OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-005

January 25, 2019

Nalcor Energy

Summary: An Applicant made an access request to Nalcor Energy (Nalcor) regarding the evaluation of his position and determination of his salary. Nalcor withheld almost all the information citing sections 35(1)(d) (significant loss or gain to a third party) and 39(1) (harm to third party business interests) of the *ATIPPA, 2015*. Nalcor also relied on section 5.4 of the *Energy Corporation Act (ECA)* to refuse access. The Applicant objected to the decision to withhold the information and also claimed that further records should exist that were not provided. While Nalcor failed to prove that the information could be withheld under sections 39(1) and 35(1) of the *ATIPPA, 2015*, section 5.4 of the *ECA* requires the Commissioner to uphold the decision of Nalcor's Chief Executive Officer to refuse disclosure.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, sections 35(1), 39(1); *Energy Corporation Act*, S.N.L. 2007, c. E-11.01, section 5.4

Authorities Relied On: NL Reports A-2018-007, A-2009-006, A-2014-008, A-2009-011; Ontario Order P-1621; *Air Atonabee Ltd. v. Canada (Minister of Transport)*, (1989) 37 Admin L.R. 245 (F.C.T.D.)

File #: 0010-086-18-034

I BACKGROUND

[1] Nalcor Energy ("Nalcor") received an access to information request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the "*ATIPPA, 2015*" or "*Act*") seeking:

> *Detailed results of position scale and evaluations on the position of [Applicant's Position] from January 1, 2017 forward. The specific points awarded to the position under the salary administration scales (at one time referred to as HAY scales) in effect for the dates involved and any changes in those points as a result of evaluations. What were, and are, the exact points for the position starting January 1, 2017 until today? Any relevant information or detail may be included.*

[2] Nalcor provided the Applicant with one record – minutes of a meeting. Nalcor excluded as non-responsive all other jobs discussed in the minutes and redacted one small portion of the responsive job description under section 39(1). Nalcor's response to the Applicant also stated:

> *Two spreadsheets containing HAY point information for this position (and others) have been withheld in their entirety, as both documents comprise, in full, the scoring results from the application of the third party's proprietary methodology.*

[3] Nalcor also indicated that the small portion of the Minutes they redacted was subject to section 5.4(b), (c), and (d) of the *Energy Corporation Act* ("*ECA*"). During the informal resolution process, Nalcor also cited the exception to disclosure in section 35(1)(d) (significant loss or gain for third party) of the *ATIPPA, 2015.*

[4] The Applicant was not satisfied with Nalcor's response and filed a complaint with this Office. The Complainant asked the Commissioner to review the records as he was unsatisfied with Nalcor's decision to deny access to most of the information. The Complainant also asserts Nalcor did not fully respond to his request because he believes there should be further responsive records related to the request before an evaluation that occurred on June 27, 2017 and after an external review that occurred in the spring of 2018.

[5] As informal resolution was not successful, the complaint proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[6] Nalcor submits that the Complainant was provided with minutes of a meeting of the Job Evaluation Committee wherein the Complainant's position was considered. Non-responsive information within the minutes was severed, as it was unrelated to the Complainant's request. The withheld information consists of a block chart containing points awarded to the Complainant's position based on the Hay Methodology – "the most widely used and accepted job evaluation method in the world." The two spreadsheets consist of the Hay points awarded to each position within Nalcor.

[7] The points awarded to the Complainant's position were withheld citing section 39(1) of the *ATIPPA, 2015*. Nalcor claims the information would reveal commercial and technical information of a third party. Nalcor submits that the information was supplied to Nalcor in confidence by the Korn Ferry Hay Group (KFHG) who created the methodology. Nalcor also states that while in this instance the information may not cause significant harm to the Third Party, release of information about the Hay Methodology might enable a person to easily compile their own database of positions and points, and make comparisons of positions regarding compensation. This would significantly harm KFHG in that the creation and maintenance of the Hay Methodology required financial and other resources on the part of KFHG, and disclosure of that information would devalue their intellectual property.

[8] Nalcor also made these arguments with respect to the harm and loss requirements under section 35(1)(d) of the *ATIPPA, 2015* and section 5.4 of the *ECA*.

