



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2014-005

February 17, 2014

College of the North Atlantic

Summary:

The Applicant requested from the College of the North Atlantic (the “College” or “CNA”) records relating to the personal information of the Applicant held in the email accounts of certain individuals. The College released the records in part and withheld certain information from disclosure pursuant to sections 13 (repetitive or incomprehensible request), section 20(1)(a) and (b) (policy advice or recommendations), section 21(a) (legal advice), section 24 (1)(a)-(e) (disclosure harmful to the financial or economic interests of a public body) and section 30 (disclosure of personal information) of the *ATIPPA*. All information withheld pursuant to section 13 was released in advance of this Report and there was, in fact, no information withheld pursuant to section 20(1)(b). The Commissioner found section 20(1)(a), section 21(a) and section 30(1) had been properly applied in some instances but that there was also information improperly withheld under these sections. Consequently, the Commissioner recommended the release of this information. Furthermore, the Commissioner determined that section 24 was claimed generically, without any specific subsection cited, and was always claimed in conjunction with another section to withhold information. The Commissioner found that section 24 was inapplicable to the records. Consequently the Commissioner recommended the release of all information withheld pursuant to section 24 unless another section claimed in conjunction with section 24 was applicable.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, sections 2(o), 20(1)(a), 21(a), 24(1), 30(1), 30(2) and 64(1).

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2005-002, 2007-015, A-2008-002, A-2009-002, A-2010-002, A-2011-009, A2012-011

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) on December 16, 2010, the College of the North Atlantic (the “College” or “CNA”) received an access to information request from the Applicant seeking disclosure of records as follows:

All emails or email conversation or email attachments that reference the following personal information (search terms are bulleted):

My name or any reasonable derivative of it:

[Applicant’s first name]
 [Applicant’s last name]
 [Applicant’s initials]
 [Applicant’s first initial and last name]

My former position or any derivative of it:

[Applicant’s former position title abbreviation]
 [Applicant’s former position title]
 [Applicant’s former position title (variation)]
 [The Department/area to which the Applicant’s title relates]
 [Applicant’s former position title abbreviation (variation)] *(this is a term often mistakenly used to identify my position)*

Departments that reported to me or initiatives that would have been part of my locus of control as
 [Applicant’s former position title abbreviation] OR *member of the executive:*

[List of 11 Departments that reported to the Applicant or initiatives that would have been part of the Applicant’s locus of control]

Period: from July 1, 2009 – Current

In the received or sent mailboxes or mailbox archives/ backups of:

[List of 9 named individuals]

An electronic copy of these emails in an Outlook PST file would be more than adequate and able to be moved around at ease electronically.

[2] The request was later narrowed by agreement dated December 22, 2010 to the following:

All emails or email conversations or email attachments that reference my personal information in the email accounts of:

[List of 9 named individuals]

The search terms for this search are [Applicant's last name], [Applicant's first name] and [Applicant's initials]. The timeframe to be search [sic] is July 1, 2009 to December 16, 2010.

[3] The College responded to the Applicant's modified access request on February 14, 2011 and released the responsive records in part, withholding some information from disclosure pursuant to sections 13, 20(1)(a) and (b), 21(a), 24(1)(a)-(e) and 30(1) of the *ATIPPA*.

[4] In a Request for Review dated February 22, 2010 – later corrected to 2011 - the Applicant asked for a review of the decision of the College.

[5] Efforts by an Analyst from this Office to facilitate an informal resolution resulted in the release of additional information to the Applicant such that no claim of section 13 remained and, in fact, no claims of section 20(1)(b) were found. However, the remaining exceptions claimed were still outstanding and therefore by letters dated March 13, 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.

II PUBLIC BODY'S SUBMISSION

[6] The College provided its formal submission on May 24, 2012, broken down into the individual legislative provisions claimed by the College.

[7] In respect of its claim of section 30 the College states:

Content redacted in accordance with Section 30 is either personal information of an individual who is not an employee of CNA, or of an employee of CNA but does not relate to their position, function and remuneration as an officer, employee or member of a public body.

[8] CNA submits that certain information is redacted because the individual to whom the information relates is a non-employee of CNA, or a “local hire”. To this end CNA provides the following information:

These individuals are locally hired employee (local hire) of CNA-Qatar. Local hires differ from Canadian hired employees in that:

- *they are employees of a foreign country*
- *they are not recruited by CNA’s Qatar Project Office (QPO)*
- *they do not receive an employment offer signed by the CNA President (as do all Canadian hires)*
- *their pay and benefits are not administered by the QPO*
- *decisions relation [sic] to discipline and/ or termination are not made by CNA*
- *their remuneration is paid in Qatar Riyals to a Qatari bank account*
- *Canadian taxes are not deducted from their paycheques and these individuals are not included in CNA’s yearly tax reporting to the Canada Revenue Agency*
- *Canadian labour law does not apply to their contracts and their contracts are not written in English*
- *their jobs tend to be non-instructional, non-management roles such as clerical and support roles*

[...] CNA cannot disclose the names of locally hired employees as they are not employees or members of a public body or members of a minister’s staff.

[9] In respect of the information which CNA indicates is the personal information of CNA employees, CNA submits this information falls into one of the following categories: personal conversations between employees not related to the Applicant, personal opinions not related to the Applicant and not given in the course of performing services for CNA as per section 30(2)(f), personal information which does not meet any other criteria set out in section 30(2) (i.e. personal identifiers, work history, national origin, personal financial information, information relating to visa arrangements) or which is otherwise not responsive to the Applicant’s access request. CNA indicates that in all such instances no paragraph under section 30(2) would apply and, therefore, it must withhold the information.

[10] In respect of its claim of section 20(1)(a) CNA submits that the withheld information:

[was developed] for the purpose of developing recommendations and planning appropriate actions [...] assuming the document would be confidential and used only by the executives included in the discussions. We believe this is an example of a circumstance for which Section 20 was intended [...]

to allow full and frank discussion of policy issues within the public service, preventing the harm which would occur if the deliberative process were subject to excessive scrutiny [...]

Or

[...] outlined directives and recommendations of the president of CNA [...] [in a] draft email. It is incomplete and there is no indication that the email was ever sent. The outline of the directives and recommendations may not be complete and accurate.

- [11] The College also notes that in connection with its claim of section 20(1)(a) it is also withholding information pursuant to section 24. It submits:

This group of records contains recommendations developed by and for the public body (CNA). Furthermore, the disclosure of this information could reasonably be expected to harm the financial interests of CNA. This information reveals the negotiations carried on by CNA in reference to the Qatar Project as well as the plans for management of personnel at CNA-Qatar.

- [12] The College describes certain of these records as: recommendations in reaction to issues such as the workplace assessment and workplace investigation, deliberations on significant College issues and information in respect of the relationship between the College and the State of Qatar. CNA states:

CNA's Qatar Project has yet to be renewed with the State of Qatar and negotiations of this renewal could be adversely affected by the release of any of this information. Failure to renew this project would have significant financial consequences for CNA.[...]

Any recommendations related to the administration of CNA and the Qatar project could potentially reveal the negotiations carried out by CNA for the benefit of this project. As indicated there is an expectation of confidentiality by the parties which could negatively impact the outcome of these negotiations.

- [13] Finally in respect of its claim of section 21(a), CNA submits that the release of this information would reveal legal advice from its General Counsel or the substance of requests for legal advice.

III APPLICANT'S SUBMISSION

- [14] The Applicant provided a formal submission on March 13, 2012. In his submission, the Applicant simply set out the substance of his complaint as follows:

- *Unwarranted delays in completing a review of the redactions in the response*
- *A myriad of promises with respect to commitments made to deliver the responses for this file*
- *Many redactions made and maintained without good cause*
 - *I believe that many of these were made only to hide information relevant to other complaints I have made to the employer*
- *A general attempt to not be forthcoming and transparent regarding the content of these emails over a period of longer than 1 year, far outside of any reasonable measure let alone that required by policy.*

IV DISCUSSION

[15] There are four issues to be discussed in this Report:

- (i) whether the College properly applied section 20(1)(a) of the *ATIPPA* to withhold the responsive records;
- (ii) whether the College properly applied section 21(a) of the *ATIPPA* to withhold the responsive records;
- (iii) whether the College properly applied section 24(1) of the *ATIPPA* to withhold the responsive records; and
- (iv) whether the College properly applied section 30(1) of the *ATIPPA* to withhold the responsive records.

[16] Before beginning my analysis it is important to point out that this Request for Review was received prior to the *ATIPPA* being amended by Bill 29 and, consequently, any analysis contained herein will be in reference to the *ATIPPA* as it was prior to the amendments.

(1) Did the College properly apply section 20(1)(a) (policy advice or recommendations)?

[17] Section 20(1)(a) states:

20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal

(a) advice or recommendations developed by or for a public body or a minister; or [...]

[18] In Report A-2011-009 I stated the position of this Office in relation to section 20(1)(a):

[16] I would like to note that an extensive Review of the case law concerning the interpretation of “advice and recommendations” was done in Report A-2009-007 and will not be repeated here. In that case, I decided as follows:

- 1. The statement by my predecessor in Report 2005-005 that “the use of the terms ‘advice’ and ‘recommendations’ [. . .] is meant to allow public bodies to protect a suggested course of action” does not preclude giving the two words related but distinct meanings such that section 20(1)(a) protects from disclosure more than “a suggested course of action.”*
- 2. The term “advice or recommendations” must be understood in light of the context and purpose of the ATIPPA. Section 3(1) provides that one of the purposes of the ATIPPA is to give “the public a right of access to records” with “limited exceptions to the right of access.”*
- 3. The words “advice” and “recommendations” have similar but distinct meanings. The term “recommendations” relates to a suggested course of action. “Advice” relates to an expression of opinion on policy-related matters such as when a public official identifies a matter for decision and sets out the options, without reaching a conclusion as to how the matter should be decided or which of the options should be selected.*
- 4. Neither “advice” nor “recommendations” encompasses factual material.*

[19] It is clear to me that certain portions of the records contain suggested courses of action made by CNA employees on policy related matters. Therefore, I accept that certain portions of the responsive records may be withheld from disclosure pursuant to section 20(1)(a).

[20] Other information in the records, however, does not contain any advice or recommendations, but rather is non-policy related opinions or views of a public body employee which has been made in the course of providing services to the College. To this end, this information should be released in accordance with 30(2)(h).

[21] Moreover, other information in the records does not meet the definition of advice or recommendations and section 20(1)(a) simply cannot apply in relation to these pieces of information.

(2) Did the College properly apply section 21(a) (legal advice)?

[22] Section 21(a) states:

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 [...]

[23] In many previous Reports, I have held that section 21 contemplates both legal advice privilege and litigation privilege; however, in the current instance we are concerned only with legal advice privilege. As held in Report A-2009-002, in order for solicitor-client privilege to exist three factors must be met. First, there must be a communication between a solicitor and client; second, this communication must entail the seeking or giving of legal advice; and finally, the communication and the advice must be intended to be confidential by the parties. In Report 2007-015, my predecessor found “[i]f all three criteria are met, the privilege is engaged and section 21 may be applied [...]. In the absence of one or more of the criteria, a public body cannot rely on the exception, thereby upholding the right of access.”

[24] There are clear instances in the responsive records where the withheld information amounts to communications between a solicitor and a client which entail the seeking or giving of legal advice and which were intended by the parties to remain confidential. Consequently, this information may be withheld. However, there are also instances where one of the three parts of the test for section 21(a) fails and, in these instances, the information should be released.

(3) Did the College properly apply section 24(1) (disclosure harmful to the financial or economic interests of a public body)?

[25] Section 24(1) states:

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:

(a) trade secrets of a public body or the government of the province;

- (b) *financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;*
- (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;*
- (d) *information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party; and*
- (e) *information about negotiations carried on by or for a public body or the government of the province.*

[26] In Report A-2010-002 at paragraph 52 I discussed the application of section 24:

[52] It is important to note that section 24 of the ATIPPA is a discretionary provision: it permits but does not require the public body to withhold information that falls within the section, and then only if the required test is met. It is the responsibility of the public body to demonstrate, on a balance of probabilities and through detailed and convincing evidence, that there is a reasonable expectation of probable harm from disclosure of specific information. There must be a clear and direct causal link between the disclosure of the information specified and the harm alleged. That link must be based on evidence, not merely speculation or argument. The evidence must be convincing, not just theoretically possible. The alleged harm must be specific. The public body must demonstrate the nature of the harm that is expected to result and how it is likely to result, and it must show the harm to be probable, not merely possible.

[27] Additionally in Report A-2008-002, I adopted the test put forward by my predecessor in Report 2005-002, and indicated that in order for section 24 to apply a public body must present evidence that establishes a clear and direct linkage between the disclosure of the information in question and the probable harm to the financial or economic interests of a public body. In order to prove this linkage a public body is required to give detailed and convincing evidence explaining how or why the alleged harm would result from the disclosure of specific information.

[28] Beyond the statements made by CNA indicating that financial harm could be expected from the release of this information, no detailed and convincing evidence has been provided. Furthermore, the recommendations, negotiations and planning referred to by CNA have been completed, the positions have been filled and the Comprehensive Agreement has been extended. These records are dated over 3 years ago and I fail to see the financial harm which could result from the release of this

information. Additionally, without detailed evidence I fail to see how the release of this information affects to the relationship between CNA and the State of Qatar.

[29] In all instances where information has been withheld and section 24 has been claimed, the information is permitted to be withheld in accordance with another section which has been claimed in conjunction with section 24. All other instances should be released.

(4) Did the College properly apply section 30(1) (disclosure of personal information)?

[30] Section 30 states:

30. (1) The head of a public body shall refuse to disclose personal information to an applicant.

(2) Subsection (1) does not apply where

- (a) the applicant is the individual to whom the information relates;*
- (b) the third party to whom the information relates has, in writing, consented to or requested the disclosure;*
- (c) there are compelling circumstances affecting a person's health or safety and notice of disclosure is mailed to the last known address of the third party to whom the information relates;*
- (d) an Act or regulation of the province or Canada authorizes the disclosure;*
- (e) the disclosure is for a research or statistical purpose and is in accordance with section 41;*
- (f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;*
- (g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;*
- (h) the disclosure reveals the opinions or views of a third party given in the course of performing services for a public body, except where they are given in respect of another individual;*
- (i) public access to the information is provided under the Financial Administration Act ;*
- (j) the information is about expenses incurred by a third party while travelling at the expense of a public body;*
- (k) the disclosure reveals details of a licence, permit or a similar discretionary benefit granted to a third party by a public body, not including personal information supplied in support of the application for the benefit; or*
- (l) the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, not including*
 - (i) personal information that is supplied in support of the application for the benefit,*
 - or*

(ii) personal information that relates to eligibility for income and employment support under the Income and Employment Support Act or to the determination of assistance levels.

[31] In conjunction with this provision, section 2(o) states:

(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;*

[32] CNA has suggested that the information which has been severed falls into one of two categories: personal information of non-CNA employees and personal information of CNA employee. I accept that some of the information does fall into these categories and is protected by section 30(1); however, a certain amount simply does not meet the definition set out in section 2(o) or should be disclosed under section 30(2).

[33] In respect of certain claims that information in the records is the personal information of non-CNA employees, the College has indicated that the information is redacted because the signatories are "local hires" and not employees in accordance with section 2(e). Consequently, CNA claims this information cannot be provided pursuant to section 30(2)(f).

[34] Section 64(1) of the *ATIPPA* states:

64. (1) On a review of or appeal from a decision to refuse access to a record or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record.

[35] As indicated in previous Reports, the burden is on the College to establish that the individuals are not employees of CNA and, therefore, their personal information must be protected in accordance with section 30. The College has failed to prove this issue. Despite requests from this Office, CNA has again failed to provide convincing evidence to support its claim regarding local hires and their distinction from Canadian hired employees. CNA has provided nothing more than the same list of information which it provided in its submission in Report A-2012-011, as evidence of the local hire issue. In that Report I stated:

The burden is on the College to establish that the signatories are not employees of CNA and, therefore, their personal information must be protected in accordance with section 30. The College has failed to prove this issue. Despite requests from this Office, CNA has failed to provide convincing evidence to support its claim regarding local hires and their distinction from Canadian hired employees.

[36] Where CNA has claimed that information is the personal opinion of an identifiable individual who is an employee of CNA, in certain instances it is clear that the information is actually factual information and not personal information. Additionally, certain claims by CNA that information is the work history of an identifiable individual cannot stand as the information is, in fact, about the position of a CNA employee and must be disclosed in accordance with section 30(2)(f).

[37] Furthermore, CNA has on certain portions of the records, claimed section 30(1), however a closer line-by-line review indicates that not all the information is protected and should be released as it fails to meet the definition of “personal information”.

V CONCLUSION

[38] I have concluded that the sections claimed by the College, with the exception of section 24(1), have been appropriately claimed to protect various portions of the records from disclosure; however, there remains information which has been improperly withheld under these sections and this information must be released.

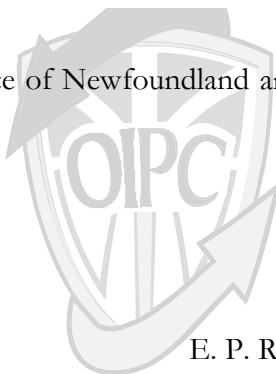
VI RECOMMENDATIONS

[39] Under the authority of section 49(1) of the *ATIPPA*, I recommend that the College release to the Applicant the information highlighted in blue/green on a copy of the responsive record attached to this Report.

[40] Under the authority of section 50 of the *ATIPPA*, I direct the head of the College 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.

[41] Please note that within 30 days of receiving the 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*.

[42] Dated at St. John's, in the Province of Newfoundland and Labrador, this 17th day of February, 2014.



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