

NEWFOUNDLAND AND LABRADOR
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

REPORT 2007-011

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 disclosing some records, and withholding or severing others under sections 20, 21, 22, 24, 27 and 30 of the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”). The Applicant then asked the Commissioner to review the decision of CNA to withhold some of the requested information. During informal resolution efforts, CNA agreed to release all additional records which were proposed for release by the Commissioner’s Office. After these additional records were released to the Applicant, the Applicant decided not to resolve the matter informally and asked the Commissioner to proceed with a Report. The Applicant indicated in her formal submission to the Commissioner that she wished the Commissioner to complete a Report on this matter due to her suspicion that CNA may not have responded accurately and completely to her request. The Commissioner determined that there was no evidence that CNA did not respond accurately and completely to the Applicant’s request. Furthermore, the Commissioner determined that CNA had released all of the records to which the Applicant was entitled, and he therefore declined to issue a recommendation.

Statutes Cited:

Access to Information and Protection of Privacy Act, SNL 2002, c. A-1.1, as am, ss 9, 16, 20, 21, 22, 24, 27, 30, 49(1), 50, 60.

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2005-006, 2006-003, 2006-013 and 2007-010; Ontario OIPC Order M-909.

I BACKGROUND

- [1] On 23 August 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”):

All records (e-mails and attachments) which contain any personal information of [Applicant] or [Applicant’s spouse] from the group of records which were returned as a result of my February 12, 2006 request. I am requesting the records from the period of January 1, 2004 to June 30, 2004.

- [2] A letter of permission from the Applicant’s spouse was provided to CNA with the request form. In a letter to the Applicant dated 19 September 2006, CNA extended the time limit for a response to this request by an additional thirty days, based on section 16(1)(b) of the *ATIPPA*, which states:

16(1) The head of a public body may extend the time for responding to a request for up to an additional 30 days where

(b) a large number of records is requested or must be searched, and responding within the time period in section 11 would interfere unreasonably with the operations of the public body;

- [3] CNA issued its response to the Applicant on 19 October 2006, in which it provided partial access to the requested records. The remaining information was withheld under sections 20(1)(a) and (b); 21; 22(1)(h) & (p); 24(1)(c) and (e); 27 and 30 of the *ATIPPA*.

- [4] On 30 October 2006 this Office received a Request for Review from the Applicant, a copy of which was forwarded to CNA. The Applicant requested that this Office review “the severing and withholding of records” in relation to this file. Informal resolution efforts were not successful, therefore this file was referred to the formal investigation process, culminating in this Report. It should be noted, however, that during informal resolution efforts, CNA agreed to release all of the records as per the suggestions of this Office. Both parties were invited to provide formal submissions, which are summarized below. The Applicant’s position on this matter is largely derived from her submission in relation to my Report 2007-010, which she requested this Office to apply to this Review as well.

II PUBLIC BODY SUBMISSION

- [5] CNA began its submission by reviewing the time lines of its receipt of the Applicant's request, through the informal resolution efforts initiated by this Office. CNA notes that in the informal resolution process, it released all records proposed for release by this Office "despite serious hesitation" with regard to certain records.
- [6] CNA says that most of these additional records were sent to the Applicant on 5 April 2007, with the one remaining record being sent to the Applicant on 10 April 2007, as per the proposal for informal resolution put forth to CNA by this Office. However, CNA notes that on 18 April 2007, this Office relayed communication from the Applicant to the effect that an incomplete set of records had been released in relation to informal resolution efforts involving another Request for Review which also involved the same Applicant and CNA (see my Report 2007-010 for additional details). The Applicant had noted that there appeared to be records missing from among those which were supplied to her in relation to that other file. In its submission on this Review, CNA briefly revisited its response to that issue, in which it acknowledged the error, supplied the missing pages to the Applicant, issued an apology to the Applicant, and identified photocopier error as the source of the problem. CNA notes that the Applicant, in an e-mail on 11 May 2007, expressed that "if that file was copied at the same time as [this file] I would anticipate the same undetected photocopier problem occurred ..." Because of the Applicant's unresolved suspicion based on previous photocopier error involving a different file which was processed by CNA at about the same time, the Applicant requested that a Commissioner's Report be issued on this file as well.
- [7] CNA outlined the history of its search in relation to this particular file, which was in one sense a two-stage undertaking. The first stage occurred when CNA responded to an earlier request by this Applicant, which was received by CNA on 17 February 2006. That request is the one referred to by the Applicant in this request, quoted in paragraph 1, which is the subject of this Request for Review. That February 2006 request involved electronic records. CNA explained in its submission that when the search was conducted, a large number of e-mail records were returned, resulting in a decision by CNA to deny access to the records and claim

sections 8(2) and 10(1)(b). Section 8(2) involves asserting that the Applicant did not provide sufficient details about the requested information in order to allow the record to be identified, while section 10(1)(b) indicates CNA's position that producing the volume of records involved in that request would interfere unreasonably with its operations. CNA relates that following CNA's response to that request, the Applicant broke her request down into smaller "chunks," which she has submitted intermittently as separate requests, and which CNA has been working through. The request which is now the subject of this Review is one of those "chunks."

- [8] CNA notes in its submission that the Applicant has asked the Commissioner to review the severing and withholding of records responsive to her request. CNA reiterated that it has already disclosed all of the records proposed for release by this Office during informal resolution efforts. CNA asserts that the remaining information which was withheld or severed is protected from disclosure under one or more of the six exceptions claimed. CNA provided to this Office a list of the pages withheld from the Applicant along with the exceptions applied on each page, including some pages which were determined to be not responsive to the request. The pages deemed to be not responsive were returned in the electronic search because they contained one of the search criteria agreed upon with the Applicant, however those records were actually related to different individuals with similar names.
- [9] In its submission, CNA says that it has correctly interpreted and applied the exceptions claimed. CNA also says, however, that the British Columbia Information and Privacy Commissioner stated at paragraph 35 of Order 02-01 that "if even one of the exemptions claimed for a record has been validly claimed then he will not go on to consider the other exemptions which have been claimed." It should be noted here that more than one exception was relied upon for a number of the records which were severed or withheld from the Applicant.
- [10] CNA briefly discussed its reasons for relying on section 30, a mandatory exception which requires public bodies to refuse to disclose personal information. CNA characterized its use of section 30 as follows:

The records to which section 30 was applied contained information which would enable the reader to deduce the educational status of an individual, information about students' family members, names of faculty members' children, opinions about individuals and social insurance numbers. These items fall squarely under the definition of personal information as stated in section 2(o) of ATIPPA. As these items are personal information of individuals other than the applicant and the person for which the applicant supplied a consent form, the College applied the mandatory provision, Section 30(1) of ATIPPA, and severed this information.

- [11] CNA then commented on its use of section 20, which allows public bodies to sever or withhold information which would reveal advice or recommendations developed by or for a public body, or would reveal draft legislation or regulations. CNA described the type of records for which it claimed this exception:

Section 20 was applied to several records containing copies of draft letters and emails, advising and seeking guidance on a particular matter.

In Order 03-08, Re: University of Victoria, the University of Victoria withheld and severed information citing the British Columbia equivalent of Newfoundland's section 20 of ATIPPA. In particular the University argued that the records "set out internal deliberations of UVic staff and faculty 'as to how to manage a series of specific issues'" and that the information would either "reveal advice that influenced UVic's decision and actions respecting the applicant or would allow a reader like the applicant, who is familiar with the circumstances to infer advice that was given."

It is the College's submission that the records withheld under section 20 in this instance fit the criteria and description given in Order 03-08 and we respectfully ask that the Privacy Commissioner so find.

- [12] CNA then went on to discuss its use of section 21, which allows public bodies to withhold information which is subject to solicitor-client privilege. CNA described its understanding of the application of section 21 as follows:

Section 21 was applied to records which contained correspondence between the College's General Counsel and external counsel, giving instructions or seeking legal advice. It was also applied to records containing correspondence between the General Counsel and staff or management of the College, giving legal advice and instruction.

We include for the Privacy Commissioner's consideration copies of Order 02-01, Re: Law Society of British Columbia; Order 00-06: Re: Simon Fraser University and the above mentioned Order 03-08, Re: University of Victoria which discuss the application of the solicitor-client exemption.

The substantive test for determining what qualifies as solicitor-client privilege is stated thus:

Solicitor client privilege was also recently discussed by Burnyeat J. in Kranz v. Attorney General of Canada, [1999] 4 C.T.C. 93 (B.C.S.C.), who quoted, with approval, the following passage from the judgment of Thackray J. in B. v. Canada, above:

As noted above, the privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:

- 1. there must be a communication, whether oral or written;*
- 2. the communication must be of a confidential character;*
- 3. the communication must be between a client (or his agent) and a legal advisor; and*
- 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.*

If these four conditions are satisfied then the communications (and papers relating to it) are privileged.

[13] CNA states that this test for solicitor-client privilege has been adopted by Commissioners in British Columbia and Ontario. CNA then divides the records for which section 21 was claimed into two categories, one being correspondence between the College's General Counsel and external counsel and the second being correspondence between the College's General Counsel and management of the College. CNA further describes these records as follows:

Category 1 records are emails contain [sic] discussion between internal and external counsel about the carriage of ongoing litigation. It is the College's submission that these records fit all four criteria outlined above. Category 2 records also contain emails either seeking or giving legal advice addressed between management and internal counsel on matters of concern to the College and there too, the College submits that these communications fit all four criteria and asks that the Commissioner so finds [sic].

[14] Although CNA also claimed sections 22, 24 and 27, no specific comment was provided in its submission about its reliance on those exceptions.

III APPLICANT'S SUBMISSION

[15] As noted above, the Applicant's request for information which is the subject of this Review was submitted and processed by CNA at approximately the same time as another Request submitted by the Applicant, which resulted in a Request for Review filed with this Office, culminating in my Report 2007-010. The Applicant has advised that her submission in relation to my Report on that matter can also stand as her submission on this one.

[16] The Applicant's submission highlights a number of her ongoing concerns with CNA and its practices in responding to access requests. Her concerns also involve previous requests for information and requests for review which have been filed with this Office. In summarizing these comments, I will focus on those which are most relevant to this particular matter.

[17] The Applicant communicated her frustration by stating that her only level of assurance that she has received the records to which she is entitled is for her to review the records provided to her with a view to discovering whether some responsive records might be missing. On this subject, she commented that "of the three parties involved, I am the one least able to identify when records are missing. There is something seriously wrong with this process when the party who is blind as to the records withheld, has to identify missing records."

[18] The Applicant also comments on the issue of pages which she discovered to be missing from the College's disclosure of records to her which was the subject of my Report 2007-010. The Applicant expressed concern about CNA's handling of the incident. Specifically, she commented on her doubts about photocopier error as the source of the missing pages, and alternately, if photocopier error was the problem, whether CNA attempted to confirm if there were other missing records or further photocopying problems. The Applicant indicated in her submission, in

reference to the missing pages, that it is unreasonable for a public body, “in this case a technology college,” to have this level of error in its responses to applicants:

It is not consistent with my knowledge of photocopiers that in this instance, having put 574 or so pages in the photocopier that the photocopier would fail only when it was copying the pages of the Risk Management document. As I indicated in my email to you on April 25, 2007, I believe the only reason I was able to identify these missing records is because the number of missing records is so large that it's difficult to miss the target. It's not reasonable to believe that out of the 42 pages of the Risk Management documents, that the photocopier failed to copy 16 times (38% of the time) but never failed on the rest of the documents being photocopied.

[19] The Applicant expressed concern that other requests for information she has made (such as the one which is now the subject of this Report) may also succumb to the same problem, but the problem may be less obvious and may go undetected. The Applicant questions how it is possible for a photocopier to fail only when copying a specific document.

[20] As noted above, during informal resolution efforts, the College agreed to release additional records as proposed by this Office. The Applicant, in her submission, expressed some doubt as to whether CNA had in fact agreed to do this, and also even if CNA agreed, whether they followed through. The Applicant felt that the wording of CNA's letter to her which accompanied the release of additional records was deliberately equivocal in not specifically stating that all records proposed for release by this Office during the informal resolution process were being released. The CNA letter referred to by the Applicant says, “Please find enclosed the records for release as per the informal review processes with [name] of the OIPC.” The Applicant says she has felt similarly misled from other correspondence from CNA:

I have no confidence that I have received all the records you have recommended for release. In fact, based on CNA's history, I would really be foolish to have any other starting point – CNA has not dealt with me in good faith, particularly in relation to withholding records.

[21] Also in relation to her request which was the subject of my Report 2007-010, the Applicant noted her concern that apparently CNA staff did not check to see that all records were accounted for before sending them to her. The Applicant expressed concern that perhaps records in addition

to those which she identified as missing had been left out of the package sent to her. The Applicant proposed in her submission that the entire set of records designated for disclosure to her should be reissued electronically to her and to this Office.

[22] The Applicant says that previous recommendations from this Office to CNA in terms of responding in an open, accurate and complete manner have not seemed to make a difference, based on problems with the records disclosed to her in this and other requests for information she has filed. The Applicant concluded her submission with the following statement: “I am requesting that until such time as CNA is in compliance with the spirit and intent of the *ATIPPA*, that the OIPC take appropriate action to fully monitor CNA compliance.”

