



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-037

August 11, 2023

Newfoundland and Labrador Hydro

Summary:

The Complainant made an access to information request to Newfoundland and Labrador Hydro under the *Access to Information and Protection of Privacy Act, 2015* seeking access to a range of information, including the Average Energy Base (AEB). NL Hydro disclosed much of the information, but refused disclosure of the AEB citing sections 34(1)(a)(i) (disclosure harmful to intergovernmental relations or negotiations), 35(1)(d) and (g) (disclosure harmful to the financial or economic interests of a public body). The Complainant submitted a complaint to this Office, arguing that the information should be disclosed. The Commissioner concluded that the exceptions had been properly applied and NL Hydro could continue to withhold the information.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 34(1)(a)(i), 35(1)(d), and (g).

Authorities Relied On:

NL OIPC Reports [A-2021-035](#) and [A-2022-006](#).

BACKGROUND

[1] The Complainant made an access to information request to Newfoundland and Labrador Hydro (“NL Hydro”), under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) for four items. They were provided a response for three of the items and these are not at issue in this complaint. The fourth item from the request was for:

4. The Average Energy Base (AEB), as defined by the 1969 Churchill Falls Contract, employed for the purpose of the Renewal Term of the Contract and confirmation that this AEB shall apply during the balance of the Renewal Term.

[2] NL Hydro denied disclosure of The Average Energy Base (AEB), citing sections 34(1)(a)(i), 35(1)(d), and 35(1)(g) of the *Act*. The Complainant did not agree with this response and filed a complaint with this Office.

[3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY’S POSITION

[4] NL Hydro made submissions to this Office noting that the exceptions at sections 34(1)(a)(i), 35(1)(d), and (g) were applied, “due to the sensitivity and confidential nature of the information.” It went on to note:

The average energy base value is used for purposes of the Renewed Power Contract and cannot be disclosed. The average energy base number has never been publically released by our organization. If released, it could jeopardize our relationship with the provincial government, the federal government and the province of Quebec from a negotiation position and a collaboration position. There are many ongoing negotiations, including on behalf of the 2041 Churchill River Analysis Team, which is a directive from Cabinet, which would be affected by the release of the average energy base. The financial repercussion of the premature disclosure of this number would not only greatly affect our organizations but also the province of Newfoundland and Labrador.

[5] Additionally, NL Hydro provided further detail to corroborate this position; noting that if it disclosed the AEB then this information could be used in combination with already publicly

available information to calculate or deduce figures under the Renewed Power Contract or make estimates in relation to the non-Renewed Power Contract sales value and volume and the confidential contract generally. NL Hydro also submitted that this information could be used to deduce price terms of the confidential Excess Energy Sales Agreement, compromising future negotiations when the contract expires.

- [6] Finally, NL Hydro submitted that Hydro Quebec has claimed the AEB is confidential and does not want it disclosed, so to do so would have negative implications on the relationship between the province of Newfoundland and Labrador and Quebec given the major ongoing discussions for the 2041 contract noted in NL Hydro's submissions above. It went on to highlight potential financial repercussions which would weigh heavily on energy marketing and the sales of energy to other provinces and in the United States, compromising competitive advantage for these potential deals if the AEB was released.

COMPLAINANT'S POSITION

- [7] The Complainant submitted that the refusal by NL Hydro to disclose the AEB for the reasons noted is arbitrary and unreasonable. They went on to make several arguments challenging NL Hydro's consistency in treating the AEB as "confidential."

- [8] The Complainant highlighted the following in suggesting the AEB should not be considered confidential:

- The AEB is referenced in the Power Contract between Quebec Hydro-Electric Commission and Churchill Falls (Labrador) Corporation Limited dated May 12, 1969, which is in the public domain and provides some definition as to the AEB's calculation and adjustment;
- The Quebec Court of Appeal decision in relation to these parties and this contract references the AEB and provides some definition as to its calculation and adjustment, noting: "there is little left in relation to the AEB that is not already public";

- The Complainant could find no reference to a court having been cautioned to treat the AEB or information about the AEB in a manner that it might have ‘commercial sensitivities’;
- The “only effect of releasing the AEB is that it will precisely quantify the limited effectiveness of the Water Management Agreement;”
- Disclosure “will not injure Hydro-Quebec ... information related to the AEB is already substantially in the public domain,” and it already “purchases all the power from the Churchill Falls Plant except for the ‘Recall’ blocks,” as “the 1969 contract effectively bars the possibility of competition to Hydro-Quebec by third parties for the power. The AEB is distinctly not a matter of ‘commercial sensitivity’ in relation to the business interests of another province,” and
- The only potential injury to NL Hydro in disclosing the AEB would be by way of, “embarrassment, having conducted the affairs of the Corporation in a reckless manner.”

ISSUES

- [9] At issue for this report is whether disclosure of the AEB falls within the scope of the exceptions to access at sections 34(1)(a)(i), 35(1)(d), or (g) as cited by NL Hydro, such that it can rely on these exceptions to withhold this information.

DECISION

- [10] The specific sections of *ATIPPA, 2015* at issue set out the following:

- 34. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
- (a) harm the conduct by the government of the province of relations between that government and the following or their agencies:*
- (i) the government of Canada or a province,*

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;

(g) information, the disclosure of which could reasonably be expected to prejudice the financial or economic interest of the government of the province or a public body; or

[11] On its face, the language of the request is suggestive that section 35(1)(d) is potentially triggered as the request notes the AEB is “employed for the purpose of the Renewal Contract,” and seeks confirmation of its application for “the balance of the Renewal Term.” If any part of that Renewal Contract or Term remains ongoing or in future, it is possible that disclosure would constitute premature disclosure of a proposal or project.

[12] This Office noted in Report [A-2021-035](#):

[11] This exception addresses premature disclosure or significant loss or gain to a third party and, therefore, a public body only has to demonstrate that one or the other applies. In this case, the Department only needs to establish that the information satisfies the first part of the sentence under subsection 35(1)(d). That is, that the information in question, if disclosed, “could reasonably be expected to result in the premature disclosure of a proposal or project.”

[12] The information sought here is on its face about an ongoing project. Disclosure would reveal the parties who have made submissions, the contents of their submissions, and the particulars of the project as outlined by the Department. Previous reports of this Office have noted that where the information in question is about an ongoing project or matter, the early release of such information could reasonably be expected to result in the premature disclosure of a proposal or project – see, for example, A-2019-002 and A-2017-015 – and we find the same here. As such early disclosure of information about this selection process could harm the integrity of the process, disclosure at this time can be properly described as ‘premature’.

[13] In its submissions, NL Hydro noted that there are “many ongoing negotiations” that would be affected by the release of the AEB. NL Hydro further provided an explanation of what this

figure is and how it relates to ongoing contract negotiations. NL Hydro submitted that if the AEB were disclosed, this information could be used in combination with already publicly available information to calculate and deduce figures under the Renewed Power Contract or make estimates in relation to the non-Renewed Power Contract sales value and volume and the confidential contract generally. NL Hydro also argued it could be used to deduce price terms of the confidential Excess Energy Sales Agreement, compromising future negotiations when the contract expires.

[14] As noted above, the Complainant's submissions noted that much information about the AEB is already in the public domain, which casts doubt on its confidentiality. The Complainant therefore argues that the AEB could fully be disclosed without any risk of harm or threat of revealing prematurely projects and proposals. However, NL Hydro noted that precisely because so much information about the AEB is already in the public domain, to disclose the value itself would reasonably be expected to result in the premature disclosure of projects and proposals utilizing the AEB.

[15] In Report A-2022-006 we addressed a similar matter involving claims that information disclosed through the access to information process could be combined with publicly-available information to make inferences about a third party's business interests. However, in that case, we found that the information at issue – which the third party was objecting to being released by the public body – did not lend itself to an accurate inference of any of the third party's other business information. Rather, this Office concluded that a number of other assumptions would need to be made and there was little likelihood that one could make an accurate inference. In the present matter we are satisfied that the AEB is a discrete value that is a component part of the other calculations involved in the Renewed Power Contract and other ongoing negotiations and its disclosure could lead to an accurate inference of sensitive information.

[16] Given the above, this Office finds that disclosure of the AEB could reasonably be expected to disclose information which would amount to a premature disclosure of a project or proposal pursuant to section 35(1)(d). Having concluded the relevant information falls within the scope of the definition of this section, NL Hydro is entitled to apply this exception to withhold this

information from disclosure. It is therefore not necessary to determine whether sections 34(1)(a)(i) and 35(1)(g) might also apply.

RECOMMENDATIONS

- [17] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that Newfoundland and Labrador Hydro continue to withhold the records in question in accordance with section 35(1)(d) of the *Act*.
- [18] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of Newfoundland and Labrador Hydro 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.
- [19] Dated at St. John's, in the Province of Newfoundland and Labrador, this 11th day of August 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador