

**NEWFOUNDLAND AND LABRADOR**  
**OFFICE OF THE INFORMATION AND PRIVACY**  
**COMMISSIONER**

**REPORT 2005-006**

**College of the North Atlantic**

**Summary:**

The Applicant applied on 14 January 2005 under the *Access to Information and Protection of Privacy Act (ATIPPA)* for six different types of records. The College of the North Atlantic (CNA) did not respond to this request within the time frames as set out by the *ATIPPA*, and Report 2005-001 addressed this issue. The Applicant was eventually sent a large collection of records in response to his request. On 6 June 2005 the Applicant forwarded a second Request for Review to the Commissioner's Office asking the Commissioner to Review whether the College had provided all of the information to which he was entitled. One matter involved a large set of e-mail correspondence. The Applicant asked the Commissioner to determine whether material which was withheld by the College was done appropriately. Following informal discussions with this Office, CNA agreed to release further e-mail records. The Commissioner's Office concurs that the e-mail records released are appropriate, and that CNA has now released all e-mail records to which the Applicant is entitled. The Applicant also believed that a set of legal invoices which had been provided to him as a result of his previous search was incomplete. The Commissioner's Office was asked to review whether in fact CNA had provided all of the records in question. Since the Applicant filed his Review, other records were identified by CNA as being responsive to that request. The Commissioner found that the College was not thorough enough in its search for those records, and that there were serious flaws in its record keeping system.

**Statutes Cited:**

*Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, as am, ss 3, 7, 9, 21, 72; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990.

**Authorities Cited:** Ontario (Attorney General) v. Ontario (Assistant Information & Privacy Commissioner) 251 D.L.R. (4<sup>th</sup>) 65 (Ont. Ct. Appeal) 2005 CarswellOnt 947 (eC); Ontario OIPC Orders M-909, PO-1954.

## I BACKGROUND

- [1] The Applicant requested that I undertake a Review of items number one and six of his initial request for access to information, dated 14 January 2005. Item one is as follows:

*All legal costs incurred by the College of the North Atlantic (CNA) for the period January 01 2002 to January 17 2005. This request includes but is not limited to all invoices and statements submitted by any law firm, or any business doing legal work for the CNA. This request is for all documents whether paid or unpaid and all legal costs whether paid by a third party or paid directly by CNA or agents of CNA. This request includes all legal costs incurred by or at the Qatar campus of CNA.*

- [2] The Applicant stated in this Request for Review that he believed CNA had not provided all the records responsive to his initial access request. The Applicant also raised other issues during the course of this review which he believed would indicate that CNA had withheld some records. These issues will be covered in detail below.

- [3] Item number six of the Applicant's original request of 14 January 2005 is as follows:

*All e-mails that reference [Applicant] and all e-mails that are sent from or sent to [Applicant] whether at the Qatar campus or elsewhere.*

Regarding this item, the Applicant stated in his request that he wished this Office to conduct a review of the documents responsive to this item in order to determine whether CNA had properly applied Section 21 of the *ATIPPA* in severing the documents which were forwarded to him.

## II COLLEGE OF THE NORTH ATLANTIC SUBMISSION

- [4] A brief submission was forwarded by the College on 19 September 2005, on the understanding that the information communicated to this Office throughout the investigation phase would substantially represent the College's position. The College's position on the many issues involved in this Review will be further outlined throughout this Report, but this will serve as a summary.
- [5] Despite the issues which were identified during the course of the Review, the College states that they believe they have fulfilled the Applicant's request to the best of their ability. The College had originally disclosed a portion of the requested e-mail records, but the Applicant wanted this Office to review whether the records had been appropriately severed. In severing some of the records, CNA had claimed section 21 of the *ATIPPA*, which deals with solicitor-client privilege. After going through the material with staff of this Office, CNA released an additional portion of e-mail records to the Applicant. I am satisfied that the Applicant has now received all of the e-mail records to which he is entitled. In its submission, the College states with regard to the e-mail records that:

*Despite the applicant's decision to proceed with a formal review, we will be providing to him the emails that were agreed to by us with the commissioner's office and, in that same disclosure package, will include any new invoices that were discovered through our review of records here and in Qatar.*

- [6] The College also states in its submission that "this process, while very resource consuming, has helped us to identify several institutional weaknesses that we are working to improve." One such weakness would no doubt be the discovery, during the investigation phase of this Review, of legal invoices which were located at their Qatar Campus and apparently being paid through that Campus. These invoices, although responsive to the Applicant's request, had not been previously identified and disclosed to the Applicant.
- [7] A second weakness identified through the course of this Review relates to the College's inability to find some other legal invoices (also responsive to the Applicant's request), which were stored

at CNA headquarters in Stephenville. These invoices were also discovered during the investigation phase of this Review. Further discussion of how these invoices were discovered, and the College's position on why they were not previously identified and disclosed will be outlined below.

### III APPLICANT'S SUBMISSION

- [8] The Applicant forwarded a formal submission to this Office on 16 September 2005 in relation to the pending release of this Report, but I think it is fair to say that the considerable correspondence between this Office and the Applicant during the course of this Review more fully represents the position of the Applicant on the many issues involved. I will briefly summarize the Applicant's position here, but this will be explored in much more detail below.
- [9] The Applicant has continually highlighted in correspondence to this Office his frustration with the process followed by the College, both in responding to his original access request, and in relation to this Review. He is particularly concerned about the fact that he has repeatedly identified evidence of missing records, and only upon bringing this evidence to the attention of CNA, through this Office, has the existence of those records been revealed. The Applicant makes the point that if he had not put such pressure on CNA, he would still have an incomplete set of records. Further, the Applicant believes that despite his efforts, he may still have an incomplete set of records, but does not wish to devote significant additional time and effort into forcing CNA to find them:

*CNA has impeded my access to records. I do not have the time or the resources to continually catch CNA at withholding records and then have CNA release the records that I have identified. I am requesting that if it is determined that CNA personnel have misled or attempted to mislead, then the full power of the OIPC be used to address that action. My request for information was made in good faith on January 14, 2005. It is a sad commentary on the leadership of CNA that in September 2005, I am dealing with this level of deception and still do not have the records.*

Clearly, the Applicant believes that there has been an intentional effort to deceive him. This is a serious allegation, and one which must be addressed in this Report.

#### **IV DISCUSSION**

[10] Even though CNA has, subsequent to the Applicant filing this Request for Review, released further e-mail records such that this Office is now satisfied that those records were severed properly in accordance with section 21 of the *ATIPPA*, the Applicant states that he is not satisfied with this result. In his final submission to this Office regarding item six of his original request, he states: “my concern is that I have no assurance that the OIPC has received from CNA all of the requested emails.” The Applicant describes this as an issue of trust between he and CNA, based partly on his experience with CNA subsequent to filing his previous Request for Review.

[11] My primary concern in this Report is based on the Applicant’s argument that CNA had not provided all the legal invoices responsive to his request. This argument was well proven, as will be outlined below. As evidence of this, he provided to my Office when he filed his Request for Review a copy of a fax cover page from the law firm in Qatar which CNA had been using. The fax cover page referred to documents in relation to legal billing which were absent from those disclosed to the Applicant by the College. When this issue was presented to the College in his Request for Review, it was done so as a request for this Office to review item number one of his original request of 14 January 2005. This request, as quoted in paragraph one above, was for all legal costs, and he was of the opinion that this particular fax cover page was not necessarily evidence that only one invoice was missing, but that others may be missing as well.

[12] It is clear that an opportunity was missed by the College at this juncture. It appears that instead of ordering a thorough search of CNA Qatar financial records to ensure that the Applicant’s original request for “all legal costs” had been properly dealt with, the College instead went to search for any records which would directly relate to the fax cover page. Records appearing to match the cover page were found and forwarded to the Applicant, accompanied by a handwritten note from the Access & Privacy Coordinator, stating to the Applicant: “Not sure if you have this

already, but this is the only thing [CNA Qatar staff person] could find that was near the date or sounded like the invoice you had mentioned.”

[13] In addition to this, the further discovery of legal invoices at CNA Qatar during the investigation phase of this Review is particularly troubling. These invoices were responsive to the Applicant’s request, but had not been previously identified or disclosed to him. The College says that they were not aware that some legal invoices had been stored at and paid from the Qatar campus. The College says that it was only through this Review that they discovered that this practice was occurring, and that steps are now being taken to ensure it is discontinued. Essentially, the College is saying that the records which were found in Qatar should not have been there, and any failure on the College’s part to locate them earlier than they did, was due to the fact that they did not look where they did not expect to find them. As evidence of CNA’s position that legal invoices should not have been paid by or stored at CNA Qatar, CNA General Counsel forwarded to this Office an e-mail which he had written in 2002 to the then-President of the Qatar Campus, stating as follows:

*In the future, I want to be advised of any and all matters that have any potential legal consequences before outside opinion/counsel is sought. We do not permit Newfoundland and Labrador campus to seek external legal advice without my prior knowledge and we are not going to do it in Qatar ...*

[14] The CNA General Counsel says that this shows that it should have been clear to CNA Qatar officials that any legal matters, including the payment of invoices, should only have been done through his office at CNA headquarters in Stephenville. Another statement made in the final submission of CNA is that:

*We also realize that when doing a search of financial records for the college (when including Qatar) we must specify that we need Qatar campus records checked as staff here cannot normally access the Management Information System for that campus.*

[15] Another issue which was explored by this Office was why additional legal invoices responsive to the Applicant’s original request were found during the course of this Review at CNA headquarters in Stephenville. In a letter to this Office dated 6 August 2005, the Applicant

provided commentary supporting his position that not all of the legal invoices had been forwarded to him. Specifically, he referenced having made a search through the Newfoundland and Labrador Supreme Court Trial Division, where he discovered Court records in which CNA was named in two separate legal proceedings which fall within the time period outlined in his request. He forwarded his search results to this Office.

[16] When this material was brought to the attention of CNA, CNA General Counsel explained that the particular records discovered by the Applicant through the Supreme Court search were not responsive to his request, although they were cases where the College was named as a party. One portion of the records discovered by the Applicant related to a collection agency which had taken action against another party, collecting bills which had been owed to the College. The nature of the College's agreement with the collection agency, according to CNA, was such that CNA essentially sold the debt to a collection agency to take whatever action it could to recover the money. The sale price would be a percentage of the amount recovered, if anything. CNA General Counsel stated that even though CNA was named as the plaintiff, it had nothing whatsoever to do with the case, and did not pay any legal costs. It was entirely a matter for the collection agency to pursue, and the only possible outcomes for the College would either be no change, if the collection agency was unsuccessful, or it would receive a cheque for a percentage of the proceeds if the agency was successful. Either way, CNA says that there were no legal costs incurred by the College, nor any records of legal costs incurred by a third party in the College's possession. I am satisfied with this explanation.

[17] The other portion of the records discovered by the Applicant through a search at the Supreme Court involved CNA and other parties being sued by individuals in relation to injuries which were allegedly sustained in the elevators of a College building. Once again, CNA General Counsel explained that the College took no part in this case, taking the position that the provincial government was solely responsible for elevator maintenance. He says that no legal costs were incurred by the College, nor were there any records of legal costs incurred by a third party in the College's possession. Once again, I am satisfied with this explanation.

[18] Even though the discovery of these particular records did not result in any additional disclosure to the Applicant, it did result in this Office requesting that CNA conduct a further search of records to determine whether any additional legal invoices could be found. This search resulted in the discovery of additional legal invoices at CNA headquarters in Stephenville which were responsive to the Applicant's access request. These were forwarded to the Applicant. In correspondence dated 31 August 2005, CNA General Counsel advised that "there are no other invoices," and that the firm with which CNA had done business in Qatar had disbanded. Both of these statements later proved problematic for CNA, as neither assertion proved to be correct. The CNA General Counsel contacted this Office by e-mail on 8 September 2005 to indicate that additional invoices had been discovered, which were located in Qatar, but found using a shared computer database by staff in Stephenville. This issue will be covered in detail below.

[19] During the course of this Review, it was important to discover why some records at CNA Qatar and Stephenville were not discovered and disclosed to the Applicant following his initial access request. This question was put to those responsible for financial records management at CNA headquarters in Stephenville by my investigative staff.

[20] It was explained by CNA Manager of Accounting (the Manager) in response to questioning that CNA General Counsel came to her on 10 March 2005 with a copy of the Applicant's search request in relation to legal invoices, and requested that she perform the search as indicated by the Applicant. She says she immediately began the search by accessing a computerized accounting system which was in use by the College from 1997 to October 2004. For the purposes of this Report, I will refer to this system as "System One." System One is not compatible with the current system in use by the College, which was introduced on 18 October 2004. I will refer to this system as "Current System (Stephenville)." The Manager had used System One extensively over the years, and was confident that the search results using that system were thorough and accurate.

[21] Current System (Stephenville) was also searched by the Manager in March 2005, but she explained that the newly discovered invoices were not found at that time due to problems which she and other accounting staff were having during the first several months of using this system.



These newly discovered invoices were found on Current System (Stephenville), not on the older System One. She explained that after Current System (Stephenville) came into use, the usual process was that invoices would be sent to CNA and entered into the system, but occasionally, for a reason she did not understand, a given invoice wouldn't "post," meaning it wouldn't be picked up automatically by the accounts payable system. The Manager said they knew this was happening, because previously, using System One, when an invoice or cheque requisition was entered into the system, the system would automatically tell the accounts payable clerks to issue payment. With Current System (Stephenville), there was a programming error which resulted in some invoices or cheque requisitions not "posting" to the system, so the system did not prompt accounts payable to issue a cheque. Essentially, it appeared that something would occasionally be lost in the system.

[22] According to the Manager, they have had ongoing problems of this nature with Current System (Stephenville) but over the course of several months they have been able to resolve most of these issues. She indicated that resolving these issues has sometimes been a case of learning a new way to use the system, but it also involved going back to the vendor, and having them issue "patches" to repair programming errors. The Manager further explained that they use Current System (Stephenville) to maximum utilization. In hindsight she stated that it is possible that the vendor did not realize all of the uses they intended to employ this software for, and therefore the vendor did not tell them some things which might have helped avoid some issues. The Manager feels that although they have learned a lot, and ironed out most of the problems, they are still learning. She says they were on a "large learning curve," at the time of the initial search in March of 2005.

[23] The Manager stated that neither Current System (Stephenville), nor Current System (Qatar) nor any of their predecessor systems are linked, so there was no way for her search, in March 2005, to come up with anything which was on an electronic accounting system in Qatar. She said that the only reason CNA later came up with additional records at their campus in Qatar (see below for further details) was that the CNA Comptroller in Stephenville was given access, in about May or June of 2005, to Current System (Qatar) as a support person. She explained that back in March 2005, it wouldn't have been possible to search Current System (Qatar) from Stephenville.

The Comptroller was given access because CNA Qatar introduced Current System (Qatar) in October 2004, which is the same type of software as Current System (Stephenville) and they were running into similar problems which she was already familiar with in Stephenville.

[24] The Manager says she went through every piece of paper personally when this search was conducted and checked it off the list which she obtained from running the Trial Balances. She also noted that this was the first large scale search of its kind since Current System (Stephenville) was introduced in October 2004. Despite her comments about programming issues, and about it being a relatively new system when the original search was conducted, the Manager accepted some responsibility for the fact that all of the requested records were not found during the search in March 2005.

[25] The CNA Comptroller was also questioned by the Investigator with regard to how the College's financial records management systems may have impacted on the ability to locate all of the legal invoice records requested by the Applicant. The Comptroller is the Team Leader at CNA for Current System (Stephenville). She shared the Manager's position on what had happened, and stated that problems with the system were being worked on during the period that the Applicant's search was being conducted. She said that they have been working with the vendor, and much of the trouble they have had has been due to programming issues. She said that "resolving these issues is still ongoing." Further discussion of financial accounting systems at both CNA Qatar and Stephenville can be found later in this Report.

[26] In addition to the process of interviewing and gathering information from CNA staff, an important factor in this Review has been the role of the Applicant in bringing forward various issues, some of which have led to the disclosure of additional records, and some of which have not. One issue which was raised by the Applicant was the presence of a number written in the top right hand corner of cheque requisition records issued to him by CNA as part of his request for legal invoices. The Applicant stated to this Office his belief that this number is a tracking system or a way of identifying the records. He reported that the numbers on the records he received ranged in sequence from 3 to 172, but with significant gaps between some numbers. He believed

it was possible that any gaps represented cheque requisitions accompanying legal invoices which were not disclosed to him.

[27] Initially, College personnel could not offer an explanation for the handwritten numbers, until the question was put to the General Counsel's Secretary. She advised that it was a number she placed on cheque requisitions, as part of her own unofficial tracking system. She said she began doing this shortly after she started working at the College in 2002 after something got lost. She explained that if no purchase order has been completed, a cheque requisition must be done. She keeps a list and places a number, in sequence, on all the cheque requisitions which go through her office. The Secretary explained that a cheque requisition is not required for all legal invoices if a purchase order has been issued, and she further indicated that they are also used for other things, such as board functions, catering, books, etc – anything which is the responsibility of the General Counsel's office, whether relating to his duties as General Counsel or as Board Secretary. I am satisfied with this explanation.

[28] Similarly, the Applicant raised other concerns about a numbering system which was present on invoices from a law firm based in this province which the Applicant felt indicated that there were missing invoices from that law firm. This Office requested that the CNA Access and Privacy Coordinator contact that law firm by e-mail to request an explanation of the numbering system. After reviewing the response of the law firm, I am satisfied that the numbering system used by that law firm does not present any evidence of missing invoices.

[29] Another issue which was raised by the Applicant during this Review is the statement of CNA General Counsel that the Qatari Law Firm which had previously acted on behalf of CNA in Qatar was no longer in business. This statement was made by the General Counsel in correspondence to the Applicant dated 31 August 2005. It was made in response to questions raised by the Applicant after the sequence of events noted earlier in this Report which led to further invoices being discovered at CNA Stephenville during the course of this Review. The statement by the General Counsel is as follows:

*I have thoroughly reviewed the billings from [the Qatari Law Firm]. There are no other invoices. First, we do not consult with Qatar counsel on a routine basis. Second, while that firm did represent the college in a matter in Qatar over an extended period of time, the firm disbanded and closed its office in December of 2004 and the college was never invoiced for the work.*

[30] After receiving this correspondence, the Applicant took the decision to personally contact the law firm in question using the telephone number on those invoices which he had already received from CNA. He noted that the telephone number had not changed. The Applicant stated that he was advised by the person he spoke to at the law firm that the office had never closed. He also contacted the law firm by e-mail and received a response (forwarded to this Office) indicating that they had never been closed, and that as far as they were aware, had no outstanding legal bills at the College. The e-mail from the law firm only indicated that the name of the firm had changed, from “Law Offices of [Qatari Law Firm]” to “Law Offices of [name], managed by legal consultant [Qatari Law Firm].” The Applicant’s comments in an e-mail dated 6 September 2005 regarding the written statement by the General Counsel are as follows:

*Legal Counsel for the College is making a final statement on the existence of further records; none existed. Until this claim was challenged CNA did not recover any further records. ‘Disbanded’ - If a law firm is disbanded, then one would not expect to find that they are in operation. Disbanded has a finality. It is the combination of those two words, closed and disbanded, which makes it clear to the reader that this law firm can not be accessed, indeed why would anyone even try.*

*‘Closed its office’ - I take this in a literal sense that the doors were shut. There is no qualification of the word closed, the meaning is quite clear and the effect on the reader would be predictable; why even check, the office closed. To say the ‘office’ is closed is quite explicit.*

*‘The college was never invoiced for that work’ - This is contradicted by [lawyer] of the law firm. I am confident that CNA can and will supply a scenario as to why new records keep surfacing, even after their statements to the contrary. [CNA General Counsel] stated that CNA was never invoiced for the work performed by [the Qatari Law Firm] which in effect is stating that any records related to this legal work do not exist. Verification of the existence of records is then discouraged, since disbanding and closing is quite definitive and final. Yet more records are found. More records will continue to be found as long as I continue to identify particular records. CNA presented this scenario in an attempt to move attention away from that law office, and*

*discourage any attempts to further pursue legal records. I am requesting that CNA be held accountable for these statements.*

[31] Subsequent to the Applicant advising this Office of his successful effort to contact the law firm which the College had stated was no longer in operation, this Office requested on 7 September 2005 that CNA contact the law firm in question and request a complete statement of account of any financial transactions between the two. The College agreed to do so, and the General Counsel stated by way of explanation that he was under the impression that the law firm had closed, as the particular lawyer he had been dealing with at that law firm had moved to another firm. The General Counsel says that the lawyer explained that she moved to another firm because there was some question as to whether the original firm would be able to continue operating, as the principal agent for the law firm no longer held a permit to operate. The General Counsel assumed that this meant that the law firm was closed, but in fact, according to communication forwarded from the firm to the Applicant, no interruption in business occurred, and the principal agent was still associated with the company. The only change in the law firm had been a change in name, although the contact information remained the same.

[32] In an e-mail on 9 September 2005, the General Counsel contacted this Office to indicate that, in addition to the request from this Office to contact the Qatari law firm directly to request a statement of account, he had also asked the Comptroller at CNA Stephenville to undertake a search of Current System (Qatar). As a result of this search, he stated:

*I regret to advise that the Finance people here in NL have just located four invoices on [Current System (Qatar)]. The invoices will be in Doha and would have been paid by the Accounts Payable staff over there. No one in Newfoundland was aware of their existence until we had our resident IT/Finance person access [Current System (Qatar)] earlier today.*

The General Counsel further indicated in this e-mail that he did not have an explanation for the College's failure to previously identify these invoices. He also stated that "there is evidence of a serious breakdown in our internal controls. These invoices should not have been paid in Qatar ..."

[33] Given this discovery, and after gathering additional detail from the Comptroller and Manager at CNA Stephenville as described above, this Office requested on 15 September 2005 that any financial accounting systems which were in operation at CNA Qatar previous to Current System (Qatar) be searched within the time period responsive to the Applicant's request for any additional legal invoices.

[34] On 23 September 2005 an update was forwarded to this Office by the CNA Access & Privacy Coordinator, who passed along an e-mail from the Vice President of Finance and Administration at CNA Qatar who had been tasked with overseeing this issue at that campus. The VP of Finance and Administration indicated that one previous financial accounting system (which I will refer to as System Two), had recently been reinstalled, and they hoped to run a search on that system within the coming days. He indicated that this system should provide information for 2003-2004. He identified that the previous system to that one, (which I will refer to as System Three), was no longer accessible because things had gotten lost as a result of their move to a new building, and due to staff turn-over, staff simply didn't know where the records were located.

[35] On 26 September 2005 an e-mail was forwarded to this Office from the CNA Access & Privacy Coordinator, indicating that he had spoken with the VP of Finance and Administration earlier that day. He said that he was told by the VP of Finance and Administration that an exhaustive search of the records had been completed, "including the old [System Two] and a manual search of every cheque issued from the campus since it opened." He also reported that CNA Qatar had not used any other law firm except [Qatari Law Firm] during the period of the Applicant's request, and that "there are no other invoices in the system." Further, the CNA Access and Privacy Coordinator stated that "it is my belief that we have provided the applicant with every invoice we have in our possession that falls within the time frame specified in his request."

[36] By 27 September 2005 the four invoices discovered through a search of Current System (Qatar) by the Comptroller in Stephenville had been received and reviewed by the Applicant. The Applicant put forward some issues about those records to the Access & Privacy Coordinator, which were copied to this Office. Among these was his observation that:

*It appears the law firm [Qatari Law Firm] has a client number for the college of 2856. Each file apparently then follows a sequential numbering system. For example, file 4 is labeled as 'general' (2856/4). I appear to be missing file three (3) and six (6). If these have not been previously supplied then can you please supply these files?*

[37] On 30 September 2005 the CNA Access & Privacy Coordinator replied to the Applicant (copied to this Office) in an e-mail stating that he had contacted the law firm regarding the sequential numbering system to see if they could determine whether there are any other invoices. He said he had asked the finance staff and legal office to check their files, and no further invoices were located. He said he had also asked CNA Qatar to re-check their files, and he was awaiting their response.

[38] On 5 October 2005 this Office received an e-mail from the Access & Privacy Coordinator indicating that the Qatari law firm had identified and faxed copies of invoices to staff at CNA Qatar. As a result of this process, an additional five invoices were discovered, despite the Coordinator's assurance on 26 September 2005 that all invoices had been provided. He says that the VP of Finance and Administration in Qatar informed him that the originals of these invoices were then found among old files as a result of a manual search by staff. In response to questions from this Office as to how they had previously failed to find these records, the Access and Privacy Coordinator forwarded to this Office some commentary from the VP of Finance and Administration in Qatar. The VP of Finance and Administration concluded that neither human error nor technical failures were responsible. He further indicated that the problem was "access to old accounting systems, which we straightened out, and paper storage, which is horrendous because of physical moves, the workload placed on staff by the startup of a new year and year-end processing."

[39] As a result of this additional discovery of invoices, staff at this Office undertook further investigation into the records management system at CNA Qatar through e-mail correspondence with the Comptroller of CNA Qatar. The CNA Qatar Comptroller indicated in correspondence dated 18 October 2005 that of the two accounting programs used prior to Current System (Qatar), System Three "was loaded on one PC, local drive only," and was not in use now. Further, "due to various relocations of finance staff over the next three years [since it was first

used], and recently the move to the new campus, we could not identify the PC with that software, or if the software is still in existence.”

[40] System Two was in use subsequent to System Three until the conversion to Current System (Qatar) on 1 October 2004. The CNA Qatar Comptroller stated that System Two was not in use, but was available, except for the period between 18 August 2005 and 25 September 2005, because the campus was “still under construction,” and during that period “personnel were fully occupied with getting facilities ready for students, with registration, and orientation (staff and student population doubled this year). Priority had to be given to getting active software and equipment operational.”

[41] One point which was unclear from the e-mail communication from the CNA Qatar Comptroller was her reference to having found on System Two a record of a legal invoice from a Newfoundland and Labrador based law firm which she believed had come to the campus in Qatar from headquarters in Stephenville. Although it appeared on their computer system, she said they did not have a copy of the actual invoice. When this issue was put to the Access and Privacy Coordinator, he initially believed this invoice would have likely been provided to the Applicant at the time of the initial disclosure, but he indicated that he would have to cross-check this with their record of that disclosure. On 26 October 2005 the Access & Privacy Coordinator indicated that they had found the invoice record, and confirmed that it had not previously been disclosed to the Applicant. A severed copy of the record was immediately mailed to the Applicant.

[42] The Access and Privacy Coordinator further explained this late discovery by saying that to the best of his knowledge it appears that the paper invoice itself was not sent to Qatar for payment. He said that the College headquarters in Stephenville initially paid it, but did what is called a budget transfer (took that amount from the Qatar campus budget). He suspected that “because it was handled that way, the invoice may have been misfiled or recorded differently on the system.” The invoice was found through a physical search of backup records in the possession of the General Counsel’s Secretary.



[43] Another issue which was raised by the Applicant during the course of this review is whether the College correctly interpreted the time frame indicated in his request for legal invoices. Specifically, the Applicant alleged in e-mail correspondence dated 6 September 2005 that his original January request for “All legal costs incurred by the College of the North Atlantic (CNA) for the period January 01 2002 to January 17 2005” had been deliberately misinterpreted by CNA in order to deny access to a portion of the records he was seeking. The Applicant stated in his correspondence, and again in his final submission, that his request for “costs incurred” meant that CNA should have provided him with invoices for legal work *performed* within the period indicated in his request, not *billed* within that period. The Applicant states in his submission that his use of the word “incurred” in his request was intentional in order to accomplish this purpose. To support his position, the Applicant provides the following definition (no source is indicated):

*in·cur* (ÿn-kûr') *tr.v.*, *-curred*, *-cur·ring*, *-curs*. 1. *To acquire or come into (something usually undesirable); sustain: incurred substantial losses during the stock market crash.* 2. *To become liable or subject to as a result of one's actions; bring upon oneself: incur the anger of a friend.*

The Applicant continues on to argue that the definition of the word incurred is clear and obvious, with only one possible interpretation:

*Most dictionary definitions of “incurred” follow the same reasoned approach. The word is time related, as in the example above; the losses were incurred at a specific time. It is not the confirmation or documentation of the event which is referenced in the word incurred. If this were the case then communication as to when events, actions or liabilities happened (were incurred) would be meaningless. In fact one would not be able to use the word “incurred” when referencing any time specific event. Making a request under the OIPC would be opened ended with no time definition*

[44] The approach of CNA, which has been documented in correspondence from the General Counsel, as well the Manager of Accounting, has been to search for records of legal invoices which were received by the College within the period indicated. The Applicant states in his submission that this approach is patently unreasonable, to the point of being evidence of misconduct by the College, and furthermore he states:

*It is my opinion that [CNA General Counsel] would not interpret the word “incurred” outside of this accepted meaning. In fact I would be greatly surprised if [CNA General Counsel], as a lawyer, will publicly state that his working definition of that word is anything other than the accepted definition.*

[45] In a letter to this Office dated 6 September 2005, the Applicant further states that:

*It is astounding that [CNA General Counsel] would make a claim that records were being withheld because the invoices for expenses incurred inside the request period, arrived outside of the request time period. If a request for records incurred in a specific time period can be withheld because the billing date was late, then defining a request time period will become meaningless.*

[46] The Canadian Oxford Dictionary (2<sup>nd</sup> ed.), defines “incur” as to “suffer, experience or become subject to (something unpleasant) as a result of one’s own behaviour etc. (incurring huge debts).” This definition is similar to the one provided by the Applicant. On the other hand, the word “incur” as defined by Funk & Wagnalls New Standard Dictionary has three related meanings, one of which it calls “law:”

- 1) To bring upon oneself, as an unpleasant or injurious consequence; subject or expose oneself to; encounter as to incur danger or displeasure*
- 2) Law. To bring upon oneself indirectly by some act; as, to incur a liability, as distinguished from a debt by contract*
- 3) To render liable to something*

[47] Reading the second definition, the word “incur” is specifically excluded from a scenario whereby a debt is brought about by contract. The College’s legal debts are specifically debts which are brought about by contract with an outside law firm. According to that definition, the word “incur,” may not in fact have been the most appropriate word to use in the Applicant’s original request.

[48] Black’s Law Dictionary (8<sup>th</sup> ed.) defines “incur” as: “to suffer or bring on oneself (a liability or expense).” Using this definition, the College brought the liability upon itself when it had a given piece of legal work performed, but it did not “suffer” the expense until the invoice came in. One way of clarifying the initial access request might have been to seek invoices for *work performed* within a given time period, instead of “costs incurred.”

[49] Regardless of these definitions and how they may be interpreted, no fault can be found with the College on this point, because it is plausible that there is more than one reasonable approach to interpreting the word “incur” in this situation. It is my opinion that the College clearly acted in good faith when it interpreted this word as it did. Furthermore, it is my understanding that the Applicant has filed a further access request for the records in question which the College deemed to be outside of the original request period. I trust that this will resolve the matter for the Applicant upon receipt of said records.

[50] Another point the Applicant wished to address was that in many instances, cover letters and additional pages detailing the legal work performed were not forwarded to him. His original request appears to focus on the release of legal costs. Even were one to conclude that the Applicant’s request was broader in nature, it should be noted that the most recent and relevant case law, *Ontario (Attorney General) v. Ontario (Assistant Information & Privacy Commissioner)* 251 D.L.R. (4<sup>th</sup>) 65 (Ont. Ct. Appeal) 2005 CarswellOnt 947 (eC), acknowledges that there is a presumption that information as to the amount of fees paid is protected by privilege. In that case, the Court supported an order releasing only the total amount of legal fees paid, and the dates of those payments. The decision indicates that solicitor – client privilege has been differentiated from other exceptions in access to information legislation, removing part of the onus typically borne by the public body to explain why information should not be released, and placing it on the Applicant to explain why it should be released. The Court goes on to say that “the presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of fees paid will directly or indirectly reveal any communication protected by the privilege.” The test used by the Court in this case is as follows:

*If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege.*

[51] It should also be noted in this case that CNA has taken the position that while some cover pages and other related records were disclosed to the Applicant, they believe that those records are not responsive to the Applicant's request, and have therefore not agreed to supply any that have not already been provided. I agree with this position.

#### IV ANALYSIS

[52] Section 3 of the *ATIPPA* sets out the purposes of the Act:

*3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*

*(a) giving the public a right of access to records;*

*(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;*

*(c) specifying limited exceptions to the right of access;*

*(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and*

*(e) providing for an independent review of decisions made by public bodies under this Act.*

*(2) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.*

[53] Section 7 establishes a general right of access to records in the custody or control of a public body, subject to limited and specific exceptions:

*7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.*

*(2) The right of access to a record does not extend to information exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.*

*(3) The right of access to a record is subject to the payment of a fee required under section 68 .*

[54] Section 9 of the *ATIPPA* sets out the responsibility of public bodies in terms of their duty to assist applicants:

*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.*

[55] Section 21 is a discretionary exception to the right of access set out in section 7:

*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.*

[56] Section 72 sets out the grounds and penalties for an offence under the *ATIPPA*:

*72. A person who wilfully*

*(a) discloses personal information contrary to Part IV;*

*(b) makes a false statement to, or misleads or attempts to mislead the commissioner or another person performing duties or exercising powers under this Act;*

*(c) obstructs the commissioner or another person performing duties or exercising powers under this Act; or*

*(d) destroys a record or erases information in a record that is subject to this Act with the intent to evade a request for access to records, is guilty of an offence and liable, on summary conviction, to a fine of not more than \$5,000 or to imprisonment for a term not exceeding 6 months, or to both.*

[57] First of all, regarding Section 21, I believe that the legal invoice records which have been forwarded to the Applicant have been appropriately severed in light of solicitor-client privilege, as discussed above. Once again, I believe that the focus of the Applicant's request was for legal costs, as opposed to cover letters and additional documents which accompanied some invoices. The Applicant may wish to make an additional application for that material should he wish to

access it, keeping in mind the limitations imposed by the broad and well-established principle of solicitor-client privilege in relation to such material.

[58] This case revolves around issues of adequacy of search, both from the point of view of the efforts which were initially made by the officials involved to respond to the Applicant's original access request and their efforts since the Request for Review was filed, as well as the technical ability of the College to perform such searches, given the problems associated with their computerized filing system. Unfortunately for the College, the fact is that the search for legal invoices should not have been encumbered with the errors which have been outlined above.

[59] It is quite clear that the Applicant's original request for legal invoices dated 14 January 2005, which included the statement, "This request includes all legal costs incurred by or at the Qatar campus of CNA," was not fully carried out until the last invoice was discovered in late October 2005. No evidence has been forwarded to this Office to show that any search of the Qatar campus financial records was carried out at the time of the Applicant's original application for access. On the contrary, it was not until the Applicant pressed his case during this Review that the first search for records in Qatar appears to have been conducted. As a result, the CNA General Counsel was later forced to conclude, on 9 September 2005, that a serious breakdown of internal controls appeared to have occurred, because no such records were supposed to be paid through CNA Qatar, much less housed there. Despite this, even more undisclosed records were later discovered after further suspicions were raised by the Applicant.

[60] Prior to those late discoveries of records in Qatar, we saw that even at CNA headquarters in Stephenville, which had none of the staff turnover or other issues which were present at the Qatar campus, there was a failure of the financial accounting system to identify some invoices which were responsive to the Applicant's original request.

[61] CNA has stated in its submission that it now recognizes these issues. Despite this recognition, there is no evidence at present which can assure me that the College of the North Atlantic is in a position to fully comply with the *ATIPPA*. The experience of the Applicant has been that whenever one issue appears to be resolved, another crops up, then another, and yet another. Each time, the Applicant has received assurances that things have been corrected and he is assured that

he has received all the records to which he is entitled, and each time the College is forced to admit that it is in error.

[62] Section 3 of the *ATIPPA* states that giving the public a right of access to records and making public bodies more accountable are among the purposes of the *Act*. Section 7 specifically sets out the right of access to those records, with limited and specific exceptions. It goes (or should go) without saying that the most basic requirement of any public body which is subject to the *ATIPPA* is that it must have systems in place which allow it to comply with this law. The problem in terms of compliance with *ATIPPA* at the College of the North Atlantic, as revealed by this particular Review, is partly due to the failure of the College to thoroughly search its records. The larger issue, though, is a systemic one. Quite frankly, the College has repeatedly demonstrated its failure to maintain a basic, reliable financial record keeping system. Without such a fully functional system, no Applicant can be assured that he or she has received all of the records to which they are entitled.

[63] Unfortunately, there was also a tendency to present to the Applicant at each stage that their findings were conclusive, when clearly they were not. To me, this says that not only was there inadequacy in their record keeping system, but a lack of awareness among those tasked with responding to this Request for Review of the problems associated with the records management system. Many of the problems with the system seem to have been well-known to those directly employed in financial records management, even if the solutions were not necessarily known at each stage. It does not appear that staff involved in directly responding to access requests were fully aware of such problems at each stage, and thus presented their conclusions much more confidently than was warranted. Other types of assurances given, such as the supposed closure of the Qatari law firm, amount to carelessness. Such repeated errors had the effect of heightening the suspicion of the Applicant to the extent that a wide variety of concerns were put forward to this Office and to CNA during the course of this Review, some of which were well-founded, and others not. The Applicant can hardly be blamed for bringing forward every possible suspicion, given that his efforts were rewarded with additional records again and again.

[64] Section 9 of the *ATIPPA* is also relevant here. Part of the duty to assist as set out in that section is to respond in an “open, accurate, and complete manner.” I do not believe that there was any

intentional effort on the part of the College to hide records from the Applicant, but clearly their response was neither accurate, nor complete. The failure to check the Qatar campus for records was a failure of the duty to assist, as was the failure of the College to do a more thorough search each time valid evidence was presented by the Applicant that records were likely to be found there. The remaining deficiencies in the College's ability to comply with the *ATIPPA* are technical in nature, relating to the operation of the College's financial records management system. Given these conclusions, I must dismiss the Applicant's assertion that the College has committed an offense under section 72 of the *ATIPPA*.

[65] 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.*

In the present Review, the Applicant has put forward enough of a case to justify, at each stage of this saga, a reasonable basis for further searches. 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." Clearly, this did not always take place. Searches were not always conducted as thoroughly as it was reasonable to do, nor were they conducted in all of the locations it was reasonable to search. When the Applicant presented the first fax cover page indicating the possible presence of a legal invoice in Qatar at the time of filing his Request for Review, the records in Qatar should have been thoroughly searched. The notion that the College failed to fully search records there because legal invoices were not supposed to be paid or stored in Qatar failed to hold water as soon as a reasonable basis was presented that such records might be stored there.

[66] Also in Ontario, the Assistant Commissioner stated in Order PO-1954 that:

*The Act does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to*



*properly discharge its obligations under the Act, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.*

I agree with this perspective. Moreover, given the litany of issues which have arisen as a result of this request, I continue to have doubts as to whether it would actually be at all advisable for CNA to issue any guarantees regarding their search results. I think it is quite clear that this “reasonable effort” had not been made prior to this Review, due to both human omission and technical inadequacy. During the course of this Review, however, I feel that CNA has made significant strides in understanding its obligations under the *Act*, as well as the limitations presented by its records management system. Given this progress, I feel that CNA now understands what is required by a “reasonable effort.” I cannot say that I have the same level of assurance about their records management system.

## V CONCLUSION

[67] The Applicant was correct in his assumption when he filed his Request for Review to the extent that he had not received all the documents to which he was entitled in his original request. Regardless of the inadequacies noted above, it is clear that an enormous amount of effort on the part of College staff went into responding to the original access request, despite a failure to respond within the prescribed time period, as well as the numerous hours of work which were spent in attempting to respond to this Review. It should also be noted that the College followed the recommendations of this Office during early attempts to settle this matter when it disclosed to the Applicant all of the e-mail records to which this Office has determined he is entitled. Although this Office received good cooperation from CNA officials, this does not override the troubling series of events described above. Clearly, CNA does not have an adequate system in place in order to correctly respond to requests such as this. Employee turnover in Qatar also appears to be a problem. This has apparently resulted in very little institutional memory, therefore issues have arisen as to where records are stored, as well as difficulties in locating a computer holding very important financial records which are only a few years old.

[68] Speaking optimistically, this experience should be seen as a learning opportunity for CNA. CNA is one of the largest public bodies in this province and it may simply have to dedicate more resources to the job of complying with this legislation. This should not be seen as an additional expenditure of resources, but a wiser use of resources. The College should be spending their time and effort in correctly responding to access requests, rather than in dealing with the consequences of an inadequate response.

[69] CNA has been the subject of two Reports conducted by this Office, and has not fared well in either. I sincerely hope that the College will take my recommendations seriously, and demonstrate a clearer commitment to the public's right of access to records as set out in the *ATIPPA*.

## **VI RECOMMENDATIONS**

[70] I find that the College of the North Atlantic has appropriately severed the records provided to the Applicant. I also find that the College has failed to fulfill its duties under sections 7 & 9 of the *Access to Information and Protection of Privacy Act* with respect to the Applicant's request.

[71] Under authority of Section 49(1) of the *ATIPPA*, I hereby make the following recommendations:

1. That the College take steps to upgrade and update records management systems at the College of the North Atlantic in Qatar and in Newfoundland and Labrador, using diagnostic procedures to identify any further issues. The College must ensure that all records are appropriately catalogued, such that a search of this nature can be accomplished with a reasonable degree of efficiency and accuracy in future;
2. That the College review its records management and storage policies with a view to ensuring better compliance with the *ATIPPA*. For example, there was clearly a disconnect between CNA Stephenville and CNA Qatar regarding the assumption that legal invoice records were not being paid nor were located at CNA Qatar. If such

policies are needed, they should be properly instituted, with copies distributed to all those involved in records management and accounting;

3. That the resources directed by the College towards compliance with the *ATIPPA* be reviewed with a view to ensuring that it is able to fulfill its obligations under this legislation; and

[72] Under authority of Section 50 of the *ATIPPA*, I direct the head of the College to respond to these recommendations within 15 days after receiving this Report.

[73] Dated at St. John's, in the Province of Newfoundland and Labrador, this 14<sup>th</sup> day of November 2005.

Philip Wall  
Information and Privacy Commissioner  
Newfoundland and Labrador