IV DISCUSSION

[23] I should start by delineating the boundaries of my comments in terms of the exceptions to be discussed versus those which I will not consider. As has been my past practice, and also in line with CNA’s suggestion, it is only necessary, when multiple exceptions are claimed for the same record or passage, for me to agree that one exception applies. Once it has been determined that one of several exceptions applies to a particular passage or record, it is not necessary for me to consider the other exceptions. After reviewing the records, it is noteworthy that all of the records for which CNA claimed sections 22, 24, and 27 were also withheld under other sections. CNA failed to provide any reasons or arguments in support of its use of sections 22, 24 and 27, and there is nothing apparent from the records which would allow me to accept the College’s application of these exceptions at face value. These exceptions, as claimed by CNA, are as follows:

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.*

...

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

(a) *that would reveal*

(i) *trade secrets of a third party, or*

(ii) *commercial, financial, labour relations, scientific or technical information of a third party;*

(b) *that is supplied, implicitly or explicitly, in confidence; and*

(c) *the disclosure of which could reasonably be expected to*

(i) *harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*

(ii) *result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*

(iii) *result in undue financial loss or gain to any person or organization*

...

[24] It is well established that, upon review by a Commissioner, a public body is expected to provide reasons in support of its decision to withhold records under particular exceptions under the *ATIPPA* or equivalent legislation in other jurisdictions. In relation to section 22(h) and (p), CNA has failed to identify the person whose right to a fair trial or impartial adjudication would be taken away if the records in question were disclosed. Similarly, CNA has not identified the particular existing or imminent legal proceedings, the conduct of which would be harmed, if the identified records were disclosed. Additionally, to reach the threshold required for me to accept

CNA's use of section 27, the College would have to provide sufficient information for me to accept that it has met the three-part harms test set out in that exception. No information has been provided by CNA in support of its use of section 27. Furthermore, section 24 requires that CNA present a reasonable expectation of probable harm. In this case, CNA has not made any attempt to argue that harm could befall CNA should certain information be released, and in fact, no comment of any kind in relation to section 24 has been put forth by CNA in its submission.

[25] Despite the lack of supporting argument or evidence from CNA in support of its use of these exceptions, the key factor here is that for each part of the record where CNA claimed sections 22, 24 or 27, CNA also claimed one or more of the following exceptions:

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

(b) draft legislation or regulations.

...

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.

...

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

[26] These three exceptions were also claimed individually or in combinations which did not include sections 22, 24 or 27. As summarized above, CNA provided some support in its submission for its use of sections 20, 21 and 30.

[27] Section 20 is a discretionary exception which allows public bodies to withhold advice and recommendations developed by or for a public body or minister. Section 20(1)(b) also allows

public bodies to protect from disclosure draft regulations or legislation, although that provision is not applicable to these particular records. CNA also used section 30 to protect from disclosure the personal information of individuals other than the Applicant and the Applicant's spouse, both of whom were named in the Applicant's request for information. Section 30 is a mandatory exception which requires public bodies to withhold personal information, subject to some specific caveats set out in section 30(2), none of which were applicable to the material withheld by CNA under this exception.

[28] In my previous Reports, I have described in detail how sections 20 and 30 are to be used by public bodies, including the type of records to which they do and do not apply. I did this most recently in my Report 2007-010, so I will not repeat those comments here. I will say, however that subsequent to the College's decision to release additional information as per informal resolution efforts brokered by this Office, all of the remaining information for which the College maintained its claim of sections 20 and 30 was, in my opinion, correctly withheld.

[29] As noted above, CNA also claimed section 21, which it did not apply to the records I reviewed in my Report 2007-010. CNA, in its submission above, sets out its position on the appropriate use of section 21. I have commented on the use of this exception in my Report 2006-013 at paragraphs 30 and 31:

[30] Solicitor-client privilege is a concept borne out of the common law, which is found in the ATIPPA as well as equivalent access legislation in other jurisdictions across Canada. Generally speaking, it is meant to protect communication between a lawyer and his or her client for the purpose of seeking or giving legal advice. Further, McNairn in Government Information: Access and Privacy expresses an additional aspect of this form of privilege as follows:

Solicitor-client privilege is intended to facilitate full and frank consideration and discussion of the circumstances on which legal advice is sought, so that the advice may be informed and effectual, and to facilitate the preparation of a case for trial.

[31] It is irrelevant whether the communication takes place between an "in-house" legal counsel or someone who is contracted by a public body to serve such a role, as long as such communication between the lawyer and the public body takes place within the context of a solicitor-client relationship. In the case of

the records subject to this Review, I believe that CNA has appropriately applied section 21.

[30] As with CNA's use of sections 20 and 30, I have reviewed the records for which CNA claimed section 21, and once again, subsequent to the College's decision to release additional information as per informal resolution efforts brokered by this Office, all of the remaining information for which the College maintained its claim of section 21 was, in my opinion, correctly withheld.

[31] I will now briefly address the Applicant's suspicion that she may not have received all of the records to which she is entitled, including those which CNA agreed to give her during informal resolution efforts brokered by this Office. The Applicant's suspicion, as noted in her submission, is based on the facts as presented in my Report 2007-010 in relation to CNA's failure to ensure that all of the records it agreed to provide to the Applicant were not forwarded to her. CNA blamed this on photocopier error, although my conclusion on the matter was that it was ultimately a matter of human error in that CNA did not check the records prior to forwarding them to the Applicant to ensure that all of the pages it agreed to release were present and had photocopied correctly.

[32] The Applicant expressed similar concerns about this file, and her decision to not accept informal resolution of this file was in fact based on problems associated with her request for information which became the subject of my Report 2007-010. Other than the fact that both requests were received and processed at approximately the same time, the Applicant has not put forth any evidence of similar problems in relation to this file.

[33] Any assertion that a public body has not performed an adequate search, or has not accurately and completely responded to a request for information, must be accompanied by some reasonable basis for that belief on the part of the applicant. This is normally associated with a complaint by an applicant that a public body has failed in fulfilling its duty to assist, as set out in section 9 of the *ATIPPA*:

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.

[34] In this case, although the Applicant has not explicitly asked me to review whether the College has fulfilled its duty to assist, the context and rationale of the Applicant's request for review calls for some comment on my part. In my Report 2007-010 I noted that CNA had been somewhat deficient in its duty to assist, in that CNA had failed to notice that some pages of the record had not photocopied properly before putting them in the mail to the Applicant. It was left to the Applicant to notice this discrepancy, which then caused some degree of skepticism on the part of the Applicant about the accuracy of CNA's disclosures of information in relation to other requests for information, including the one which is now the subject of this Report.

[35] I commented on this type of situation in my Report 2007-010:

[39] The Applicant commented in her submission that she does not believe it is appropriate that the onus is on her to detect whether CNA has failed to disclose copies of responsive records to which she is entitled. This issue has been dealt with in previous Reports produced by this Office, which I will not reproduce in great detail. While this is unfortunate from the Applicant's point of view, in those prior Reports I have observed that this is recognized to be the only practical way for this detection to occur. In my Report 2006-003 my comments were as follows:

As I noted in my Report 2005-006 (also in relation to CNA), adequacy of search with regard to access to information requests has been dealt with by other jurisdictions in Canada. In Ontario Order M-909, the Inquiry Officer commented that

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

[36] No particular evidence has been provided by the Applicant in relation to the subject matter of this Report which would, in my opinion, amount to a reasonable basis for concluding that additional records may exist. The fact that CNA did not notice a photocopy error with one file, does not translate into a reasonable basis to conclude that records would likely be missing from

the next file as well. If this were the case, it would cause me to conclude that the Commissioner's Office must take a role in double checking all of CNA's work in responding to access requests. I do not believe that the present situation warrants this level of scrutiny.

V CONCLUSION

- [37] CNA has been chastised in some of my previous Reports when it has failed in one way or another to comply fully with the *ATIPPA*. It has also been vindicated in a few Reports. In this case, I agree that the College has provided to the Applicant all of the records to which she is entitled. Furthermore, I see no basis to conclude that the Applicant has received an incomplete copy of the records.
- [38] Having found that the College of the North Atlantic acted appropriately in relation to these records, it is not necessary for me to make a recommendation. Accordingly, I hereby notify the Applicant, in accordance with section 49(2) of the *ATIPPA*, that she has a right to appeal the decision of the College to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 within 30 days after receiving a decision of the head of the College of the North Atlantic, as per paragraph 39 of this Report.
- [39] 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 Commissioner's Report to indicate the College's final decision with respect to this Report.
- [40] Dated at St. John's, in the Province of Newfoundland and Labrador, this 14th day of August, 2007.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador