



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2017-012

May 3, 2017

Nalcor Energy

### Summary:

In March 2013 the Applicant filed seven requests with Nalcor Energy under the *Access to Information and Protection of Privacy Act* in force at that time. Nalcor refused one of the requests on the ground that the information could not be disclosed pursuant to section 5.4 of the *Energy Corporation Act* and various *ATIPPA* exceptions. Nalcor refused to process the remaining six requests, first on the ground that they were repetitive under section 43.1 of the *ATIPPA*, and also on the basis that the information in those requests could not be disclosed under section 5.4 of the *ECA*. The Applicant filed requests for review with this Office. Because of related pending court actions the requests for review were held in abeyance. When the court actions were deemed abandoned the files were re-activated. The Commissioner concluded that the information covered by all seven requests was commercially sensitive information within the meaning of the *ECA*, and that Nalcor was entitled to refuse to disclose it.

### Statutes Cited:

[Access to Information and Protection of Privacy Act, SNL 2002 c. A-1.1](#), sections 16, 43.1.

[Energy Corporation Act, SNL 2007 c. E-11.01](#), sections 2, 5.4.

## I BACKGROUND

[1] On March 11, 2013 the Applicant filed seven access to information requests with Nalcor Energy (“Nalcor”) pursuant to the *Access to Information and Protection of Privacy Act*, (the “ATIPPA” or “the Act”). That Act has since been repealed and replaced by the *Access to Information and Protection of Privacy Act, 2015*. All of the issues dealt with in this Report are decided in accordance with the former ATIPPA.

[2] The requests were for the following records:

*Copies of all confidentiality agreements Nalcor and/or Newfoundland Hydro entered into with all oil and gas firms to view seismic data, evaluate buying interest, or otherwise, for the timeframe 1990-March 8, 2013.*

(PB/068/2013)

*Copies of all communications relating to interests Nalcor and/or Newfoundland Hydro obtained in Canadian offshore Production Licenses, Significant Discovery Licenses and Exploration licenses, for the timeframe 1990-March 8, 2013.*

(PB/069/2013)

*Copies of all agreements relating to interest Nalcor and/or Newfoundland Hydro obtained in Canadian offshore Production Licenses, Significant Discovery Licenses and Exploration licenses, for the timeframe 1990-March 8, 2013.*

(PB/070/2013)

*Copies of all records relating to seismic data regardless of the form in the possession of Nalcor and/or Newfoundland Hydro, for the timeframe 1990-March 8, 2013.*

(PB/071/2013)

*Copies of all Operating Agreements and related correspondence and records relating to interests held in Production Licenses, Significant Discovery Licenses, and Exploration licenses by Nalcor and/or Newfoundland Hydro for the timeframe 1990-March 8, 2013.*

(PB/072/2013)

*Copies of correspondence and transmittals between Nalcor and/or Newfoundland Hydro and other interest holders in each Production License, Significant Discovery License, and Exploration license where Nalcor has an interest, for the timeframe 1990-March 8, 2013.*

(PB/073/2013)

*Records, lists, correspondence, invoices, inventories, transmittals relating to all seismic information, including items that contain seismic information, that has been or is in the possession [of] Nalcor and/or Newfoundland Hydro, for the timeframe 1990-March 8, 2013.*

(PB/074/2013)

- [3] On six of the seven requests (PB/069/2013 to PB/074/2013) Nalcor initially notified the Applicant that it was extending the time for responding to the requests (as it was then entitled to do unilaterally under subsection 16(1) of the Act). The Applicant then filed six Requests for Review with this Office about the delay caused by the extension of time limits and prospectively about anticipated further delay and improper redactions. Those Requests for Review were consolidated into one investigation file (our file 0010-086-13-001).
- [4] On the first request (PB/068/2013) Nalcor considered the nature of the records requested, estimated the amount of time that might be required to address the request, and sent the Applicant a fee estimate. The Applicant forwarded half the estimated amount, as required by the fee provisions at that time, and Nalcor began to process the request.
- [5] On May 21, 2013 Nalcor sent the Applicant a decision letter in response to the first request, advising that it refused to disclose any of the records responsive to the request, on the ground that all of those records (the confidentiality agreements) constituted “commercially sensitive information” that could not be disclosed pursuant to section 5.4 of the *Energy Corporation Act* (the “ECA”). Nalcor also claimed that certain provisions of the *ATIPPA* required or permitted Nalcor to withhold the requested information. The Applicant then filed a Request for Review with this Office respecting this refusal, which was assigned to a separate file (0010-086-13-002).
- [6] On June 13, 2013 Nalcor sent the Applicant further decision letters in respect of the six remaining requests which had been the subject of time extensions. Nalcor notified the Applicant that it had decided to refuse to process all of those requests pursuant to section 43.1 of the *ATIPPA*, on the grounds that due to their repetitive or systematic nature, the requests would unreasonably interfere with the operations of the public body.

- [7] The Applicant then complained to this Office about those refusal decisions. Rather than open a number of files, it was decided to consolidate all of Nalcor's decisions about these into one file (0010-086-13-001).
- [8] Efforts were made to resolve these matters informally. In particular, Nalcor was asked to consider whether it would agree to process any part of the six requests it had refused to process, provided that the Applicant was willing to narrow or subdivide the request so that smaller portions were manageable. Nalcor agreed to do so. However, before any agreement with the Applicant could be reached on a test case, Nalcor advised that it had conducted a preliminary review of the records that would be responsive to those six remaining requests. Nalcor concluded that even if processed piece by piece, substantially all of the resulting responsive records would likely be withheld, either as "commercially sensitive information" under section 5.4 of the *ECA*, or under certain exceptions in the *ATIPPA*.
- [9] In the meantime another earlier access request by this same Applicant had also been refused by Nalcor. Rather than filing a Request for Review of that refusal decision with our Office, the Applicant appealed that decision directly to the Supreme Court of Newfoundland and Labrador, Trial Division pursuant to the provisions of subsection 43(3) of the *ATIPPA*. On November 6, 2013 an interim decision by the court in that matter imposed a stay of proceedings pending the outcome of yet another related court action.
- [10] The Applicant filed an appeal of that interim decision in the Court of Appeal. It appeared that the issues in dispute in the court matters could well have a direct effect on the Requests for Review under consideration. On that basis, we decided that it was appropriate to hold the Request for Review files in abeyance pending the outcome of the case at the Court of Appeal.
- [11] In October 2016 the Court of Appeal deemed the appeal to have been abandoned. Under those circumstances, it was decided that with the passage of time it was no longer in anyone's interest to hold these files in abeyance. Therefore the parties were notified on December 6, 2016 that the Request for Review files had been re-activated and referred to formal investigation.

[12] The parties were asked to provide additional submissions on the issues if they saw fit to do so. Both parties advised that they would rely on the submissions that they had already provided.

## II NALCOR'S POSITION

[13] Nalcor provided evidence and submissions supporting its argument that the records responsive to the first request (PB/068/2013) constituted “commercially sensitive information” and could not be disclosed pursuant to section 5.4 of the *ECA*. Nalcor also submitted that those records could also be withheld under provisions of the *ATIPPA*.

[14] With respect to the remaining six requests (PB/069/2013 to PB/074/2013) Nalcor provided evidence and submissions in support of its decision to refuse to process those requests pursuant to section 43.1 of the *ATIPPA*, on the grounds that due to their repetitive or systematic nature, the requests would unreasonably interfere with the operations of the public body.

[15] Nalcor also submitted that the records responsive to the remaining six requests could alternatively be withheld pursuant to section 5.4 of the *ECA* as well as pursuant to exceptions in the *ATIPPA*.

## III APPLICANT'S POSITION

[16] The Applicant's submissions mainly focused on whether data created by the Applicant under contracts with other bodies has been improperly obtained by Nalcor and used for its own benefit without compensation to the Applicant. Those issues are outside our purview. The Applicant did not address in detail the provisions of the *ATIPPA* applicable to the present requests.

[17] The Applicant argues that his requests had to be worded broadly because, he asserts, Nalcor would otherwise improperly exclude relevant information.

[18] The Applicant further asserts, contrary to Nalcor's position, that the number of responsive records should not be large, and therefore states that although he is willing to accept that the records be produced to him in instalments, he is not willing to narrow his requests.

[19] The Applicant argues that the *ECA* was created by Nalcor to shield it from having to reveal that it illegally obtained the Applicant's confidential commercial information without payment.

[20] The Applicant has forwarded to this Office the pleadings from other litigation with Nalcor in the Trial Division, and asked that those pleadings be considered as additional submissions in the present case.

#### IV DECISION

[21] The first issue the Applicant complained to our Office about is the issue of Nalcor's delay in responding to his access requests. Under subsection 16(1) of the *ATIPPA* (as noted above, all references are to the version of the old *Act* that was in force at that time, not to the *ATIPPA, 2015*) a public body has the authority to unilaterally extend the time for replying to a request, for up to 30 additional days in circumstances where a large number of records has been requested and it would unreasonably interfere with the operations of the public body to complete the task within the initial 30 day period. This was what Nalcor initially did. Under subsection 16(4) the Applicant was entitled to complain to our Office about that extension, and did so. I have reviewed the circumstances and I conclude that given the number and breadth of the seven requests, Nalcor's extension of the time limit was reasonable.

[22] A second issue involves the additional delays in responding to the access requests. Under subsection 16(2) a public body may ask the Commissioner to approve additional time extensions, where the circumstances set out in subsection 16(1) apply for longer than 30 days, or where there are multiple concurrent requests. In May 2013 Nalcor made such an application, covering all seven requests, which was approved. The *ATIPPA* provides that where such an extension has been approved, the Applicant may not file a complaint, since the Commissioner has already considered and decided the issue.

[23] At one point in the process, the Applicant complained to our Office that he had been given a fee estimate by Nalcor in accordance with the *Act*, had paid the requested half of the fee, but had then been refused any records. Nalcor ultimately made the decision to reimburse the amount paid by the Applicant. I will therefore not comment further about the fee issue.

#### **Nalcor's Decision on the First Request**

[24] The main issues arise from Nalcor's final decision letters in response to the requests. Nalcor's decision letter in response to first request (PB/68/2013) informed the Applicant that the records were being withheld under section 5.4 of the *Energy Corporation Act*:

*5.4 (1) Notwithstanding section 6 of the Access to Information and Protection of Privacy Act, in addition to the information that shall or may be refused under Part III 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 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 43 of the Access to Information and Protection of Privacy Act, 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.

[25] Under subsection 5.4(2) above I must first determine whether the information in question is "commercially sensitive information" within the meaning of subsection 2(b.1) of the ECA, which reads:

(b.1) "commercially sensitive information" means information relating to the business affairs or activities of the corporation or a subsidiary, or of a third party provided to the corporation or the subsidiary by the third party, and includes

(i) scientific or technical information, including trade secrets, industrial secrets, technological processes, technical solutions, manufacturing processes, operating processes and logistics methods,

(ii) strategic business planning information,



- (iii) *financial or commercial information, including financial statements, details respecting revenues, costs and commercial agreements and arrangements respecting individual business activities, investments, operations or projects and from which such information may reasonably be derived,*
- (iv) *information respecting positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the corporation, a subsidiary or a third party, or considerations that relate to those negotiations, whether the negotiations are continuing or have been concluded or terminated,*
- (v) *financial, commercial, scientific or technical information of a third party provided to the corporation or a subsidiary in confidence,*
- (vi) *information respecting legal arrangements or agreements, including copies of the agreement or arrangements, which relate to the nature or structure of partnerships, joint ventures, or other joint business investments or activities,*
- (vii) *economic and financial models used for strategic decision making, including the information used as inputs into those models, and*
- (viii) *commercial information of a kind similar to that referred to in subparagraphs (i) to (vii);*

[26] The definition of commercially sensitive information above is extremely broad. It is quite clear from a review of the Applicant's access requests that the responsive records fall into one or more of the categories described above, particularly paragraphs (i), (iii), (v) and (vi). The information in them therefore constitutes "commercially sensitive information" within the meaning of subsection 2(b.1) of the ECA.

[27] The second part of subsection 5.4(2) requires the chief executive officer of Nalcor to certify, and the board of directors of Nalcor to confirm, that the refusal to disclose the requested records was for the reasons set out in subsection 5.4(1) of the ECA. I have received that certification and confirmation with respect to the first request (PB/68/2013) and therefore, pursuant to subsection 5.4(2), I am required to uphold the decision of the head of Nalcor to withhold the records responsive to that request.

## Nalcor's Decisions on the Remaining Six Requests

[28] Nalcor's decision letters in response to the remaining six requests (PB/69/2013 to PB/74/2013) are identical, and the refusal to disclose the records is grounded in the provisions of paragraph 43.1(1)(a) of the *ATIPPA*, which reads as follows:

*43.1 (1) The head of a public body may disregard one or more requests under subsection 8(1) or 35(1) where*

*(a) because of their repetitive or systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to the abuse of the right to make those requests;*

[29] At first glance each of the Applicant's requests may appear to be quite specific. However, on a closer reading, and after discussions with the public body, it is clear that these requests involve very large quantities of records. For example, the first request is for "all confidentiality agreements ... with all oil and gas firms to view seismic data, evaluate buying interest, or otherwise...." Effectively the last two words, "or otherwise" convert this into a request for every confidentiality agreement ever entered into by Nalcor's Oil and Gas Division over a 23-year period. Confidentiality agreements are routine arrangements in oil and gas exploration and development, and the records responsive to this one request could number well into the thousands.

[30] Similarly, several of the remaining requests are for "all communications", "all agreements", "all operating agreements and related correspondence" or "all correspondence and transmittals" relating to production licenses, significant discovery licenses or exploration licenses over that same 23-year period. Nalcor points out that in relation to a single offshore project, hundreds of agreements exist between Nalcor and other companies or organizations on subjects such as fiscal issues, benefits, equity interests, operations, security, transportation, tariffs, assignments, data, and so on. I am informed, and accept, that this would involve the disclosure of the majority of records held by the Oil and Gas Division – many thousands of records.

[31] These requests are very broad, and they are also repetitive. For example, "all records relating to seismic data" would logically contain all of the records separately requested as

“records, lists, correspondence, invoices, inventories, transmittals relating to all seismic information”. Yet in order for a search to comply with the *Act*, each individual request must be dealt with separately, thoroughly and completely.

[32] Nalcor spent considerable time and effort attempting to persuade the Applicant to narrow his requests, or to divide them up into manageable portions. The Applicant was insistent from the beginning that he had to word the requests this way in order to prevent Nalcor from avoiding disclosure of some records by narrowly interpreting the requests. After the Applicant filed the Requests for Review, this Office attempted to mediate a similar narrowing of requests, but also without success. Applicants are never required to amend their requests; however, refusing to do so may entitle the public body to invoke exceptions in the *Act*.

[33] I have concluded that asking Nalcor to attempt to process these requests within any reasonable period of time is unreasonable. It would involve the prolonged efforts of a large number of experienced and knowledgeable staff to locate and copy vast numbers of records. Further, the expenditure of considerably more time by people familiar with the access to information process would be required to review all of those records and sever information that must be withheld under mandatory provisions of the *Act*. Many of the agreements with third parties might require notice to them and the receipt of their submissions. In the words of section 43.1, it would unreasonably interfere with the operations of the public body, and therefore Nalcor was entitled to disregard these requests.

[34] I will also add that at the time Nalcor made its decision to disregard these requests, it had decided that the information in the first request could be withheld on the basis of the provisions of section 5.4 of the *ECA*. Nalcor later submitted that the information in the remaining six requests would also appear to fall into the same category of “commercially sensitive information” and if those requests had been processed, the responsive records would likely have been withheld on that basis as well. In the circumstances of this matter, I agree that this determination could have been made.

[35] Finally, I noted above that the Applicant asked that I consider its pleadings in other court cases as additional submissions in the present matter. I have reviewed those pleadings, and find that they mostly involve other issues, such as exceptions in the *ATIPPA* that are not claimed here by Nalcor, or concerning the sealing of court files, that are not relevant to the present case.

[36] For all of the above reasons, it is my conclusion that Nalcor is entitled to withhold all of the information requested in all seven of the Applicant's requests.

## V RECOMMENDATIONS

[37] Under the authority of section 48 of the *ATIPPA* I recommend that the head of Nalcor Energy

- (a) continue to withhold the information previously withheld from the Applicant in response to the access request in file 0010-086-13-002 (PB/068/2013); and
- (b) continue to disregard the access requests made by the Applicant in file 0010-086-13-001 (PB/069/2013 to PB/074/2013).

[38] As set out in subsection 50(1) of the *ATIPPA*, 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 15 days<sup>1</sup> of receiving this Report (in this case the Applicant).

[39] Please note that within 30 days of receiving the decision of Nalcor Energy under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*.

---

<sup>1</sup> Please note that all time limits contained in the recommendations refer to calendar days, under the provisions of the *ATIPPA* in force at the time, not to business days as required by the current *ATIPPA*, 2015.

[40] As set out in subsection 50(2) of the *ATIPPA*, the head of Nalcor Energy must inform the persons who were sent a copy of this Report of the right to appeal the decision to the Trial Division under section 60 and of the time limit for an appeal.

[41] Dated at St. John's, in the Province of Newfoundland and Labrador, this 3rd day of May 2017.

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

