



**Submission to the
Access to Information and Protection of
Privacy Review Committee**

August 2014

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SUMMARY OF RECOMMENDATIONS

College of the North Atlantic's submission to the ATIPP Review Committee has been divided into two main sections: (a) Section 3.0 which includes the college's recommendations submitted to the ATIPP Review Committee; and (b) Section 4.0 which includes the college's endorsement of recommendations submitted to the ATIPP Review Committee by other individuals or groups.

A summary of these recommendations has been provided below:

CNA's Recommendations to the ATIPP Review Committee

1. Amend section 5(1) of the *ATIPP Act* to exclude records where the public body is acting as a Service Provider and has been retained under a contract to perform services for a third-party client, or amend section 5(1) of the *ATIPP Act* to apply to only those records in the custody and under the control of a public body.
2. Amend section 10(1) of the *ATIPP Act* to include all records, regardless of format, where producing them would not interfere unreasonably with the operations of the public body.
3. Maintain the current time limits for responding to a request for information under section 11(1) of the *ATIPP Act*.

Endorsement of Recommendations Submitted to the ATIPP Review Committee by Other Individuals or Groups

1. Amend the definition of personal information to exclude business contact information and add a definition for employee personal information.
2. Amend section 22.2 (information from a workplace investigation) for more clarity.
3. Add definitions for "frivolous and vexatious".
4. Clarify the language within the transitional clause.

SECTION 1.0 BACKGROUND

College of the North Atlantic is Newfoundland and Labrador's public college and is one of the largest post-secondary educational and skills training centres in Canada. The college was established under the *College Act, 1996* and operates 17 campuses across the province.

Within the province, the college enrolls over 20,000 students each year in more than 100 full-time programs and more than 300 part-time courses. The college employs over 1,500 staff and operates on a budget of approximately \$150 million.

The college offers a broad range of full and part-time certificate, diploma and advanced diploma programs in academics, applied arts, business, engineering technology, health sciences, information technology, industrial trades, tourism and natural resources. These programs are offered at our 17 campus locations in the province, in China through partnerships with eight post-secondary institutions, and globally through distance education. The college is also currently engaged in a contract with the State of Qatar to operate a technical college located in Doha, Qatar.

In addition to our main line of business of providing full and part-time academic programs, the college is also involved in other lines of business such as:

- Providing contract training programs and courses to the meet the needs of business, industry or government.
- Providing continuing and community education programs and courses to encourage learning opportunities for communities and citizens.
- Conducting applied research projects that support the development and commercialization of new technologies, patents, licenses, and products.
- Conducting industry engagement projects that assist organizations with the development of innovative products, processes and business models that enable them to be competitive in a global economy.

SECTION 2.0 HISTORY OF CNA'S ACCESS TO INFORMATION REQUESTS

The college received its first request for information, under the *Access to Information and Protection of Privacy (ATIPP) Act*, on January 17, 2005, the day the *ATIPP Act* was proclaimed. The college is currently working on responding to its 266th request for information.

In the last three fiscal years, between April 1, 2011 and March 31, 2014, the college received 93 requests for information under the *ATIPP Act*, or on average approximately 30 requests for information every year. With respect to these 93 requests for information:

- Approximately 45% of these requests involved requests for personal information and approximately 55% of these requests involved requests for general information.

- In terms of the requests' outcome:
 - Approximately 70% of these requests resulted in an outcome of either full or partial disclosure to the applicant.
 - Approximately 15% of these requests resulted in an outcome of abandonment or withdrawal of their request by the applicant.
 - Approximately 10% of these requests were denied by the college.
 - Approximately 5% of these requests resulted in another outcome, such as:
 - No responsive records were found to the applicant's request
 - The information requested by the applicant was available in the public domain
 - The request was deemed repetitive by the college, or
 - The request was transferred by the college to another public body.
- There were 24 complaints and requests for review made to the Office of the Information and Privacy Commissioner (OIPC) by our applicants:
 - Five of these requests involved either a fee or time extension complaint.
 - 19 of these requests involved a request for review, including five which were referred to the formal investigation process where the OIPC released a formal report.
- The number of responsive pages provided to the applicants, under these 93 requests for information, total over 13,000 pages of information released. This does not include the number of potentially responsive pages the college reviewed in order to determine whether records were responsive to an applicant's request.

SECTION 3.0 CNA'S RECOMMENDATIONS TO THE ATIPP REVIEW COMMITTEE

Since the ATIPP Act was first proclaimed back in 2005, the college has obtained extensive experience in responding to requests for information under the *ATIPP Act*. It is with this unique perspective that the college offers the following three recommendations to the ATIPP Review Committee:

1. **Amend section 5(1) of the *ATIPP Act* to exclude records where the public body is acting as a Service Provider under a contract to perform services for a third party client, or amend section 5(1) of the *ATIPP Act* to apply to only those records in the custody and under the control of a public body**

It is common for public bodies to enter into a contract with a third party, also known as a "Service Provider", such as an accounting or consulting firm, to provide a service to the public body in accordance with the contract's terms and conditions. In this instance, the Client is the public body and the information generated or compiled during the execution of the contract by the Service Provider would typically be accessible under the *ATIPP Act*. Section 2(e) of the *ATIPP Act* supports this belief where it has defined an employee as "*a person retained under a contract to perform services for the public body*". Based on this definition, it appears that the information generated by

the Service Provider would then be accessible to the public under the *ATIPP Act*, subject to any exemptions to disclosure.

However, it is less common for a public body to act as a Service Provider and provide a service to a third party, in accordance with a contract's terms and conditions. In this instance, where it is not a joint venture or partnership between the public body and the entity, but rather a situation where the public body is providing a service to a third-party client entity, it is not evident whether the information generated or compiled by the public body for the Client would be accessible to the public under the *ATIPP Act*.

The concept of custody and control also plays into this issue. When public bodies are acting as a Service Provider to a Client, they typically have some or all of the information generated or compiled during the execution of the contract in their possession; however, they may not necessarily have control of that information. That is, the public body may not have the authority to manage the information. In contracts between Service Providers and Clients, the control of that information typically lies with the Client.

Section 5(1) of the *ATIPP Act* begins with "*this Act applies to all records in the custody of or under the control of a public body...*". This suggests that only one of the conditions needs to be present in order for the information to be accessible under the *ATIPP Act*. The college submits that both custody and control should be present in order for information to be accessible under the *ATIPP Act*.

The college is acting as a Service Provider and has been contracted by a number of Clients to provide specific services. Examples of these types of contracts include:

- Continuing Education and Contract Training contracts.
- Applied Research contracts.
- Industry Engagement contracts.
- International Project contracts such as the Qatar Project and the China Project.

In these instances, the college usually has custody of some or all of the information being generated or compiled in the execution of these contracts; however, the college does not always have control of the information to authorize its disclosure. Section 5(1)(h) of the *ATIPP Act* does exclude a "*record containing teaching materials or research information of an employee of a post-secondary educational institution*" from being accessible to the public under the *ATIPP Act*.

In these examples of contracts where the college is acting as a Service Provider, the release of the Client's confidential business information and intellectual property, under the *ATIPP Act*, would harm our competitive positioning. It would be extremely difficult for the college to compete and enter into any similar contracts with other Clients if these entities understood that their confidential business information and intellectual property may be accessible under the *ATIPP Act*. It would have a direct negative impact on the college's ability to negotiate and secure these types of contracts in the future, resulting in lost opportunities and revenue for the college.

A relevant example for discussion is the Qatar Project. The college is currently engaged in an international contract to operate a technical college for the State of Qatar located in Doha, Qatar. The Client is a foreign government, the State of Qatar with which the college has a contract also

known as the Comprehensive Agreement. The budget for this contract is in excess of \$1.4B over a 10 year period. The college has been retained by the State of Qatar to perform specific services, and has been referred to as the Service Provider in this agreement. The State of Qatar is remunerating the college for these services, including the recruitment of individuals to staff the contract. The individuals recruited and hired by the college to fill these positions are college employees and are commonly referred to as “Canadian-hire employees”.

The term of the original Comprehensive Agreement was set to expire in August 31, 2013. However, the College has extended its current contract with the State of Qatar for another three years until August 31, 2016, and is presently negotiating another extension.

If the college released State of Qatar business information under the *ATIPP Act*, the State of Qatar may conclude that the college has breached the Comprehensive Agreement resulting in damage to the contractual relationship between the State of Qatar and the college, and the potential termination of the Comprehensive Agreement. In fiscal year ending 2012, the college received over \$10 million in compensation for the services it provides under the Comprehensive Agreement and employed over 500 Canadian-hire employees. This is a very lucrative contract which makes it attractive to other institutions. At present, there are at least six North American colleges and universities operating in the State of Qatar, in addition to the college.

Under the present *ATIPP Act*, the college considers that any information created or compiled during the performance of this contract to administer the relationship between Canadian-hire employees and the college would be accessible to applicants under the *ATIPP Act* (Refer to Section 4 – Recommendation 1 for additional information on the definition of an employee’s personal information). However, the college does not support the notion that any competitive business information created or compiled by the college in relation to this contract, acting as a Service Provider for the State of Qatar, should be accessible under the *ATIPP Act*.

In addition, the college may have access to business and or personal information of employees and or students of the State – which information is owned by the State of Qatar. The college has not received authority from the State of Qatar to disclose this information under the *ATIPP Act*.

The college is recommending that the ATIPP Review Committee amend section 5(1) of the *ATIPP Act* to exclude records where the public body is acting as a Service Provider under a contract to perform services for a third party client, or amend section 5(1) of the *ATIPP Act* to apply to only those records in the custody and under the control of a public body.

2. Amend section 10(1) of the *ATIPP Act* to include all records, regardless of format

Section 10(1) of the *ATIPP Act* states:

Access to records in different or electronic form

10.(1) Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where

(a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and

(b) producing it would not interfere unreasonably with the operations of the public body.

Section 10(1) of the *ATIPP Act* clearly references and applies to “electronic records” but does not include a reference to “paper records”. This section appears to assume that the majority of records in the custody or under the control of a public body exist in electronic format. However, this may not necessarily be the case for all public bodies; the college in fact has a significant number of records that exist only in paper format.

This issue was noted in the OIPC’s report A-2013-013 where an applicant requested from the college, all records containing their personal information. Given the broad nature of this request and the applicant’s unwillingness to provide any other search criteria to limit the scope of this request, the college had no option but to refuse this request, in part, under section 10(1)(a)(b) of the *ATIPP Act*. As a result of this refusal, the applicant requested a review by the OIPC. The informal review process was unsuccessful and this request was referred to the formal investigation process resulting in Report A-2013-013.

In Report A-2013-013 the Commissioner concluded by stating:

“I appreciate the position the College is in and do not believe that this is a reasonable request. This is a unique situation where the Applicant’s involvement with the College is quite extensive and varied, as outlined by the College above. The search required in order to respond to the Applicant’s request is undoubtedly massive and, in my opinion, quite an unreasonable task, given the broad wording of the request. Section 10 gives the College the ability to not provide electronic records where producing them would interfere unreasonably with the operations of the College. That is clearly the case here and I do not hesitate in concluding that the College is entitled to rely on section 10 to not provide electronic records. However, the old ATIPPA did not make any provision for disregarding a request where paper records were involved. As such, I can find no basis in the old ATIPPA upon which the College can rely to not search for and provide records that exist only in paper form which are responsive to the requests...”

Based on this experience, the college is recommending that the ATIPP Review Committee consider amending section 10(1) of the *ATIPP Act* to include all records, regardless of format.

3. Maintain the time limits for responding to a request for information, under section 11(1) of the *ATIPP Act*

There have been a number of submissions, made by other individuals or groups to the ATIPP Review Committee, to reduce the amount of time a public body has to respond to a request for information under the *ATIPP Act*. The college submits that the current time limits for responding to a request for information under the *ATIPP Act* are reasonable and should not be changed.

As noted under Section 2.0, the college has received and responded to 93 requests for information during the last three fiscal years. While 14 of these requests were seeking access to a specific piece of information, file or document, the remaining 79 of these requests – 85% of the access requests received – involved significant searches for information which would be responsive to the request. In total, these 93 requests for information involved over 13,000 pages of responsive records that were released to the respective applicants. As mentioned previously, there is considerable effort required to identify the responsive records; a reasonable estimate is that the college may have had

to review over 20,000 pages of potentially responsive records to identify those 13,000 pages of records that were in fact responsive.

In responding to these requests for information, the college has found that the majority of time spent in the 30 day response time, involves not the collection of the potentially responsive records, but the review of these records in order to:

- Determine and identify which records are responsive to the applicant's request;
- Identify and consistently apply the appropriate redactions to all pages of potentially responsive records, including where identical information may be repeated on other pages of responsive records; and
- Consult with the appropriate senior managers within the college to determine whether discretion will be exercised to release information where a discretionary exemption to disclosure may apply.

If the current response time is reduced, it would undermine the college's ability to produce a high-quality response to an applicant's request for information. The college may not have sufficient time to conduct adequate quality assurance checks to ensure that the college is protecting, as required, the privacy of individuals when applying section 30 of the *ATIPP Act*, to ensure that redactions have been consistently applied to the same information found on multiple pages of responsive records, or even to ensure that all responsive records have been correctly identified.

The college is recommending that the ATIPP Review Committee maintain the time limits for responding to a request for information under section 11(1) of the *ATIPP Act*.

SECTION 4.0 ENDORSEMENT OF RECOMMENDATIONS SUBMITTED TO THE ATIPP REVIEW COMMITTEE BY OTHER INDIVIDUALS OR GROUPS

There have been a number of recommendations previously submitted to the ATIPP Review Committee, by other individuals or groups, which the college supports. The college wishes to emphasize the following four recommendations in particular which we support:

1. Amend the definition of personal information to exclude business contact information and add a definition for employee personal information

Memorial University's submission to the ATIPP Review Committee, under Recommendation #1 starting on page 5, recommends that:

"the definition of personal information in BC's FIPPA be adapted to replace the current definition in the ATIPPA, as follows: Personal information means recorded information about an identifiable individual other than business contact information".

The college supports this recommendation and also submits that the definition of what constitutes employee personal information be added to the definition of personal information, under section 2(o) of the *ATIPP Act*. Section 1(1)(j) of Alberta's *Personal Information Protection Act* defines "personal employee information" as follows:

1(1)(j) *“personal employee information” means, in respect of an individual who is a potential, current or former employee of an organization, personal information reasonably required by the organization for the purposes of*

(i) establishing, managing or terminating an employment or volunteer-work relationship, or

(ii) managing a post-employment or post-volunteer-work relationship

Between the organization and the individual, but does not include personal information about the individual that is unrelated to that relationship.

This proposed amendment would enable public bodies to clearly identify what information is responsive to an applicant’s request when the applicant is a public body employee and submits a request for information asking for all of his or her personal information.

2. Amend section 22.2 (information from a workplace investigation) for more clarity

The OIPC’s submission to the ATIPP Review Committee, starting on page 25, recommends that section 22.2 of the *ATIPP Act* be amended to *“remove the phrase ‘substance of records’ and clarify what information must be provided to a party to a workplace investigation ...’*. The college supports and endorses the OIPC’s recommendations on this topic and underscores the need for guidance to be provided to public bodies on what information to release to the complainant and respondent to a workplace investigation when these parties request this information under the *ATIPP Act*.

3. Add definitions for “frivolous and vexatious”

In Nalcor Energy’s submission to the ATIPP Review Committee, starting on page 6, they recommend that section 43.1(1) of the *ATIPP Act* remain unchanged and include a guidance document, published by the United Kingdom’s Information Commissioner Office, on Dealing with Vexatious Requests.

The New Democratic Party Caucus’s submission to the ATIPP Review Committee, starting on page 12, on the topic of introducing a “frivolous and vexatious” clause under section 43.1(b) of the *ATIPP Act* with Bill 29, states that *“there is no definition as to what constitutes a ‘frivolous’ or a ‘vexatious’ request”*. This submission then recommends that either this clause be repealed or strong definitions be added to the *ATIPP Act*.

The college submits that section 43.1 of the *ATIPP Act* should remain in effect and that a definition as to what constitutes a “frivolous or vexatious” request should be added.

4. Clarify the language within the transitional clause

The OIPC’s submission to the ATIPP Review Committee, starting on page 86, concerning the language found in the transitional clause, states:

“We have found the transitional clause in Bill 29 (Clause 34) to be the cause of some confusion, and it is currently one of the subjects of an ongoing court case in which this Office is an intervenor. We believe it is important to have a transitional clause which is easily understood and operates as intended”.

The college experienced this confusion first hand when requests for information were received and processed under the *ATIPP Act*, prior to Bill 29. Some of these applicants then submitted a complaint or requested a review by the OIPC where these complaints or requests for review were submitted to the OIPC after Bill 29 had passed. The college responded to the applicant's request under one set of rules and conditions (under the *ATIPP Act* prior to Bill 29), but the request was being assessed by the OIPC under a new set of rules and conditions (under the *ATIPP Act* after Bill 29 passed).

The college submits that the language in any future transitional clauses be clarified to ensure that the same set of rules and conditions apply to the request during the entire lifecycle of that request, including when complaints or requests for review have been made to the OIPC or have been referred to the Supreme Court Trial Division.

SECTION 5.0 SUMMARY

The college thanks the ATIPP Review Committee for the opportunity to make this submission based on our experiences in responding to requests for information under the *ATIPP Act*. We are committed to continuously improving our ATIPP policies and procedures to ensure our compliance with the *ATIPP Act* and welcome any advice or guidance from this Committee to assist with these efforts as the result of your independent and comprehensive review of the *ATIPP Act*.