



REPORT A-2009-011

College of the North Atlantic

Summary:

The Applicant applied to the College of the North Atlantic (“the College”) pursuant to the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) for access to the admissions policy section from an Operational Policy and Procedures Manual referred to in the testimony of a College official at a Public Service Commission hearing. The College provided the Applicant with several documents. The Applicant filed a Request for Review stating that the documents received were not the records requested. The Commissioner found that the College had not provided the Applicant with the records he requested; that the records supplied bore no reasonable resemblance either to what was requested or to what was described by the College official in her testimony; and that the requested records probably do not exist. The Commissioner further concluded that the College had failed to fulfill its duty to assist the Applicant, by failing to complete a reasonable search, by failing to respond to the Applicant in an open or complete manner, and by failing to answer his reasonable questions.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A – 1.1, as amended, sections 9, 49(1), 50, 60.

Authorities Cited:

Newfoundland and Labrador OIPC Report 2007-009.

I BACKGROUND

[1] On February 16, 2007 the Applicant in this matter filed with the College of the North Atlantic (“CNA” or the “College”) a request for information under the *Access to Information and Protection of Privacy Act* (the “ATIPPA”). The request is reproduced in full below. (Names of individuals have been removed.)

I am requesting the cover page, general table of contents and the full admissions policy section from the Operational Policy and Procedures Manual, including the date of preparation. [Name], Vice President Academic CNA-Q referenced this document in her evidence given on January 12 2005. This is the manual confirmed to exist, and to be available from the admissions office, containing the topic of admissions. This manual, as confirmed by [V.P. Academic CNA-Q] is specific to Qatar.

The following excerpt is transcribed from [V.P. Academic CNA-Q]’s taped testimony and is provided as assistance in supplying this record. This evidence was given at the Public Service Commission hearing dealing with the wrongful dismissal of [the Applicant].

[Panel Member 1] and [Panel Member 2] were members of the panel, appointed by the PSC.

*[V.P. Academic CNA-Q]’s Testimony
January 12, 2005*

[Panel Member 1]: Just one question [inaudible] confusion here [inaudible]. Is there a copy of an Operational Policy and Procedures manual? Not a handbook. Not a calendar. We want to know yes or no, is there a copy of an Operational Policy and Procedure manual specific to Qatar.

[CNA Lawyer]: Ms. [V.P. Academic CNA-Q]

[V.P. Academic CNA-Q]: Yes

[Panel Member 2]: That covers the admissions policy.

[CNA Lawyer]: I know what you’re after. Ms. [V.P. Academic CNA-Q]?

[V.P. Academic CNA-Q]: Yes.

[CNA Lawyer]: I referred you earlier to Tab 14 of the Grievor’s Submission which is the College of the North Atlantic Operational Policy and Procedure, Topic Admissions.

What the panel would like to know: Is there a written College of the North Atlantic Operational Policy and Procedure, Topic Admission that's done specifically for Qatar in the form found at Tab 14.

[V.P. Academic CNA-Q]: in tab 14, we would have a draft copy of a, because once we finalize our policy they have to go back to CNA for approval. There would be a draft policy from our admission office that I can get and have included. It would be done in this format and I would get you a copy.

[Applicant's Lawyer]: We would want to know when the draft is done.

[CNA Lawyer]: When was the draft policy prepared?

[V.P. Academic CNA-Q]: Yes and I will get it, it's in our, their procedures manual. So I will get it in a binder, I mean so I will get it for you.

[Applicant's Lawyer]: And the date when it was done please.

[V.P. Academic CNA-Q]: Yes I will.

[Bold and underlining in original]

- [2] A little background is in order. The College of the North Atlantic is a publicly-funded, Newfoundland and Labrador post-secondary educational institution. It provides full-time and part-time courses in a wide range of arts, sciences and technology to over 20,000 students each year. It has 17 campus locations across the province, and one campus in the State of Qatar in the Middle East, which opened in September 2002 under an agreement between the State of Qatar and CNA. It is this latter campus that is referred to above, and will be referred to throughout this Report as CNA-Qatar or simply CNA-Q.
- [3] On March 6, 2007 CNA provided two documents to the Applicant in response to his request. CNA indicated in correspondence to the Applicant on that date that the cover page and table of contents do not exist, while the date of preparation of the documents provided to the Applicant was the 2002-2003 academic year. The Applicant filed a Request for Review with this Office, received on April 12, 2007, stating that the records provided to him through this request "do not match, in any way, the description of these records given by [V.P. Academic CNA-Q] in January 2005."

[4] During informal resolution efforts, CNA reviewed the matter further at the request of this Office. On the one hand, CNA reaffirmed that the records provided to the Applicant are the records referenced in the testimony quoted in his request; however, CNA also stated that there was no separate Operational Policy and Procedures Manual for CNA-Qatar. The Applicant was not satisfied with this statement, and he did not agree to resolve the matter informally on this basis. Both parties were notified on June 2, 2008 that the matter was being referred for formal investigation. Both parties filed formal submissions on July 2, 2008. Those submissions are summarized below.

II SUBMISSION OF THE PUBLIC BODY

[5] The College provided this Office with a written submission on July 2, 2008. In it, the College set out in detail the various steps it took in dealing with this file, from the date the access request was received to the date this Office requested written submissions, and explained its position on the matters at issue. The following paragraphs are a summary of the submission of the College. I have included a fair amount of detail because it is important to understand the process followed by the College in responding to this request.

