OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

September 25, 2014

Mr. Clyde Wells
Chair
ATIPPA Review Committee
Suite C, 83 Thorburn Road
St. John's, NL
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Dear Mr. Wells:

I write to you today primarily in response to a submission by the College of the North Atlantic (CNA) which was posted to the *ATIPPA* Review Committee web site on September 16th. At the outset I should note my disappointment in the fact that the College chose to provide a written submission without appearing before the Committee. Although there is no requirement for any public body to make an in-person presentation to the Committee, I am of the view that this would have been the appropriate course of action for a public body such as the College. CNA is one of the largest public bodies in the Province, with full-time staff devoted to *ATIPPA* administration, as well as full-time, in-house legal counsel. Unlike perhaps a private citizen or a small town with limited resources and expertise, the College was certainly in a position to appear before the Committee so that its recommendations could be subject to scrutiny through oral questions from the Committee in a public forum, in keeping with the open and transparent *ATIPPA* Review process.

I will also include at the end of this letter a brief comment of clarification in response to the supplementary submission of Nalcor.

Proposed Amendment to Section 5

I will begin by addressing the recommendation put forth by the College in Part 1 of its submission respecting section 5(1) of the *ATIPPA* "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 to "amend section 5(1) of the *ATIPPA* to apply to only those records in the custody and control of a public body."

I will start with the second of these proposed alternatives. The reason is clear why most access to information statutes in Canada are constructed so that they apply to records in the "control or custody" of a public body. It is to ensure that the accountability purpose of the legislation is not thwarted or limited, and it does this by making it clear that the records to which such laws are intended to apply are not a narrowly defined group of documents, but instead encompass the full scope of activities of public bodies. Section 3 of the *ATIPPA* makes it clear that exceptions to access must be limited and specific, and the way exceptions to the scope of the *ATIPPA* are carved out in section 5 is very much consistent with that purpose. To introduce language which would result in large swathes of records to be deemed outside the scope of the *ATIPPA* is not consistent with the purpose of the *Act* and it is offside in terms of the Canadian context.

The "control or custody" construction which we have under the *ATIPPA* is common to the comparable legislation in Nova Scotia, Prince Edward Island, New Brunswick, Manitoba, Alberta, British Columbia, Yukon, North West Territories, and Nunavut. For all intents and purposes it is also common to Saskatchewan except that the word custody is replaced by the word "possession." A plain reading of section 1 of the Quebec statute is that it is either very similar to or the same as the "control or custody" model, although it uses different language, while only the older statutes of Ontario and the federal jurisdiction use only control, without custody. No jurisdictions require both control and custody, which is clearly overly restrictive in terms of the negative effect on the application provision in section 5. The "control or custody" model is viewed as the Canadian standard and 30 years of case law has developed which assists in the interpretation of that model across most jurisdictions.

We are also strongly of the view, as noted above, that it is necessary to have both terms present as alternatives (one or the other rather than both being required in order for the *Act* to apply), because of the way public bodies typically operate. Quite often public bodies do not have both custody and control. Custody is a simple one to explain. There are many potential examples, but it is well known that public bodies often contract with outside parties to perform particular services. The contractor may produce a significant volume of records in the course of performing the service, and it may not be viewed as necessary by either party for all of those records to be physically provided to the public body, either during the process or after the contract has been concluded. Such records would not be in the custody of the public body, but according to the ample case law on this subject, they would be considered to be in the control of the public body. If both custody and control were required in section 5, it would be quite simple for public bodies to contract with outside parties to perform any work which they wished to keep outside of the scope of the *ATIPPA*. For example, it is quite possible that a public body could contract with a records management company to store its records in the cloud. It is conceivable that an argument could be presented that the public body in such a circumstance no longer has the records in its custody.

If such a model was introduced it would have a disastrous effect on the efficacy of the *ATIPPA* in accomplishing the accountability purpose of the *Act* as set out in section 3, and it is worth reflecting on the fact that any such amendment would of course apply to all public bodies, not just CNA. The most obvious type of mischief which could reasonably be foreseen resulting from such an amendment would be that public bodies and/or third parties who wish to prevent the release of information will argue control and custody issues at every turn, rather than attempting to rely on the exceptions in the *ATIPPA*, which could completely bog down both the request and review process.

In terms of the concern expressed by the College that information relating to the State of Qatar that could be in the custody of the College might be required to be released to an applicant, the College should be reminded that exceptions exist to the right of access which ensure that information that would harm a third party or which would harm intergovernmental relations, or which would harm the financial or economic interests of a public body already exist in the *ATIPPA*. To amend a provision which affects the fundamental structure of the legislation in a profound way that would reduce the accountability and transparency of public bodies is unnecessary and the wrong approach for this Province to take. If there is a concern that one of the exceptions I referenced are not strong enough to protect certain kinds of information which it believes should be protected, a more productive discussion to have would have been to consider the effectiveness of those exceptions, rather than attempting to remove a large proportion of records from the scope of the *ATIPPA*, which would be the result of the proposed amendment.

We hold a similar view in relation to the College's alternative recommendation that a separate provision be created in section 5 to "exclude records where the public body is acting as a service provider under a contract to perform services for a third party client." As far as we know, such a provision would be unique in Canadian access to information law. In setting forth its argument, the College listed four examples of types of contracts that it has been engaged in as a service provider:

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

Regarding the first two examples, section 5 of the *ATIPPA* already excludes research information and teaching materials. Without having reference to any particular records which could be subject to an access to information request, it is possible that such information might therefore already be excluded from the scope of the *ATIPPA*. What would not be excluded from the scope of the Act, however, and this applies to all four examples, would be the contracts themselves, and we would argue in the strongest of terms that such a proposition is a complete non-starter from an accountability perspective. Particularly when dealing with foreign governments and companies, it would be naïve to suggest that such transactions and interactions should be done with less scrutiny than occurs between Canadian companies and public bodies, regardless of which party is the service provider. Ultimately, public bodies are meant to provide services to the public, and their ability to generate additional income through service provider contracts must be done in such a way that those activities can be subject to appropriate transparency requirements. Once again, the provisions exist in the *ATIPPA* exceptions to ensure that information in the control or custody of a public body which could harm a third party or a public body and others are already in place.

It should be noted that the College has been operating with the *ATIPPA* in place since 2005, and it has been engaged in contracts such as the one involving its Qatar campus throughout this period. In its submission the College has not provided any examples where a contract was cancelled or not renewed on the basis of information which was disclosed to an applicant in compliance with the *ATIPPA*, or where any harm has been demonstrated either to the College or to a third party. On the contrary, the College notes that its contract with Qatar was actually renewed in 2013 for a three year period, and obviously its other work as a service provider in the categories described above is ongoing. The assertions by the College regarding the types of information that the *ATIPPA* would require them to disclose are speculative at best. If there was a realistic concern on the part of the Qataris that the College would somehow be required to disclose "State of Qatar business information" I would imagine there would have been no contract extension at all. I would also expect that the Qataris are aware that any public institution such as a publicly owned college or university is likely to be subject to accountability laws which would apply to that institution's activities wherever they are located. This should be the case for any public college or university in Canada, and may in fact be the case for such institutions based in other countries which have laws similar to the *ATIPPA*.

It must be admitted that it is relatively rare for a provincial public body to operate any kind of facility in a foreign country, such as the CNA campus in Qatar. We submit that the duty of any public body is to provide services and be accountable to the people of this Province first and foremost, and to be fully subject to all of its laws including the *ATIPPA* in order to fulfil that duty. Any ability to generate revenue as a service provider is certainly to be applauded and encouraged if it benefits the public interest in this jurisdiction, but a clear and convincing rationale must be presented before special exceptions are introduced in legislation to reduce the transparency and

accountability of such activities. The fact that such contracts are generating large sums of money for the benefit of the people of this Province is a factor in favour of more transparency and accountability, not less, particularly given the fact that these contracts may involve foreign governments and other business partners with very different legal systems and financial reporting obligations.

We are also very much concerned by the fact that these suggestions in relation to the College's role as a "service provider" are in many respects relevant to an ongoing court case which was still in the process of being heard by Justice Furey (Court File # 2013 04G 0007) at the Supreme Court, Trial Division in Corner Brook. We are an intervenor in that case. We are of the view that the College's description of its role in relation to the campus in Qatar in that case is significantly different from what it had been in the first several years of our relationship through the *ATIPPA*, and we are concerned that this is simply the first case in what will be a longer term effort to remove its operations in Qatar from the scope of the *ATIPPA*. We believe the College's proposals regarding section 5 may be part of that project.

In our submissions and presentations to the Committee, whenever we addressed an issue which related to an ongoing or pending court case, such as the one involving our ability to review claims of section 5, which will be heard at the Court of Appeal in coming months, as well as the recent decision by Justice Whalen involving section 27, we advised the Committee that these matters were ongoing before the courts, we provided links to and copies of any relevant court decisions, and also advised that we would provide the Committee with any new court decisions as soon as they were available. Not to advise the Committee that these matters were currently before the court in a matter involving CNA and the Commissioner in our view, is to provide an incomplete picture to the Committee. We are of the view that the characterization of the College's activities in Qatar has been the subject of pleadings in this recent court case.

As noted by the College, they have had to respond to a fair number of access requests over the years, and this has no doubt been somewhat burdensome to them. As it turns out, and this is somewhat of an anomaly across all public bodies, most of the matters relating to CNA which have come to our Office for review have been initiated by current or former employees of CNA's campus in Qatar, and most of the requests which have been the subject of these reviews have related to attempts by employees to pursue various grievances they have had with CNA regarding their experiences at the campus in Qatar. We can certainly see that any amendment which would limit the ability of current or former employees to file access requests relating to the College's operations in Qatar would be a relief to the College, but we do not believe that the amendment proposed is an appropriate means of doing so.

Proposed Amendment to Section 10

We believe this proposed amendment is without merit. The rationale for the proposal is that the *ATIPPA* must contain a provision to ensure that public bodies do not have to respond to requests which would interfere unreasonably with their operations. In our experience, such requests would usually be ones that are "overly broad." We agree with the rationale, but we believe a suitable provision is already in place to accomplish this goal.

The *ATIPPA*, in section 43.1(2), allows a public body to request that the Commissioner authorize the public body to disregard a request which is overly broad. An amendment to section 10 is therefore in our view redundant and unnecessary. The excerpt from our Report A-2013-013 effectively illustrates the situation encountered by public bodies prior to Bill 29, but not the current reality. Although the Report was issued after the proclamation of Bill 29, it involved a request that

was filed before the Bill 29 amendments at a time when section 43.1(2) did not exist. According to our interpretation of the transitional clause of Bill 29, we were required to review the decision of the College in that matter on the basis of the Act which was in force at the time the College issued its decision, which was the pre-Bill 29 version of the *ATIPPA*, so 43.1(2) was simply not available. If the same request had been filed after the proclamation of Bill 29, the College would have been free to request the Commissioner's authorization to disregard the applicant's request under section 43.1(2), which any public body can now do under the current *ATIPPA*.

Proposed Amendments to the Definition of Personal Information

We have no objection to the spirit of the proposed amendments. In terms of the proposal initially presented by Memorial and endorsed by CNA to exclude business contact information from the definition of personal information, we are of the view that a correct application of the harms test in section 30 would likely result in business contact information being disclosed to an applicant. Although business contact information is not listed in section 30, on its face we are of the view that disclosure of such information would typically not be an unreasonable invasion of privacy. In the spirit of making the *ATIPPA* more easy to use and interpret, however, there may be value in either amending the definition as proposed or perhaps preferably and more appropriately simply listing business contact information in section 30(2) as a type of personal information which is not an unreasonable invasion of privacy.

The other proposed amendment would result in a separate definition for "personal employee information." Although the legislation is silent on this, there is a concept of "work product" as being distinct from personal information which is well established in case law, and upon which this Office has relied and issued reports in the past. The proposed definition attempts to reflect the work product concept by carving out what is considered to be within the bounds of this particular definition. It is unclear how this recommendation is intended to interact with the existing definition of personal information, which, if the goal is to make it clearer for applicants and public bodies, would have to be clarified. A better approach might be to find a way to include the work product concept in the *ATIPPA* so that it is clear that such information is not considered to be the personal information of an employee. Ultimately this is an issue which might have benefitted from more study and discussion at an earlier stage in the *ATIPPA* review process, however at this point in the process it might be better left for a future review.

Proposal to Add a Definition of "Frivolous and Vexatious"

This is another case where greater awareness of government's *ATIPPA* Manuals might prove helpful. Page 51 of the Access Manual contains a short but useful explanation of these terms, and it also provides links to decisions from Ontario and Alberta where these terms are discussed and interpreted. This should be a sufficient guide to any public body coordinator or applicant who is having difficulty with these terms.

Proposal to Clarify the Language within the Transitional Clause

While this section of the College's submission agrees with the OIPC submission that the transitional clause ought to be made clearer the next time the *ATIPPA* is to be amended, we take strong exception to the comments made about our past interpretation of it. The College says the following in its submission, provided to the Review Committee on August 29th:

> *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).*

It is difficult to overstate my frustration upon reading this paragraph. The author of this submission to the *ATIPPA* Review Committee has taken a position which is diametrically opposed to the one which was being argued by the College of the North Atlantic's own lawyer during the same time frame in the above referenced court matter in Corner Brook in which this Office intervened. Furthermore, the author of this submission representing the College has taken the long-standing position of this Office and claimed it as its own, while incorrectly asserting that we have taken the opposite view. In fact, this Office has always, and consistently, taken the view that any review conducted by this Office, and any subsequent Appeals to the Trial Division, must consider the matter under review using the version of the statute which was in force at the time the decision was made by the public body in relation to the request. To do otherwise would be absurd, as we have recently argued to Judge Furey. It is the College of the North Atlantic which argued to Judge Furey that even though CNA made a decision under the pre-Bill 29 version of the *ATIPPA*, that the Court should now conduct a review of that decision by applying a version of the particular provision at issue which did not exist at the time of CNA's decision. We are certainly satisfied with the way we have made this case to Judge Furey, and we await his decision on the matter, but to see my Office portrayed as taking the obviously absurd position adopted by the College is extremely vexing. We contacted CNA through its legal counsel as soon as we were made aware of this error, and we later raised the matter with their Access and Privacy office.

Clarification in Reply to Nalcor's Supplementary Submission

Before concluding, I wish to make one brief comment on the supplementary submission of Nalcor regarding its assurances that despite the broad definition of "commercially sensitive" it is restricted in withholding only that information which meets the conditions in section 5.4 of the *Energy Corporation Act*. The key consideration for us in section 5.4 is that the CEO must only hold a reasonable belief that the conditions in section 5.4 apply to the information. This provision lacks an objective test, and we are of the view that this weakness should be addressed by removing the subjective aspect and replacing it with something more akin to one of the harms-based exceptions in the *ATIPPA*.

Once again, I must thank the *ATIPPA* Review Committee for allowing me to make this supplementary submission. You made it clear to me early in the process that you agreed that the OIPC, due to its special role, as well as its expertise and experience, would be allowed an opportunity to comment on the other submissions received by the Committee, and you have been true to your word. If any matter herein requires further clarification, I am available at your convenience.

Yours truly,

E.P. Ring
Commissioner