



Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Catherine Tully

REVIEW REPORT 16-07

July 13, 2016

Halifax Regional Municipality

Summary: Where a third party objects to the disclosure of information on the basis that it believes disclosure would be harmful to its business interests, it is the third party that bears the burden of proving that the applicant has no right of access. If, as in this case, the third party provides no evidence in support of its position, it fails to meet its burden of proof. In the absence of any evidence to support the application of the third party business exception the Commissioner recommends full disclosure of the naming rights agreement for the Halifax Regional Municipality (HRM) owned fourplex.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c 5](#), s. 21; *Municipal Government Act*, [SNS 1998, c 18](#), ss. 481, 498.

Authorities Considered: **Newfoundland:** Report A-2016-004, [2016 CanLII 37499 \(NL IPC\)](#); **Nova Scotia:** Review Reports FI-09-100, [2015 CanLII 70493 \(NS FOIPOP\)](#); FI-10-59M, [2015 CanLII 39148 \(NS FOIPOP\)](#); FI-12-01(M), [2015 CanLII 54096 \(NS FOIPOP\)](#); FI-13-28, [2015 NSOIPC 9 \(CanLII\)](#); 16-01, [2016 NSOIPC 1 \(CanLII\)](#).

Other Sources Considered: Halifax Regional Council Minutes – September 28, 2010 – HRM: <https://www.halifax.ca/council/documents/c100928.pdf>; Halifax Media Room – Public Service Announcement, Friday November 5, 2010: <https://www.halifax.ca/mediaroom/pressrelease/pr2010/101105BMOCentre4-padcentreOfficialRibbonCutting.php>.

INTRODUCTION:

[1] This request for review relates to two different access to information requests for the same agreement – the 10 year naming rights agreement granted to the Bank of Montreal (BMO) for the external naming rights of the BMO Centre. Following receipt of the first access request in 2012, the Halifax Regional Municipality (HRM) consulted two third parties. Following that consultation HRM determined that it would partially disclose the record. Both third parties objected. Subsequently, a second access request for the same information was received by HRM but since that review was not complete on the two third party appeals, HRM declined to disclose the record to the second applicant. As a result, the second applicant also filed an appeal to this

office. All three appeals deal with the same record and the same issue and are therefore the subject of this review report.

ISSUE:

[2] Was HRM required by s. 481 of the *Municipal Government Act (MGA)* to refuse access to the record or any part thereof because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

DISCUSSION:

Background

[3] On November 5, 2010, HRM announced the official opening of the BMO Centre (4-Pad Arena). The official announcement stated:

This \$39 million facility was financed primarily by HRM with a contribution from the Province (\$2 million). The arena complex is owned by the Halifax Regional Municipality and will be operated by Nustadia Recreation.¹

[4] Shortly before the official opening, HRM Council passed a motion specifically in relation to the naming agreement. On September 28, 2010, the HRM Council passed the following motion:

1. Approve the 10 year agreement (Attachment 1) with the Bank of Montreal (BMO) for external naming rights of the HRM 4 Pad Arena.
2. Approve the annual Naming Rights payment be made to the approved Facility Capital Reserve Account.²

[5] In 2012 an applicant made a request for a copy of, “the 10 year naming rights agreement granted to BMO for external naming rights to the BMO Centre (4-Pod Arena). Agreement was approved by council on Sept. 28, 2010.”

[6] In response, HRM notified two affected third parties of the access request and sought their views on the disclosure of the record. The first third party (third party “A”) did not respond to the notice. The second third party (third party “B”) did respond objecting to the proposed disclosure. HRM decided that it would partially disclose the requested record. Both third parties objected by filing a request for review with this office. As a result, the applicant has yet to receive any information in response to his 2012 access request pending the outcome of this review.

[7] In the meantime, a second applicant made a request in the fall of 2015 for the same contract. Because the matter was still before this office, HRM declined to provide access to the record

¹ Halifax Media Room – Public Service Announcement, Friday November 5, 2010, available at: <https://www.halifax.ca/mediaroom/pressrelease/pr2010/101105BMOCentre4-padcentreOfficialRibbonCutting.php>.

² Halifax Regional Council Minutes, September 28, 2010, available at: <https://www.halifax.ca/council/documents/c100928.pdf>.

pending the outcome of this review. The second applicant then filed a request for review of HRM's decision to deny him access to the record.

[8] All five parties – the two applicants, the two third parties and the public body – were invited to provide submissions in support of their various positions. No party provided any submission.

Relevant Statutory Provisions

[9] Section 481 of the *MGA* provides in part:

Confidential information

481 (1) The responsible officer shall, unless the third party consents, 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 municipality 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 organization, 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.

Burden of Proof

[10] Section 498(3) of the *MGA* provides that in the case of third party confidential information as described in s. 481, it is the third party who bears the burden of proof:

498(3) At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party

(a) in the case of personal information, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and

(b) in any other case, the burden is on the third party to prove that the applicant has no right or access to the record or part.

Was HRM required by s. 481 of the *MGA* to refuse access to the record or any part thereof because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

[11] As per our usual process, all five parties received a written notice of formal review and were invited to provide submissions in support of their positions. The notice of formal review

also advised the third parties that, pursuant to s. 498(3) of the *MGA*, they bear the burden of proof in this matter. No party provided any submission.

[12] The review process is informal and, when necessary, I can and do review all the material supplied in the course of the informal resolution efforts that precede the formal review hearing. In this case, there was very little in the way of informal resolution.

[13] Third party A never provided any submission, argument or evidence at any point in these proceedings. It did not respond to HRM's initial notice other than by filing a request for review with this office. And, it did not provide any argument or evidence directly to this office in support of its review request.

[14] While third party B initially provided information in support of its position to HRM, it later advised this office that it would not be objecting to the disclosure of the agreement and so would not be filing any submissions.

[15] As noted above, where s. 481 is at issue, it is the third party who bears the burden of proof. I have, on a number of occasions, explained the requirements of s. 481.³ The third party must establish that the disclosure of the requested information would reveal:

1. Trade secrets of a third party or commercial, financial, labour relations or technical information of a third party;
2. That was supplied implicitly or explicitly in confidence; and
3. The disclosure of which could reasonably be expected to cause one or more of the harms enumerated in s. 481(1)(c).

[16] Since I have no evidence to support the application of s. 481, I find that the third parties have failed to satisfy their burden of proof as set out in s. 498(3)(b) of the *MGA*.⁴

[17] As noted earlier, I also received no submissions from HRM in support of the application of s. 481 to the requested record.

[18] Therefore, I find that s. 481 does not apply to the requested record and I recommend the full disclosure of the requested document.

³ See for example NS Review Reports FI-10-59M and FI-12-01(M). For discussions of the equivalent provision under the *Freedom of Information and Protection of Privacy Act* (s. 21) see for example NS Review Reports FI-13-28, FI-09-100 and 16-01.

⁴ In a recent decision by the Information and Privacy Commissioner for Newfoundland, the Commissioner also determined that where the third party did not provide any evidence it had therefore failed to meet its burden of proof and so he recommended full disclosure of the requested record. The report also details a related Court of Appeal decision in relation to the same records. OIPC Newfoundland Report A-2016-004.

FINDINGS & RECOMMENDATIONS:

[19] I find that:

1. The third parties have failed to adduce any evidence or argument in support of their positions that s. 481 applies to the requested record and so have not met their burden of proof.
2. Section 481 does not apply to any of the information at issue.

[20] I recommend that HRM release the requested record in full.

July 13, 2016

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

OIPC File: FI-12-46
OIPC File: FI-12-47
OIPC File: 15-00091