to his access request. The first problem he identified was what he felt was an

attempt by CNA to exclude the records of one of the individuals named in his access request. The same individual was named by the Applicant in both his initial request, and his later amended request.

[35] The Applicant notes that on 16 October 2006, he received a response from CNA citing section 2(e) of the *ATIPPA* which defines the term "employee," and indicating that this particular individual (noted above as an employee of the State of Qatar), was not an employee of CNA, and therefore that person's records were considered by CNA to be "outside the scope of the *ATIPPA* and the college may not search those records."

[36] The Applicant explained that he was aware that the individual is not an employee, and that he was only requesting records which were in "the possession of CNA." He notes that his request was for "records which are in the custody of CNA whether or not the individuals named in this request are employees of CNA …" The Applicant indicated that he expected that CNA would understand that the *ATIPPA* applies to records in the custody of a public body:

> *The reference to the definition of employee in section 2(e) indicates either a very weak attempt to deny access or unfamiliarity with the ATIPPA, which is troubling. There is no reference in the ATIPPA which indicates that only records of employees can be released. That would frankly be absurd, as any consultant, vendor, contractor, or any person not employed by the public body would have all information concerning their dealings with a public body sealed from the public.*

[37] After he received CNA's response denying him access to records in the e-mail archive belonging to that person, the Applicant wrote an e-mail to CNA in response on 20 October 2006. He stated that "I am not asking you to go to the COT to get the records."(COT stands for College of Technology, which is an arm of the State of Qatar.) He also stated as follows:

> *Further you have indicated that* [*named individual*] *is not an employee of the College.* […] *I have requested the records in the custody of or under the control of CNA (i.e. on your server, in your files, etc.) to, from or cc to* [*named individual*] *that reference me and/or* [*Applicant's spouse*] *or contain any personal information. I am not asking you to go to the COT to get the records. I cannot see anywhere in the ATIPPA where records in the custody of or under the control of the public body are only eligible for release if the source being searched is that of*

> *an employee of the public body. To maintain that position would create significant areas where a public body could hide or exclude records. There are many records in the custody of or under the control of a public body, where those records would have no affiliation at all with any employee. I am identifying a source, where there are records responsive to my request in the custody of or under the control of CNA and I am requesting those records.*

[38] The Applicant then continued his submission by asserting that CNA's use of section 8(2) in response to his initial request was unnecessary and was in fact an attempt to delay his request. The Applicant indicated that he had filed a number of previous requests which were similarly worded. He indicated that in this request he provided the dates, the names of individuals whose e-mail accounts or archives needed to be searched, and other information which he says was "as specific as I could possibly be," and he was of the opinion that "an employee of CNA could quite easily identify the records from the information provided."

[39] The Applicant asked CNA for an explanation as to the basis for its reliance on section 8(2). In response, the Applicant received a letter from CNA's General Counsel dated 3 November 2006 indicating that a further review of the Applicant's request had been completed, with the conclusion that the Applicant had met the criteria of section 8(2). With this statement, CNA's objection based on section 8(2) was abandoned, although its other objection, based on section 10(1), remained in place. The Applicant felt that CNA's use of section 8(2) was "off the mark," and "uncalled for."

[40] The Applicant then proceeds in his submission to comment on CNA's reliance on section 10(1) of the *ATIPPA* in its initial response to his request for information. The Applicant complains that CNA used this section of the *ATIPPA* while relying on an "entirely inaccurate" calculation of the number of records. He further comments that both the Applicant and this Office must rely on the numbers presented by CNA when CNA raises section 10(1) in a response denying access to records. The Applicant notes that CNA advised him in its letter of 16 October 2006 that it was invoking section 10 because of the large number of responsive records, including 12,000 in just one e-mail account. The Applicant says the impression given was that this number was not an anomaly, but instead indicated that the overall number was much larger.

[41] The Applicant says that he indicated by e-mail to CNA on 20 October 2006 that the figure of 12,000 seemed extraordinarily high, and asked CNA whether there might be a mistake. His e-mail to CNA includes the following passage:

> *I have requested records for a period of 18 months (approximately 540 days). You have indicated that you have identified over 12,000 records responsive to my request in just one email account. If one employee search returned 12,000 records then that would mean that this one employee sent or received or was copied an average of 22 emails per day, seven days a week for 18 months, that contained a reference to the criteria. Given that most employees would normally work 5 days a week, an average of 31 emails per day would be generated over that 18-month period. This doesn't account for at least 4 weeks of holidays, summers as well as Christmas and other holidays. Have you considered that there may be a mistake in conducting the search? Can you tell me the result of the search for the other seven individuals because at least four of them were not associated with the college for the entire 18 months and their numbers should be significantly lower.*

[42] The Applicant indicates that he was dissatisfied with CNA's 3 November 2006 response to his e-mail, which he says indicated that aside from the 12,000 records, there were an additional 2098 records responsive to his request from three other individuals' e-mail accounts. He says that this did not entirely answer his question as to the total number of e-mails in the accounts of each of the other seven individuals named. The Applicant says that this letter from CNA confirmed the 12,000 figure, without addressing the specific concerns associated with such a high number.

[43] The Applicant then amended, or "narrowed the scope" of his request in an e-mail to CNA on 22 November 2006 to three of the eight individuals listed in his initial request, including the one individual who CNA said was not a CNA employee and therefore that person's e-mail records could not be searched. The Applicant notes that he narrowed the scope of his request without knowing whose account supposedly held 12,000 e-mails. He says: "I was limiting the scope of the request yet CNA had not been forthcoming in addressing my concerns regarding the numbers reported."

[44] The Applicant asked CNA in an e-mail on 30 November 2006 to identify the person whose account reportedly held 12,000 responsive e-mails. He indicated in his e-mail that he was

requesting this information in order to prepare to file a future request for the remainder of the information sought in his initial request. This information was provided by CNA in a letter dated 4 December 2006, and further confirmed in another letter to the Applicant dated 8 December 2006. In its letter of 4 December, CNA had indicated that this information about the 12,000 e-mails was provided by a particular individual named in the Applicant's request. The Applicant, in his submission, questions why the information was supplied by this individual instead of CNA IT staff, who, according to CNA's other communications with the Applicant, had been the ones to conduct the search and provide the information to CNA's Access & Privacy Coordinator.

[45] In a letter dated 1 December 2006 the Applicant was informed that the results of his amended request had not yielded any responsive records, and he was advised of his right to file a request for review with this Office. The Applicant notes that he was told in the letter that "CNA double checked these results with the IT department in Newfoundland and Labrador and Qatar." The Applicant comments that the statement is quite definitive and asserts that the comment about the results being double checked was meant "… to convey to me that the results are entirely accurate and can be relied upon." In the Applicant's opinion, CNA's response was not a mistake, but was intended to provide misleading information in order to "… stop the process and frustrate my right of access under the *ATIPPA*."

[46] The Applicant indicates that he addressed further questions to CNA in his e-mail of 4 December 2006 which he said remained unanswered, including whether it was possible that there had been a mistake in the search result which yielded 12,000 records. Before receiving a response to this e-mail, the Applicant indicates that he forwarded a Request for Review to this Office on 7 December 2006 (received at this Office on 11 December 2006). The Applicant received a response to his 4 December e-mail from CNA in a letter dated 8 December 2006. In it, the Applicant notes that he was advised as follows:

> *The search was conducted by the IT staff. When you first posed this question, the IT department was asked to repeat the search and there was no mistake. You should have been informed of this as it would certainly have eliminated some confusion.*

[47] The Applicant raised a number of concerns in his submission relating to the incorrect search results reported by CNA in its responses to both his initial and amended requests. He expresses interest in seeing any correspondence between the CNA Access & Privacy Coordinator and the IT personnel involved in conducting the searches, in terms of what they were asked to search for, and what results they reported. Regardless of the specific process, the Applicant concludes that this turn of events "… does not place the IT department of CNA in a very favourable light…" given that CNA says two separate searches were conducted yielding no results, yet a later search (following the Applicant's decision to file a Request for Review) resulted in hundreds of records being returned. Essentially, the Applicant is seeking a better understanding of where the problem lies, whether with CNA IT or with other decision-makers within CNA.

[48] The Applicant notes in his submission that in conjunction with his Request for Review, he supplied copies of some e-mail records which he had previously obtained which would have been responsive to his request (including his amended request). These were then forwarded to CNA along with the Request for Review. When CNA responded to this Office to say that it had now identified records responsive to the request which would soon be forwarded to the Applicant, this information was passed on to the Applicant by this Office. The Applicant recounts that upon being informed of this, his response was "here we go again."

[49] The Applicant indicated that he had filed a number of requests for information with CNA, and he feels that the events flowing from this request fit into a pattern which has been followed on previous occasions:

> *First, CNA without reservation declares that there are no records responsive to the particular request (or very few), or declares definitively that all records have been supplied to the applicant. Then after considerable investigation and research on my part, I provide to CNA evidence that I am aware of the existence of records not previously supplied to the applicant, which in my opinion are responsive to my request. Only at that point does CNA release the records. Certainty this does not take place with every ATIPPA request made to CNA, however this pattern or variations of it happens with consistency.*

[50] The Applicant says he received a letter from CNA dated 21 December 2006 in which he was informed as follows:

> *On December 01 2006 you were informed that the search for your key words resulted in no records being found. Regrettably, upon revisiting this issue we realized that there are records that meet your search criteria. These records have been forwarded to this office and will be processes* [sic] *and sent out to you no later than January 15 2007.*
>
> *We apologize for this inconvenience.*

[51] The Applicant felt that given the preceding communications between he and CNA that this was an inadequate response:

> *This is more than an inconvenience; it is a pattern of delay, denial and misleading of the applicant. There was no explanation offered by CNA as to why after two searches, where no records were returned (not even a single record responsive to the request); now there are hundreds of records for release. There was no indication from* [CNA Coordinator] *in the December 21 letter that a new search was conducted; or if there was a search, who conducted the search.*

[52] The records, which CNA had denied the existence of on 1 December 2006, were released to the Applicant by CNA on 8 January 2007. The Applicant notes that CNA withheld some information from the records based on sections 20, 21, 22, 24, and 30 of the *ATIPPA*, however further records were released by CNA on 13 April 2007 in response to an informal resolution initiative attempted by this Office.

[53] Shortly after receiving the first disclosure of records from CNA in January 2007, the Applicant proceeded with further questions about the 12,000 e-mails reported by CNA as belonging to a particular individual who the Applicant had listed in his original access request. The Applicant maintains that the number did not seem reasonable to him at the time, so on 18 January 2007 he sent the following e-mail to the CNA Access & Privacy Coordinator:

> *In your December 08 2006 correspondence you stated "*[named individual]* has over 12,000 attachments in his email account."*
>
> *Could you confirm for me that* [named individual] *has over 12,000 attachments in his email account within the period coved by my request (April 01 2005 to October 04 2006).*

[54] The Applicant notes that the reply he received confirmed that the 12,000 figure was what the Coordinator had been provided with. The Coordinator further indicated to him that a formal request would have to be made by the Applicant to confirm the number again. The Applicant's comment about this in his submission is as follows:

> *Rather than check on the accuracy of the information,* [*the CNA Coordinator*] *advised me that a formal request (presumably through the ATIPPA) was required in order to confirm the accuracy of the number of records returned. This type of response from CNA is not new; in fact it is indicative of the attitude displayed by CNA in handling public information requests. I questioned the results given to* [*the CNA Coordinator*] *by* [*the named individual*] *and the result is that in order to make an accurate check of this account, I am told a new request would be required. This action on the part of* [*the CNA Coordinator*] *is more than a failure to assist; it is deliberately placing obstacles in the way of the applicant.*

[55] The Applicant notes that on 23 January 2007 he wrote an e-mail to this Office, to the Investigator assigned to his Review. The Investigator at that time was in the process of attempting to resolve this Review informally. The Applicant's e-mail stated as follows:

> *I have requested that CNA confirm that the 12,000 attachments are indeed inside the time period covered by my request. If that were confirmed then I would omit that section and make a separate request for those records at a later date, while proceeding with a request for the remaining records. Each time that I have requested basic information relative to this issue* [*the CNA Coordinator*] *has been less than clear in her response. I altered my original request because of CNA's claim that the 12,000 attachments were responsive to my request. I am concerned that the number is quite large for such a limited time period; however I obviously do not have the full picture. I would simply request confirmation of the 12,000 being responsive.*
>
> *I would also note that twice* [*the CNA Coordinator*] *has written:*
>
> > *"As a suggestion, made in the spirit of the ATIPPA and with an honest desire to fulfill the College's duty to assist, you are welcome to contact this office before you make your formal request to clarify your criteria. Other applicants have used this strategy and it has been very beneficial."*
>
> *Yet now her response is that I am required to file a formal request to get information regarding the number of responsive records returned in a previous request, so that I can file an appropriate formal request that does not unduly interfere with the operations of the college. Essentially I would like to submit a*

> *request to access the remaining records from my original request but the question of the accuracy of the 12,000 needs addressing, hopefully without a separate formal request.*

[56] The Applicant states in his submission that it was only after my Office communicated the Applicant's concern to CNA, that CNA agreed to re-examine the numbers. The Applicant reports that this resulted in a letter dated 31 January 2007 from CNA to the Applicant, in which he was advised that the CNA Coordinator had misunderstood information presented to her in an e-mail from the individual whose account was said to contain 12,000 e-mails, which would have had to be searched in response to the Applicant's original request. CNA advised the Applicant that there were 12,000 e-mails with attachments in the individual's e-mail folder, but when this figure was presented to the CNA Coordinator, "… there was no mention of time frame." CNA then confirmed to the Applicant that the number of e-mails with attachments within the time frame stipulated in his request was actually 3,275.

[57] The Applicant expressed a great deal of frustration with this response, particularly given that he had raised the issue repeatedly to CNA since October 2006, and each time the number 12,000 was confirmed. The Applicant felt that it was unreasonable for it to take so long for CNA to look into his suspicions on this matter, particularly given that a significant search error had already been discovered regarding the search for other records at CNA-Qatar. Furthermore, the Applicant felt it should not have been necessary to require intervention from this Office for CNA to confirm whether this figure was correct. The Applicant presented many questions in his submission, in an attempt to understand how such an error could have been made in the first place, and why it took so long to correct the error. He questioned, for example, why one particular individual appeared to be involved in searching his own e-mail account, in apparent contradiction of CNA's statement that its IT professionals had been tasked with undertaking the search.

[58] The Applicant then comments on the apology offered by CNA for this mistake in its 31 January 2007 letter:

Finally, I apologize for this misunderstanding. College of the North Atlantic is very aware of its duty to assist you in any Access to Information Request you may have. To ensure that this duty is filled more adequately I will use more caution in future to ensure the numbers of records I quote to you are accurate.

[59] The Applicant's point of view, as expressed in his submission, is that this is yet another apology from CNA for a number of such errors which have resulted in various recommendations from this Office. The Applicant notes that a number of my Reports in relation to CNA "… have chronicled the need for more training, more care and generally more adherence to the duty to assist the applicant." In support of his position, the Applicant quotes the following recommendations from several of my past Reports involving CNA:

May 17 2005 Report 2005-001

2. That the College ensure a timely and complete response to any individual applying for access to information;

4. That the College perform its duties under the ATIPPA in a manner that is consistent with the duty to assist an Applicant;

November 14 2005 Report 2005-006

3. That the resources directed by the College towards compliance with the ATIPPA be reviewed with a view to ensuring that it is able to fulfill its obligations under this legislation; and

March 14 2006 Report 2006-003

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;

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.

November 20 2006 Report 2006-015

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

[60] The Applicant also suggests the possibility that errors associated with CNA's response to his initial request and to his amended request may in fact constitute an offence under section 72 of the *ATIPPA*. In his submission, the Applicant reviewed several questions and apparent discrepancies involving the information he was provided with by CNA in an effort to support his allegation.

[61] The Applicant expressed his frustration with the process which was followed by CNA in responding to his access request:

> *At what point in the process is an applicant supposed to accept the word of CNA; when they are advised once that there are no records, advised twice that there are no records? If I had quit my attempt to secure records from CNA on receiving official notification from CNA (on two occasions) that there were no responsive records, then I would not have received any records; zero. CNA would have successfully withheld the records. This raises significant questions as to the credibility of CNA in responding to future ATIPPA requests. I am requesting that the OIPC hold accountable those at CNA who seem to have no regard for the ATIPPA.*

[62] The Applicant asserted that his request was not handled in an open, accurate and complete manner, and he indicated that he has no confidence that he has received all of the records in relation to this file. He also commented as follows:

> *While I appreciate the provisions of the ATIPPA and have been successful in accessing records through that legislation, until CNA is held accountable for the flagrant violations of that Act then I expect that there will continue to be this type of behavior from CNA as it relates to compliance with the spirit and intent of the Act.*

IV DISCUSSION

[63] One of the first issues brought to CNA's attention by the Applicant, well before his Request for Review to this Office, is CNA's use of section 8(2) of the *ATIPPA* in its correspondence to the Applicant of 16 October 2006 to deny access to the records he requested. Section 8(2) is as follows:

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

[64] The Applicant disagreed with CNA's claim that he had not filed his request in accordance with section 8(2). As noted above, CNA issued a letter to the Applicant dated 3 November 2006 in response to his objection on this matter, in which it changed its position on that particular point, agreeing instead that the Applicant had in fact met the requirements of section 8(2). I do not see any basis in the wording of the Applicant's request to support CNA's initial concern about section 8(2), so I will simply say that I think the College erred when it originally raised that section as a reason for not proceeding further with the Applicant's request. CNA acted appropriately in changing its position on section 8(2) when the issue was raised by the Applicant. Although the Applicant was concerned that CNA attempted to use section 8(2) in refusing to grant access to the requested records, the Applicant's request was not affected by this, due to the fact that CNA, while dropping its reliance on section 8(2), continued to rely on section 10(1)(b) of the *ATIPPA* to withhold the records. Be that as it may, public bodies should ensure that any decision to rely on section 8(2) (or indeed any section of the *ATIPPA*) is well-considered before it is cited in a response to an applicant.

[65] In terms of CNA's reliance on section 10(1)(b), it originally relied on this section based on the erroneous figure of over 12,000 records belonging to only one of the eight individuals named. If that figure had proven to be correct, it could easily be justified that a search of those records would trigger section 10(1)(b), especially since the 12,000 records were e-mail attachments which, at the time the request was made, the College was only technically capable of searching manually, one at a time, in order to identify responsive records. Section 10(1)(b) is as follows:

> *10(1) Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where*
>
> *(b) producing it would not interfere unreasonably with the operations of the public body.*

[66] After much prompting by the Applicant in which he argued that the 12,000 figure must be in error, CNA continued to rely on section 10(1)(b) by referring to the e-mail records of other individuals named in the Applicant's request. Aside from the 12,000 figure, CNA felt that the numbers were still too high for a search to be conducted without interfering unreasonably with its operations. For four of the eight individuals named in the Applicant's original request, CNA reported that a total of 953 responsive e-mails were found, as well as an additional 3,967 "potentially responsive" records, which were e-mail attachments, for a total of 4,920 responsive records. CNA was capable of doing an electronic search of the 953 e-mails, but because of technical limitations at the time the request was being processed, each one of the 3,967 attachments would have had to be read manually to determine whether or not they were actually responsive. This is the task which, in my opinion, tilts the scale in favour of agreeing with CNA that it was reasonable to refuse to undertake the search based on section 10(1)(b).

[67] It should be noted that while the figure of 4,920 reflected the College's assessment in November 2006, this did not include responsive records which were later discovered to be on the College's server at CNA-Qatar, which were subsequently disclosed to the Applicant in January 2007, with additional disclosure made in April 2007 as a result of informal resolution efforts brokered by this Office. Therefore, if CNA had actually done a proper search initially, the results would have further supported its use of section 10(1)(b) to refuse to conduct a search as per the Applicant's original request.

