

February 4, 2020

VIA EMAIL

s. 40(1)

Attention: [REDACTED]

Dear [REDACTED]

s. 40(1)

Re: Your request for access to information under Part II of the *Access to Information and Protection of Privacy Act, 2015* (File #: PB/888/2019)

On November 25, 2019, Nalcor Energy received your request for access to the following records/information:

The Grant Thornton Report prepared for the MFI, at Exhibit P-00454, on page 38, makes the following statement: "The PPA provides specific remedies if Base Block Payments are not made. In particular, if NLH fails to make the necessary Base Block Payments while MFCo continues to be in compliance with this agreement, MFCo may provide notice to NLH it is invoking their rights under the PPA which requires that within 10 days of providing such notice, if NLH has not paid the outstanding payment, NLH is required to pay a lump sum amount equal to the full repayment of the debt financing (including principal, accrued interest and any premiums) plus any associated costs (including legal, advisory, transaction and administrative costs)."

Section 14.4 of the Power Purchase Agreement defines an "event of default" for NLH.

- 1. Please advise if the province has guaranteed NLH against any such default and if the province is responsible "to pay a lump sum amount equal to the full repayment of the debt financing (including principal, accrued interest and any premium) plus any associated costs (including legal, advisory, transaction and administrative costs)."*
- 2. If so what instrument, Order-in-Council, regulation, legislation and/or agreement places these obligations upon the province and what was its effective date?*
- 3. If NLH cannot provide sufficient revenues to meet these financial obligations does this mean the province must provide the funding?*
- 4. Do these financial obligations include operation and maintenance costs, thereby committing the province to operating the assets even when the business case for such operations might demand a shutdown?*
- 5. Does the federal loan guarantee provide recourse to the province from default by NLH even though NLH debt is not subject to guarantee and its assets have not been pledged as security?*
- 6. Is the province responsible for the liabilities incurred by NL Hydro through the power purchase agreement?*
- 7. Does section 3.1 of the Energy Corporation Act relieve the province from any financial obligations of NLH relating to the power purchase agreement?*

Please see Appendix A, attached hereto, for the information that is responsive to your request.

It is the goal to publish this letter following a 72 hour period after it is sent electronically to you or five business days in the case where the letter has been mailed to you.

Please be advised that you may ask the Information and Privacy Commissioner to review the processing of your access request, as set out in section 42 of the Access to Information and Protection of Privacy Act (*the Act*). A request to the Commissioner must be made in writing within 15 business days of the date of this letter or within a longer period that may be allowed by the Commissioner. Your appeal should identify your concerns with the request and why you are submitting the appeal.

The appeal may be addressed to the Information and Privacy Commissioner as follows:

Office of the Information and Privacy Commissioner
2 Canada Drive
P. O. Box 13004, Stn. A
St. John's, NL. A1B 3V8
Telephone: (709) 729-6309
Toll-Free: 1-877-729-6309
Facsimile: (709) 729-6500

You may also appeal directly to the Supreme Court Trial Division within 15 business days after you receive the decision of the public body, pursuant to section 52 of the Act (a copy of this section of the Act has been enclosed for your reference).

If you have any further questions, please feel free to contact the undersigned by telephone at (709) 733-5346 or by e-mail at granthiscock@nalcenergy.com.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Grant Hiscock', with a stylized flourish at the end.

Grant Hiscock
Access and Privacy Officer

Access or correction complaint

42. (1) A person who makes a request under this Act for access to a record or for correction of personal information may file a complaint with the commissioner respecting a decision, act or failure to act of the head of the public body that relates to the request.

(2) A complaint under subsection (1) shall be filed in writing not later than 15 business days

(a) after the applicant is notified of the decision of the head of the public body, or the date of the act or failure to act; or

(b) after the date the head of the public body is considered to have refused the request under subsection 16(2).

(3) A third party informed under section 19 of a decision of the head of a public body to grant access to a record or part of a record in response to a request may file a complaint with the commissioner respecting that decision.

(4) A complaint under subsection (3) shall be filed in writing not later than 15 business days after the third party is informed of the decision of the head of the public body.

(5) The commissioner may allow a longer time period for the filing of a complaint under this section.

(6) A person or third party who has appealed directly to the Trial Division under subsection 52(1) or 53(1) shall not file a complaint with the commissioner.

(7) The commissioner shall refuse to investigate a complaint where an appeal has been commenced in the Trial Division.

(8) A complaint shall not be filed under this section with respect to

(a) a request that is disregarded under section 21;

(b) a decision respecting an extension of time under section 23;

(c) a variation of a procedure under section 24; or

(d) an estimate of costs or a decision not to waive a cost under section 26.

(9) The commissioner shall provide a copy of the complaint to the head of the public body concerned.

Direct appeal to Trial Division by an applicant

52. (1) Where an applicant has made a request to a public body for access to a record or correction of personal information and has not filed a complaint with the commissioner under section 42, the applicant may appeal the decision, act or failure to act of the head of the public body that relates to the request directly to the Trial Division.

(2) An appeal shall be commenced under subsection (1) not later than 15 business days

(a) after the applicant is notified of the decision of the head of the public body, or the date of the act or failure to act; or

(b) after the date the head of the public body is considered to have refused the request under subsection 16(2).

(3) Where an applicant has filed a complaint with the commissioner under section 42 and the commissioner has refused to investigate the complaint, the applicant may commence an appeal in the Trial Division of the decision, act or failure to act of the head of the public body that relates to the request for access to a record or for correction of personal information.

(4) An appeal shall be commenced under subsection (3) not later than 15 business days after the applicant is notified of the commissioner's refusal under subsection 45(2).

Appendix A: Responses

1. Please advise if the province has guaranteed NLH against any such default and if the province is responsible “to pay a lump sum amount equal to the full repayment of the debt financing (including principal, accrued interest and any premium) plus any associated costs (including legal, advisory, transaction and administrative costs).”

No, the province has not guaranteed NLH against any such default.

2. If so what instrument, Order-in-Council, regulation, legislation and/or agreement places these obligations upon the province and what was its effective date?

Please see the response to 1, above.

3. If NLH cannot provide sufficient revenues to meet these financial obligations does this mean the province must provide the funding?

No, if NLH cannot provide sufficient revenues to meet these financial obligations, the province does not have a requirement to provide the funding under the Power Purchase Agreement.

4. Do these financial obligations include operation and maintenance costs, thereby committing the province to operating the assets even when the business case for such operations might demand a shutdown?

Please see the answer to 3, above.

5. Does the federal loan guarantee provide recourse to the province from default by NLH even though NLH debt is not subject to guarantee and its assets have not been pledged as security?

No, the Federal Loan Guarantee does not provide recourse to the province from default by NLH.

6. Is the province responsible for the liabilities incurred by NL Hydro through the power purchase agreement?

No, the province is not responsible for the liabilities incurred by NL Hydro through the Power Purchase Agreement.

7. Does section 3.1 of the Energy Corporation Act relieve the province from any financial obligations of NLH relating to the power purchase agreement?

It is section 3.1 of the Hydro Corporation Act, not the Energy Corporation Act, which speaks to NLH.

“Where the corporation enters into contracts and ancillary arrangements relating to the purchase of electrical energy, capacity and transmission services including contracts providing for direct cost reimbursement to the Muskrat Falls Project, the corporation shall be considered to have entered into those contracts and ancillary arrangements in its own capacity and not as an agent of the Crown, and the Crown shall not be liable as principal in contract, tort or otherwise at law or equity for the liabilities of the corporation created directly or indirectly by those contracts or arrangements.”

As a non-agent of the Crown, in this case, NLH would be more at arm’s length from the province with respect to financial and contractual obligations than if NLH was acting as an agent of the Crown.