



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2013-020

November 29, 2013

College of the North Atlantic

Summary:

The Applicant applied to the College of the North Atlantic (“the College”) under the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) for access to records containing his personal information. The Applicant questioned the methodology of the search because a certain document, which was provided under a later access request, was not included in the responsive records in this request, even though that record should have been responsive to both access requests. The Commissioner determined that the College improperly applied section 13 when conducting the search and erred when it failed to provide the records to this Office. However, as the College has since changed its policy on the use of section 13, the Commissioner had no recommendations to make.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, s.13.

I BACKGROUND

- [1] In accordance with the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) the Applicant submitted an access to information request to the College of the North Atlantic (“the College”) on April 13, 2008, in which he requested disclosure of records as follows:

All records that contain my personal information or the personal information of [another named individual] from the email account referenced by [a named employee] in her October 16, 2006 correspondence wherein she stated:

Furthermore, we are unable to respond to your request given its present scope since we have identified over 12,000 records responsive to your request in just one email account.

I am requesting all emails and attachments from this group of records except those from the period of April 1, 2005 to July 31, 2005.

- [2] The College responded to the access request which is the subject of this Report (the “2008 Request”) by releasing some of the responsive records and claiming various exceptions to disclosure over the other responsive records. They relied on exceptions set out in sections 20 (policy advice and recommendations), 21 (legal advice), and 30 (personal information).
- [3] In a Request for Review dated June 29, 2008 and received in this Office on July 3, the Applicant asked for a review of the College’s decision to withhold or sever information under the above-noted exceptions.
- [4] This review was placed in abeyance under this Office’s banking policy during 2008 and was re-opened on March 24, 2010.
- [5] During the informal resolution process the College agreed to release additional records to the Applicant. Most of the issues surrounding the redactions were resolved through informal resolution.
- [6] The section 21 issue, in particular, was resolved as it had become moot as the email that was redacted in the 2008 Request (the “2:28 email”) was released under a 2012 request (the “2012 Request”).

[7] In the 2012 Request, however, the College also released a new email which on its face seemed responsive to the 2008 search (the “1:08 email”). This record was not included in the responsive records provided to the Applicant pursuant to the 2008 Request. This therefore raised for the Applicant a concern about the search process used in the 2008 Request.

[8] By letters dated December 6, 2012 the parties were advised that the Request for Review had been referred for formal investigation as per section 46(2) of the *ATIPPA*. As part of the formal investigation process and in accordance with section 47 of the *ATIPPA*, both parties were given the opportunity to provide written submissions to this Office.

[9] The issue which is the subject of this review is limited to the adequacy of the search conducted in 2008 and whether this may have resulted in the Applicant receiving fewer records than he was entitled to at the time.

II APPLICANT’S SUBMISSION

[10] The Applicant did not provide a formal submission specific to this Report, but instead relied on earlier correspondence he had written to this Office requesting a prosecution under section 72(b) of the *ATIPPA* (willfully misleading or attempt to mislead the Commissioner or another person performing duties or exercising powers under the *Act*) arising out of the same facts as this Report.

[11] This correspondence, dated 18 October, 2012, indicates that it is the Applicant’s belief that the College:

...has wrongfully withheld an email with attachments dated May-06-03 1:08:28 PM contrary to the provisions of the Access to Information and Protection of Privacy Act with the intent to misled [sic] or attempted to mislead the OIPC in the conduct of the investigation into [this] OIPC file, or other files.

[12] The 1:08 email was not provided to the Applicant as part of the responsive records for the 2008 Request and was not included in the records given to this Office as part its review of the redactions under that same request.

[13] The Applicant believes that this constituted a willful decision to withhold the records from him and from this Office and a willful attempt to mislead the Commissioner and this Office. He requested that the appropriate authorities be notified so that an investigation under section 72 of the *Act* could be launched.

[14] In reflecting on the fact that he had received the 2:28 email among the responsive records from the 2008 Request but not the 1:08 email, the Applicant raised the question:

The two May 06 2003 emails are quite similar in that both deal with the same subject matter; have similar attachments; were sent from the same account to the same person; and were sent the same day, about 80 minutes apart. In fact on the face of it, the withheld record contains more responsive criteria than the similar record provided to me by CNA. The question then is how did one email make it into the “responsive pool” and the other, which is equally (if not more) responsive to the criteria, not make it in to that “responsive pool”?

[15] The Applicant suggests in his submission that the College had motive to withhold the 1:08 email as they were attempting to “mitigate against possible legal consequences resulting from positions taken in sworn statements by a person or persons on behalf of CNA” in related litigation.

III COLLEGE’S SUBMISSION

[16] On the issue of the methodology of the search performed in relation to the 2008 Request, the College applied section 13 of the *Act* (repetitive requests) to the 2008 Request as earlier searches had been conducted of that particular employee’s email account in response to previous access requests from the same Applicant.

[17] When the College conducts a search they use specific search terms (here the Applicant’s name or variations thereof) in specific fields of the emails and the body of the email. The commonly used text fields that are searched are the: to, from and subject line fields.

[18] The College excluded as repetitive any and all records where the same term had been searched in the same field in a prior search. In the 2008 Request, this included the 1:08 email. The College decided to exclude this record from the 2008 Request on the basis of its interpretation of section 13 of the *ATIPPA* (repetitive request).

[19] The College did not use section 13 to exclude the 2:28 email from the 2008 Request as the search terms used were not found in the commonly used text fields (i.e. the subject line) but only in the attachment name.

[20] The College has since accepted, on the basis of discussions with this Office, that this provision (Section 13) should be applied on the record level instead of the search level, so that if the records are not provided in the original request, they can release them under a second request, even if the search scope is repetitive in nature. The College noted that their “current access to information process has been adapted to recognize this interpretation.”

[21] The College’s submission also indicates that searches conducted subsequent to the 2008 Request also revealed the 1:08 email. These searches were conducted in 2010, 2012 and 2013.

[22] In the 2010 Request the 1:08 email was responsive but the records for that Request were not provided to the Applicant due to non-payment of fees. However, in 2012 the 1:08 email was provided in redacted form. The College notes in their submission that they released the address and subject fields. The 2013 search also included the 1:08 email, but no records were released as the college confirmed all records had been previously released to the applicant. In this decision, the College appropriately applied section 13 as the record had been provided already (albeit in redacted form).

[23] There was another access request referenced in the College’s submission, which they interpreted as “a request for records which were returned as part of the [2008 Request]”. The College describes their response to this access request by stating they “reviewed every record contained in the ‘Section 13’ folder in the 2008 Request. The 1:08 email was included in these responsive records as well, in redacted form.

[24] The College summarizes its position on the method of the search in the following passages:

In summary, the college maintains that the search completed for the applicant’s access to information request PB-69-2008 was reasonable and in keeping with the college’s access to information practices in 2008.

...

The college would like to respectfully request that the OIPC consider the amount of time that has elapsed since access to information request PB-069-2008 was first submitted to the college. A report based on the college's practices used in 2008 to process an access to information request is no longer relevant today as the college's practices have evolved considerably since then. The college maintains that it acted in good faith in processing this access to information request, as it does in all requests.

IV DISCUSSION

[25] The issue of the prosecution raised by the Applicant under section 72(b) of the *ATIPPA* will not be discussed in detail in this Report except to note that I wrote to the Applicant indicating that there was not sufficient evidence of willful intent to mislead this Office to proceed with a prosecution.

[26] The only issue to be decided in this Review is whether the methodology used in conducting the original search was in compliance with the *ATIPPA* and why the 1:08 email was not included in the responsive records.

[27] The 1:08 email was returned in the initial search in response to the 2008 Request. The College applied section 13 to the record and did not provide it to the Applicant. Further, the College did not include the record (or any other record to which they determined section 13 applied) to this Office for review at the time the Applicant filed his Request for Review, which is the subject of this Report.

[28] The College's explanation of their prior use of section 13 is problematic. There is no reasonable explanation offered for this interpretation.

[29] Section 13 states:

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

[30] The "already provided" portion of this section is clearly intended to cover records that have already been provided to the Applicant. This does not refer to records that have been previously searched and not provided. This is a critical distinction because, as we learned in this case, a record may be searched and retrieved but not provided for a myriad of reasons.

[31] The College has indicated in its submission that it has now altered its application of section 13 to align with this interpretation. The release of the 1:08 email in redacted form in the 2010, 2012 and 2013 searches is evidence of this change in policy.

[32] I must note further that the College erred in its decision not to include the section 13 records in the records provided to this Office. All responsive records, including those which the public body determines are subject to exceptions and/or those that fall under section 13 must be provided to this Office as part of its review. By not disclosing the existence of these records the College has caused a lengthy review by this Office and effectively denied the existence of these critical records for years. The Applicant is of the view that this impacted his ongoing legal action against the College.

[33] The College has indicated that it now includes all records for which section 13 is claimed in records provided to this Office. This does little to remedy the problems their past position has caused for the Applicant and calls into question the completeness of all documents provided to this Office by the College up to 2010.

V CONCLUSION

[34] I have concluded that the College improperly applied section 13 to the 2008 Request. However, the College has since rectified this error and therefore I have no recommendations to make.

VI RECOMMENDATIONS

[35] Although I have made no recommendations, 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 its final decision with respect to this Report.

[36] Please note that within 30 days of receiving the decision of the College of the North Atlantic 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*.

[37] Dated at St. John's, in the Province of Newfoundland and Labrador, this 29th day of November 2013.

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

