OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2017-026

December 5, 2017

Nalcor Energy

Summary: Nalcor Energy (Nalcor) received two access requests for information about its embedded contractors. Nalcor withheld the names of companies associated with the contractors, billing rates and other financial information. The Commissioner did not recommend disclosure of any of the records as section 5.4 of the *Energy Corporation Act* prevails over the *Access to Information and Protection of Privacy Act, 2015*.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c.A1.2, sections 2, 40.
Energy Corporation Act, SNL 2007 c. E 11.01, sections 2, 5.4.
Public Sector Compensation Transparency Act, SNL 2016, c.P-41.02.

Authorities: *Canada (Information Commissioner) v. Canada (Commissioner of the RCMP)*, 2003 SCC 8
Dagg v. Canada (Minister of Finance), [1997] 2 SCR 403
Corporate Express Canada Inc. v. Memorial University of Newfoundland, 2015 NLCA 52
Newfoundland and Labrador Teachers' Association v.Newfoundland and Labrador English School District, 2016 NLTD(G) 211
BC IPC Order 01-01
OIPC Report A-2015-005

Other Resources: Hansard (Newfoundland and Labrador House of Assembly: May 28, 2008), Vol. XLVI, No. 34.

File #'s: 0010-086-17-014 to 026

I BACKGROUND

[1] Nalcor Energy ("Nalcor") received a request under the *Access to Information and Protection of Privacy Act, 2015* (the *ATIPPA, 2015* or the *Act*) from two different applicants for similar information about what have become known as contractors 'embedded' into Nalcor operations.

[2] These individuals are not directly employed by Nalcor, but by other companies (companies that in some instances are personal corporations created by the individuals). They provide their services to Nalcor under professional services contracts, occupy Nalcor positions and work on Nalcor projects, including the Lower Churchill Project, which currently includes an 824 megawatt hydroelectric generating station at Muskrat Falls, the Labrador-Island Link that will transmit power from Muskrat Falls to the island of Newfoundland, and the Maritime Link connecting Newfoundland and Nova Scotia.

[3] The first access request sought:

> *A list of all the people who have done work for Nalcor Energy or any of its subsidiaries on a professional services contract, for each fiscal year from 2010 to 2017. For each person, I am requesting the following information as well: the name of the company providing the professional services contractor, the hourly or daily billable rate (whichever is applicable) for the contractor, the total hours or days billed in the applicable year, and a description of what work was being provided (eg. engineering/project management/IT support/janitorial etc.) For the sake of expediency and cost, in all instances for this request I would prefer email correspondence over traditional mail correspondence, and electronic records are preferable to paper records.*

[4] The second access request contained 12 separate inquiries. One of them sought:

> *Records related to the corporation and/or recruitment agency contracted for the position of environment and regulatory compliance manager on the Lower Churchill Project. Request includes contract signed between Nalcor and the corporation/agency, costs billed to Nalcor in the 2016 calendar year, and any invoices that detail breakdown of those costs.*

[5] The other 11 inquiries were identical, differing only in the title of the senior management position to which the requested information related. Nalcor in its response treated them collectively as if they were one request, and I shall do the same.

[6] Nalcor's response to the first request included a spreadsheet listing 961 individual contractors' names.[1] For each name, the list included the title of the Nalcor position they occupied, whether the contract was active or inactive, the year of the contract and its end date. Of the 961 names, 498 were active employees at the time of the request. In separate documents, Nalcor also disclosed the hours worked by each named individual during the course of each year from 2010 to 2017.

[7] Nalcor withheld the billing rates for each individual, and other financial information, claiming that it was "commercially sensitive information" that it was required to withhold under section 5.4 of the *Energy Corporation Act* (the *ECA)*.

[8] Nalcor also withheld the name of the company with which it had entered into the professional services contract associated with each named individual, claiming that the information was the personal information of each individual (employment status or employment history) and exempt from disclosure pursuant to section 40 of the *ATIPPA, 2015*.

[9] Nalcor's response to the second request was similar. For each of the 12 positions referred to in the request, Nalcor provided the applicant with records, including the contracts between Nalcor and the companies, any revisions, amendments and invoices.

[10] As with the first request, Nalcor withheld the daily or hourly rates for each individual, citing section 5.4 of the *ECA*, and the name of the company associated with each individual, claiming that the information was personal information exempt from disclosure pursuant to section 40 of the *ATIPPA, 2015*.