[68] I stated at paragraph 58 of my Report 2006-003 that the threshold to be reached in order for a public body to utilize section 10(1)(b) is high:

> *[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.

[69] In my report 2006-015 (also involving the College of the North Atlantic) I went into some detail with regard to an analysis of section 10(1)(b). The College's search process is also described in that Report, so I will not repeat myself on either count here. I agreed in that Report with the College's use of section 10(1)(b). I will, however, repeat my caution on the use of section 10(1)(b):

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

[70] In its submission, CNA focused on defending its position that it had properly fulfilled its duty to assist the Applicant, as set out in section 9 of the *ATIPPA*. Section 9 states:

> *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.*

[71] In putting forth its position that there was no failure of the duty to assist, CNA has asserted that its efforts in undertaking the search "were those which would be viewed as reasonable by a fair and rational person." CNA acknowledged its errors and apologized to the Applicant, and maintains that the Applicant has now received all of the records to which he is entitled.

[72] In addition to the two decisions of the Alberta Information and Privacy Commissioner which are quoted above from CNA's submission, CNA also referenced several orders from British Columbia for the purpose of supporting its position that it has not in fact failed in its duty to assist. That province's duty to assist is found in section 6(1) of the *British Columbia Freedom of Information and Protection of Privacy Act*:

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[73] Clearly, the duty to assist under British Columbia's legislation is equivalent in all material respects to that found in this province's *ATIPPA*. I will now briefly comment on the British Columbia orders referenced by CNA, which were Orders 00-51, 00-15, 00-26, 00-32, 01-42, 01-43, 01-44, and 01-45. In BC Order 00-51, the Applicant's request was very broad, for a wide range of general and specific items. In that case, the Commissioner found that a proper search had been conducted, even though one particular record had not been found. The Commissioner did not find that there had been a failure of the duty to assist, but he did order a new search for the one record which had not been found.

[74] In BC Order 00-15, once again there was a physical search for records. The Applicant had alleged that some responsive records were not located, but the Commissioner determined that those records were not likely held by the public body to which the request had been made. There was no finding of a failure of the duty to assist.

[75] In BC Order 00-26, the Commissioner found the efforts of the public body's Access & Privacy Coordinator to be "commendable," but the Commissioner found that the public body had not, on one "minor" point, fulfilled its duty to assist. The Commissioner ordered the public body to do a new search.

[76] In BC Order 00-32, the Commissioner found that the public body did not meet its duty to assist, because it did not conduct an adequate search for responsive records. The Commissioner ordered a further search, as explained in this excerpt from the decision:

An applicant should not have to initiate the review process under the Act in order to ensure that a public body has discharged its s. 6(1) duty. The Act requires a public body to meet the above-described search standards - and its other duties under s. 6(1) - at the time it responds to an applicant. It can still meet its s. 6(1) duties after an applicant makes a request for review under s. 52 of the Act: any steps taken by a public body after its initial search and response - including

> *during the review and inquiry processes - will be relevant to any order I might make. But the first question to be considered in an inquiry such as this is whether, at the time it responded to an applicant's access request, the public body met its duty to make every reasonable effort to assist the applicant and to "respond without delay ... openly, accurately and completely" to the applicant.*
>
> *Nothing before me indicates that the Ministry has deliberately withheld relevant records from the applicant. Still, the events as they have unfolded indicate to me that the initial search efforts - specifically within the Gaming Policy Secretariat - were not carried out as diligently as they should have been. This is borne out, in my view, by the discovery, at the time this inquiry was held, of several additional files in the custody of the Gaming Policy Secretariat.*

[77] In BC Orders 01-44 and 01-45 (both related), the Commissioner found that there had been an adequate search, and that the public body had fulfilled its duty to assist. The facts of those cases do not appear particularly analogous to those of this Report, however, as there was no finding that there had been any mistakes by the public body. Both of those Orders were very much “open and shut” cases in which the Commissioner appeared to be exasperated with the Applicant. In the case before me now, CNA acknowledges that mistakes were made, but disputes whether this constitutes a failure of the duty to assist. Finally, in the remaining cases referenced by CNA (BC Order 01-42 and 01-43), the BC Commissioner did not consider or comment on the duty to assist, so they are not relevant to this discussion.

[78] CNA also quoted from two Alberta Commissioner’s decisions, and forwarded copies of them as part of its formal submission. Alberta’s *Freedom of Information and Protection of Privacy Act* also contains a duty to assist, which is set out as follows:

> *10.(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[79] In the Alberta cases cited by CNA, the Alberta Commissioner found that the public bodies had done inadequate searches, but also determined that this did not amount to a failure of the duty to assist.

[80] One difference between the matter before me in this Report and the cases cited by CNA is that the searches in those cases were physical searches. As an example, when a public body is

undertaking a physical search, it is not always readily apparent where records might be found. Even though there might be 20 places where records are stored, a knowledgeable access and privacy coordinator acting on behalf of the public body might only be aware of 19, and despite his or her best efforts, may only discover the other records location at a later date. Failure to locate records is not automatically cause for a determination that a public body has failed in its duty to assist. Such a determination can only be made on a fact-specific basis. The facts in this case are that CNA had already done numerous searches of this nature, and there were only 2 possible locations for records, one being a server and archives in NL and the other being a server and archives at CNA's location in Qatar. In the first instance, an extremely inaccurate figure (12,000 e-mails with attachments) was provided to the Applicant. Although the error was eventually acknowledged, it is easy to see that this very high figure raised questions for the Applicant which made it difficult for him to decide how to amend his request. Although CNA says that IT was asked to check its results again, no evidence has been presented to me that CNA examined the vast discrepancy between the figure erroneously provided by the individual whose e-mail account contained over 12,000 e-mails with attachments and the much smaller figure provided by IT for that person's account, which was limited to the time frame specified in the Applicant's request. It appears that CNA took the word of the person who owned the e-mail account. To be fair, CNA's position is that even without the 12,000 records, the remaining number of responsive records (or "potentially" responsive records) which were found by IT would still allow CNA to rely on section 10(1)(b) based on their view that, even aside from the 12,000 records, the number of records to be searched would still interfere with the operations of the College.

[81] One of my main concerns here is that CNA stated to the Applicant in a letter dated 8 December 2006, in response to his repeated questioning of the 12,000 figure, that the 12,000 figure had previously been double checked and confirmed as correct. CNA reiterated this statement in its formal submission to this Office, saying essentially that it was only after checking for a third time that the figure was determined to be incorrect - the first time being the initial misunderstanding, the second presumably being when it was supposedly double-checked at the Applicant's request, and the third upon inquiry by this Office after the Request for Review had been filed. Upon further investigation by this Office in an attempt to learn more about why

the second check on the figure failed to reveal the error, CNA has been unable to provide any evidence of a second check on the figure, and it appears likely that this never occurred. I am concerned that this assertion was made to the Applicant, and repeated in CNA's formal submission to this Office.

[82] I find the Applicant's position compelling, whereby he calculated the exceedingly high number of e-mails with attachments which would have had to be sent or received (or copied) to or from one individual's e-mail account on a daily basis in order to arrive at the 12,000 figure. As noted above, it left the Applicant at a certain disadvantage when attempting to amend his request, without having a good understanding as to how to amend it in such a way as to avoid receiving another response claiming section 10(1)(b). Any delay by the Applicant in amending his request was understandable given that the information provided to him by CNA appeared highly suspect to the Applicant.

[83] At the opposite end of the spectrum was CNA's search result that no records existed responsive to the Applicant's amended request. Due to ongoing issues involving the Applicant and the College which meant that the Applicant already had possession of some records responsive to this amended request, the Applicant was reasonably certain that this result could not be correct.

[84] In relation to the amended request, the College's actions bear some examination. In its submission, CNA stated that the CNA-NL Technical Analyst concluded that no responsive records were stored at CNA-NL. The Technical Analyst's comments gave some indication that such records might, however, be found at CNA-Qatar, due to the e-mail addresses being "redirects" to CNA-Qatar. Although the request for information was forwarded to CNA-Qatar, no response was received by 1 December 2006, by which time most staff and faculty had gone on holiday. CNA said that it therefore found it "…unlikely that the College would receive any response before the deadline of December 6th…" so it responded to the Applicant by stating that no records were found.

[85] In making this assertion, CNA seemed to be relying on its previous search, of which the amended search was a subset. In response to the first search, the individual who performed the search in Qatar replied to the CNA Access & Privacy Coordinator on 7 November 2006, indicating that no responsive records were found. Unfortunately, that result was not correct. Questions were posed by this Office as to how that particular search could have missed the significant number of responsive records which were eventually found during the course of this Request for Review. It appears from two brief e-mails on the subject between the individual who conducted the search and the CNA Access & Privacy Coordinator that there was an error made. The factors which may have contributed to that error are difficult to determine conclusively at this stage, because the individual who conducted the search in Qatar is no longer associated with CNA and was unavailable to participate in this investigation.

[86] Further aggravating this situation is that when CNA issued its letter of response dated 1 December 2006 to the Applicant in relation to his amended request, CNA assured the Applicant that "CNA double checked these results with the IT departments in Newfoundland and Labrador and Qatar." Yet, as noted above, CNA says that no response was received from its operation in Qatar by 1 December 2006, and it was deemed unlikely that a response would be received by the deadline of 6 December 2006. Thus, CNA's letter assuring the Applicant that the results had been double checked in both this province and Qatar was not an accurate statement to the Applicant, and in fact was quite misleading.

[87] In relation to both errors, the one with the original request and the one involving the amended request, the Applicant was unable to satisfactorily address his concerns without proceeding to a Request for Review. It was only during the Request for Review process that CNA was able to recognize these errors and deal with them.

[88] I will now turn to another issue raised by the Applicant. One of the individuals named by the Applicant in both the original and amended request is a person who is not a CNA employee, but is instead employed by the State of Qatar. In its original response to the Applicant on 16 October 2006, CNA referenced the definition of employee found in section 2(e) of the *ATIPPA* in its response to the Applicant, telling him that because this individual was not an employee, therefore

that person's records are "… outside the scope of the *ATIPPA*." The Applicant is quite correct in one aspect of his comments on this assertion by CNA. Whether or not someone is an employee may or may not impact on disclosure under the *ATIPPA*, but it does not, in and of itself, mean that the *ATIPPA* does not apply to records of non-employees.

[89] The key factor here is whether the records in the possession of this individual are in the control or custody of CNA. Section 5(1) states as follows:

> *5(1) This Act applies to all records in the custody or under the control of a public body but does not apply to …*

[90] Section 5(1) then goes on the list specific types of records which are outside of the scope of the *ATIPPA*, none of which are relevant to this situation. Therefore, the key determination is whether the records of the individual named by the Applicant who is not a CNA employee are within the control or custody of CNA or not. If so, they are responsive, and CNA must cite an exception under the *ATIPPA* to withhold them. If I find that the records are not within the control or custody of CNA, then I will not consider the matter further.

[91] CNA sent a letter somewhat expanding its position on this matter to the Applicant on 3 November 2006, wherein it states that the records are not in its custody:

> *According to the definitions found in the ATIPPA,* [*individual*]*'s records are not searchable by CNA. ATIPPA does not allow us to go to the State of Qatar to search their employee's records. If a record is transmitted between* [*individual*] *and CNA and is kept by CNA it is a record in our custody and is included in our search. We are not refusing to release records in our custody.*

[92] CNA further commented on this when asked to do so during this investigation. The individual who was named by the Applicant is working for the State of Qatar, which participates with CNA in overseeing the overall operation of the College in Qatar. Even though the individual has been assigned and used CNA-Qatar e-mail addresses, CNA explained that this was solely for the convenience of allowing the individual to participate in e-mail discussion groups with others who have e-mail addresses on CNA's Global Address List, whereby a single

e-mail sent to the e-mail group is copied to the entire list. CNA explained that e-mails sent or copied to this person are then redirected to a non-CNA e-mail address on a server belonging to the State of Qatar's College of Technology, and no copy of these e-mails remains on CNA servers. The Applicant has stated in correspondence to me and to CNA that he does not expect access to any e-mails which are not within the control or custody of CNA. I accept that the e-mail account and archives of this individual are not within the control or custody of CNA, and are therefore outside of the scope of the *ATIPPA*.

[93] While this changes nothing in terms of what records the Applicant is entitled to, I should point out, however, that the Applicant was frustrated by the reason presented by CNA for denying access to that set of records. I fully concur with the Applicant that the employment status of the individual is only one aspect of determining control or custody, and is not by itself determinative of this.

[94] After CNA found the records responsive to the Applicant's amended request, CNA provided partial access, withholding some records under the following provisions of 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;*
>
> *21. The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is subject to solicitor and client privilege; or*
>
> *(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.*
>
> *22. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to*
>
> *(h) deprive a person of the right to a fair trial or impartial adjudication; and*
>
> *(p) harm the conduct of existing or imminent legal proceedings.*
>
> …

> *24. (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of the province or the ability of the government to manage the economy, including the following information:*
>
> *(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public; and*
>
> *(e) information about negotiations carried on by or for a public body or the government of the province.*
>
> *30. (1) The head of a public body shall refuse to disclose personal information of an applicant.*

[95] I have previously commented on these provisions in several prior reports in relation to this Applicant and CNA, so I do not believe it is necessary for me to explain them in detail again here. As noted in the background section of this report, on 8 January 2007 CNA forwarded a set of responsive records to the Applicant from his amended request, withholding and severing some information based on sections 20, 21, 22, 24 and 30. On 16 January 2007 a copy of all records responsive to the Applicant's request, including those which were severed or withheld, was provided to this Office for review.

[96] This Office then undertook informal resolution efforts. During that process, this Office reviewed all of the records which had not been provided to the Applicant and proposed that additional records be released to the Applicant. As a result of these informal resolution efforts, CNA agreed to provide all records to the Applicant which were proposed for release by this Office, which it did on 13 April 2007. As noted above, due to the many concerns raised by the Applicant about the process which had been followed by CNA in responding to his initial request and subsequent amended request, and about how the search was conducted, the Applicant did not wish to accept an informal resolution, and instead requested that I issue a Report into this particular matter. No additional records are being recommended for release as a result of this Report.

V CONCLUSION

[97] It is readily apparent that the Applicant has faced considerable frustration resulting from CNA's handling of his request for information. The College's errors were significant and repeated, ranging from an initial response indicating that there were far more responsive records than was actually the case, and later indicating that there were no responsive records when there were. One can hardly blame the Applicant for not wishing to rely on CNA's responses to his request, given such wide ranging errors.

[98] In British Columbia Order 00-32 the Commissioner found that an inadequate search had been conducted, and concluded that the public body had failed in its duty to assist. In the Alberta cases cited by CNA, there was a similar finding in terms of the adequacy of the searches undertaken, but the Commissioner did not find that there had been a failure of the duty to assist. In three very similar provisions relating to the duty to assist, Alberta, British Columbia, and this province, all share the word "reasonable." In each instance where the duty to assist is under consideration, the Commissioner in each jurisdiction must make a determination as to what seems reasonable, after considering all of the relevant factors involved in each case. One factor I think is relevant here is the magnitude of the errors. In the Applicant's original request, as well as in his subsequent amended request, the Applicant ended up with no records, first because there were too many, and then because there were none, or so CNA stated at the time. These errors were of a significant magnitude. Secondly, CNA is experienced in undertaking such searches. This particular Applicant, as well as others, have filed a number of similar requests for e-mail records. The College is (or should be) very familiar with the steps which must be undertaken in order to search for records of this nature. Thirdly, as referenced above, this type of search is unlike those referenced in any of the cases cited by CNA, in that the requests involved electronic records. The techniques for storing and retrieving such records require a certain amount of expertise, but in a sophisticated computer network such as that operated by CNA, the locations which must be searched for such records are very much finite, and CNA is or should be familiar with where such records are stored and how to search for them.

[99] CNA states in its submission that the Applicant contributed to the problems associated with this matter due to his delay in submitting an amended request. CNA says that the applicant was experienced with the request process, and was a sophisticated user of the *ATIPPA*, and proposes

that had the Applicant acted more quickly, "… CNA may have been able to avoid the confusion that led to the unfortunate conclusion of this matter." In my view, any delay on the part of the Applicant in filing an amended request could not have had any bearing on the types of errors which were occurring during CNA's internal search processes. I think the Applicant could equally say that CNA is also very experienced with the *ATIPPA*, and such errors should not be occurring with a public body having this level of experience.

[100] A definitive answer was given to the Applicant in relation to his amended request, indicating that no records existed, before a final response was received from CNA-Qatar, because most of the staff at CNA-Qatar were on holiday and CNA did not want to go past the statutory deadline for issuing a response. While it may appear on the one hand that this demonstrates the seriousness with which CNA takes the statutory time frames in the *ATIPPA*, it also highlights a significant problem in the College's access regime when staff at CNA-Qatar can leave to go on holiday without responding one way or the other within those time frames. CNA then apparently relied on its previous search result when issuing its response, which was in fact incorrect. CNA must ensure that when a request is passed on to its IT divisions in this province and in Qatar that procedures are clear, accountabilities are well known and well defined, and appropriate training is in place so that the people undertaking searches are qualified to do so and understand the importance of doing so correctly and with due diligence.

[101] In relation to the earlier error with the figure of 12,000 records, I believe that CNA made another significant error. The Applicant repeatedly put to the College that the figure seemed improbable, and asked that it be checked. The figure was not checked until well into the Request for Review process at the urging of this Office, and what is worse, both the Applicant and this Office were informed that the figure had in fact been checked and confirmed as correct, when this was not the case. This tells me, at the very least, that CNA has not reviewed its own actions carefully enough to know with certainty what it has and has not done to remedy a significant error. In looking at this situation, it appears that a mistake was made in relation to the original finding of 12,000 potentially responsive records, but CNA failed to take reasonable steps to confirm this figure when good reasons to do so were presented by the Applicant. Telling both the

Applicant and this Office that those figures had at one point been checked and confirmed further compounds the error.

[102] My assessment is that CNA has failed to respond within a reasonable standard of accuracy to the Applicant's request and amended request, given the College's experience with such requests and the expertise at its disposal, and the fact that both the original and amended request were not particularly out of the ordinary in terms of other requests which CNA has dealt with.

[103] The Applicant has already listed in his submission several recommendations which I have issued to the College in several previous Reports over a span of two and a half years, most of which I could issue again in the context of this Report. Although I acknowledge that the College has faced a steep learning curve in handling requests such as these from this and other Applicants, I think it is reasonable to conclude that CNA should no longer be making the kind of errors which it still appears to be making. I must therefore reiterate the essence of some of my previous recommendations in the hope that CNA will take a more diligent and careful approach to the fulfillment of its obligations under the *ATIPPA*.

VI RECOMMENDATIONS

[104] Even though CNA made a significant error in reporting to the Applicant the number of e-mail records to be searched in conjunction with its use of section 10(1)(b), I agree that when more accurate figures became available, the number of records to be searched was still high enough to justify CNA's response in that regard, and I therefore make no recommendation on CNA's use of section 10(1)(b). Despite this, I find that the College has failed in its duty to assist as required by section 9 of the *ATIPPA*, by failing to respond to the Applicant within a reasonable standard of accuracy. I hereby issue the following recommendations under authority of Section 49(1) of the *ATIPPA*:

1. 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*;

2. That the College take more care to ensure the accuracy of its statements to applicants and to the Commissioner's Office; and

3. 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.

[105] 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.

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

[107] Dated at St. John's, in the Province of Newfoundland and Labrador, this 24th day of October, 2007.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador