MCINNES COOPER

J. Alex Templeton
Direct +1 (709) 570 7344
alex.templeton@mcinnescooper.com

5th Floor
10 Fort William Place
PO Box 5939
St. John's NL
Canada A1C 5X4
Tel +1 (709) 722 8735 | Fax +1 (709) 722 1763

Our File: 149544

April 27, 2018

Via Email & Courier

Board of Commissioners of Public Utilities
Prince Charles Building
120 Torbay Road, P.O. Box 21040
St. John's, NL A1A 5B2

Attention: Ms. Cheryl Blundon
Director of Corporate Services & Board Secretary

Dear Ms. Blundon:

Re: NLH 2017 GRA - Application in Relation to Confidential Documents – Hydro's Reply Submission

The following is Newfoundland and Labrador Hydro's ("Hydro") reply to the Parties' submissions regarding Hydro's Application respecting confidential RFIs ("the Application").

1.0 Summary of the Parties' Submissions

The Parties' submissions are summarized as follows:

- The Consumer Advocate opposes the Application. The Consumer Advocate submits that Hydro has not presented sufficient evidence for the Board to determine that the responses to the RFIs should remain confidential. The Consumer Advocate references the decision of the Newfoundland and Labrador Court of Appeal ("the NLCA") of *Corporate Express Canada Inc. v. Memorial University of Newfoundland et al.*, (2015) NLCA 52 ("*Corporate Express*"), in which the NLCA recognized the standard of proof that a party must establish in applying to keep its information confidential pursuant to sections 35 and 39 of the *Access to Information and Protection of Privacy Act, 2015,* SNL 2015, Chapter A-1.2 ("the *ATIPPA, 2015*") as being that stated by the Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 ("*Merck Frosst*"): that a party claiming exemption under this kind of provision must show *"that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur"*. The NLCA further

recognized a summary of a statement by the Information and Privacy Commissioner of Saskatchewan in his *Report 2005-003*, that the test requires *"a clear cause and effect relationship between the disclosure and the alleged harm, that the harm must be more than trivial or inconsequential, that the likelihood of harm must be genuine and conceivable, and that detailed and convincing evidence that shows that results ... [are] more than merely possible or speculative."* The Consumer Advocate submits that Hydro has provided no such supporting evidence to the Board, that the alleged harm to Hydro and/or the ratepayers is vague and speculative, and that the Application should therefore be denied.

- The Island Industrial Customer Group ("the ICC Group") supports the Application. The ICC Group submits that the information sought to be kept confidential by Hydro *prima facie* falls within the categories for which disclosure may be refused by a public body pursuant to sections 35 and 39 of the *ATIPPA, 2015*[1]. The ICC Group further submits that in the context of this recognition in the *ATIPPA, 2015* of categories of information which should be considered confidential, Hydro's willingness to disclose the information, but subject to the confidentiality conditions stated in the proposed Undertaking, is a reasonable and justifiable measure.

- The remaining Parties did not make submissions in respect of the Application.

2.0 Hydro's Reply to the Consumer Advocate's Submissions

In reply to the Consumer Advocate's submissions, Hydro submits that the Board is not bound to adopt the test and standard of proof applicable to sections 35 and 39 of the *ATIPPA, 2015* for the purpose of granting confidentiality orders under the Board's *Rules of Procedure*. Despite being subject to the *ATIPPA, 2015,* the Board controls its own process; see section 20 of the *Public Utilities Act*, RSNL 1990, Chapter P-47.

For the reasons set out below, were the Board to approach confidentiality orders in the manner advocated by the Consumer Advocate (i.e., on the basis of the test described in *Corporate Express* and *Merck Frosst*) it would unreasonably negate other statutory exceptions to access, including that which is most likely to be claimed to protect the confidentiality of the RFI responses in the event of an access to information request made to the Board: section 5.4 of the *Energy Corporation Act,* SNL 2007, Chapter E-11.01 (the *"ECA"*).

The Consumer Advocate's submissions falsely presume that in the event the Board decides that RFI responses PUB-NLH-149 and CA-NLH-254 should be treated as confidential, that any subsequent request for access to the RFI responses made under the *ATIPPA, 2015* would be determined based on the applicability of the exceptions to access set out in sections 35 and 39 of the *Act*. In actual fact, any such request for access to information is most likely to be determined in favour of maintaining the confidentiality of the records on the basis of section 5.4 of the *ECA* (the prevailing authority of which is recognized in subsection 7(2) and Schedule A of the *ATIPPA, 2015*). Subsections 5.4(1) and (2) of the *ECA* state:

[1] Hydro believes the ICC Group intended to refer to the current *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, Chapter A-1.2, and not its repealed precursor *Access to Information and Protection of Privacy Act,* RSNL 2002, Chapter A-1.1.

Records of commercially sensitive information

5.4 (1) Notwithstanding section 7 of the *Access to Information and Protection of Privacy Act, 2015* , in addition to the information that shall or may be refused under Part II, Division 2 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, taking into account sound and fair business practices, 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 42 of the *Access to Information and Protection of Privacy Act, 2015* , 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.

In the case of PUB-NLH-149 and CA-NLH-254, the information contained therein is commercially sensitive information of Nalcor Energy Marketing Corporation ("NEM"), a subsidiary of Nalcor Energy; see the definition of *"commercially sensitive information"* in subsection 2(b.1) of the *ECA*. While the definition of *"subsidiary"* in subsection 2(h.3) of the *ECA* excludes Hydro, subsection 5.4(1) of the *Act* is clear that the refusal to disclose may be made by *"the chief executive officer of the corporation or a subsidiary, or the head of another public body"* (i.e., the head of Hydro or the head of the Board).

A comparable set of facts was reported on by the Information and Privacy Commissioner of Newfoundland and Labrador ("the IPC") in *Report A-2017-003*. A request was made under the *ATIPPA, 2015* for access to commercially sensitive records relating to the Muskrat Falls generating station. The IPC concluded that Nalcor was entitled to refuse to disclose the records on the basis of both subsection 35(1)(g) of the *ATIPPA, 2015* and section 5.4 of the *Energy Corporation Act.* The IPC reasoned as follows:

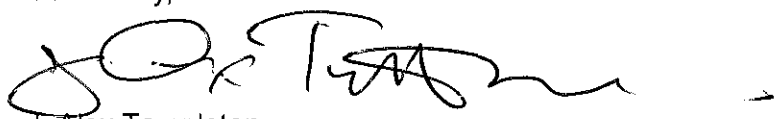
> [11] Nalcor also relied on paragraph 35(1)(g) which concerns records the disclosure of which could prejudice the financial interests of the province. Nalcor argues that a disclosure of these records would limit its ability to negotiate the best possible agreements for the project. Nalcor points out that it is wholly owned by the province, and argued that financial prejudice to Nalcor would result in the kind of financial or economic prejudice to the province that is contemplated by paragraph 35(1)(g). I agree.
>
> ...
>
> [13] Finally, Nalcor has invoked the provisions of section 5.4 of the *ECA* in response to requests 1 and 2. The relevant provisions of section 5.4 read as follows:
>
> [subsections 5.4(1) and (2)]
>
> [14] I must first determine, under subsection (2) whether the information in question is "commercially sensitive information" within the meaning of paragraph 2(b.1) of the *ECA*:
>
> [subsection 2(b.1)]
>
> [15] It is abundantly clear that the records themselves fall into the very broad category of "commercially sensitive information" within the meaning of section 2 of the *ECA*, particularly paragraph (iv) (information developed for the purpose of negotiations).
>
> [16] Given this finding and Nalcor's compliance with the requirements of paragraph 5.4(2)(a) and (b), I have no discretion to do otherwise than to uphold the CEO's decision. Even if I could find that the *ECA* did not allow Nalcor to withhold the records, I have already found that the records can be withheld pursuant to section 35 of the *ATIPPA, 2015.*

> [17] For all of the above reasons it is my opinion that Nalcor is entitled to refuse to disclose the records in requests 1 and 2.

As in the case of *Report A-2017-003*, here it is abundantly clear that the information contained in RFI responses PUB-NLH-149 and CA-NLH-254 is commercially sensitive information that warrants protection from disclosure, specifically for the reasons set out in paragraphs 4 to 10 of the Application, and supported by the Affidavit of Jennifer Williams, Vice President, Production, of Hydro. The confidentiality of this information should be declared by Board order and the Parties' access to the information governed by the terms of the contemplated Undertaking.