[1] The related applicant agreed, during the processing of the access request, to narrow the request from the entirety of Nalcor and all its subsidiaries to the Lower Churchill project.

[11] Both applicants filed complaints with this Office. During the course of our investigation, Nalcor created and disclosed to both Complainants a table of occupational or professional groups (i.e. Administrative Assistant, Cost Analyst or Senior Engineer). For each group Nalcor provided the title, the number of individual contractors in each group, the highest, lowest and average billing rates within each group, and the total remuneration paid to each group. That record did not disclose the names of the individuals in the groups, individual billing rates or the company names associated with those individuals.

[12] As efforts to achieve informal resolution were unsuccessful, the complaints proceeded to formal investigation in accordance with section 44 of the *ATIPPA, 2015*. Nalcor responded to the requests in similar ways, and its responses resulted in similar complaints, so this Report addresses both.

II NALCOR'S POSITION

[13] Nalcor takes the position that the name of the company associated with each individual contractor is personal information about identifiable individuals, specifically their "employment status" (for individuals currently under contract) or "employment history" (for individuals not currently under contract) within the meaning of section 2(u)(vii) of the *ATIPPA, 2015*.

[14] Nalcor points out that as its organizational charts are public, names of the contractors and the Nalcor position they occupy are public knowledge. Further, it disclosed names of companies with which it has done business in response to previous access to information requests and the information is otherwise available – for example, a list of companies it has contracts worth over $100,000 is posted on Nalcor's website.[2] Nalcor's position is that it is necessary to avoid linking the individual names and company names in order to protect the personal information of the individuals (their employment status or history).

[2] See, for example, Nalcor Response to PB/441/2017, August 31, 2017

[15] Nalcor argues that information about an individual's employment status or history is presumed to be an unreasonable invasion of privacy under section 40(4)(c) and (g) of the *ATIPPA, 2015*, and that the presumption is not rebutted by any of the circumstances in section 40(5) that could result in disclosure.

[16] Nalcor states that it withheld the billing rates and other financial information pursuant to section 5.4 of the *Energy Corporation Act*. Nalcor argues that it is commercially sensitive information, the disclosure of which will harm the competitive position of Nalcor or third parties, would result in financial loss or harm to Nalcor or third parties and is information treated consistently in a confidential manner by third parties.

III THE COMPLAINANTS' POSITIONS

[17] The Complainants made separate access requests, separate complaints and separate submissions. As their positions/arguments, are similar, I will summarize them together:

- The purpose of the *ATIPPA, 2015* is to foster accountability. There is no other public policy issue that deserves greater scrutiny than the Lower Churchill project, and it therefore meets the section 40(5)(a) test for determining whether a disclosure is an unreasonable invasion of privacy;
- The company name is not employment history, but employment status, and that is only while providing services to the public body. Given the public interest and the need to be able to determine whether there has been favouritism in the allocation of contracts, for example, it is not an unreasonable invasion of privacy to disclose it;
- *ATIPPA, 2015* section 40(2)(g) (details of a contract to supply goods or services to a public body) directly applies to this information and should permit it to be disclosed;
- OIPC Report A-2015-005 (Office of the Chief Information Officer) recommended disclosure of similar information;

- OIPC Report A-2016-019 (Health and Community Services - physicians' MCP billings) alternatively applies to contractor billing information, in that it is business information, not personal information;
- The purpose of section 5.4 of the *ECA*, citing then Premier Williams in *Hansard*, is to protect the proprietary technology of multinational oil giants, not to restrict public accountability of remuneration paid to contractors, information that would be routinely released if they were directly employed;
- With respect to the *ECA*, Nalcor has previously released similar "commercially sensitive" information, for example, a similar contractor's salary was disclosed in 2011, and information about 233 positions, with company names and day rates, was disclosed in 2016 in response to access request PB/477/2016; and
- With regard to confidentiality, Nalcor is withholding information that some of the senior managers have posted on their personal LinkedIn accounts.

IV DECISION

ATIPPA, 2015 Issues

[18] The *ATIPPA, 2015* issues in these complaints involve section 40 (disclosure harmful to personal privacy) the relevant provisions of which read as follows:

> *40.(1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where*
>
> *. . .*
>
> *(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;*

> *(g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;*
>
> . . .
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where*
>
> . . .
>
> *(c) the personal information relates to employment or educational history;*
>
> . . .
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether*
>
> *(a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;*
>
> . . .
>
> *(e) the third party will be exposed unfairly to financial or other harm;*
>
> . . .

Section 40(2)(f) – Position, Functions and Remuneration

[19] Nalcor's position is that the name of the company associated with each contractor is personal information, under section 2(u)(vii) of the *Act* because it is information about an identifiable individual's employment status (for current contracts) or employment history (for past contracts).

[20] If the information is personal information, then what is the relationship between Nalcor and the "identifiable individuals"? The Complainants argue that, for the purposes of the *ATIPPA, 2015*, those individuals are actually Nalcor employees.

[21] The *ATIPPA, 2015* defines employee as:

> *2(i) "employee", in relation to a public body, includes a person retained under a contract to perform services for the public body;*

[22] Nalcor agrees that the contractors are employees of Nalcor. Nalcor's position is that each individual is both an employee of Nalcor and an employee of the associated company, but that for the purposes of the *ATIPPA, 2015* and the present complaints, the contractors fall within the definition of employee in the *Act*.

[23] If, as Nalcor argues, a company name is information about the individual's employment status or employment history, then surely it is also information about the "position or functions" of the employee with Nalcor.

[24] In my view, the expression "employment status" for each individual means the status of that individual with Nalcor: for example, it includes the title of the position and the individual's place in the organization. Disclosure of that particular information is not at issue here – in fact, that information is already available. However, I also conclude that employment status also includes information about whether Nalcor's engagement of an employee is direct or through a personal services contract. For the latter group, the name of the company with which Nalcor has contracted for the employee's services also falls into the category of information about their position within Nalcor.

[25] "Employment history" refers to an individual's work history, found in an individual's personnel file: previous employers, performance assessments, promotions, discipline, and so on. The Complainants did not seek historical employment information of current employees retained through corporate entities.

[26] As for former employees, I note that the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)* concluded that many aspects of employment history constitute information that relates to the position and functions of an employee. Disclosure of information such as previous positions, promotions or places of employment, does not constitute an

unreasonable invasion of privacy. By contrast, other aspects of employment history, such as evaluations or performance reviews, are not about the position and functions, but about the competence or characteristics of the employee, and therefore, are not disclosable under that exception.

[27] A similar conclusion was reached in *Dagg v. Canada (Minister of Finance),* concerning a request for information about the number of hours worked by employees on weekends, outside regular working hours. The Supreme Court of Canada, reasoning that employees do not generally work overtime unless the responsibilities of the position require it, held that such information was subject to disclosure as it is characteristic of the position and functions of the employees and not their personal information.

[28] Therefore, even if the company name information was determined to fall into the category of "employment history" (for contractors who are no longer actively employed at Nalcor), it can still be characterized as information about the position and functions of an employee within the meaning of section 40(2)(f). Disclosure of this information does not result in an unreasonable invasion of privacy.

[29] For these reasons, I conclude that if section 40(2)(f) is determinative, the disclosure of the company name information would not be an unreasonable invasion of privacy in respect of current or former employees.

Section 40(2)(g) – Details of a Contract

[30] Section 40(2)(g) provides that the financial and other details of a contract to supply goods or services to a public body may be disclosed, because that information is also deemed not to be an unreasonable invasion of privacy. In applying this provision, I conclude that Nalcor cannot withhold the names of the individuals whose services Nalcor retains under a contract or the names of the company providing the services. These are essential "details" of the contract.

[31] The treatment of personal information in the context of section 40 of the *ATIPPA, 2015,* is currently before the Newfoundland and Labrador Court of Appeal[3]. As such, I will treat sections 40(2) and 40(5), alternatively, as decisive as to whether disclosure of personal information is an unreasonable invasion of privacy.

Section 40(5) – Whether Unreasonable Invasion of Privacy

[32] If the provisions of section 40(2)(f) and (g) of the *ATIPPA, 2015*, deeming that certain kinds of disclosures are not unreasonable invasions of privacy, are not determinative, then a decision on whether those disclosures constitute an unreasonable invasion of privacy requires consideration of all relevant circumstances under section 40(5). I consider the circumstances in 40(5)(a) and (e) as most relevant to this matter:

> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether*
>
> *(a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;*
>
> *(e) the third party will be exposed unfairly to financial or other harm;*

[33] How does one assess the desirability of subjecting the activities of the province or a public body to public scrutiny? Does it matter that the scale of the project and the province's connections to Nalcor are such that the provincial economy appears tied to the success of the project? Where does the public interest lie?

[34] At present, this project eclipses all other subjects of public opinion in the province. Detractors appear to outnumber supporters, a ratio that seems to have increased from the project's initiation to today. Public interest is distinct from public opinion. The latter can be fickle and transitory. Between the detractors and the supporters reside the rest of the populace, uncertain as to the facts and preoccupied by potential impacts on their financial futures.

[3] Newfoundland and Labrador Court of Appeal File #: 2017 01H 0010

[35] One of the purposes of the *ATIPPA, 2015* is to foster accountability and transparency. The records in question can contribute to a more accurate picture as to how Nalcor is managing this project. It is difficult to conceive of another instance where the public interest could more conceivably require exposure of the activities of a public body to public scrutiny. Legitimate concerns include discrepancies between the remuneration received by the employees working pursuant to personal services contracts and that of other employees, and the benefits or detriments stemming from Nalcor structuring such a large percentage of its workforce in this way.

[36] Considering section 40(5)(e), there is no evidence that disclosure of this information could unfairly expose these employees to the risk of financial or other harm. The introduction of public sector salary disclosure legislation in the province resulted in the disclosure of the salaries of many of their fellow employees. While there may be individual circumstances where salary disclosure unfairly exposes an employee to harm, I reject Nalcor's position that disclosure unfairly exposes this group of employees as a whole to financial or other harm.

[37] It is true that disclosure could enhance competition in terms of the provision of personal services to other employers. Is enhanced competition unfair? While in the context of section 39 of the *ATIPPA, 2015*, our Court of Appeal in *Corporate Express Canada Inc. v Memorial University of Newfoundland* was clear that heightened competition does not automatically equate to unfair competition:

> *The most that can be said about the impact disclosure of the usage reports would have, is that Dicks may be in an improved position to compete for the next office supplies tender contract that MUN offers, and that this could possibly affect whether Staples would be awarded the next tender contract. I agree with the Judge that this is speculation, and that there was no evidence as to how such a speculative result could reasonably be expected to harm Staples' competitive position or result in significant financial loss to it. While it can be reasonably inferred that disclosure of the requested information could have some effect on the advantageous competitive position that Staples has been enjoying, it does not follow that, in the absence of other evidence, Staples' competitive position would be harmed or that Staples would suffer significant financial loss as a result. One prospective bidder's loss of exclusive knowledge of MUN's contract and non-contract usage of office supplies in a previous time period, without more, does not translate to a*

> *risk of harm considerably above a mere possibility, or a real risk of financial loss. 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. Accordingly, to the extent that disclosure of the requested information would expose the bidding strategy of Staples, exposure of Staples' bidding strategy, without more, is not evidence from which harm to Staples' competitive position and significant financial loss to it can be reasonably inferred.*

[38] Nalcor previously disclosed elsewhere the billing rates and total amounts paid to most or all of those companies under those same contracts, without apparent harm to them.

[39] Further, as already noted, under the *Public Sector Compensation Transparency Act* (the *"PSCT Act"*) the total amounts of compensation paid to Nalcor's 'direct' employees is publicly available[4]. These employees in many cases work side by side with the embedded contractors doing similar work. Nalcor's position is that these contractors fall within the definition of employee in the *ATIPPA, 2015*. The definition of employee in the *PSCT Act* is similar:

> *2(b) "employee", unless otherwise indicated, means an individual who is, or was, employed by the public sector during the year*.

[40] I conclude that, on consideration of all relevant circumstances as required by section 40(5) it does not constitute an unreasonable invasion of personal privacy to disclose the names of the companies associated with each of the embedded contractors, along with the names of the individuals.

[41] For all of the above reasons I conclude that the *ATIPPA, 2015* does not require Nalcor to withhold the names of the companies associated with the embedded contractors. However, it is still necessary to consider the effect of the *ECA* on the disclosure of the requested information.

[4] http://www.exec.gov.nl.ca/exec/hrs/pdf/nalcor_and_subsidiaries_report.pdf

Energy Corporation Act

[a] Commercially Sensitive Information

[42] The *ECA*'s definition *of commercially sensitive information* is all-encompassing:

> *2(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);*

[43] Nalcor assessed the billing rates in the contracts between Nalcor and the corporate entities as commercially sensitive within the *ECA*'s definition of that term. The breadth of the

definition in the *ECA* does not permit a different assessment. I do conclude however that the information in issue is not 'sensitive' in terms of section 39(1)(c) of the *ATIPPA, 2015*. If these contractors were similarly supplying services to any other public body in the province, it is very unlikely that they could rely on the *ATIPPA, 2015* to require the public body to withhold their billing and other information. Report A-2015-005 recommended disclosure of similar details in relation to a contractor providing services to the Office of the Chief Information Officer.

[44] The decision of Nalcor's CEO (whose decision was confirmed for me by the Board of Directors) to refuse disclosure pursuant to section 5.4 of the *ECA* dictates this result. Section 7 of the *ATIPPA, 2015* gives this provision precedence and I have no discretion to recommend the disclosure of the financial information.

[45] After these issues became public, Premier Ball wrote a letter to Nalcor on September 12, 2017, in which he stated:

> *As you are aware, Nalcor's board of directors have a fiduciary obligation to the shareholders of the corporation; that is, the people of Newfoundland and Labrador. While I concede that the intense political scrutiny surrounding Nalcor may be seen as problematic for those more accustomed to a typical corporate climate, as premier of this province I absolutely endorse openness and transparency as it is a hallmark of any functioning democracy.*[5]

[46] That statement is encouraging in that it appears the only solution to this unintended differential treatment of similarly situated employees is via legislative amendment. Legislation often leads to unanticipated results. The ability to amend legislation ensures that unintended consequences are not permanent.

[47] In support of the position that the situation here is an unintended consequence, one need look no further than relevant quotes from Hansard:

> *... are very, very narrow restrictions, and that is to ensure that this company can be successful, that it can operate in a competitive environment, that it allows itself to enter into partnerships with major corporations around the world who would not enter into these partnerships if not for these provisions.*

[5] Letter from Premier Ball to Brendan Paddick on September 12, 2017 provided to OIPC by Nalcor.

> *... and I can tell you quite clearly that if these provisions are not there then the Hebron deal would go down, because the equity provision that is in the Hebron deal would not take place if corporations like ExxonMobil and Chevron and Petro Canada and Norsk Hydro had to open their guts to the world.*
>
> *... is restricted is on the release of commercially sensitive information. For example, if ExxonMobil have some new technology that allows them to drill 300 miles below the ocean that is proprietary and no other company has it, ...These are commercially, competitive proprietary pieces of technology that are not allowed to be disclosed.*

[48] As evidenced, the intent of section 5.4 of the *ECA* was ensuring the ability to attract and do business with multinational corporations who might not engage in mega-projects if disclosure of their commercially sensitive information was not restricted. The situation here bears no resemblance to that scenario.

V CONCLUSION

[49] I have concluded that Nalcor cannot rely on section 40 of the *ATIPPA, 2015* to withhold the personal information (names of the companies linked to the "embedded" contractors). I have also concluded, however, that section 5.4 of the *ECA* precludes the disclosure of the financial information (the billing rates). As noted earlier, Nalcor maintains that linkages between the personal information and other publicly available information would result in indirect disclosure of the financial information. This is referred to by some as the mosaic effect, referred to in British Columbia Report 01-01:

> *... the mosaic effect. The term describes the result where seemingly innocuous information is linked with other (already available) information, thus yielding information that is not innocuous and, in the access to information context, is excepted from disclosure under the Act.*

I conclude that there are linkages between the personal information and publicly available information about payments to the companies that could reasonably lead to the indirect disclosure of the financial information. As the financial information cannot be disclosed, the personal information must also be withheld.

VI RECOMMENDATIONS

[50] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend that the head of Nalcor Energy continue to withhold all of the personal information originally withheld due to linkages to the financial information that I recommend continue to be withheld under section 5.4 of the *ECA*.

[51] 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 (in this case, the Complainants) within 10 business days of receiving this Report.

[52] Dated at St. John's, in the Province of Newfoundland and Labrador, this 5th day of December, 2017.

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