III COMPLAINANT'S POSITION

[9] The Complainant submits that the response to his request was nearly completely redacted and did not provide the information he requested. The Complainant states that

"since the information is directly related to my evaluation and many others in the organization have access to this information I feel the information should be released to me."

[10] The Complainant also notes that the information provided in the response to his request consisted only of meeting minutes from June 27, 2017, although he specifically asked for information regarding the points awarded prior to the June 2017 evaluation, and also after the external review in the spring of 2018.

IV DECISION

[11] There are four issues that must be addressed in this Report:

1. Whether Nalcor conducted an adequate search for responsive records.
2. Whether Nalcor appropriately applied section 39(1) of the *ATIPPA, 2015* to the responsive records.
3. Whether Nalcor appropriately applied section 35(1)(d) of the *ATIPPA, 2015* to the responsive records.
4. Whether Nalcor appropriately applied section 5.4 of the *ECA*.

Adequacy of Search

[12] The Complainant alleges that the search for records was inadequate, asserting that there are other records responsive to his request that Nalcor failed to disclose. Conducting a reasonable search is considered to be part of the duty to assist an applicant, so I must consider whether Nalcor fulfilled its duty under section 13 of the *ATIPPA, 2015:*

> *13.(1) 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.*
>
> *(2) The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.*

[13] Report A-2009-011 discusses the duty to assist:

> *[80] The duty to assist, then, may be understood as having three separate components. First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner.*

[14] Report A-2009-011 also states that "the standard against which the duty to assist is measured is reasonableness, not perfection."

[15] Nalcor advises that a Human Resources Specialist in its compensation and benefits division conducted the search. Nalcor states that the HR Specialist knew exactly where to look for the information, which was stored electronically and located on a confidential share drive. Upon receipt of the original request, due to labeling, it assessed one record as non-responsive. After clarification from this Office during the course of the investigation, Nalcor reviewed the record again, deemed the record responsive and it sent it to this Office. This record relates to the periods in regards to which the Complainant maintains that records are missing. Nalcor states that the same exception to disclosure under the *ECA* applies to that record. Nalcor did not notify the Complainant that it identified an additional responsive record.

[16] Even though Nalcor objected to disclosure of this record, it ought to have notified the Complainant that it existed and explained its reasons for withholding it. While deficient, as noted, the standard is reasonableness, not perfection and Nalcor complied with its duty to assist.

Section 39(1)

[17] Section 39(1) of the *ATIPPA, 2015* states:

> *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.*

[18] Section 39 is a mandatory exception to the right of access under the *ATIPPA, 2015* and consists of a three-part test. All three parts must be satisfied and Nalcor bears the onus of proof pursuant to section 43. Failure to meet any part of the test will result in disclosure of the requested records.

[19] The first part of the test states that the information must be "trade secrets of a third party" or "commercial, financial, labour relations, scientific or technical information of a third party". The information sought by the Applicant is a set of points awarded to his position with Nalcor. Nalcor provided the KFHG with a position description, which is converted into a points system by KFHG using their algorithms. These points are compared by KFHG to other positions within Nalcor and other organizations to analyze compensation and ensure a fair, standard evaluation of the position. Nalcor asserts that disclosure of the points would reveal commercial and technical information of KFHG, citing language in its contract with KFHG:

> *5. Intellectual Property*
>
> *a. Subject to section 5.b., Client will also own copies of reports and analyses Korn Ferry Hay Group delivers to client under this Agreement ("New Materials"). Client may use the New Materials in the form provided for its internal purposes only; Client may not use the New Materials for any other purpose or permit any other person, firm or entity to use the New Materials.*
> *b....Client will not download, copy, publish, disclose, create derivative works of, disassemble, decompile or otherwise attempt to reverse engineer Korn Ferry Hay Group Materials, nor will Client permit any other person to do so. ...*

[20] In Report A-2009-006, this Office considered the meaning of "technical information":

> *[22] I must first consider whether the information at issue in this case would reveal the type of information referred to in paragraph (a) of section 27(1). In Ontario Order PO-2145, the following statement with respect to technical information was made:*
>
> > *Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the Act. [Order P-454]*

[21] The information, though created by KFHG using the Hay Methodology, does not describe how the process works to award the points and viewing the points themselves does not give any indication how the system is used to provide the results. Therefore, I find that the information is not technical information.

[22] I also find that the information is not "commercial information" as set out in the *Act*. The information does not relate to the commercial activities of the service provided by KFHG. As explained in Ontario Order P-1621, information which may be considered to have commercial value does not necessarily constitute commercial information:

> *In Order P-493, former Adjudicator Fineberg described "commercial information" as follows:*

> *Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.*
>
> *The information contained in these records does not relate in any way to the buying or selling of goods or services. Other than stating that the document has "substantial commercial value", the Ministry has provided insufficient evidence to establish that this information has commercial value within the communications industry, and in any event, the existence of commercial value would not be sufficient to bring this information within the scope of the definition of "commercial information".*

[23] Although not raised by Nalcor specifically, I find that the points fall within the scope of "trade secrets." Ontario Order P-1621 addresses the definition of trade secrets:

> *"[T]rade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which*
>
> *(i) is, or may be used in a trade or business,*
>
> *(ii) is not generally known in that trade or business,*
>
> *(iii) has economic value from not being generally known, and*
>
> *(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.*

[24] KFHG's points system, including the points it awards to all the positions it evaluates, forms part of the Hay Methodology to establish benchmarks. The points themselves are part of the Hay Methodology and considered valuable not just by KFHG, but also its clients and the industry. Therefore, I am satisfied that the information at issue is a trade secret of the Third Party.

[25] The second part of the test under section 39(1) requires that the information be supplied in confidence to the public body by the third party. As noted in Report A-2018-007,

> *[t]his requires an assessment of both whether the information was "supplied" solely by the third party rather than the result of negotiations or collaboration*

> *between the third party and the public body as well as whether the parties intended to treat the information confidentially.*

[26] Nalcor maintains that the information at issue was supplied to Nalcor in confidence:

> *With respect to section 39(1)(b), this information is supplied in confidence, as set out in Appendix F – Korn Ferry Hay Group's General Terms and Conditions which formed part of the contract between Nalcor and Korn Ferry Hay Group (KFHG) wherein KFHG agreed to evaluate certain positions within Nalcor.*

[27] This Office previously addressed the meaning of "supplied" in Report A-2014-008:

> *[12] With respect to section 27(1)(b), one must consider whether the information was "supplied in confidence". The meaning of "supplied" has been considered by this Office in the past, but I would like to briefly set out the interpretation again here. In British Columbia order 08-22, it was stated:*
>
> > *Many decisions have addressed the "supplied" element in s. 21(1)(b). The clear and prevailing consensus––including in the courts––is that the contents of a contract between a public body and a third party will not normally qualify as having been "supplied", even when the contract has been preceded by little or no back-and-forth negotiation. The exceptions to this are information that, although found in a contract between a public body and a third party, is not susceptible of negotiation and is likely of a truly proprietary nature. The rationale is that "supply" is intended to capture immutable third-party business information, "not contract information that––by the finessing of negotiations, sheer happenstance, or mere acceptance of a proposal by a public body––is incorporated in a contract in the same form in which it was delivered by the third-party contractor" or mutually-generated contract terms that the contracting parties themselves have labelled as proprietary.*

[28] The information at issue results from evaluations provided to Nalcor by KFHG, and Nalcor and KFHG regard it as proprietary information of KFHG. The evaluations are completed using the Hay Methodology and not negotiated. I find that the information is supplied within the meaning of the *ATIPPA, 2015*.

[29] It must also be determined whether the information was supplied "in confidence." The test to determine whether information was supplied in confidence is set out in *Air Atonabee Ltd. v. Canada (Minister of Transport),* (1989) 37 Admin L.R. 245 (F.C.T.D.), at paragraph 42:

> *[…] whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:*
>
> *a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,*
>
> *b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and*
>
> *c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.*

The information is not available from other sources or to the public, as "currently, the only way to access this information (as well as the evaluation services or to be trained in the methodology) is to pay for it." Nalcor asserts KFHG provided the information with the expectation that it would not be disclosed, as outlined in the contract between Nalcor and KFHG. I conclude that the information was supplied in confidence. Therefore, the second part of the test is met.

[30] The third part of the test requires that disclosure of the information could reasonably be expected to significantly harm the competitive position of the Third Party. This is addressed in Report A-2018-007:

> [25]…*To establish a reasonable expectation of such consequences, a party must provide detailed and convincing evidence that logically explains why and how the disclosure could lead to a particular identifiable outcome or harm. The Supreme Court of Canada in Merck Frosst Canada Ltd. v. Canada (Health), [2012] 1 S.C.R. 23 states that a party "must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur."*

[31] Nalcor's position is that if point evaluations by KFHG in general are released, any person would be able to submit similar ATIPP requests for similar information to public bodies in jurisdictions across the country and compile their own database of position descriptions,

evaluations, points, and compensation. This would be done without compensation to KFHG who have used significant resources creating and protecting the Hay Methodology. In essence, by disclosing this information, the floodgates would open to ATIPP requests which would inevitably cause significant harm to KFHG.

[32] I reject Nalcor's argument that disclosure to the Complainant could result in significant harm. The information cannot be withheld because of the possibility that a person *may* attempt to recreate a similar system to KFHG's Hay Methodology by making multiple other requests in multiple jurisdictions. Its arguments are founded on speculation that falls short of establishing that the potential for harm is considerably above a mere possibility. Further, Nalcor undermined its position in stating that disclosure of the requested information may not cause significant harm in and of itself.

[33] I find that the third part of the test under section 39(1) is not met.

Section 35(1)(d)

[34] Section 35(1)(d) of the *ATIPPA, 2015* states:

> *35.(1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose*
>
> > *(d) information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;*

[35] Nalcor provided no arguments to support its reliance on 35(1)(d) other than reiterating its position pursuant to section 39(1)(c). Nalcor has not discharged its burden of proof regarding this exception as it has failed to establish that release of this information could reasonably be expected to result in significant loss or gain to a third party.

Section 5.4 of *ECA*

[36] Section 5.4 of the *ECA* states:

> *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.*

[37] Section 5.4(1)(b) of the *ECA* mandates that the head of a public body refuse to disclose commercially sensitive information of a third party. Section 5.4(1)(a) makes it a discretionary decision to refuse to disclose commercially sensitive information of Nalcor.

[38] Nalcor reviewed the requested information and concluded that the information falls within the broad scope of "commercially sensitive information" according to the definition in the *ECA*. Nalcor believes that disclosure of the information may harm the competitive position of KFHG and result in financial loss or harm to KFHG.

[39] Nalcor's Board of Directors certified the CEO's decision to refuse disclosure pursuant to section 5.4(2) of the *ECA*. I have been provided with a copy of the certification. Section 7 of the *ATIPPA, 2015* provides that section 5.4 of the *ECA* takes precedence in this circumstance. As such, I am unable to recommend disclosure of the information.

[40] The *ECA* establishes and maintains Nalcor's unparalleled position among public bodies subject to the *ATIPPA, 2015*. The only recent change to that status was the minor amendment addressing disclosure of information relating to Nalcor's independent contractors. Under the *ECA*, Nalcor alone has significant leeway to determine, unilaterally, the extent of its own accountability and transparency.

V CONCLUSIONS

[41] Nalcor failed to meet the three-part test set out in section 39(1) of the *ATIPPA, 2015* and therefore cannot rely on section 39(1) to withhold the information. As a similar argument was put forth regarding harm for section 35(1)(d), I conclude that Nalcor also cannot rely on section 35(1)(d) to withhold the information.

[42] I further conclude that section 5.4 of the *ECA*, in conjunction with certification by the Board of Directors of Nalcor Energy, means that Nalcor is entitled to withhold the requested information.

[43] Nalcor's failure to discharge its burden of proof with respect to sections 35 and 39 is based on the evidence it presented on the element of harm. This does not foreclose the possibility of finding that similar disclosures of the KFHG information could cause it harm based on different arguments and evidence.

VI RECOMMENDATIONS

[44] Under the authority of section 47 of the *ATIPPA, 2015,* I recommend that the head of Nalcor Energy continue to withhold the information relating to the points evaluation of the Complainant's position under section 5.4 of the *ECA.*

[45] As set out in section 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 any person who was sent a copy of this Report within 10 business days of receiving this Report.

[46] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25th day of January, 2019.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador