



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-003

March 28, 2016

Nalcor Energy

Summary:

The Applicant requested from Nalcor Energy copies of the Civil Works Agreement and other records for the Muskrat Falls project. Nalcor was prepared to disclose part of the requested records, but a Third Party objected and complained to this Office, arguing that more of the information ought to be withheld on the basis of section 39 of the *ATIPPA, 2015* (disclosure harmful to the business interests of a third party) and on the basis of provisions in the *Energy Corporation Act (ECA)* that prevail over the *ATIPPA, 2015*. The Commissioner found that the objections of the Third Party had not met the requirements of section 39, and that the *ECA* did not apply. The Commissioner therefore recommended that Nalcor disclose the information it had proposed to disclose (subject to the redaction of a small amount of personal information).

Statutes Cited:

Access to Information and Privacy Act, 2015, SNL 2015, c. A-1,2, s.39; *Energy Corporation Act*, SNL 2007 c. E-11.01, ss. 2, 5.4.

Authorities Relied On:

Corporate Express Canada Inc. v. Memorial University of Newfoundland, 2015 NLCA 52; *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University*, Gary Kachanoski, 2014 NLTD(G)107; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603; BC IPC Order F15-53; Saskatchewan OIPC Review Report 195-2015 & 196- 2015; Newfoundland and Labrador IPC Reports A-2016-001, A-2015-006, A-2016-005, A-2015-002, A-2015-001, A-2014- 013, A-2014- 008, A-2013-009, A-2013-008, A-2011-007, 2008-002, 2007-03, 2005-005.

I BACKGROUND

- [1] In November 2015, an Applicant made a request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or “the Act”) to Nalcor Energy (“Nalcor”), for a copy of the Civil Works Agreement for the Muskrat Falls hydro-electric generation project in Labrador, between Muskrat Falls Corporation (a subsidiary of Nalcor) and a Third Party. In addition to the Agreement and a number of exhibits appended to it, the Applicant requested copies of certain correspondence and schedules.
- [2] After reviewing the request Nalcor notified the Third Party pursuant to section 19 of the Act that some of the information in the responsive records was commercial information of the Third Party, the disclosure of which might be harmful to the financial and economic interests of the Third Party under section 39 of the Act. Nalcor proposed to withhold some information on the ground that its disclosure would be harmful to the financial or economic interests of Nalcor under section 35 of the Act. Further, Nalcor advised that it considered much of the information to be “commercially sensitive” within the meaning of the *Energy Corporation Act* (“the ECA”) the disclosure of which might harm the financial and economic interests of Nalcor or the Third Party.
- [3] Ultimately Nalcor advised the Third Party that it intended to withhold some information from the responsive records, and intended to disclose the rest to the Applicant. The Third Party objected to the disclosure of some of the information that Nalcor proposed to release, and filed a complaint with this Office in accordance with subsection 42(3) of the Act.
- [4] During the course of our investigation we received written submissions from both Nalcor and the Third Party in support of their positions. Attempts to resolve the complaint informally were not successful, and the matter was referred for formal investigation under subsection 44(4) of the Act. Both Nalcor and the Third Party were given an opportunity to make additional written representations.

II THE THIRD PARTY'S POSITION

[5] The main body of the agreement that is the subject of the access request is almost 100 pages long, and the exhibits appended to it, the correspondence, and the schedules are many pages more. The Third Party took the position that while it agreed with Nalcor's proposed redactions, they did not go far enough. The Third Party argued that substantially all of the information that Nalcor was proposing to disclose should be redacted, on the ground that it was pricing, payment or scheduling information, the disclosure of which could harm the Third Party's financial, economic or competitive position, or on the ground that its disclosure could harm the position of the Third Party in ongoing negotiations. The Third Party based its arguments on section 39 of the *ATIPPA, 2015*, and also on section 5.4 of the *ECA*.

III NALCOR'S POSITION

[6] Nalcor took the position that while much of the information at issue was commercial or financial information within the meaning of section 39 of the *ATIPPA, 2015*, a great deal of it had already been publicly disclosed in response to a previous access request, and therefore could not now be withheld. Nalcor further took the position that of the information that was new to the present request, a portion should be disclosed since, in Nalcor's view, it did not meet either the harm test in section 39 of the *ATIPPA, 2015*, or the harm test in section 5.4 of the *ECA*. Nalcor argued that the remaining information did meet the tests in both statutes, and therefore should be withheld.

IV DECISION

[7] Section 7 of the *ATIPPA, 2015* provides that where access to a record is prohibited or restricted by a provision of another statute designated in Schedule A to the *Act*, then that provision prevails over the *ATIPPA, 2015*. A list of twenty such statutes may be found in Schedule A to the *Act*. The *ECA*, passed in 2007, is one such statute. It creates Nalcor Energy as a corporation with the responsibility for energy resources in the province generally, including hydroelectric power generation and transmission, and offshore oil exploration, development and production. One of Nalcor's projects, through its subsidiary

Muskkrat Falls Corporation, is the construction of a hydro-electric generating station on the Lower Churchill River in Labrador.

[8] Section 5.4 of the *Energy Corporation Act*, restricting or prohibiting access to information, applicable to the issues in the present case, reads as follows:

5.4 (1) Notwithstanding section 7 of the Access to Information and Protection of Privacy Act, 2015 , in addition to the information that shall or may be refused under Part II, Division 2 of that Act, the chief executive officer of the corporation or a subsidiary, or the head of another public body,

- (a) may refuse to disclose to an applicant under that Act commercially sensitive information of the corporation or the subsidiary; and*
- (b) shall refuse to disclose to an applicant under that Act commercially sensitive information of a third party where the chief executive officer of the corporation or the subsidiary to which the requested information relates, taking into account sound and fair business practices, reasonably believes*
- (c) that the disclosure of the information may*
 - (i) harm the competitive position of,*
 - (ii) interfere with the negotiating position of, or*
 - (iii) result in financial loss or harm to the corporation, the subsidiary or the third party; or*
- (d) that information similar to the information requested to be disclosed*
 - (i) is treated consistently in a confidential manner by the third party, or*
 - (ii) is customarily not provided to competitors by the corporation, the subsidiary or the third party.*

(2) Where an applicant is denied access to information under subsection (1) and a request to review that decision is made to the commissioner under section 42 of the Access to Information and Protection of Privacy Act, 2015 , the commissioner shall, where he or she determines that the information is commercially sensitive information,

- (a) on receipt of the chief executive officer's certification that he or she has refused to disclose the information for the reasons set out in subsection (1); and*

(b) confirmation of the chief executive officer's decision by the board of directors of the corporation or subsidiary,

uphold the decision of the chief executive officer or head of another public body not to disclose the information.

[9] I do not dispute the Third Party's interpretation of the *ECA*. The purpose of section 5.4 of the *ECA*, broadly speaking, is to prevent the disclosure of what is deemed to be "commercially sensitive information" if that disclosure is likely to cause harm to Nalcor or to a third party. In the present case it is clear that large portions of the Muskrat Falls contract may be "commercially sensitive information" within the exceedingly expansive definition contained in section 2 of the *ECA*. However, under section 5.4 of the *ECA* it is the CEO of Nalcor who determines whether a disclosure is likely to cause harm, and therefore whether information will be withheld under section 5.4, rather than (potentially) disclosed under the provisions of the *ATIPPA, 2015*. I will return to the application of section 5.4 in a later part of this decision.

[10] I also agree with the Third Party that the Muskrat Falls contract contains "commercial, financial, labour relations and technical information" within the meaning of section 39 of the *ATIPPA, 2015*. However, it remains to be determined, item by item, whether any of the information in question meets the requirements of the three-part test in section 39. I appreciate the Third Party's argument that it is necessary to assess the potential disclosure of sensitive information in the context of the ongoing relationships among Nalcor and its subsidiaries, the Third Party and other contractors involved in the Muskrat Falls project. I accept, and Nalcor accepts, that the disclosure of some of the information that is responsive to the access request could possibly interfere with the negotiating position of, or result in undue financial losses to, the Third Party.

[11] However, much of the information that Nalcor is proposing to disclose in response to the present access request was previously disclosed in response to another access request, made in February 2015. Nalcor informed the Third Party in 2015 of its intended disclosure of that previous set of records, and the Third Party made no objection at that time. It is Nalcor's position that once information has already been disclosed in response to an access

request under the *ATIPPA, 2015*, it becomes public information, and it cannot then be withheld in response to a subsequent access request, either by virtue of any exception to access in the *ATIPPA, 2015*, or by virtue of section 5.4 of the *ECA*.

[12] I agree with Nalcor's position on that issue. The *ATIPPA, 2015*, section 3(3) provides explicitly that it does not limit access to information that is not personal information and is available to the public. It is of course not possible to restrict what further use or disclosure of information an applicant may make once that information has been received in response to an access request. Therefore it has long been a basic principle of access to information legislation that disclosure to an applicant must be treated as disclosure to the world. The only exception to that principle would be the case of sensitive personal information that had earlier been wrongly disclosed.

[13] The items included in the present access request, that are identified as having been previously requested in an access request and disclosed in full, are:

- Exhibit 2 - Compensation - Attachment 1 - Measurement and Payment;
- Exhibit 2 - Compensation - Appendix C - Small Tools, Consumables and PPE;
- Exhibit 2 - Compensation - Appendix G - Contractor Share of Labour Cost Difference;
- Exhibit 2 - Compensation - Appendix H - Sworn Declaration.

Nalcor proposes to fully disclose those items, but the Third Party objects. However, it is my view, as indicated above, that Nalcor has no choice but to disclose them.

[14] Similarly, the items that have been identified as having been previously requested in an access request, and disclosed in part, are:

- The Contract – All Articles;
- Exhibit 2 - Compensation;
- Exhibit 2 - Compensation - Appendix F - Contractor's Workforce Not Covered by the Collective Agreement;
- Exhibit 2 - Compensation – Appendix J -LNTF with Amendment No.1;

Exhibit 9 - Interface and Milestone Schedule.

Nalcor proposes to disclose these items, subject to the same redactions as previously. The Third Party objects to the disclosures. It is my view, as indicated above, that in response to the present request Nalcor must disclose the previously-released portions. As for the portions of those documents that Nalcor intends to continue to withhold, the Third Party does not object.

[15] There are a number of items that are included in the present access request that were not part of a previous request. Those which Nalcor intends to disclose in full are:

Exhibit 4 - Supplier Document Requirements List;

Exhibit 14 - Performance Security;

Exhibit 16 - Rules for Dispute Review Board and Arbitration.

It is my understanding that the Third Party objects to the disclosure of all three of these items. Nalcor agrees that there are certain items of personal information that ought to be redacted, but were overlooked. Nalcor intends to redact that personal information before those records are disclosed to the applicant.

[16] There is one item that is new to the present request that Nalcor intends to disclose in part:

Exhibit 3 -Coordination Procedures.

Nalcor has identified portions of this item that it intends to withhold, and intends to disclose the rest. The Third Party objects to the disclosure of any portion of this item.

[17] To summarize, it is, first of all, my conclusion that Nalcor must disclose to the Applicant any information that has previously been disclosed. I have explained the reasons for that finding above.

[18] Second, with regard to the information that Nalcor is proposing to withhold, whether from records that were subject to the previous request, or from those that are new to the present request, my conclusion is straightforward. In the present complaint it is not necessary to conduct a review of any proposed redactions under *ATIPPA, 2015*, because the Complainant does not, of course, object to those redactions, and so they are not at issue.

[19] Third, with regard to the information that is new to the present request, and which Nalcor is proposing to disclose in full (Exhibits 4, 14 and 16) or in part (Exhibit 3), the *ECA* has no application in the present complaint. My Office only plays a role in the process set out in subsection 5.4(2) of the *ECA* in a case where an applicant has been denied access under subsection 5.4(1) and has made a complaint to this Office under section 42 of the *ATIPPA, 2015*. The present complaint is not about a denial of access. In the present case, Nalcor has decided that the disclosure of some information would not be harmful under the *ECA* or under the *ATIPPA, 2015*, and it is the Third Party, not the applicant, who has objected to that decision. The issue of whether Nalcor is right to withhold the remaining information is not before me in the present complaint. Therefore I have no more to say about the application of the *ECA* in this Report.

[20] However, the Third Party has based its objections to disclosure not only on the *ECA*, but on section 39 of the *ATIPPA, 2015*. A section 39 review of those records is therefore required.

[21] Section 39 of the *ATIPPA* reads as follows:

39. (1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

- (i) *harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
 - (ii) *result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
 - (iii) *result in undue financial loss or gain to any person, or*
 - (iv) *reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*
- (2) *The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return, gathered for the purpose of determining tax liability or collecting a tax, or royalty information submitted on royalty returns, except where that information is non-identifying aggregate royalty information.*
- (3) *Subsections (1) and (2) do not apply where*
- (a) *the third party consents to the disclosure; or*
 - (b) *the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.*

Section 39 is a mandatory exception to disclosure. It consists of a three-part test, and all three parts have to be met. Failure to meet any part of the test will result in the inapplicability of section 39 to the relevant information. The interpretation of Section 39, and similar provisions in other access to information statutes across Canada, has been the subject of numerous commissioners' reports, including reports from this Office, and numerous court decisions. The main principles are well-known. In the present case, the required determinations include: whether the information is the information of the Third Party; whether it was supplied by the Third Party or was the result of negotiation; whether any information that was supplied, was supplied in confidence; and finally, whether its disclosure would be likely to cause any of the various sorts of harm set out in the *ATIPPA, 2015*, paragraph 39(1)(c). I have completed the required review, and my conclusions on the proposed disclosures are as follows.

[22] “Exhibit 4 - Supplier Document Requirements List” appears to be a list of the documents that will be required to be provided by various parties on the jobsite or who are supplying goods or services to the jobsite, at different stages of the project. It lists such documents as safety plans, drawings, wiring diagrams and so on. It seems to me that these documents are a normal or typical requirement of any large project. It is possible that a particular document of this sort might contain commercially sensitive information, or information that might be properly withheld under *ATIPPA, 2015*. However, the access request is not for any of those documents themselves, but simply for the list. I would conclude that the list is a requirement of Nalcor, and thus does not constitute the information of the Third Party. At most, inclusion of some items on the list might have been negotiated as part of the Agreement. I see nothing in the list that strikes me as information the disclosure of which might conceivably meet any part of the section 39 test.

[23] “Exhibit 14 - Performance Security.” The records contained in this exhibit are all templates for things like performance bonds, letters of credit, warranties, advance payments and so on. I see nothing here that could be described as the Third Party's information. These documents are standard form legal documents, neither remarkable nor sensitive. They are simply templates or forms, on which neither the names nor any other information of the parties have been entered. I see no information in them that could be withheld under section 39.

[24] “Exhibit 16 - Dispute Resolution Procedure.” This document consists entirely of the detailed rules and procedures for a Dispute Review Board and for the arbitration of disputes between the parties to the contract. Such rules and procedures would be familiar to anyone involved in the resolution of commercial or labour relations disputes. I do not see any portion of this record that could constitute the Third Party's own information, and even if there was, it is clearly the type of information that is the product of negotiation and agreement between the parties, and so could not be “supplied” within the meaning of section 39 of the *ATIPPA, 2015*. Therefore there is nothing that ought to be withheld.

[25] “Exhibit 3 - Coordination”. Some information in this exhibit is personal information which Nalcor agrees to redact in accordance with section 40. The rest is typical project

management principles, rules and checklists. There is nothing that could be termed the Third Party's own information, or anything that could conceivably cause harm to any party if disclosed.

VI RECOMMENDATIONS

[26] Under the authority of section 47 of the *ATIPPA, 2015* it is my recommendation that Nalcor Energy disclose to the Applicant the information it has proposed to disclose (subject to the agreed-upon redaction of personal information that was missed in Nalcor's initial review.)

[27] As set out in paragraph 49(1)(b) of the *ATIPPA, 2015*, the head of Nalcor Energy must give written notice of his or her decision with respect to these recommendations, to the Commissioner and to any person who was sent a copy of this Report, within 10 business days of receiving this Report.

[28] Please note that within 10 business days of receiving the decision of Nalcor Energy under section 49, the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 54 of the *ATIPPA, 2015*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal.**

[29] Dated at St. John's, in the Province of Newfoundland and Labrador, this 28th day of March 2016.

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