OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-021

October 4, 2016

Nalcor Energy

Summary: The Applicant requested e-mails of former Nalcor board members. Nalcor provided e-mails from its internal database, but the Applicant complained that Nalcor ought to have provided e-mails from board members' personal e-mail accounts as well. Nalcor stated that the personal e-mail accounts of former board members were not within Nalcor's custody or control. The Commissioner concluded that in order to complete a reasonable and adequate search, Nalcor ought to have at a minimum asked the former board members for relevant e-mails, and recommended that Nalcor do so.

Statutes Cited: *Access to Information and Privacy Act, 2015,* SNL 2015, c. A-1.2, ss.5, 13, 115.

Authorities Relied On: *Canada (Information Commissioner) v. Canada (Minister of Defence),* 2011 SCC 25.

Access to Information Policy and Procedures Manual, November 2015. ATIPP Office, Department of Justice and Public Safety, at www.atipp.gov.nl.ca.

Use of Personal E-mail Accounts for Public Business, OIPC Guideline at www.oipc.nl.ca.

OIPC Reports A-2016-005, A-2014-012 at www.oipc.nl.ca; Report of the 2014 ATIPPA Statutory Review Committee, 2015, at www.atipp.gov.nl.ca, Volume II: Full Report.

I BACKGROUND

[1] The Applicant submitted a request under the *Access to Information and Protection of Privacy Act* ("the *ATIPPA, 2015"* or "the *Act"*) to Nalcor Energy ("Nalcor") for the following information:

> *"All e-mails sent to/from any Nalcor board members between Friday, April 15 and Friday, April 22, inclusive."*

[2] Nalcor provided the Applicant with over 200 pages of e-mail correspondence, after severing some information on the basis of section 40 (unreasonable invasion of personal privacy) and section 30 (solicitor-client privilege). That severing was not raised as an issue by the Applicant.

[3] The Applicant filed a complaint with this Office, alleging that he had not received all of the records to which he was entitled, as he had reason to believe that Nalcor board members had been using their personal e-mail accounts for correspondence involving Nalcor business, and he had not been given access to those records.

[4] The Complaint could not be resolved informally, and was referred to formal investigation under subsection 44(4) of the *ATIPPA, 2015.* Written submissions in support of their positions were received from both Nalcor and the Applicant.

II APPLICANT'S POSITION

[5] The Applicant argues that, on principle, the business of government conducted by public sector workers and elected officials, paid for by public funds, is a matter of public ownership. If records are created in the course of that business, those are public records. The *ATIPPA, 2015* provides that it applies to all records "in the custody of or under the control of a public body" and it should apply equally to all e-mail correspondence, regardless of whether that correspondence was created on a personal e-mail account.

[6] The Applicant also argues that, if it is established that, by using personal e-mail addresses, top-level public officials have effectively shielded themselves from scrutiny under *ATIPPA*, 2015, it will create a dangerous precedent and an incentive for further use of non-governmental systems for correspondence.

[7] If a record is effectively in the custody of the public body one day, but no longer available the next day, says the Applicant, surely that record has been effectively destroyed as a record subject to the *Act,* or alternatively, some person has effectively acted so as to conceal a record from public disclosure. The Applicant argues that this might constitute an offence under section 115 of the *Act.*

III PUBLIC BODY'S POSITION

[8] Nalcor agrees that regardless of what account an officer or employee uses to conduct Nalcor business, the correspondence is a record as defined by the *ATIPPA, 2015.* Nalcor also agrees that Nalcor officers and employees should use their Nalcor email accounts for work purposes, or, if for some reason this is not possible, should ensure that any records are made available to Nalcor so that they will be kept within Nalcor's custody or control.

[9] Nalcor states, however, that by the date of the request, all of the individuals who had been members of the Nalcor board of directors during the period covered by the request had resigned. While Nalcor provided the Applicant with copies of all relevant e-mails from Nalcor's e-mail database, the e-mails referred to in the Applicant's complaint were not in the custody or control of Nalcor.

IV DECISION

[10] The sole issue to be dealt with in this Report is whether the Applicant has received all of the e-mails responsive to his request, given that some members of Nalcor's board of directors were using their personal e-mail accounts for Nalcor business. In the language of access to information, the issue becomes whether Nalcor has fulfilled its duty, under section

13 of the *Act*, to assist the Applicant, by conducting a reasonable search for records responsive to the request.

[11] A reasonable search, as defined in Canadian access to information jurisprudence, and in the Access to Information Policy Manual from the ATIPP Office, is a search "undertaken by knowledgeable staff in locations where the records in question might reasonably be located."

[12] I am satisfied, first of all, that Nalcor's IT department searched the Nalcor e-mail database for messages to or from any of the directors. That search captured all responsive e-mail messages that were created using Nalcor accounts, as well as any messages sent to or from a director's personal e-mail account to or from a Nalcor account.

[13] However, that search could not have captured a message from a director's personal account to another government account, or to another personal account, unless the message had been copied to a Nalcor e-mail address. Personal e-mail correspondence between board members about Nalcor business would never appear on Nalcor's network if it was never copied or forwarded to a Nalcor e-mail account.

[14] It is clear that at least some such personal e-mail messages existed. The Applicant has provided this Office with examples, previously made public by the government, of e-mail messages between members of the Nalcor board of directors, the Premier and the Minister of Natural Resources, on Wednesday, April 20, 2016, during the period covered by the access request. There are e-mail addresses on those messages, in the "From", "To" and "Cc." categories, which belong to Nalcor, government and private e-mail accounts. It is notable that all four of the board members involved in that particular exchange used only their personal (non-Nalcor) e-mail accounts. Use of their personal accounts was unnecessary given that all were furnished with Nalcor e-mail accounts.

[15] It is also clear from the content of the April 20, 2016 messages that they involved Nalcor business. They discussed specifically and in detail, issues to be dealt with at that day's board meeting, including the termination of the employment of the Chief Executive Officer.

Given that in those sample messages, the only e-mail addresses used by the board members were personal addresses, it is reasonable to infer that during that period there might likely be other, similar e-mail messages, dealing with Nalcor business, using directors' personal e-mail accounts.

[16] There is no doubt that such personal e-mails would be subject to the *ATIPPA, 2015.* As this Office has stated in a guideline issued in June 2016, and posted on the OIPC website, the *ATIPPA, 2015* applies to any records, created or received by officers and employees of public bodies in the course of their duties, which relate to the business of the public body, including those created or received on personal email accounts.

[17] Whether a reasonable search in response to the Applicant's access request should have produced e-mails from the personal accounts of board members depends on whether the public body has custody or control of the e-mails in question.

[18] The concepts of custody and control were discussed by the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of Defence),* 2011 SCC 25, in which it stated that where a record is not in the physical possession of a government institution, it will still be under its control if two questions are answered in the affirmative:

1. Do the contents of the document relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the document upon request?

[19] The issue of custody or control has also been discussed by this Office on a number of occasions, most recently in Report A-2016-005. A lengthy list of some of the factors that must be considered in order to determine whether a public body has control of a record may be found in Report A-2014-012.

[20] The e-mails in question, if they exist, are not in the custody, or physical possession, of Nalcor. They would, if not deleted, be in the custody of the former individual board members, in their personal e-mail accounts. Assuming that there are such e-mails, with contents

relating to Nalcor business, does Nalcor have control of those records? The issue becomes whether Nalcor could reasonably expect to obtain a copy of those e-mails upon request.

[21] The OIPC guideline referred to above states that, as a general rule, any email that an officer or employee sends or receives as part of his or her work-related duties will be a record under the public body's control, even if a personal account is used. However, Nalcor submits that the statement presumes a legal relationship of some kind between the individual creating the e-mail and the public body, such that the public body could demand that the individual provide the e-mail, and would have some means of enforcing that demand.

[22] In response to that argument, I would observe that, under both the common law and relevant legislation, the directors of a corporation have a duty to carry out their responsibilities in good faith and with reasonable diligence and skill, in the best interests of the corporation. I would expect that the duty would extend to creating records relating to the business of the corporation, and preserving and safeguarding those records. It may well be that this is a duty that continues after the termination of a director's relationship with the corporation.

[23] Nalcor argues that the *ATIPPA, 2015* does not grant public bodies the power to search the private records of private individuals over whom the *Act* has no application. Similarly, Nalcor argues that it would be a meaningless exercise to simply ask former directors for e-mails, because Nalcor would have no means of confirming the accuracy of the response.

[24] It is true that in the ordinary case, a public body could legitimately demand that an officer or employee comply with a workplace rule governing the preserving and sharing of work-related e-mails. An employee could, for example, be subject to discipline for refusing to comply. Nalcor argues that after the resignation of a board member, there is no longer any way of gaining access to e-mails from that individual's personal account.

[25] It may be the case that Nalcor does not have the legal means of compelling a former board member to grant access to personal e-mails. However, other than stating that the

ATIPPA, 2015 does not give them the power of compulsion, it is far from clear that Nalcor has considered or exhausted other means, either at common law or pursuant to other applicable legislation. The duty to assist and to conduct an adequate search requires something more than saying, if we cannot demand them under the *Act* we cannot help you. The question to be answered is not whether Nalcor could compel production of those e-mails, but whether Nalcor could "reasonably expect" to obtain a copy of those e-mails on request.

[26] This issue was discussed in Report A-2016-005 from this Office, where it was known that the record had previously been in the custody of the Premier's Office, and that a copy could be obtained from the person, outside government, who had created it. In that case the Report concluded that an adequate search would include contacting persons who would be likely to have responsive records, and recommended that the Premier's Office contact the author of the record and obtain a copy.

[27] Nalcor argues that it cannot be expected to contact previous employees or directors when an access request is received, to determine whether they have records in their possession responsive to the request. However, in this case we are not talking about random former personnel. There appears to be a reasonable likelihood that more e-mails may exist, and there is a small number of known individuals who would need to be contacted. Furthermore, it is possible that those individuals are still subject to a continuing duty to the corporation, as mentioned above, which would certainly be a factor in their response to a request.

[28] Former board members might agree to search a personal e-mail account for such business records, and provide them to Nalcor on request. To be deemed adequate in the present case, a search by Nalcor should at least include a request to former board members to voluntarily provide relevant e-mails from their personal accounts, and in the circumstances of the present case, I conclude that the duty under section 13 to assist the Applicant requires nothing less.

[29] If the request results in additional records being provided, then they can be reviewed to determine whether any *ATIPPA, 2015* exceptions apply, and provided to the Applicant. If a former director should respond by stating that no records exist, or decline to participate in the search, or simply does not respond, then the search may be complete.

[30] This case illustrates the problems that arise when public bodies fail to implement effective information management policies that ensure records are both accessible and secure. Nalcor advises that it is still in the process of developing a policy on the use of personal e-mails. Nalcor further advises that the policy will be informed by the guidance documents issued by the OIPC. Nalcor also advises that new members of the board of directors, appointed earlier this year, have been informed that all business relating to board activities and duties should be conducted using Nalcor e-mail accounts. Were these same instructions given to the previous directors?

[31] Nalcor's position, that it is not even entitled to ask former board members for personal e-mails involving its business, suggests little if any control over records that could, for example, jeopardize commercially sensitive information circulated via unsecured personal e-mail accounts.

[32] The Applicant is right that public officials should not be able to shield public body records from scrutiny by using personal e-mail addresses. As discussed in the OIPC's guideline on the use of personal e-mails, government information management policies make no distinction between personal and official e-mail records. However, there is, so far, no government policy prohibiting the use of personal e-mail accounts for the conduct of government business.

[33] This is a gap in legislation that this Office discussed six months ago, in Report A-2016-006, which referred to the recommendations of the ATIPPA Statutory Review Committee, and recommended that the government make strides toward that much-needed policy development and legislative amendments as soon as feasible. The gap remains un-addressed.

[34] The fact that Nalcor is developing its own long overdue policy on this important issue is encouraging. Ultimately, however, the problem must also be dealt with as an aspect of a comprehensive implementation of the recommendations of the ATIPPA Statutory Review Committee, which urged the government to take steps to establish a duty to document.

[35] Finally, the Applicant has suggested that using a personal e-mail account to conduct public body business might be an offence under section 115 of the *ATIPPA, 2015*. It should be noted that section 115 makes it an offence to destroy, erase or conceal a record "with the intent to evade a request for access to records." In a case where there was a reasonable suspicion of such intent, this Office would consider commencing an investigation. However, in the present case there is no evidence to ground such a suspicion.

V RECOMMENDATIONS

[36] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that Nalcor Energy take steps to obtain copies of responsive e-mails, including, at a minimum, requesting them from former members of its board of directors, review any resulting records in accordance with the *ATIPPA, 2015*, and subject to any exceptions that may apply, grant access to those records to the Applicant.

[37] I further recommend that Nalcor Energy complete the process of developing its policy on the use of personal e-mails for Nalcor business as soon as possible, and, when completed, send a copy of the policy to this Office.

[38] 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.

[39] Dated at St. John's, in the Province of Newfoundland and Labrador, this 4th day of October, 2016.

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