



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2010-010

June 16, 2010

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 relied on by the College’s external legal counsel or the College in making certain statements in correspondence sent to the Applicant’s legal counsel. The Applicant alleged that the College had not conducted a proper search for the responsive records and had withheld responsive records. The Commissioner determined that the College had complied with its duty to assist under section 9, including conducting a reasonable search for the records responsive to the Applicant’s request. The Commissioner concluded that there was no evidence that the College was withholding records responsive to the Applicant’s request.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A – 1.1, as amended, s. 9.

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2006-009 and A-2009-011.

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 dated June 13, 2007 to the College of the North Atlantic (the “College”), seeking disclosure of records as follows:

[The College’s External Legal Counsel], [Name of Law Firm] *on behalf of his client CNA, in correspondence dated April 28, 2006, to [the Applicant’s Legal Counsel], [Name of Law Firm] made the following statement:*

The exchange rate used in your calculations for purposes of reaching the Canadian dollar value for [the Applicant’s] salary is far in excess of the exchange rates which were in effect during the applicable periods. Based upon exchange rates taken from Oanda.com for the respective periods the salary conversion for year 1 through year 3 inclusive of the 25% Overseas Service Premium would be as follows (page 3)

I am requesting all records on which [External Legal Counsel] or his client CNA, relied on [sic] in making the above statement and making the reduction in my 2003-2004 and 2004-2005 salary due to the changes in the exchange rate. This would include all communication to or from or copied to CNA. Further, I am requesting any record, which confirms that any other "Canadian hire" employee, during the life of their contract, had a reduction in their remuneration due exclusively to a change in the exchange rate.

[External Legal Counsel], *in the April 28 2006 document, presented a reduced salary grid whereby my compensation (as presented in my claim) is reduced by at least \$49,000. I view the requested documentation supporting [External Legal Counsel’s] statement as very important.*

In an effort to assist CNA in this search, and further define the requested records, I offer the following information:

[External Legal Counsel] *gives the impression that the amount listed as my yearly salary in my November 2005 claim was the result of the application, (by me) of an exchange rate. To give that impression is incorrect and quite misleading.*

*Throughout the time of my three year contract, all Canadian hire employees at the Qatar campus were paid from CNA, Stephenville in the same manor [sic] as any other CNA employee; **a fixed amount in Canadian dollars for the life of the employee's contract.***

My contract with CNA, as with all other employees at that time, stated an amount of remuneration in United States dollars. The only exchange rate application is made by CNA, prior to or at the time of hire. As noted above, the pay to the employee is a set amount in Canadian dollars for the entire contract. The salary amount, as presented in my claim, is taken from CNA, NL payroll

information and is not the product of any application of an exchange rate by my counsel or me. This information is certainly available to [External Legal Counsel] through his client.

[External Legal Counsel] gives the impression that salaries paid to employees at the CNA Qatar campus are adjusted using an exchange rate, apparently on a yearly basis, with the result that the salary received by the employee is adjusted on a yearly basis. To give that impression is incorrect and quite misleading.

[External Legal Counsel] knew or should have known the following information at the time of the preparation of the April 28 2006 document:

- *All directors, and it appears all Qatar Canadian hire employees, did not experience any variance in their level of remuneration attributable to the changes in the exchange rate, for the life of the contract. For example the director of Health Science received the same salary from 2002-2005.*
- *My contract does not contain any provision for having my salary fluctuate with the exchange rate.*
- *[Name of College Employee] replaced me as [Applicant's Position with College], Qatar campus. [College Employee's] 2003-2004 salary was exactly the same as my 2002-2003 salary. [College Employee] started with the Qatar campus in the Academic year 2003-2004, in my exact position. If the salary for that position were to be reduced for me due to changes in the exchange rate for the 2003-2004 year, would it not also be reduced for [College Employee]? It appears that this reduction in salary due to exchange rate changes was reserved for me only; and not instituted with any other employee of the Qatar campus.*

[Emphasis in original]

[2] The College responded to the Applicant's access request in correspondence dated July 12, 2007, advising him that a search had been conducted for records responsive to the request but that no such records were found.

[3] In a Request for Review dated August 11, 2007 and received in this Office on August 16, 2007, the Applicant asked for a review of the decision of the College with respect to the access request.

[4] During the informal resolution process the College agreed to conduct another search for records responsive to the Applicant's request. Following this search the College wrote to the Applicant in correspondence dated November 26, 2009 stating:

On July 12, 2007 CNA responded to your request for information. As indicated at that time no such records were found to exist. In an effort to cooperate fully with the Office of the Information and

Privacy Commissioner's informal resolution process CNA has made further inquiries in this matter. Please be advised that once again no such records were found to exist.

As a point of clarification the April 28, 2006 correspondence to [Applicant's Legal Counsel] was a response to the letter sent to legal counsel for CNA by [Applicant's Legal Counsel] in his capacity as your legal counsel, dated November 25, 2005.

- [5] Attempts to resolve this Request for Review by informal means were not successful and by letters dated January 22, 2010 both the Applicant and the College were advised that the Request for Review had been referred for formal investigation pursuant to subsection 46(2) of the *ATIPPA*. As part of the formal investigation process, both parties were given the opportunity to provide written submissions to this Office in accordance with section 47.

II PUBLIC BODY'S SUBMISSION

- [6] In its submission dated March 5, 2010, the College provided details of its initial search for records responsive to the Applicant's access request and of its second search conducted at the request of this Office:

This office began searching for records responsive to this request with an assumption similar to that expressed by the applicant in his request for review. Our assumption was that some sort of consultation between external legal counsel and CNA likely took place as part of the process of drafting the April 28, 2006 letter. Given that direction to external legal counsel comes from CNA's General Counsel and Corporate Secretary the search for records was focused on that office. No records were found.

Upon request from your office the search exercise was repeated. Please note that external legal counsel was contacted by telephone directly by this office during the second search process in order [sic]. We made specific inquiry about the request and about the use of a website to access currency exchange rate information. No records were found.

- [7] The College ended its submission by maintaining that its actions in this matter were appropriate and reasonable.

III APPLICANT'S SUBMISSION

- [8] The Applicant's written submission was received in this Office on March 4, 2010. In that submission the Applicant provided the following background information to his access request:

On or about November 25 2005 legal counsel acting on my behalf issued a claim demand, to the attention of . . . external counsel for the College of the North Atlantic. [External Legal Counsel] issued a response to that claim, on behalf of the College, dated April 28 2006. . . .

- [9] The Applicant submitted that a proper search had not been conducted:

Did [the College's Access and Privacy Coordinator] review the file on this matter? Did she review the correspondence on this file? If the College is stating for the record that there was no written correspondence on this file then how did CNA communicate to their solicitor and indicate to the solicitor what was to be included in that letter? [External Legal Counsel] relied on the information provided to him from his client, the College and the person at the College handling this file was [the College's In-house Counsel], as it was his duty to handle all legal matters which involved external counsel. The file maintained by [the College's In-house Counsel] on this April 2006 letter, should have been searched by [the College's Access and Privacy Coordinator]. It should have been searched employing sufficient criteria such that records from [the College's In-house Counsel] to [External Legal Counsel] regarding the April 2006 letter would have been deemed responsive. The correspondence from/to [External Legal Counsel] /[the College's In-house Counsel] would be responsive because [External Legal Counsel] relied on the information from [the College's In-house Counsel] to construct that letter, including the item which is the subject of this request.

*It was reported that [External Legal Counsel] accessed the internet to gather the exchange rate information therefore there was no written record on which he relied. My access request however did not limit the records to the mechanics of the finding of an exchange rate which was current in a specific year. **The request is for what was relied on in the sense of authority or approvals from CNA, documentation that the reduction of my salary was according to policy, approved agreement, financial department memo, cancelled cheques, or pay stubs etc. . . .***

[Emphasis in original]

- [10] The Applicant put forth the position that there are responsive records not yet released:

. . . [External Legal Counsel's] letter . . . was complicated in that to address my Claim one would need to be familiar with the Qatar operation. This would have required the exchange of information and the development of draft copies of documents and approvals at various levels.

[External Legal Counsel] *would have relied on the advice and approval of [the College's In-house Counsel] in order to include the "exchange rate" item in his response letter of April 2006 .*

. . . The College is maintaining that there is not one written record indicating who at the College was responsible for this action. It is entirely reasonable to assume that . . . then in house counsel, was the person responsible for the construction of that letter on behalf of the College. Further it is entirely reasonable to assume that [the College's In-house Counsel] was the person giving [External Legal Counsel] the approval to include and move ahead with that letter, including the "exchange rate" item and [External Legal Counsel] would have relied on that written correspondence.

I am requesting the release of all responsive records including the correspondence between [the College's In-house Counsel] and [External Legal Counsel] and others involved in the construction or approval of the April 2006 letter, wherein the item referencing the reduction in my salary is contained.

IV DISCUSSION

[11] The Applicant took the position in his submission that the College has not conducted a proper search for the requested records and has not released certain responsive records. This raises the issue of whether the College has fulfilled its duty to assist the Applicant, which is 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.

[12] The duty to assist has been discussed in numerous reports from this Office. I outlined the three components of this duty in paragraph 80 of Report A-2009-011:

[80] 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. . . .

[13] Also in Report A-2009-011, I discussed the measurement to be used when determining if a public body has met its duty to assist:

[79] . . . the standard against which the duty to assist is measured is reasonableness, not perfection. I would also observe that while the overall burden of proving that the duty to assist has been fulfilled

rests with the public body, it may be the case that on any specific issue, the burden of proof of a particular proposition may rest with the party that is asserting it.

- [14] In this Request for Review the Applicant has asserted that the College has not conducted a reasonable search for records and is refusing to disclose responsive records in its possession. In Report 2006-009, I discussed the onus on an applicant where such assertions are made:

[17] . . . It is important to note that when an Applicant, in a Request for Review, takes the position that a public body is intentionally withholding a record or has not undertaken an adequate search for a record, there is some onus on the Applicant to present a reasonable basis for that position. . . . 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.

. . .
 [18] *I noted in my Report 2005-006 that "the Inquiry Officer in Order M-909 also states that records searches 'must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.'"*

- [15] In assessing whether a reasonable search has been conducted by the College, I must determine if the search was conducted by knowledgeable staff in locations where the records might reasonably be located. In this case, the College consulted with both its in-house legal counsel and its external legal counsel, who prepared the letter dated April 28, 2006, as to which records were responsive to the Applicant's request. There were no responsive records found. The College also had a second confirmation from external legal counsel that there were no records responsive to the Applicant's request. In my view, the search was conducted by the persons who would be most knowledgeable as to which records were responsive to the request. Furthermore, I am of the opinion that the most reasonable locations to search for the records would have been the files of counsel involved in this matter, particularly those of the external legal counsel who prepared the letter dated April 28, 2006.

- [16] I find that the College has met its duty to assist the Applicant. The College has conducted a reasonable search for the requested records and has thereby fulfilled the requirement of the second component of the duty to assist. In relation to the first and third components of the duty to assist they were not specifically raised or discussed by either the Applicant or the College in their

submissions. Consequently, I make no specific finding in relation to the first and third components of the duty to assist. In addition, I find that there was no evidence presented to demonstrate that the College is intentionally withholding records responsive to the Applicant's request.

V CONCLUSION

[17] My conclusions are as follows:

- (1) The College has conducted a reasonable search for the records responsive to the Applicant's access request and has thereby met the duty to assist imposed on it by section 9 of the *ATIPPA*.
- (2) There is no evidence that the College is intentionally withholding records responsive to the Applicant's access request.
- (3) Having found that the College acted appropriately, it is not necessary for me to make a recommendation.
- (4) Although I have not made a recommendation in this Report, under 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.
- (5) Please note that within 30 days of receiving a decision of the College under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*.

[18] Dated at St. John's, in the Province of Newfoundland and Labrador, this 16th day of June 2010.

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

