



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2011-017

December 15, 2011

### College of the North Atlantic

**Summary:**

The Applicant applied under the *Access to Information and Protection of Privacy Act* (“the *ATIPPA*”) to the College of the North Atlantic (“the College”) for access to e-mail records containing references to himself and to another individual. The College disclosed a number of records, some of which it had severed claiming several exceptions to disclosure. The Applicant asked the Commissioner to review the severing and the way in which the search had been conducted. In particular, the Applicant requested that a manual search be performed to determine whether e-mails existed which referenced the Applicant without using his name. The Commissioner concluded that the severing had been done appropriately and that the College had conducted a reasonable search. The Commissioner also concluded that it would be unreasonable to request that the College conduct the manual search requested by the Applicant given that the expenditure of time and effort required would be disproportionate to any benefit to be achieved.

**Statutes Cited:**

*Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, as amended, ss. 2(o), 9, 30, 43.

**Authorities Cited:**

Newfoundland and Labrador OIPC Reports 2007-003; A-2009-011.

## I BACKGROUND

- [1] On February 27, 2008 the Applicant submitted a request for access to information under the *Access to Information and Protection of Privacy Act* (the “ATIPPA” or “the Act”) to College of the North Atlantic (“CNA” or “the College”) which read as follows:

*All records that contain my personal information or the personal information of [another named individual] from the email files of [a named employee of the College] for the period of April 1, 2007 to June 30, 2007. I am requesting all email records and/or attachments that contain personal information as defined in the ATIPPA, whether or not either of us are referenced by name.*

The Applicant enclosed a written consent to the disclosure of personal information from the other named individual.

- [2] On March 14, 2008 the College replied to the request, granting access to the requested records in part. Some information in the records was refused, based on a number of claimed exceptions to disclosure.
- [3] On July 3, 2008, the Applicant filed a Request for Review with this Office, asking that the OIPC review the withholding and severing of the responsive records. He also requested that the OIPC review the entire group of records to determine if his personal information was contained in records that had not been disclosed to him, even though he may not have been referenced by name.
- [4] Upon receipt by our Office, this Request for Review was “banked” in accordance with our policy, which provides that, if our Office is currently working on five or more other files from the same applicant, the newest one may not be processed to completion until a previous file has been closed. This policy was developed in response to a large number of requests received by this Office during that period, and in accordance with the direction given to us by the Court. In the present case, the file was removed from the bank and assigned to an investigator on September 18, 2009.
- [5] During the informal resolution phase of the investigation, the investigator reviewed the severing of the responsive record, and advised the Applicant that it appeared that the various claimed exceptions had been appropriately applied. The Applicant did not dispute that conclusion, and so the severing of information was therefore no longer an issue.

[6] The Applicant's request was for "personal information" which, under section 2(o) of the *ATIPPA* is defined as follows:

(o) *"personal information" means recorded information about an identifiable individual, including*

- (i) *the individual's name, address or telephone number,*
- (ii) *the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
- (iii) *the individual's age, sex, sexual orientation, marital status or family status,*
- (iv) *an identifying number, symbol or other particular assigned to the individual,*
- (v) *the individual's fingerprints, blood type or inheritable characteristics,*
- (vi) *information about the individual's health care status or history, including a physical or mental disability,*
- (vii) *information about the individual's educational, financial, criminal or employment status or history,*
- (viii) *the opinions of a person about the individual, and*
- (ix) *the individual's personal views or opinions;*

[7] During the course of the informal resolution process, a related issue arose: how to deal with what has come to be referred to as "work product." The above definition of personal information as information "about" an identifiable individual, if broadly interpreted, could be read to include such things as letters, e-mails, reports, memos and so on prepared by an individual in the course of his or her work. In recent years, in most Canadian jurisdictions it has come to be accepted that there is a distinction between personal information, strictly speaking, and information which, while created or compiled by the individual, is not really "about" the individual in any meaningful sense, but which is simply "about" the individual's work.

[8] It has been accepted by this Office that a distinction between personal information and work product information is appropriate when determining whether information should be withheld under *ATIPPA* subsection 30(1) (see, for example, Report 2007-003). The College has developed a policy for dealing with work product information which, in brief, is to identify and separate that information in responding to a request for personal information. The other personal information requested (narrowly defined) is provided to the Applicant without charge, whereas under the rules established under the *ATIPPA* and the fee schedule issued by the Minister, a fee may be charged for the work product information.

