

NEWFOUNDLAND AND LABRADOR
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

REPORT 2007-016

College of the North Atlantic

Summary: The Applicant applied to the College of the North Atlantic (“CNA”) for access to certain records. CNA responded by saying that the requested records do not exist. The Applicant asked the Commissioner to review CNA’s decision. The Applicant presented evidence which he believed must point to the existence of the records. CNA disagreed, stating that such a conclusion on the Applicant’s part was merely a supposition, and that it had conducted a thorough and reasonable search for the records. The Commissioner accepted that a reasonable search had been conducted, and was not convinced that the Applicant’s submission formed a basis to conclude that responsive records may exist. As a result, no recommendation was issued by the Commissioner in this Review.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A 1.1, as am. s. 9, 49(1), 50, 60. *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 10(1).

Authorities Cited: Newfoundland and Labrador OIPC Report 2006-009; Alberta OIPC Orders F2004-20, F2005-24; Ontario OIPC Order M-909.

I BACKGROUND

- [1] On 24 November 2006 the College of the North Atlantic (“CNA” or the “College”) received the following request under the *Access to Information and Protection of Privacy Act* (the “ATIPPA”):

[External legal counsel], representing College of the North Atlantic, in correspondence dated April 28 2006 addressed to [Applicant’s legal counsel], made the following statements:

Statement one

*[Applicant] chose not to return to his previous employment at the end of his one year leave of absence, **and opted instead to extend his leave of absence for two additional one – year periods.** (Page two)*

Statement two

*As previously stated it is our position that [Applicant] failed to properly mitigate his damages in **that he could have returned to his previous employment at the end of his one-year leave of absence...**it is our position that [Applicant] could have mitigated his damages for the period commencing September 2003 to August 2005 in the amount of [dollar amount]. (Page 4)*

I am requesting all records relied upon by CNA to support the statements contained in the April 28 2006 document. These statements are labeled in this request as statements one and two. This request would include but not be limited to all emails or other correspondence between CNA and the Western Newfoundland and Labrador School District (WNLSD); all records of when any leave was requested by me or granted from the Western Newfoundland and Labrador School District, the documentation pertaining to dates as to when I allegedly applied for the additional two one-year leave periods, the records pertaining to me allegedly being eligible to return to my position with the WNLSD subsequent to my termination and who supplied this information to CNA.

[emphasis in original]

- [2] On 14 December 2006 CNA responded to the Applicant’s request, advising the Applicant that “no such records exist.”
- [3] On 8 January 2007 a Request for Review was received at this Office from the Applicant as follows:

I am requesting that the OIPC review the denial of the existence of records and the withholding of the records responsive to this request which are in the custody and control of CNA.

- [4] Attempts to resolve this matter informally were unsuccessful. Both parties were notified of this in a letter dated 26 April 2007, at which time they were given the opportunity to provide formal submissions. Both CNA and the Applicant chose to provide submissions, which are summarized in this Report.

II PUBLIC BODY'S SUBMISSION

- [5] CNA began its submission by noting that it advised the Applicant in correspondence dated 14 December 2006 that no record responsive to his request exists. CNA says that the Applicant's stated purpose (as noted in his request) was to receive "all records relied upon by CNA to support the statements contained in the April 28, 2006 document." CNA explained that the 28 April 2006 document is "a settlement letter prepared by CNA's external legal counsel and addressed to the Applicant's legal counsel on a without prejudice basis." CNA stated that the settlement letter was subsequent to "... a Public Service Commission hearing on allegations made by the Applicant against the College." CNA indicated that the College's external legal counsel had carriage of that matter, under the direction of CNA's former General Counsel.

- [6] CNA then went on to comment on the search which was undertaken for the requested information. CNA indicated that it contacted both the former and current CNA General Counsel, and both indicated that they had not contacted the Western Newfoundland and Labrador School District ("WNLSD") requesting records, nor were they aware of any request being made to the WNLSD. CNA says it also conducted a search of the files held in the General Counsel's Office, and no responsive records were found. CNA says that its external legal counsel was also contacted and requested to search his records for the requested information, but no records were located there either.

- [7] CNA says that these places and individuals "... would have been the only offices involved in this inquiry or handling the matter..." CNA further notes that while the external legal counsel's office retains most of the original documents generated by its own office, "... copies are generally sent to the General Counsel's Office." CNA says this results in a large amount of (although not necessarily exact) duplication of files.
- [8] CNA then proceeded in its submission to briefly compare legislative provisions for situations in which records are believed not to exist. CNA says that Ontario's *Freedom of Information and Protection of Privacy Act* is the only one which specifically refers to this situation and stipulates how the public body must respond. Section 29(1) of that *Act* states that in situations where there is no such record, the Applicant must be informed that there is no such record, and that the Applicant has a right to appeal to the Commissioner the question of whether the record exists.
- [9] CNA commented on the similarity of the access legislation in Alberta and British Columbia to that of Newfoundland and Labrador in relation to cases where a public body has determined that a requested record does not exist. CNA says that any such determination by a public body is treated in all three jurisdictions as a denial of access, and a Commissioner in either jurisdiction who undertakes a review of such a decision does so "... under the guise of the duty to assist and the duty to respond openly, accurately and honestly."
- [10] CNA then goes on to comment that in Ontario as well as Alberta and British Columbia, "... the standard for reviewing a public body's assertion that a record does not exist is the standard of reasonableness applied to the search conducted by the public body for the records." CNA says that any review on this basis is fact-specific.
- [11] CNA then briefly cites specific decisions from Alberta which it believes to be supportive of its position in this matter. CNA first references Order F2005-024, which was a Review of a public body's response that there were no records responsive to the Applicant's request. CNA refers specifically to paragraphs 8 and 9 of the decision, which it quoted in part as follows:

The Commissioner said that a public body must show that it has conducted an adequate search. ...

In Order 98-003, the Commissioner said that a decision concerning an adequate search must be based on the facts relating to how the public body conducted a search in a particular case. There is no specific test for the adequacy of the search, as this is a question of fact to be determined in every case. The standard for the search is not perfection but rather what is “reasonable” in the circumstances.

- [12] CNA asserts in its submission that in some previous decisions regarding situations where public bodies have stated that a record does not exist, it is implied that “... the applicant must provide some basis for his or her assertions that records are being withheld from the applicant.” CNA qualifies this by stating that applicants do not have to prove that responsive records exist, but “...merely that he or she should give some basis for a reasonable assertion that they may exist.” On this point, CNA refers to Alberta Order F2004-20, in which an Applicant had requested records about him which he alleged were in the possession of a police service. CNA quotes paragraph 22 of that decision, in which the Alberta Commissioner considered evidence presented by the Applicant which he felt would support his assertion that records were being withheld from him:

I respect that the Applicant maintains a belief that all of the evidence supports his position that the Public Body must have records containing information about him. However, a strong belief that something is true does not, by itself, make it true. The evidence before me does not cause me to reach the same conclusion regarding the existence of responsive records held by the Public Body. The Applicant has not demonstrated that it is reasonably likely that the Public Body is in custody of responsive records.

- [13] Proceeding on that basis, CNA then comments on the absence of any evidence presented by the Applicant to support his allegation that CNA is withholding responsive records. CNA acknowledges that the Applicant has quoted statements made by CNA’s external legal counsel in a letter to the Applicant’s legal counsel, which CNA says was followed by “... the leap in logic that there must be records.” CNA says the same quoted statements were the basis for his original request, and he has not provided any new information to CNA. CNA also observes that nowhere

in the letter referenced by the Applicant is there a mention of records from the WNLSD, and CNA says that the Applicant "... merely supposes that there must be some."

[14] CNA says that it has conducted a search for the responsive records which

... amply fulfils the 'reasonableness' standard in that it has consulted with all of those individuals who were likely to have in their possession or know of, records responsive to the applicant's criteria and has searched in all those places which are likely to contain records which fit the applicant's criteria.

III APPLICANT'S SUBMISSION

[15] The Applicant filed a lengthy and detailed submission on this matter, of which I will summarize those parts which are most relevant to this Review. The Applicant began his submission by explaining that he had requested records which CNA had relied on in making the two statements which he quoted in his request for access to information. The Applicant vehemently denied any suggestion that he himself, during the course of his testimony at his Public Service Commission hearing, could have been the source of the information referenced by CNA's external counsel as quoted in his access request. The Applicant went through the specific facts in relation to his leave requests from the WNLSD, and in no uncertain terms he clearly pointed out the discrepancy between what he says he stated in his testimony as opposed to what was stated by CNA's external counsel in the letter referenced in his request.

[16] Shortly after the Applicant filed his Request for Review, this Office attempted to determine whether there might exist an audio recording of the Public Service Commission hearing referenced in the Applicant's request, in the event it proved to be relevant in determining the existence or non-existence of the records requested by the Applicant. The Applicant notes that he strongly objected to CNA's statement to this Office that it believed the Applicant to have a copy of the recording of the proceedings. When he was asked by this Office to confirm whether or not this was accurate, he stated that to his knowledge, only the statements of three individuals who participated in the hearing from Qatar were recorded in Qatar, and that both parties have access

to that taped testimony. The Applicant acknowledged that CNA later told this Office that its assertion that the Applicant had a full recording was in error. Before this correction was made by CNA, the Applicant was quite concerned as to the implications of the assertion by CNA of a recording having been made, and that it was alleged to be in his possession. He explained these concerns in some detail in his submission, and he also alleged that CNA had made a false statement to this Office in doing so.

[17] The Applicant also commented in his submission on the details and timing of his termination from CNA which he believes to be relevant to this particular Review. The Applicant believes that statements in the letter quoted in his request are incorrect, and have been damaging to him. He indicated that, in his opinion, there are two aspects to the issue: "...the truthfulness of the two statements and secondly the information or records relied on by CNA to make the statements." The Applicant believes these two aspects to be "... so interconnected that in order to discuss the existence of records, which were relied on by CNA, first the truthfulness of the statements must be examined." The Applicant then goes on to refer to a series of e-mail exchanges between various CNA personnel, in which the letter quoted in his request and the general subject of a settlement offer are referenced. The Applicant uses these references to conclude that there was extensive involvement within CNA in relation to the contents of the letter referenced in his request, and that the letter was not likely to have been solely the product of the CNA external counsel. He combines this with his assertion that the information cited by the CNA external counsel could also not have come from the Applicant's own testimony at the Public Service Commission hearing. This leaves the Applicant to beg the following question: "If my own statements at the hearing cannot support the two statements made by [CNA external counsel], then on what did CNA rely in making those statements?" The Applicant acknowledges two possible answers, one being that there is "... a distinct possibility of the existence of other records in the possession of CNA ..." responsive to his request. Later in his submission, in reference to the e-mail exchanges between various CNA personnel, he reiterates that view even more definitively:

There appears to be significant involvement on the part of [former CNA General Counsel] and others at CNA as it relates to the compilation of the April 28 2006

document. It is not at all reasonable that there would not be any records related to how these statements were formulated.

- [18] The Applicant also puts forward a second possible answer as to the source of the statements, wherein he alleges that CNA, through its external legal counsel, did not perform due diligence in gathering facts, and made false statements in the letter quoted in his request:

[CNA external counsel] failed to perform due diligence as a lawyer in respect of these statements. He could have contacted the WNLSD and inquired as to the contract governing these situations. He could have contacted my legal counsel, he could have contacted the teachers association (NLTA), and he could have contacted me. [CNA external counsel] chose none of those options instead he chose to make these damaging statements apparently without any research and without any documentation.

[...]

[CNA external counsel] either was given advice by his client as to his two statements in my ATIPPA request or he made the statements completely on his own. If he was advised by CNA then I would expect that this advice and the person at CNA giving the advice would be forthcoming. If the statements were made by [CNA external counsel], without receiving any such advice, then the lack of due diligence in making these very damaging false statements is astounding. These false statements have been used by CNA to limit the award of the PSC panel; costing me a considerable amount of money and other damage.

- [19] In a similar vein, the Applicant also comments in his submission that “it appears that CNA through legal counsel can make personally damaging statements about me and have absolutely no evidence to support those statements.” The Applicant concludes his submission by expressing his concerns and frustrations as follows:

Does not the board of CNA have a responsibility to ensure that those making submissions to the Public Service Secretariat on behalf of CNA are actually telling the truth? Does the professional association, which regulates the conduct of lawyers, have a duty to ensure that the members, when presenting official submissions on behalf of a client, are telling the truth?

The two statements, for which I am requesting records, do not deal with opinion; these two statements are presenting the material as fact. As noted above, the lawyers involved in making these two statements did not present the truth neither did they perform due diligence.

These two unsupported statements and others in the April 28th document apparently have been relied upon by the PSS to deny me the financial compensation awarded by the PSC Panel.

[20] The Applicant forwarded a subsequent submission several weeks after the deadline, in which he provided excerpts from records which were meant to show that CNA's external counsel had information at his disposal which contradicted the information he presented in the letter quoted in the Applicant's submission. This information was reviewed, but did not add anything to my consideration of the issues.

IV DISCUSSION

[21] In this Review, the Applicant has asked this Office to examine CNA's response to him which stated that no responsive record exists. CNA has provided with its submission examples of two orders from Alberta (F-2004-20 and F-2005-24) which show that the Commissioner in that province has reviewed such decisions within the context of whether the public body has conducted an adequate search for responsive records. In both cases referenced by CNA, the Alberta Commissioner found that an adequate search had been conducted. The Alberta Commissioner has determined that this analysis must take place within the context of section 10(1) of the *Alberta Freedom of Information and Protection of Privacy Act*, which states as follows:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[22] Section 10(1) of Alberta's *Act* is very similar in effect to section 9 of the *ATIPPA*, which states 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.

[23] Certainly, the requirement to respond in an open, accurate and complete manner would place an onus on any public body to do a thorough search for responsive records. Any Review of a response which states that there are no responsive records must therefore involve an assessment of whether that conclusion was drawn only after a complete and accurate search was conducted. I have addressed this issue in several previous Reports. One example is Report 2006-009, in which I stated as follows:

[17] In this case, the Department is asserting that the record being sought simply does not exist. It is important to note that when an Applicant, in a Request for Review, takes the position that a public body is intentionally withholding a record or has not undertaken an adequate search for a record, there is some onus on the Applicant to present a reasonable basis for that position. As I noted in my Reports 2005-003 and 2006-006, 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 my opinion, the Applicant has not provided a reasonable basis to conclude that records relating to this electrical permit exist.

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

[24] Although Ontario Order M-909 referenced in the above quotation does not specifically reference the duty to assist, it establishes a similar onus on the public body to show that a reasonable search has taken place. Furthermore, if a public body can show that it has done such a search, there is also some onus on the Applicant to provide some reasonable basis that would contradict that result, thus concluding that records may in fact exist.

[25] In this case, CNA has described the search it undertook, maintaining that the search would amply fulfil the reasonableness requirement. Conversely, the Applicant has put forth his reasons for concluding that records may in fact exist.

[26] CNA contacted those people who would likely have had such records in their possession, if they existed, and also searched those places where any such records were likely to have been stored. CNA is not required to prove that the records do not exist, but rather to show that it undertook a reasonable search. I accept that CNA did indeed undertake a reasonable search for the responsive records, and that no records were found.

[27] Despite this conclusion, I have also carefully considered the arguments put forward by the Applicant. In considering these arguments, it is important to recognize that the Commissioner's Office cannot become engaged in determining the accuracy or truthfulness of statements made during or subsequent to a hearing of another body, nor of the source of information presented by CNA's external legal counsel. This Office can only be concerned with a request for information in the control or custody of a public body, and in this case, whether a reasonable search for records was conducted by CNA. The Applicant is of the opinion that written statements attributed to CNA's external legal counsel are wrong, and he further states that the information presented in those statements could not have been based on the Applicant's own testimony at a Public Service Commission hearing. Even if the Applicant is correct, that the information the Applicant gave at the hearing was different from that which was represented by CNA's external legal counsel in a letter (which cannot be verified because there was no official transcript or recording of the Applicant's testimony), this does not mean that a record exists somewhere which is responsive to the Applicant's request. The Applicant has provided information in his submission which he says explains exactly the correct facts, showing how the statements of CNA's external legal counsel were wrong. Again, even if the Applicant is correct, this would simply prove that CNA's external legal counsel was wrong. It does not mean that a record exists which contradicts the facts as the Applicant believes them to be.

[28] The Applicant states that there were no tape recordings made of his testimony. It is not the role of this Office to determine whether CNA's external legal counsel misheard or misunderstood the Applicant's testimony, whether he ignored information presented by the Applicant's counsel, whether or not he made it up, or even who is right or wrong. Nothing in the facts of this case leads me to conclude that CNA's external legal counsel must have gotten the

statements he made in his letter from a record which the Applicant alleges that CNA is withholding from him.

V CONCLUSION

[29] Having found that the College of the North Atlantic acted appropriately in its response to the Applicant's request, it is not necessary for me to make a recommendation. Accordingly, I hereby notify the Applicant, in accordance with section 49(2) of the *ATIPPA*, that he has a right to appeal the decision of the College to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60. The Applicant must file this appeal within 30 days after receiving a decision of the head of the Department as per paragraph 30 of this Report.

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

[31] Dated at St. John's, in the Province of Newfoundland and Labrador, this 1st day of November, 2007.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador