



Government of Newfoundland and Labrador
Office of the Premier

October 13, 2017

Mr. Brendan Paddick
Chairperson
Nalcor Energy Board of Directors
C/O Nalcor Energy
Hydro Place, 500 Columbus Drive
P.O. Box 1280
St. John's, NL A1B 0C9

Dear Mr. Paddick:

I write in response to your letter of October 2 wherein you respond to my concerns regarding embedded contractors and the disclosure of their billing rates.

I am cognizant of the circumstances upon which you and the present board began to preside over Nalcor and the Muskrat Falls project. I agree that the decision to split the management structures of the Muskrat Falls Project into two distinct components divided between construction of the Muskrat Falls Plant and transmission line was a prudent one.

I further agree Nalcor's core business is in energy and not the construction of mega-projects; it is one of the reasons why I never supported the Muskrat Falls project. With that said, it is encouraging that under the guidance of the present Board of Directors, and CEO Stan Marshall, the project is now 83% complete. While things remain imperfect, this is an outstanding achievement given the project was only 48% complete last year. This, in conjunction with reducing the number of managers on the project team, is certainly positive. While I wish the Province was not in this position, I am happy that the project is finally on track.

However, I must disagree with you on the matter of public disclosure of billing rates for embedded contractors. While I concede there may be some instances where the requested information is commercially sensitive, I question the full denial in these circumstances, especially in the context of individuals who incorporate themselves. I query as to what extent Nalcor analyzed each contractor to determine whether the release of billing rates of individual contractors was potentially commercially sensitive or whether an assumption was made in light of the perceived breadth of the *Energy Corporation Act* (ECA)?

I also query as to whether all avenues to ensure openness and transparency were explored. For instance, was there consideration of releasing information in the aggregate such that, where billing rates were commercially sensitive, the total amount paid to each individual contractor could be released? Such an approach would be consistent and aligned from a principled perspective with this government's introduction of what's known as "Sunshine List" legislation in addition to the duty to assist under the *Access to Information and Protection of Privacy Act* (ATIPPA).

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While section 39 of ATIPPA is not applicable in the context of the ECA, section 5.4(1)(c)(i) of the ECA specifically mentions harm. Therefore, it is fair to say harm to a third party is part of the analysis in determining whether the CEO "reasonably believes" the grounds set forth in 5.4(1)(c) and (d) of the ECA are met. The Office of the Chief Information Officer has given guidance on what constitutes harm. In Report A-2016-001 dated February 22, 2016, the Commissioner stated at paragraph 16:

...This Office has discussed the competitive advantage in previous reports and concluded that heightened competition should not be interpreted as harm, as it helps ensure that public bodies are making the best possible use of public resources. This view has also been referenced in the recent Supreme Court of Newfoundland and Labrador Court of Appeal decision 2015 NLCA 52 at paragraph 43 as follows:

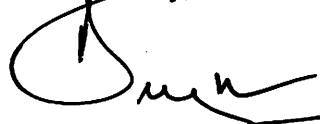
[...] More specifically, disclosure of MUN's usage information simply puts prospective bidders on a more equal footing. This is how it should be, for it ultimately makes MUN, as a public institution, more accountable in its expenditure of public monies. [...]

I understand the Office of the Information and Privacy Commissioner (OIPC) may be presiding over an appeal on this matter. As Premier, I will not rush to considering legislative change until it is clear that it is necessary. In particular, I will wait until the results of the OIPC review and any further thoughts you might have in light of the foregoing.

As Premier of this Province I remain steadfast in my commitment to openness and transparency. I understand that you are acting in good faith in this matter and know your interests are the same as mine in maintaining the best interests of everyone involved; however, I have no choice but to disagree with you on the refusal to release this information.

Once again I thank you very much for the work you do for Nalcor as a corporation and by extension, the people of this province.

Sincerely,



DWIGHT BALL

Premier

MHA, Humber-Gros Morne