Should you have any questions, please contact the undersigned.

Yours truly,



J. Alex Templeton

cc: Gerard Hayes - Newfoundland Power
Liam O'Brien – Curtis, Dawe
Dennis Browne, Q.C. – Browne Fitzgerald Morgan & Avis
Paul Coxworthy - Stewart McKelvey
Dean Porter - Poole Althouse
Denis J. Fleming - Cox & Palmer
ecc: Van Alexopoulos - Iron Ore Company
Benoît Pepin - Rio Tinto
Senwung Luk – Olthius Kleer Townshend LLP

Encl: Referenced Legislation
IPC *Report A-2017-003*

Referenced Legislation

***Public Utilities Act*, RSNL 1990, Chapter P-47, section 20:**	
	Regulations re practice **20.** The board may make, revoke and alter rules and regulations for the effective execution of its duties and of the intention and objects of this Act, and the regulations of the practice and procedure with regard to the matters over which it has jurisdiction and the rules and regulations, when approved by the Lieutenant-Governor in Council, shall have the force of the law.
***Energy Corporation Act*, SNL 2007, Chapter E-11.01, sections 2(b.1), 2(h.3), 5.4:**	
	Definitions **2.** In this Act (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);

(h.3) "subsidiary" means a subsidiary of the corporation except Newfoundland and Labrador Hydro; and

Records of commercially sensitive information

5.4 (1) Notwithstanding section 7 of the *Access to Information and Protection of Privacy Act, 2015* , in addition to the information that shall or may be refused under Part II, Division 2 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, taking into account sound and fair business practices, 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 42 of the *Access to Information and Protection of Privacy Act, 2015* , 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.

(3) Where a person appeals,

(a) under subsections 52 (1) and (2), subsections 53 (1) and (2) or section 54 of the *Access to Information and Protection of Privacy Act, 2015* , from a decision under subsection (1); or

(b) under subsections 52 (1) and (2), subsections 53 (1) and (2) or section 54 of the *Access to Information and Protection of Privacy Act, 2015,* from a refusal by a chief executive officer under subsection (1) to disclose information,

paragraph 59 (3)(a) and section 60 of that Act apply to that appeal as if Part II, Division 2 included the grounds for the refusal to disclose the information set out in subsection (1) of this Act.

(4) Paragraph 102 (3)(a) of the *Access to Information and Protection of Privacy Act, 2015* applies to information referred to in subsection (1) of this section as if the information was information that a head of a public body is authorized or required to refuse to disclose under Part II, Division 2.

(5) Notwithstanding section 21 of the *Auditor General Act,* a person to whom that section applies shall not disclose, directly or indirectly, commercially sensitive information that comes to his or her knowledge in the course of his or her employment or duties under that Act and shall not communicate those matters to another person, including in a report required under that Act or another Act, without the prior written consent of the chief executive officer of the corporation or subsidiary from which the information was obtained.

(6) Where the auditor general prepares a report which contains information respecting the corporation or a subsidiary, or respecting a third party that was provided to the corporation or subsidiary by the third party, a draft of the report shall be provided to the chief executive officer of the corporation or subsidiary, and he or she shall have reasonable time to inform the auditor general whether or not in his or her opinion the draft contains commercially sensitive information.

(7) In the case of a disagreement between the auditor general and a chief executive officer respecting whether information in a draft report is commercially sensitive information, the auditor general shall remove the information from the report and include that information in a separate report which shall be provided to the Lieutenant-Governor in Council in confidence as if it were a report to which section 5.5 applied.

(8) Notwithstanding the *Citizens' Representative Act* , the corporation, a subsidiary, another public body, or an officer, member or employee of one of them is not required to provide commercially sensitive information, in any form, to the citizens' representative in the context of an investigation of a complaint under that Act.

***Access to Information and Protection of Privacy Act, 2015,* SNL 2015, Chapter A-1.2, sections 7, 35, 39, and Schedule A**

Conflict with other Acts

7. (1) Where there is a conflict between this Act or a regulation made under this Act and another Act or regulation enacted before or after the coming into force of this Act, this Act or the regulation made under it shall prevail.

(2) Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in Schedule A, that provision shall prevail over this Act or a regulation made under it.

(3) When the House of Assembly is not in session, the Lieutenant-Governor in Council may by order amend Schedule A, but the order shall not continue in force beyond the end of the next sitting of the House of Assembly.

Disclosure harmful to the financial or economic interests of a public body

35. (1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose

(a) trade secrets of a public body or the government of the province;

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;

(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;

(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;

(e) scientific or technical information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee of priority of publication;

(f) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body, or considerations which relate to those negotiations;

(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

(h) information, the disclosure of which could reasonably be expected to be injurious to the ability of the government of the province to manage the economy of the province.

(2) The head of a public body shall not refuse to disclose under subsection (1) the results of product or environmental testing carried out by or for that public body, unless the testing was done

(a) for a fee as a service to a person or a group of persons other than the public body; or
(b) for the purpose of developing methods of testing.

Disclosure harmful to business interests of a third party

39. (1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return, gathered for the purpose of determining tax liability or collecting a tax, or royalty information submitted on royalty returns, except where that information is non-identifying aggregate royalty information.

(3) Subsections (1) and (2) do not apply where

(a) the third party consents to the disclosure; or
(b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.

Schedule A

(e) section 5.4 of the *Energy Corporation Act* ;

OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2017-003

February 3, 2017

Nalcor Energy

Summary: The Applicant requested from Nalcor Energy records relating to the Muskrat Falls hydroelectric generation project. Nalcor denied the request in full, relying on section 35 of the *ATIPPA, 2015* (disclosure harmful to the financial or economic interests of a public body); on section 5.4 of the *Energy Corporation Act* (records of commercially sensitive information); and on the assertion that part of the request was for information already provided to the Applicant. The Applicant filed a complaint with this Office. The Commissioner found that Nalcor Energy was entitled to refuse to disclose the information on all of the above grounds, and recommended that Nalcor Energy continue to withhold the information.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A 1.2, ss.21, 22, 35;

Energy Corporation Act, SNL 2007 c. E-11.01, s.5.4.

File # 0010-086-16-011

I BACKGROUND

[1] The Applicant submitted a request under the *Access to Information and Protection of Privacy Act, 2015* ("the *ATIPPA, 2015*" or "the *Act*") to Nalcor Energy ("Nalcor") for the following records relating to the Muskrat Falls hydroelectric generation project:

> 1. *Public Utilities Board Muskrat Falls Review – Nalcor Confidential Exhibits:*
>
> a) *CE 65 Gate 2 Capital Cost Estimate Report – Muskrat Falls Generation Facility;*
> b) *CE 67 Project Control Schedule;*
>
> 2. *Public Utilities Board Muskrat Falls Review – Abridged and/or Redacted Exhibits:*
>
> a) *A complete un-redacted copy of CE 51 (R1)(public) – Overview of Decision Gate 2 Capital Cost and Schedule Estimates; and*
> b) *A complete un-redacted copy of CE 52 (R1)(Public) – Technical Note – Strategic Risk Analysis and Mitigation;*
>
> 3. *The specific information relied on by Nalcor in its calculation for labour for Decision Gate 3, including the estimation in terms of labour force required for the Project, type/number and skill of labour, the labour productivity on site, the performance factors, the labour man/hours quantities and wage rates; and*
>
> 4. *The specific information relied on by Nalcor in its assessment of labour required for construction of the work for the CH0007 contract, including the estimation in terms of labour force required for the Project, type/number and skill of labour, the labour productivity on site, the performance factors, the labour man/hours quantities and wage rates.*

[2] Nalcor responded denying the request in full. With respect to requests 1 and 2, Nalcor relied on the exceptions in paragraphs 35(1)(f), 35(1)(g) and 35(1)(h) of the *ATIPPA, 2015* and subsection 5.4(1) of the *Energy Corporation Act* ("*ECA*"). With respect to requests 3 and 4, Nalcor stated that they are repeat requests that had already been addressed. The Applicant was not satisfied with the response and filed a complaint with this Office.

[3] As efforts to resolve the complaint informally were unsuccessful, the complaint was referred to formal investigation in accordance with subsection 44(4) of the *ATIPPA, 2015.*

II NALCOR ENERGY'S POSITION

[4] With respect to requests 1 and 2 above, Nalcor refused access in accordance with paragraphs 35(1)(f), 35(1)(g) and 35(1)(h) of the *ATIPPA, 2015*, arguing that the disclosure of the information would be harmful to the economic interests of Nalcor and of the Province. Nalcor also claimed that the information is commercially sensitive information, as defined in section 5.4(1) of the *ECA*, that if released would (i) harm the competitive position of Nalcor and the Province, (ii) interfere with the negotiating position of Nalcor and the province, and (iii) result in financial loss or harm to Nalcor and the Province.

[5] With respect to requests 3 and 4 above, Nalcor stated that they are, in essence, identical to items 11 and 14 of a previous access request by the same applicant. That request PB/102/2016, was submitted earlier this year and was the subject of a complaint to this Office that was settled by informal resolution.

III COMPLAINANT'S POSITION

[6] The Complainant argues that Nalcor has not properly applied the claimed exceptions to access. With respect to requests 1 and 2, the Complainant argues that the cost estimates were prepared specifically for the Muskrat Falls project, and will not be relevant to any future project, so that the cited *ATIPPA, 2015* exceptions do not apply. In addition, the Complainant argues that while the requested information may be "commercially sensitive" within the meaning of the *ECA*, it will not be relevant to any future project, and Nalcor has not shown how its disclosure could cause the harm claimed under section 5.4.

[7] With respect to requests 3 and 4, the Complainant argues that the wording of the present requests differs significantly from the requests in items 11 and 14 of PB/102/2016, and that in any case the records provided in response to items 11 and 14 were not responsive to the request and therefore remain outstanding.

IV DECISION

Requests 1 and 2

[8] The issues with respect to requests 1 and 2 involve the application of section 35 of *ATIPPA, 2015* and section 5.4 of the *ECA*. Section 35 addresses disclosures harmful to the financial or economic interests of a public body:

> *35. (1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose*
>
> ...
>
> *(f) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government of the province or a public body, or considerations which relate to those negotiations;*
>
> *(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*
>
> *(h) information, the disclosure of which could reasonably be expected to be injurious to the ability of the government of the province to manage the economy of the province.*

[9] Nalcor relies first on paragraph 35(1)(f), which concerns records developed for the purpose of contractual or other negotiations. The Complainant argues that the cost estimates were prepared specifically for the Muskrat Falls project, and will not be relevant to any future project. Nalcor points to another potential hydroelectric project at Gull Island, which is in a similar location on the same river and to which similar considerations would likely apply. More immediately, there are parts of this ongoing project at Muskrat Falls for which contracts have not yet been awarded, as well as current contracts that may need to be renegotiated.

[10] In my view, while the records responsive to requests 1 and 2 were created initially for the negotiations that took place at the beginning of the Muskrat Falls project, they directly affect ongoing negotiations, and would likely impact negotiations around the potential future project. This is enough to satisfy the requirements of paragraph 35(1)(f) which does not require evidence of harm.

[11] Nalcor also relied on paragraph 35(1)(g) which concerns records the disclosure of which could prejudice the financial interests of the province. Nalcor argues that a disclosure of these records would limit its ability to negotiate the best possible agreements for the project. Nalcor points out that it is wholly owned by the province, and argued that financial prejudice to Nalcor would result in the kind of financial or economic prejudice to the province that is contemplated by paragraph 35(1)(g). I agree.

[12] Similarly, Nalcor relies on paragraph 35(1)(h), which concerns disclosures injurious to the ability of the government to manage the economy of the province. Nalcor refers to the well-known fact that the provincial government is facing financial difficulties. The province is funding the cost of the Muskrat Falls project, which is currently estimated to be approximately $11.4 billion. This is around 7 times the projected provincial deficit of $1.6 billion for 2016. It is evident that any harm to Nalcor's ability to limit further costs on this very large and costly project would negatively impact the ability of the government to manage the provincial economy within the meaning of section 35(1)(h). In perhaps what is the province's direst financial situation since Confederation and perhaps 1933, it is difficult to contemplate anything other than an injurious outcome to the government's ability to manage the economy if Nalcor's own struggles to date were compounded by the disclosure of these records.

[13] Finally, Nalcor has invoked the provisions of section 5.4 of the *ECA* in response to requests 1 and 2. The relevant provisions of section 5.4 read as follows:

> *5.4 (1) Notwithstanding section 7 of the Access to Information and Protection of Privacy Act, 2015 , in addition to the information that shall or may be refused under Part II, Division 2 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, taking into account sound and fair business practices, 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 42 of the Access to Information and Protection of Privacy Act, 2015 , 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.

[14] I must first determine, under subsection (2) whether the information in question is "commercially sensitive information" within the meaning of paragraph 2(b.1) of the *ECA*:

(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);

[15] It is abundantly clear that the records themselves fall into the very broad category of "commercially sensitive information" within the meaning of section 2 of the *ECA*, particularly paragraph (iv) (information developed for the purpose of negotiations).

[16] Given this finding and Nalcor's compliance with the requirements of paragraph 5.4(2)(a) and (b), I have no discretion to do otherwise than to uphold the CEO's decision. Even if I could find that the *ECA* did not allow Nalcor to withhold the records, I have already found that the records can be withheld pursuant to section 35 of the *ATIPPA, 2015*.

[17] For all of the above reasons it is my opinion that Nalcor is entitled to refuse to disclose the records in requests 1 and 2.

Requests 3 and 4

[18] Nalcor assessed Requests 3 and 4 to be repeated requests for the same information that was the subject of an earlier access request by the Complainant. Nalcor refers to items 11 and 14 of the access request in file PB/102/2016, which was the subject of a complaint to this Office on June 20, 2016. That complaint was resolved informally, by agreement of the parties, on September 19, 2016.

[19] The Complainant argues that the wording of requests 3 and 4 in the present matter "differs substantially" from the wording in items 11 and 14 of the previous request.

[20] I have closely examined the wording of the current requests and compared them with the requests previously made in PB/102/2016 (specifically items 11 and 14 of that earlier request) and while there are differences in the wording of the requests the essence of the requests is the same. Records responsive to each request are the same. Requests 3 and 4 are therefore "repeat requests".

[21] The previous complaint file was resolved in the informal investigation phase by a written agreement mediated by this Office. Pursuant to that agreement the Complainant agreed to accept Nalcor's provision of specific links to websites containing the records as a satisfactory response to items 11 and 14 of that request.

[22] While the Complainant initially experienced some difficulty in accessing the links provided by Nalcor, that problem was subsequently rectified, and this Office confirmed that the records were accessible. I am satisfied that those same records are the records that would be responsive to items 3 and 4 of the present request, and those records have already been provided to the Complainant.

[23] Repetitiveness is not an enumerated exception in the *ATIPPA, 2015* that a public body can reply upon to withhold records from an applicant. Repetitiveness can however form the basis for a public body to seek approval from the Commissioner pursuant to section 21(1)(c)(ii) to disregard a request. Applications to disregard must be filed by public bodies

within five (5) business days of receiving a request. No such application was made by Nalcor regarding items 3 and 4 of the Applicant's request. Had Nalcor made that application, approval to disregard would have been granted for items 3 and 4.

[24] When legal reality and unequivocal common sense collide surely the latter may occasionally prevail. In this case the repetitive information in question was provided less than five (5) months ago and is publicly available via the internet. As such, I decline to recommend that Nalcor disclose again records that have already been provided.

V CONCLUSION

[25] In summary, I conclude that Nalcor is entitled to refuse to disclose the records responsive to items 1 and 2 of the request on the basis of paragraphs 35(1)(f), (g) and (h) of the *ATIPPA, 2015*, and also on the basis of section 5.4 of the *Energy Corporation Act*. I also conclude that Nalcor does not have to provide the records responsive to items 3 and 4.

VI RECOMMENDATIONS

[26] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that Nalcor continue to withhold the records it originally withheld from the Complainant.

[27] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of Nalcor 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 Complainant) within 10 business days of receiving this Report.

[28] Please note that within 10 business days of receiving the decision of Nalcor under section 49, the Complainant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of the *ATIPPA, 2015*.

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

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