[6] It is the policy of CNA that when an individual member of the College is named in an access request, a copy of the request is provided to the individual, who is asked to conduct a search for the requested records and forward copies to the Access and Privacy Coordinator's office. On February 19, 2007, therefore, the College contacted the individual identified in the request as "VP-Academic, CNA-Q" (hereinafter referred to as "VP") and asked her to supply the requested records as soon as possible. The Applicant's request was acknowledged in a letter to him dated February 20, 2007.

[7] On February 20, 2007 VP responded to the Coordinator, asking for a copy of the "tab 14" document which had been discussed during the 2005 Public Service Commission hearing, and which was referenced in the Applicant's request. A copy of this document was forwarded to VP on February 22, 2007.

- [8] On February 25, 2007 VP provided the Coordinator with copies of two documents. One, which I will refer to as "Document 1", was a three-page document titled *"Admissions, Registration and Grade Reporting for CNA-Qatar – Processes and Responsibilities."* VP stated that she had received it from CNA's Registrar back on October 30, 2002. The second, which I will refer to as "Document 2", was an 8-page document with an additional cover page that read: *"Student Admissions Policy and Procedure – CNA-Qatar."* VP stated to the Coordinator that she had only a paper copy of this document, not an electronic one.
- [9] The Coordinator sought clarification from VP via e-mail on February 26, 2007 regarding the matter of the cover page, general table of contents and date of preparation of the Policy and Procedure Manual. VP responded that the general table of contents does not exist. VP further stated that the date of preparation was "the 2002-2003 academic year." That information was subsequently provided to the Applicant.
- [10] On March 1, 2007 CNA contacted the Applicant with a request for the payment of the thirty-three dollar fee associated with this request. CNA received payment in full from the Applicant on March 6, 2007. On the same day CNA sent to the Applicant the two records referred to above.
- [11] On March 12, 2007 the Applicant sent an e-mail to the College outlining a number of concerns about the response to his request, and asking for additional information. CNA replied to the Applicant, via e-mail, on March 26, 2007 indicating that they were looking into his concerns and would respond in the near future. On March 30, 2007, however, the College wrote to the Applicant indicating that they had completed his request, that the file was closed, and CNA would not be reopening the search to find this additional information. The College submits that the questions and concerns outlined by the Applicant are well beyond the scope of the original request. The College asserts that, in fact, some of these questions could be separate access requests. Others, the College states, fall well outside the duty to assist under section 9 of the *ATIPPA*.
- [12] The Applicant sent a further, similar e-mail to the College on July 4, 2007, copied to the Acting President of CNA at that time, to the Director of Student Services and to the Chair of CNA's Board of

Governors. CNA responded to the Applicant on July 19, 2007, stating that a reasonable search had been conducted and that all responsive records found to exist had been provided in full. The College stated that while it will assist in inquiries about the nature and type of records, and assist in identifying what records may exist and where they may be located, it will not, for example, comment on development of policy.

[13] CNA states that its understanding of the Applicant's request is that the responsive record, by virtue of the actual wording of the request, would be those portions of the Operational Policy and Procedures Manual for CNA-Qatar referenced by VP in her testimony, as quoted in the request. The College states that having requested and received these records directly from VP, the College has provided them to the Applicant. CNA acknowledged at that time that the requested cover page and table of contents did not exist.

[14] The College attempted to clarify the matter in a letter to the Applicant dated May 21, 2008. In that letter CNA stated:

The documents provided to you are copies of the documents which the Vice President – Academic for CNA-Qatar was referencing in her statement quoted above. The Operational Policy and Procedure manual for CNA-Qatar is the Operational Policy and Procedure Manual for CNA. There is no separate Operational Policy and Procedure Manual for CNA-Qatar. This office has been informed that all current admissions policy information is available on CNA's website (www.cna.nl.ca).

[15] The College states that the Applicant has provided a significant amount of information explaining his reasons for believing that the disclosed records cannot be the records to which VP was referring in January 2005. The concerns that the Applicant has expressed, however, call into question whether the records existed in the December 2002 – January 2003 period. CNA asserts that the question presented in the request, which was in turn relayed to VP, involves records which existed in January 2005. As the College has stated previously, the records disclosed to the Applicant are those to which VP referred in her January 2005 testimony. CNA has followed up with VP on two occasions since the records were first received, to confirm that these are in fact the records VP was referring to in her January 2005 testimony. On both occasions she has confirmed that they are.

[16] CNA states that in Report #2007–009 the Commissioner accepted CNA's interpretation of the duty to assist. Its submission at that time read as follows:

Reported decisions on the interpretation of the "duty to assist" divide the duty to assist into two categories: (1) (a) the duty to make every reasonable effort to assist an applicant in making a request and (b) the duty to respond to the applicant in an open, accurate and complete manner; and (2) the duty to conduct a reasonable search for records responsive to the applicant's request. The standard by which to judge whether a public body has fulfilled its duty to assist is "reasonableness", not perfection. The "reasonableness" of the public body's actions in fulfilling its duty to assist is fact-specific.

[17] With respect to the duty to assist an applicant in making a request, and the duty to respond in an open, accurate and complete manner, the College states that the Applicant was informed on March 6, 2007 that access to the records which were found to exist was granted in full. CNA also outlined which of the requested records did not exist. The College acknowledges that it is clear from the text of the Request for Review that the Applicant does not think that the records he received are what he expected to get. CNA says that while that is regrettable, CNA conducted a reasonable search and provided that Applicant with all the results of that search, without delay, in a very open, accurate and complete manner.

[18] As noted previously, CNA asserts that the questions and concerns posed by the Applicant on March 12, 2007 are well beyond the scope of the original request, and in some cases could be separate access requests.

[19] The College states that the duty to respond in an "open, accurate and complete" manner is generally interpreted to mean that the public body, when making its response to an applicant's request is to (i) tell the applicant whether or not it is granting access to the records; (ii) identify records which are being withheld and provide reasons for withholding the records; (iii) inform the applicant of his or her right to review, and in general, give the applicant a complete picture of the public body's response to his or her request including reasons. The College submits that it has done all of those things and, therefore, has fulfilled its duty to assist under the *ATIPPA* with respect to assisting the Applicant.

[20] With respect to the duty to conduct a reasonable search, the College first notes that based on the wording of the request and the lengthy quotation provided by the Applicant, it began its search for the records by going directly to the individual being quoted. VP was asked to review the request and provide the documents she was referring to. CNA states: "We fail to see how the applicant could expect us to read anything else into his request given the lengths he went to tie the requested records to [VP]'s testimony".

[21] It is the College's submission that its actions in undertaking the search for records responsive to this request were reasonable and fair, and it has fulfilled its duty to assist the Applicant with respect to its duty to conduct a reasonable search for records responsive to the Applicant's request.

III SUBMISSION OF THE APPLICANT

[22] The Applicant began his submission by reiterating his Access to Information Request, which quotes at some length from transcribed testimony from an appeal against the termination of his employment by CNA, held under the auspices of the Public Service Commission. He emphasized that he had requested four items, all from a record referred to as the Operational Policy and Procedures Manual for the CNA Qatar campus. The four items listed were the cover page, the general table of contents, the full admissions policy section, and the date of preparation.

[23] The four requested items, as noted above, all have to do with an Operational Policy and Procedures Manual, referenced in the sworn evidence given by VP at the Public Service Commission hearing. It is important, says the Applicant, to note that VP is, and was in 2005, Vice-President Academic, Qatar campus, College of the North Atlantic. She is the person responsible for Student Services. She is the one who was responsible for Student Services, and for documenting the amendment of Student Services Policies. When she testified, she was in fact acting President of the Qatar campus.

[24] In addition to the excerpt from the transcribed evidence presented in his request, the Applicant refers to other references to the existence of written policy specific to the admission of students, that he says VP made at that hearing. Such remarks, he says, affirm that VP was making reference to documents that

were specific to the operation of the Qatar campus, including where such documents were physically located, what topics were addressed in the policy and so on.

[25] The Applicant further asserts that it is clear from VP's evidence that she was referencing a written policy which was extant in 2002-2003, as distinct from one that existed at the time she was giving her evidence in early 2005. He states that the central issue for the panel of the Public Service Commission convened to hear his case was whether the Applicant was wrongfully dismissed for alleged violations, in 2002-2003, of CNA policies on admissions, and what all concerned were asking for was a copy of the policy on which the dismissal was based. The Applicant argues that everyone involved at the hearing, including VP, understood that the focus was on the policy as it existed in 2002-2003, not at the time of the hearing in 2005. The Applicant asserts that whether or not there was in fact a written policy was quite significant, and that CNA could have chosen to disclose at that time that the policy did not exist. However, VP stated explicitly that the policy did exist. The Applicant states that his request is not complicated – he is simply now asking for that policy referenced by VP.

[26] The Applicant further states that in July 2007 he submitted a further, separate Access to Information Request to CNA, asking for a copy of the College's policies and procedures on which the College relied when the author of its letter of dismissal dated May 11, 2003 stated in that letter that he had violated policy and procedures. The Applicant states that CNA has informed him, in response to that request, that his request is redundant, citing *ATIPPA* Section 13 (Repetitive or Incomprehensible Request). In that correspondence CNA stated that the policy already provided to the Applicant as responsive to the present request (the subject of this formal Report) is the same policy on which the College relied in constructing his letter of dismissal.

[27] Further in response to the July 2007 request, CNA has also claimed that the records responsive to that request are covered by Section 21 of the *ATIPPA* (Legal advice - solicitor-client privilege). The Applicant states that while he realizes that these are separate and distinct requests (and therefore matters for separate review by this Office) the assertion by CNA that the records are in fact the same raises some additional questions.

- [28] First, why are the same records, supplied by CNA without restrictions as responsive to one request, declared to be covered by solicitor-client privilege under a second request?
- [29] Second, since CNA is declaring the two sets of responsive records to be the same, then does that not establish the time-frame to which that set of records belongs – clearly 2002-2003, not 2005?
- [30] As for the question of the form and content of the records, the Applicant makes a number of specific arguments. First, he once more refers to passages from the transcript of testimony supplied to the College with his request. He points out that Panel Member 1 asks: *“Is there a copy of an Operational Policy and Procedures Manual? Not a handbook. Not a calendar.”* The reply of VP clearly accepts the distinction. The Applicant states that the documents supplied to him do not match that description.
- [31] Second, the Applicant states that although one of the documents carries a title page labeled “Operational Policy and Procedures Manual” there is very little in the form or content of that document that is similar to a standard CNA Policy and Procedures Manual. While VP’s evidence was that it covered the admissions policy, there is no presentation of an admissions policy in either of the supplied documents. In addition, neither of the documents is marked “draft” although VP’s evidence was that it would be in draft form.
- [32] Third, the Applicant references CNA’s written statement, on May 21, 2008 in response to his request, that there is no separate Operational Policy and Procedures Manual specific to Qatar, which contradicts the evidence given by VP.
- [33] Fourth, the Applicant points out that VP described the record with a high degree of specificity. Why, he asks, would one speak of a document being in draft format, or in the form of standard CNA policy, and claim to be aware of its location, unless one was familiar with a specific record? There was, he says, no doubt that VP was claiming that the referenced document was specific to Qatar, that it was part of an Operational Policy and Procedures Manual, and that it existed as such in December 2002 – January 2003.

- [34] The Applicant makes the following points about the two records supplied by CNA. One record is titled, on a separate cover page, as *Student Admissions Policy and Procedure - CNA-Qatar*. It has 9 pages and has a number of headings and sub-headings. The Applicant states that the supplied cover page is not in keeping with the document to which it is attached. Further, there is no reference in the text of the document that it purports to be policy. The Applicant questions whether this cover page was manufactured as a result of this specific request for access, as he has never seen any other CNA policy, draft or otherwise, that had its own separate cover page.
- [35] According to the Applicant, there are numerous other references in this document to processes or things that, the Applicant asserts, did not come into existence until the fall of 2003 or later. Therefore, he says, this document must date from a later period.
- [36] The Applicant also asserts that this document contains statements about admissions criteria that are contradictory. Along with other inconsistencies, these lead the Applicant to conclude that while the document may be a discussion document, it is not a policy. He also points out that it contains a reference to an "Appendix A" which has not, however, been supplied.
- [37] The second record, titled *Admissions, Registration and Grade Reporting for CNA-Qatar*, does not contain a separate cover page, and has a total of 3 pages. There is a heading on the first page, and there are a number of sub-headings. The Applicant makes similar comments about discrepancies and shortcomings of this document, and likewise concludes that the document is really not much more than a discussion guide. He concludes that it might be useful if a group were to become engaged in the planning of a registration process, but can hardly be seen as a policy.
- [38] The Applicant makes the following further observations. He states that it appears that the College in its response is attempting to create two distinct entities (one being VP and the other being CNA) with no relationship to each other. VP, however, is a senior employee with CNA – a Vice-President who presumably speaks for the organization. The Applicant does not accept that CNA can offer statements in contradiction to VP.

[39] The Applicant states that he asked CNA for, and paid for, specific records. CNA has a responsibility to ensure that the records supplied to an applicant are indeed the requested records. If CNA is familiar enough with the records to assess a particular fee then it should be able to ensure that they are in fact the records requested.

[40] The Applicant observes that, unlike other examples of CNA policies, both documents are completely lacking any signatures, approvals or dates.

[41] The Applicant concludes that he has demonstrated in his submission that the records supplied by CNA are not those that are described by VP. The Applicant therefore states that the records provided to him were not the records he requested. He further states that it is fraudulent to say that these constitute the admissions policy in existence during the December 2002 – January 2003 period.

[42] The Applicant states that after receiving the records from CNA pursuant to this request, he addressed eight questions to the CNA Access and Privacy Coordinator in a March 12, 2007 e-mail. Those questions raised concerns which came from a reading of the records, as it was apparent to the Applicant that the records supplied by CNA did not match the statements made by VP concerning those records. The eight questions covered essentially the same issues which the Applicant has addressed in his submission, regarding apparent discrepancies between VP's sworn evidence and the records supplied by CNA.

[43] The Coordinator responded on March 26, 2007 that some of the answers required research; however, within days of that reply, the Coordinator wrote in a letter dated March 30, 2007, *"Our search results as set out in our letter of response dated March 06 2007 was as follows.... This file is, therefore, closed. CNA will not be reopening the search to find the information sought in your email."* On July 4, 2007 the Applicant wrote to the Coordinator expressing his view that CNA was not in compliance with the *ATIPPA* in unilaterally cutting off all discussion concerning this file.

[44] The Applicant asserts that the action of CNA in refusing to answer these questions is not only a failure to assist the Applicant but is an attempt to put a stop to the process. He argues that CNA had the

option to ask for clarification regarding the questions, or they could have requested more time to answer them. He suggests that if senior CNA officials are advising the Coordinator to frustrate the processes of the legislation, then that fact should be of interest to the Office of the Information and Privacy Commissioner.

[45] The Applicant concludes his submission by referring again to the CNA statement of June 2, 2008: *“As we indicated in our letter of May 21 2008 the records provided on March 06 2007 are the records referenced in the testimony quoted in the wording of your request”*. The Applicant declares that that is misleading; the records as referenced by VP were not supplied. He asks that if the records exist then CNA should supply those records. If the records do not exist, then he would expect an unambiguous statement from CNA indicating that.

IV DISCUSSION

[46] In his Request for Review, the Applicant states that he has not been supplied with the requested records. He states that the records supplied do not match the description of the records given by VP. He further complains that CNA has refused to address any of his questions regarding his request and has unilaterally closed the file. In his view, CNA has failed to comply with its duty to assist the Applicant. As a remedy, he asks that CNA supply the records as requested.

[47] There are, therefore, two issues for me to deal with:

1. Has the College supplied the Applicant with the record he requested?
2. Has the College failed to fulfill its duty to assist the Applicant?

Issue 1: Has the College supplied the Applicant with the record he requested?

[48] Whether the Applicant did or did not get the records that he requested is a question of fact. First, I must look at the request, deconstruct it and examine each element, in order to determine what the Applicant asked for. Then I must examine what he received, and compare that to the terms of the request.

[49] The request is set out in its entirety in paragraph [1] of this Report, above, and may be divided into three parts. The first sentence asks for four items: the cover page, the general table of contents, and the full admissions policy section from the Operational Policy and Procedures Manual, and the date of preparation. That would appear to be reasonably clear and concrete, and one might have supposed that this request, by itself, would be sufficient to identify the records in question.

[50] The Applicant, however, added a second part to his request, in which he further specifies the requested records as those referenced by VP in her evidence given on January 12, 2005, stated to be from a manual confirmed to exist and specific to CNA-Qatar. Those references further narrow down and explain the request.

[51] For greater certainty, the Applicant added a third part to his request, by excerpting a lengthy portion from a transcript of VP's actual testimony dealing with the subject. The Applicant stated that he was providing this excerpt for assistance in supplying the record. That excerpt comprises by far the greatest part of the request, and is reproduced in paragraph [1] above.

[52] The core of what the Applicant requested, therefore, is what VP described in her testimony. There has been no objection taken by CNA to the accuracy of the transcribed testimony provided by the Applicant in his request, and therefore I will accept it as accurate for the purposes of this review.

[53] The excerpt from the testimony consists of an extended conversation among VP (the witness), two members of the hearing panel, and two lawyers, one representing the College and the other representing the Applicant. As is often the case in such hearings, the panel members appear to have been engaged in direct questioning of the witness themselves, in order to establish certain facts to their own satisfaction.

[54] Panel Member 1 first asks: *"Is there a copy of an Operational Policy and Procedures Manual? Not a handbook. Not a calendar. We want to know yes or no, is there a copy of an Operational Policy and Procedure Manual specific to Qatar".* VP answers *"yes."*

- [55] Panel Member 2 then asks whether it covers admissions policy. VP answers “yes.”
- [56] CNA’s own lawyer at the hearing then rephrases the whole question, asking whether there is a written CNA Operational Policy and Procedure, on the topic of admissions, “...done specifically for Qatar, in the form found at Tab 14” which was a document already entered into evidence at the hearing. VP replies that there would be a draft policy in the CNA-Q admission office, in the format of Tab 14, in their procedures manual. She undertook to get a copy of that document for the panel, along with the date on which it was prepared.
- [57] As the Applicant pointed out in his submission, VP was at the time of the hearing, Vice-President – Academic, and at the time was in fact Acting President, Qatar campus. As such, she was responsible for Student Services, and would be expected to be thoroughly familiar with such things as admissions policies and the way in which they were documented. It appears that CNA shared that view, since it was to VP that CNA immediately went to conduct its search for the requested records.
- [58] I have been provided with a copy of “Tab 14.” It is a 9-page document headed, at the top of its first page, “College of the North Atlantic Operational Policy and Procedure” alongside the CNA logo, with the sub-heading “Admission.” Immediately below the sub-heading there is a small box, containing information identifying the document as Policy No.: AC-102, Division: Programs, with Effective Date: (R3) June 2000. The following 8 pages are all clearly headed with the policy number and topic, and are identified as “page 2 of 9”, “page 3 of 9”, etc. The content consists of numbered paragraphs and sub-paragraphs, of which the first (1.0) is titled “Purpose and Scope”, the second (2.0) is titled “Policy” and the third (3.0) is titled “Procedure.” From its content, it is clearly applicable to CNA in Newfoundland and Labrador. At the bottom of the last page is a space for the signature of the official who has approved it – in this case the President. Appended to the document is an additional “Fact Sheet” which outlines the dates of preparation and approval of the original policy, and of its several successive revisions.
- [59] The College has an extensive website which is to be found at www.cna.nl.ca. An inspection of the website reveals a section titled “Policies and Procedures” which contains more than 90 policy documents and a similar number of procedure documents, including “Tab 14”. They are all laid out and written in a

similar format. In fact, the first one, Policy PO-001, is a “policy on policies” that lays down a uniform standard for the format and content of other policies and procedures, and it appears that all of the other policy and procedure documents on the website actually do conform to Policy PO-001.

[60] Another policy – PO-004 – effective June 9, 2002, sets out how CNA policies are to apply to CNA-Qatar to the extent possible, and also sets out a procedure for creating appropriately modified policies when they cannot be directly applied. There do not, however, appear to be any specifically CNA-Q policies on the CNA-NL website. The Qatar campus has its own separate website at www.cna-qatar.com. There is a great deal of information on that website that pertains in one way or another to the subject of admissions, such as instructions to applicants (as, of course one also finds on the CNA-NL website), but there do not appear to be any formal policy documents, whether in the format set out in Policy PO-001 or otherwise. From the websites, at least, there is no indication that any such policies have ever been created.

[61] It is easy to see from even a cursory inspection that the records provided, while they contain references that are specific to the Qatar campus, are not in the least similar to CNA policies such as “Tab 14” or to the more than 90 other policy documents found on the CNA website. Neither Document 1 nor Document 2 is constructed in the format laid down by Policy PO-001. Neither document bears a logo or a header box setting out the topic, policy number, division and so on. Neither document bears any indication of an effective date, or any date reference whatever. Neither document contains the three main sections (1.0 – Purpose and Scope; 2.0 – Policy; and 3.0 – Procedure) mandated by Policy PO-001 and followed without exception in all of the 90-plus other policies on the website. There is no place on either document for an approval signature. Neither document even has page numbers. Clearly, if these documents are policy documents, they are not, in any respect, written in conformity with Policy PO-001, nor are they remotely similar to “Tab 14.”

[62] Document 1 (titled *“Admissions, Registration and Grade Reporting for CNA-Qatar – Processes and Responsibilities”*) nowhere refers to itself as a policy. Upon review it appears to be a very preliminary assessment of how anticipated tasks will be assigned. For example, it contains comments such as “This responsibility should be assigned to...” or “At busy times of year, the Admissions Officer will need

clerical assistance...” or “The College must establish an appropriate protocol to deal with these issues.” The inference might be drawn that Document 1 appears to be a form of discussion paper that could even predate the opening of the Qatar campus. It would be difficult, however, to conclude that it is a policy.

[63] Document 2 carries a separate cover page headed “*Student Admissions Policy and Procedure.*” However, the body of the document actually begins with the words: “The following document is a work in progress intended to identify the various steps and procedures involved in the admissions process. It is subject to change as steps are added or changes are made.” That declaration alone would appear to disqualify the document from policy status.

[64] It is conceivable that these documents could be very early creations, intended to lead eventually to the preparation of a policy in the approved format and forwarded to the appropriate authority for approval. It is also possible that these documents may have served a dual purpose, as discussion documents and as guides to actual administrative practices in a pre-policy phase. It may be that one or the other, or both, documents may have even served as a makeshift admission policy at some stage in the operations of the Qatar campus. All of that, however, is purely speculation. The question for this Office is not: “What documents served as admission policies at certain times at CNA-Q?” Rather, the question is simply: “Did the Applicant get the records he requested?” Those other considerations may be of great significance to the Applicant. However, they are not the issues I have to decide.

[65] At one point in its submissions CNA has asserted that the question presented in the Applicant’s request, which was in turn relayed to VP, involves records which existed in January 2005, not records that existed in the December 2002-January 2003 period. CNA states that VP has confirmed that the records supplied were those to which she was referring in her January 2005 testimony. It is not clear whether the College intended to change its argument on this point, or whether it was simply intended to be argued in the alternative. Either way the argument does not stand up to examination. As the Applicant has pointed out in his submission, the whole point of the Public Service Commission hearing was to decide whether or not the Applicant was wrongfully dismissed, *in May 2003*, for alleged violations of CNA admissions policy. It is abundantly clear to me that the focus of everyone involved at the hearing would therefore have been on policy documents that existed and were in effect in 2002-2003. Policies

that were only created or that only came into effect subsequent to the Applicant's dismissal would have been irrelevant to the issues.

[66] Someone in VP's position must be taken to have understood those things in January 2005. In addition, both VP and the CNA Access and Privacy Coordinator must be taken to have understood those same things in February 2007, at the time of responding to the Applicant's request. In fact, in its submissions CNA recounts how it sought clarification from VP, in February 2007, about the date of preparation of the documents, and subsequently forwarded to the Applicant the information that the date of preparation was "the 2002-2003 academic year." I have no doubt that throughout this entire exercise, everyone concerned understood that the records being sought were those that were in effect in the 2002-2003 academic year.

[67] The Applicant further submits that in July 2007 he filed a separate Access to Information Request with CNA, for a copy of the policy relied upon as the basis for his termination by the author of his letter of dismissal in May 2003. The College responded that his request was refused on the ground that it was redundant, as the policy documents supplied to him in response to the (present) request of February 2007 are the same records. Without making any determination about any of the issues or the outcome of that July 2007 access request, I observe that the response of the College in that matter appears to stand in at least partial contradiction to the position it has taken in its submission here. If the records supplied in response to the present request are the same as the records requested in July 2007, then they must, logically, have existed prior to the letter of dismissal in May 2003.

[68] The Applicant makes a number of other statements in his submission about the format and content of the documents supplied to him. I have already dealt with (and agreed with) the essence of many of those arguments in the foregoing paragraphs. Some other issues, such as the question whether a record, supplied to an applicant in response to one request, could be subsequently withheld on the basis that it is covered by solicitor-client privilege, are not issues arising out of the present request, and so must be dealt with in the matter in which they arise. In addition, the Applicant also refers to other statements which he asserts VP made on other occasions during the hearing, which I must, however, disregard as no transcript or other evidence of such statements is before me.

[69] Similarly, the Applicant states that Document I must date from a period later than the winter of 2002-2003, since it refers to processes or things that did not yet exist on the Qatar campus at that time. He may well be right, but I can draw no conclusion about those arguments simply because I have no independent evidence before me that it is so. However, these reservations do not detract from the conclusions I have reached on the first, factual question: whether or not the Applicant received the records he requested.

[70] The Applicant has made a convincing case that the records provided to him do not constitute excerpts from a "Policy and Procedures Manual." What we are left with is whether the records provided to the Applicant could reasonably be accepted as the records which were referred to by VP in her testimony before the Public Service Commission. The Applicant has pointed out the numerous discrepancies between that testimony and the records he received. It is clear to me that despite CNA's arguments to the contrary, the records produced do not match VP's testimony.

[71] The bottom line is that the Applicant has requested excerpts from a Policy and Procedures Manual *as referenced by the CNA-Q VP Academic in her testimony*. CNA's position splits this in two, stating that the Manual doesn't exist, but at the same time maintaining that what was provided is what was referred to in the testimony. In my view the essential element is the lack of a Manual. If it does not exist, then the documents referred to in VP's testimony likewise must not exist.

[72] For all of the reasons referred to in the preceding paragraphs I have reached the conclusion on the first issue, that the records the Applicant received are not the records he asked for.

[73] Further, it is reasonable to conclude from the evidence that the records requested by the Applicant probably do not exist. It is difficult to prove a negative, but in this case all of the evidence points to that conclusion. After all, policy is not something that is generally hidden. It is usually circulated, at least internally, if not externally. The extensive compilation of CNA's policies on its website suggests that if an admission policy specific to CNA-Qatar existed, it would be found there. There has been no evidence presented to me that there are secret, unpublished policies. If the policy referred to by VP existed, there would likely be no great difficulty in locating it.

[74] The notion that CNA or someone within CNA might be hiding it is, I suppose, conceivable, but it is not reasonable. For one thing, the inability of CNA to produce the policy referenced by VP at the hearing of January 2005 would obviously have worked against CNA in the hearing into the Applicant's management grievance claiming wrongful dismissal. If any such policy existed, I would expect that it would have been produced by CNA in support of its case at the Applicant's hearing.

[75] This conclusion is not the same as concluding that the records referred to by VP have never existed. It is even more difficult to prove that sort of negative proposition, and it is beyond either our jurisdictional mandate or our resources to draw such a conclusion. Our role is to review the decisions of public bodies to determine whether they adhere to the letter and spirit of the *ATIPPA*. In this case it is within our mandate to go so far as to draw a conclusion that the requested records probably do not exist. It is not within our mandate to go further than that. This Office can offer no further comment on that point, except to say that there is no evidence before me in this particular case that leads me to believe that the responsive record exists and that CNA is intentionally withholding it.

[76] It is also not my role to determine the accuracy of statements given at a Public Service Commission hearing. It is clear, from her recorded testimony, what VP was referring to. Her words were clear and unambiguous. Whether she was simply mistaken, or whether she meant or intended something different, is another question, and one that I am not in any position to answer. There is no way for me to adequately verify what VP meant by her testimony. Although I view with puzzlement how VP's comments at the hearing fail to correspond with the records, it is conceivable that the records ultimately received by the Applicant were what VP had in mind. They are not, however, what the Applicant requested.

Issue 2: Has the College failed in its duty to assist the Applicant?

[77] The duty to assist is set out in section 9 of the *ATIPPA* as follows:

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.

[78] It is true, as the College states in its submissions, that in Report 2007-009 my predecessor accepted CNA's interpretation of the duty to assist. Specifically, my predecessor said: *"I take no issue with the College's understanding, described in its submission, of what constitutes the duty to assist, but I question whether it was fully executed in this case."* The College's interpretation at that time read as follows:

Reported decisions on the interpretation of the "duty to assist" divide the duty to assist into two categories: (1) (a) the duty to make every reasonable effort to assist an applicant in making a request and (b) the duty to respond to the applicant in an open, accurate and complete manner; and (2) the duty to conduct a reasonable search for records responsive to the applicant's request. The standard by which to judge whether a public body has fulfilled its duty to assist is "reasonableness", not perfection. The "reasonableness" of the public body's actions in fulfilling its duty to assist is fact-specific.

[79] Like my predecessor I take no issue with this interpretation. I also accept the position, taken by the College then and now, that 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.

[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. I will review each of those components in turn.

[81] First, I have concluded that the College has not failed in its duty to assist the Applicant in making his request. From the outset, the Applicant was extremely clear and specific about precisely what records he was requesting. This was not a case in which an Applicant was requesting certain information and the College needed to clarify the request in order to determine what records might contain that information. In this case, given the way in which the Applicant worded his request, there was nothing left to clarify. Therefore there was no need for the College to ask the Applicant for any further details, or to offer any assistance in concretizing the request.

[82] Second, the College initially commenced what it considered was a reasonable search. The requested records were firmly tied to the testimony given by VP. Therefore it was quite reasonable for the College, as its starting point, to ask VP to provide the records she was referring to. It was, of course, reasonable to provide VP with the text of the request. It was also reasonable for the College to send VP a copy of the Tab 14 policy documents to assist in narrowing the search. Up to that point, the steps taken by the College to identify and locate the requested records were sensible and straightforward, and would have reasonably been expected to result in production of the documents the Applicant wanted.

[83] However, when the results of the initial search, eventually provided by VP, were Document 1 and Document 2, it ought to have been patently obvious that there was something wrong. I have concluded, above, that those documents in no way resembled what was referred to in the request, and it is my opinion that this ought to have been equally apparent to the searchers at that time. It would therefore have been reasonable for the College, when first reviewing those two documents, to request confirmation – to get back to VP and ask: “These documents don’t look like policy documents. Are you sure there are no policy documents, in the format of Tab 14?” There is no evidence that anyone did so. The result was that no further search appears to have been conducted.

[84] The search went off the rails completely when CNA then wrote to the Applicant purporting to provide the records requested. In doing so, I conclude that the College failed in the remaining aspect of the duty to assist – responding to the Applicant in an open, accurate and complete manner.

[85] First of all, the College did not communicate openly with the Applicant regarding the discrepancy in the records. The College perhaps ought to have written to the Applicant, or even telephoned, and said, “We have conducted a thorough search, and have not been able to find any documents matching the description of those you requested. We have come to the conclusion that the records you requested do not exist. All we have been able to find are the enclosed documents, which we hope may be of assistance.” Instead, the College first sent the Applicant a letter requesting payment of fees. When it received payment, the College then sent Document 1 and Document 2 to the Applicant, with a cover letter that said: “Please find enclosed the requested documents.”

[86] The *ATIPPA* requires that a public body be accurate in its dealings with an applicant. Yet in the present case, the College has wasted a great deal of time and effort by insisting that the Applicant got what he asked for, when clearly he did not. In my view it is not consistent with the letter or the spirit of the *ATIPPA* to persist in maintaining a dual, contradictory position, as CNA has done in this case.

[87] Similarly, a public body is required to respond to an applicant in a complete manner. In the present case, CNA eventually conceded that a Policy and Procedures Manual, specific to Qatar, does not exist, but still has not acknowledged that *none* of the documents requested by the Applicant appears to exist. This may seem like semantics, but it is not. Any time a public body is not accurate and complete in its dealings with an applicant, it raises the quite natural suspicion in the mind of the applicant and others that there is something the public body is attempting to hide.

[88] The College has refused to answer any of the questions submitted by the Applicant when he first received the records. It has argued that the questions or concerns outlined by the Applicant are “well beyond the original request” and that in fact some of them could be separate access requests. The Applicant argues that the refusal to address those concerns is not only a failure to assist but is an attempt to curtail the access to information process.

[89] The Applicant’s questions to CNA dated March 12, 2007 were quite detailed and specific, and arose out of his review of the documents supplied. In brief, he wanted to know:

1. When was the cover page added to Document 2?
2. Who wrote Document 2?
3. What was the date of preparation of Document 2?
4. Who gave you the date of preparation as the “2002-2003 academic year”?
5. Does a procedures manual exist?
6. What is the explanation for the discrepancy in format?
7. Is Document 2 currently the draft admissions policy?
8. In terms of Board of Governors approval, at what stage in policy development is this?

[90] For the most part, these questions were quite reasonable. Clearly they arose, not simply out of the Applicant's heightened curiosity, or out of any shortcoming in the presentation of his access request, but directly out of the obvious discrepancies between what the Applicant asked for and what he received. In my view, when the Applicant had legitimate concerns about whether the records he has received were indeed those that he requested, the College was under a duty to make a reasonable attempt to provide some sort of explanation.

[91] Under some circumstances, such further supplementary questions by an applicant might appropriately be ruled the subject of a separate request, particularly if what is being asked for is a separate parcel of new information. Here, it was the apparent non-correspondence between the records and the request that gave rise to the Applicant's questions, and those questions were not about new or different information or records, but were all about the documents that had been provided by the College.

[92] In its submissions the College states that while it will assist in inquiries about the nature and type of records, and assist in identifying what records exist and where they may be located, it will not, for example, comment on development of policy. This statement appears to me to be not unreasonable in terms of its duty to assist. However, the Applicant's questions were all precisely about the nature of the records provided. Even question number 8 (above) is not actually about "development of policy." It is really about the provenance, authenticity or official status of a record which has been provided in response to a request for a policy, but does not appear to be a policy. In my view, that was a reasonable question that deserved an answer.

[93] Some of the Applicant's questions could perhaps have been more appropriately worded. It is generally understood that what the *ATIPPA* actually provides is not simply a right to information, but a right of access to *records*. It does not oblige a public body to provide information unless it is in the form of a record. Arguably, therefore, the Applicant's questions 2 and 4, for example, ask for the names of particular individuals, and a narrow technical reading of the *ATIPPA* might not require the College to answer them. Sometimes, however, a record needs to be explained. Under the circumstances of this particular case, it is my view that the purposes of the *Act* and, in particular, the responsibilities inherent

in the duty to assist, would have been better served by an earnest attempt to answer the very reasonable questions posed by the Applicant.

V CONCLUSION

[94] On the first issue, whether the College has supplied the Applicant with the record he requested, I have concluded that it has not. The documents provided bear no reasonable resemblance to what was requested, or to what was asserted to exist and described by VP in her testimony. I have further concluded that the records requested probably do not exist.

[95] On the second issue, whether the College has failed to fulfill its duty to assist the Applicant, I have concluded that it has. While it did not need to clarify the request with the Applicant, and while it set out initially to conduct a reasonable search, it did not complete it. In addition, the College failed to respond to the Applicant in an open, accurate or complete manner by refusing to acknowledge that the documents requested by the Applicant could not be found, by insisting that the documents he was given were what he requested, and by failing to answer his reasonable questions.

VI RECOMMENDATIONS

[96] Under the authority of section 49(1) of the *ATIPPA* I therefore recommend:

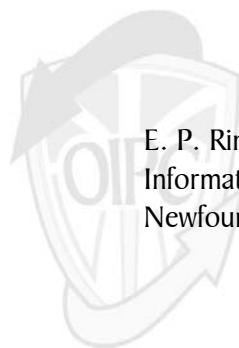
1. that if the College is unable to provide the records requested by the Applicant, it should acknowledge that fact and return the \$33.00 fee charged to the Applicant;
2. that the College make a reasonable attempt to provide answers to the questions asked by the Applicant on March 12, 2007, or alternatively that the College should acknowledge to the Applicant that the records it provided are not responsive to the request, and that the records requested do not exist;
3. that the College in future be mindful of its duty under section 9 of the *ATIPPA* to assist applicants, and review its practices in an attempt to be more open and

straightforward with applicants, in accordance with the duty to assist and with the intent and purpose of the *ATIPPA*.

[97] Under the authority of section 50 of the *ATIPPA* I direct the head of the College of the North Atlantic to write to this Office and to the Applicant within 15 days after receiving this Report to indicate the College's final decision with respect to this Report.

[98] 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*.

[99] Dated at St. John's, in the Province of Newfoundland and Labrador, this 30th day of October, 2009.



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