[9] In the present case, it was initially not clear whether the College policy on work product information, which had only recently been developed, had been applied to this request. Upon investigation it turned out that the College had indeed separated out and withheld records that it considered to fall into the category of work product, but had neglected to notify the Applicant that it had done so. Ultimately a resolution was reached by which the College reviewed those work product records, severed information where necessary, and provided them without charge to the Applicant in March 2010. Again, the severing appeared to have been done appropriately, and did not subsequently become an issue.

[10] As noted earlier, the Applicant in his request for review asked that this Office to determine whether there were records withheld from him that contained his personal information even though he had not been referenced by name. This issue could not be resolved in the informal resolution process. Consequently on August 12, 2011 the matter was referred to formal investigation. A written submission was received from the College on September 1, 2011. No further written submission was received from the Applicant.

## II SUBMISSION OF THE COLLEGE

[11] In its written submission the College reviewed all of the actions taken by it in response to the access request. In particular, the submission focused on the way in which the electronic search of the named employee's e-mail account was conducted, the choice of search terms used, and the efforts made to find references in that e-mail account to the Applicant without the use of his name.

[12] The College also made submissions on the question of conducting a manual search for records that did not mention the Applicant by name. These issues will be addressed in the "Discussion" section, below.

### III APPLICANT'S SUBMISSION

[13] No written submission was received from the Applicant. However, I will refer below to arguments made by the Applicant in other correspondence during the course of this Review.

### IV DISCUSSION

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

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

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

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

The only issue to be dealt with in the present case is whether or not the College has conducted a reasonable search for the records requested by the Applicant.

[16] The Applicant's request was for all records containing his personal information or the personal information of another named individual, from the e-mail files of a specific named employee of the College for a three-month period in 2007. By the time this request was made in February 2008, the College's e-mail system had implemented a program called Extender, in which a copy of every incoming or outgoing e-mail is saved to a separate journal server.

[17] Searching e-mail messages in response to an access request is now, therefore, a relatively straightforward electronic process, involving key words. In the present case, the first step was to determine what the most appropriate key words ought to be.

[18] When most people write business e-mails, and refer to other individuals, they commonly do so by using either their first or last names, sometimes both. Therefore the most obvious search terms for finding references to an applicant would be the applicant's first and last names. In the present case, the College chose the Applicant's first name as one key word. In most cases an applicant's last name would be the next logical term to choose. In the present case, because of the possibility that the Applicant's last name is easily mis-spelled, the decision was made to use the first several letters of the Applicant's last name. The College's IT personnel in charge of conducting the search assured the Coordinator that this method would capture all instances of the last name, even if it were mis-spelled. Using those two search terms would be guaranteed to return every e-mail containing the first or last name of the Applicant.

[19] The Applicant had asked for all e-mails containing references to himself, and also to another named individual. Two similar search terms were chosen based on the first and last names of the other individual. The College was confident that this would capture all e-mails containing either of that individual's names as well.

[20] The Applicant had also requested, however, that the College disclose all e-mails containing references to him or to the other individual, even if neither were referred to by name. A common practice in some types of correspondence is to refer to an individual by another designation. For example, in the access and privacy context individuals are often referred to by terms such as "applicant" or "complainant." This is something our Office has a practice of doing, as a matter of security, in order not to identify an individual or to include any of that individual's personal information where it is not necessary to do so. The College advises that a similar practice has developed in its offices, and individual applicants are generally not named in correspondence unless it is necessary to do so.

[21] At the time the search was carried out in the present case, the named CNA employee whose e-mails were being searched was the College's in-house legal counsel. In the course of conducting the search the College consulted him about this issue. He confirmed that he followed the practice mentioned above when writing about issues related to access to information requests. He stated that this would be the only circumstance in which the Applicant might have been referred to indirectly as

“the applicant” and in which the Applicant’s name might therefore be entirely missing from an e-mail message.

[22] In the present case, the Applicant and the other named individual had each made a number of previous access to information requests. The College has advised that, like other public bodies, all incoming access requests are reported to the Justice Department ATIPP Office for statistical tracking purposes, and the ATIPP Office assigns each request a unique number that begins with the letters “PB.” In subsequent correspondence College personnel typically refer to an access request by its file number. The present matter, for example, is File PB/42/2008.

[23] The College therefore decided that in order to try to capture possible instances where the Applicant or the other named individual might have been referred to indirectly in connection with an access request, a second search was made using the search terms “applicant” and “PB.”

[24] The searches using the actual names of the Applicant and the other individual as search terms returned a number of e-mail messages. The College severed some information based on a number of exceptions in the *ATIPPA*, and disclosed those records to the Applicant. The severing was not an issue.

[25] The second search using just the terms “PB” and “applicant” also returned some additional messages. Each of those messages had to be individually inspected to determine, by reference to the file number, whether it was actually about the Applicant or the other named individual. If it was about the Applicant then it was severed, as necessary, and disclosed to the Applicant.

[26] I have concluded that the choice of the above search terms by the College was a reasonable one. Whether a particular search term would be reasonable would depend on the context and background of the case. Neither the College nor the Applicant has suggested any further terms that might have been useful in the present matter.

[27] The Applicant referred this Office to a similar practice of referring to individuals indirectly, which had been used by a predecessor of the individual whose e-mails were searched in the present file. The Applicant asserts that this represents a practice of correspondence between CNA and

government officials which are deliberately written to be undetectable in an electronic search pursuant to an access request. However, as I have recounted above, the College has given a quite reasonable explanation of how and why such a practice may legitimately develop. Without some convincing evidence that such a practice has been adopted for an improper purpose, I cannot draw the conclusion urged upon me by the Applicant. Likewise, without some convincing evidence supporting a suggestion that some particular search term, other than “applicant” would be likely to produce positive results, I am not willing to recommend to CNA that it should conduct yet another search, even an electronic one.

[28] The Applicant has requested that the College conduct a manual search of the e-mails in the named employee’s e-mail account for the period of the request, and has suggested that such a manual search would not be onerous. CNA has advised me that there are 4,998 e-mails in that account for the requested 3-month period. A manual search would require someone to read each and every e-mail from beginning to end, focusing on the content and meaning, in an attempt to determine whether or not the message referred to some person whose name was not given. Supposing that such an exercise were to take an average of five minutes per message, it would take over 400 hours of search time. Such an expenditure of time and effort would be totally disproportionate to any conceivable benefit to be achieved, and therefore I do not consider it to be a reasonable request.

[29] What would be the point of such an exercise? Suppose an e-mail contained statements that appeared to be “about” a person, but without any information identifying the person. How would that constitute the Applicant’s personal information? Possibly there might be circumstances in which a knowledgeable individual, aware of the context, might be able to draw a reasonable inference that such a statement was indeed about the Applicant. The person who wrote the e-mails might be considered to be such a knowledgeable individual, but he is no longer an employee of the College, so the College would have no means or authority to ask him to assist in the search. What criteria would any other searcher, even a knowledgeable one, use to link such an e-mail to the Applicant? What if the searcher made a mistake? If the message was not in fact about the Applicant, then the College would be in the position of having disclosed someone else’s personal information without consent.



[30] The Applicant in his Request for Review asked that this Office review the entire group of records to determine if his personal information was contained therein, even though he may not have been referenced by name. If this was meant literally as a request for employees of this Office to conduct a manual search of the records themselves, it is not one with which we could comply, even if such a search did not require the expenditure of time and effort referred to above.

[31] It is the responsibility of the public body having custody or control of the records to conduct the search in response to an access request. The role of this Office under section 43 of the *ATIPPA* is to review "...a decision, act or failure to act of the head of the public body that relates to the request." Accordingly, this Office will review the evidence related to a search to determine whether or not, in our opinion, it was a reasonable one. We will, where appropriate, review how a public body has dealt with a request in order to determine whether there has been a failure of the statutory duty to assist an applicant. We will routinely review severing decisions in order to determine whether the exceptions to access in the *ATIPPA* have been properly applied. However, it is not the role of this Office to substitute itself for the public body and conduct the search or carry out the severing ourselves.

## V CONCLUSION

[32] I have concluded that the College has conducted a reasonable search for the records requested by the Applicant, and that those records have been provided to him. I have further concluded that it was not reasonable for the Applicant to request that a manual search of the relevant e-mails be carried out and that therefore the refusal by the College to conduct such an additional search was not unreasonable. I have also concluded that it is not the role of this Office to conduct any search for records in the custody or control of other public bodies.

## VI RECOMMENDATIONS

[33] In view of the conclusions I have reached above, there is no need for me to make any recommendation under paragraph 49(1)(a) of the *ATIPPA*.

[34] Although I have made no recommendation, under the authority of section 50 of the *ATIPPA*, I direct the head of the College of the North Atlantic to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the final decision of the College with respect to this Report.

[35] In addition, I hereby notify the Applicant, in accordance with subsection 49(2) of the *ATIPPA*, that he has a right to appeal the decision of the College of the North Atlantic to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60. The Applicant must file any appeal within 30 days after receiving a decision of the College referenced above.

[36] Dated at St. John's, in the Province of Newfoundland and Labrador, this 15<sup>th</sup> day of December, 2011.

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