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

REVIEW REPORT 16-09

August 8, 2016

Halifax Regional Municipality

Summary: A third party objected to a proposed disclosure decision by the Halifax Regional Municipality (HRM). The third party argued that disclosure of any of the records would harm its business interests. The Commissioner notes that, considering the type of records involved and HRM's statutory duty to sever, it is unlikely that the exemption could apply to every line of the record. A thorough review of the records confirmed that no exemption could apply to a majority of the information. The Commissioner further finds that much of the third party's evidence amounts to mere assertions that harm will result, and concludes that the evidence provided does not satisfy the requirements of the *Municipal Government Act*. HRM provided no submission or evidence in support of its application of the exemption and so failed to meet its burden of proof. She recommends full disclosure.

Statutes Considered: *Access to Information Act*, RSC 1985, c A-1, s. 20; *Municipal Government Act*, SNS 1998, c 18, ss. 461, 465, 467, 472, 481, 482, 498.

Authorities Considered: British Columbia: Decision F08-07, 2008 CanLII 41155 (BC IPC); Order F09-14, 2009 CanLII 58552 (BC IPC); **Nova Scotia**: Review Reports FI-07-12, 2007 CanLII 30653 (NS FOIPOP); FI-10-59(M), 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); **Ontario:** Order P-454, 1993 CanLII 4779 (ON IPC).

Cases Considered: *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD); *Atlantic Highways Corp. v. Nova Scotia*, 1997 CanLII 11497 (NS SC); *Bitove Corp. v. Canada (Minister of Transport)* 1996 CarswellNat 1418 (T.D.); *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (CanLII); *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII); *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII); *O'Connor v. Nova Scotia*, 2001 NSCA 132 (CanLII); *Stenotran Services v. Canada (Minister of Public Works and Government Services)* 2000 CanLII 15464 (FC).

Other Sources Considered: Nova Scotia Department of Environment, *Functional Assessment of Wetlands - Introduction to Nova Scotia Wetland Evaluation Technique*: http://www.novascotia.ca/nse/wetland/assessing.wetland.function.asp.

Nova Scotia Department of Environment, *Municipal Solid Waste Landfill Guidelines* (October 1997): http://www.novascotia.ca/nse/dept/docs.policy/guidelines-municipal.solid.waste.landfill.pdf.

Stantec Consulting Ltd., *Waste Resource Strategy Update* (January 2013): https://www.halifax.ca/council/agendasc/documents/130205ca1222.pdf.

INTRODUCTION:

[1] In April 2012 an applicant sought access to records relating to the operation of the Halifax Regional Municipality (HRM) landfill by Mirror Nova Scotia Limited. In particular the applicant sought records relating to the closure of cell #5 and the construction of cell #6 including records relating to the construction of a borrow pit access road.[1]

[2] HRM determined that a third party should be notified of its intention to partially release the requested records. HRM proposed to withhold a portion of the information citing third party business interests, harm to intergovernmental relations and unreasonable invasion of third party personal privacy as authority for withholding portions of the record. The third party filed a request for review of HRM's decision with this office seeking instead to have the entire record withheld under s. 481 of the *Municipal Government Act* (*MGA*).

ISSUE:

[3] There is one issue under review: is HRM required to refuse access to information under s. 481 of the *MGA* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

DISCUSSION:

Background

[4] In 1997 HRM concluded an agreement with Mirror Nova Scotia Limited in relation to the design, construction and operation of components of the HRM's solid waste facilities. An access applicant who was clearly familiar with this 1997 agreement made an access request for records he believed were produced in relation to this agreement. As HRM gathered the responsive records, it determined that a portion of the records potentially contained information of a third party. Section 482 of the *MGA* requires that where a municipality receives a request for access to a record that contains or may contain information of or about a third party that cannot be disclosed, the responsible officer shall promptly give the third party notice and give the third party the opportunity to make representations concerning disclosure. This was the process undertaken here by HRM.

[5] HRM forwarded a portion of the responsive records (a total of 308 pages) to the third party for consultation. Following the third party consultation, HRM determined that it would partially disclose records that were subject to the consultation. The third party filed this request for review seeking instead to have the entire 308 pages withheld.

[1] A borrow pit is a pit containing necessary construction material – in this case clay.

[6] The applicant has not received any records in response to his access request made in April 2012. This despite the fact that this review only deals with a portion of the responsive records – that is, only those records HRM sent to this third party. HRM advised that it conducted a number of third party consultations with respect to responsive records. Only one of which resulted in a request for review. With respect to records not in dispute in this matter, HRM has a duty to respond to the applicant in keeping with the requirements of s. 467(2) of the *MGA*. That duty is not suspended by a third party review request.[2]

[7] The records at issue consist of 308 pages sent by HRM to the third party as part of the third party consultation process. The access applicant confirmed that he is not interested in third party personal information and so this review will not examine the application of s. 480 of the *MGA* to the records.

[8] Following receipt of the Notice of Formal Review, HRM advised that it had decided to no longer redact information under s. 472. As a result only one issue remains.

[9] Section 481 of the *MGA* provides in part:[3]

> 481(1) The responsible officer shall, unless the third party consents, refuse to disclose to an applicant information
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> (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;
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> (b) that is supplied, implicitly or explicitly, in confidence; and
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> (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…

Burden of Proof

[10] The *MGA* s. 498 sets out the rules regarding the burden of proof. The third party bears the burden of proving that the applicant has no right to access records containing information that relates to a third party:

> 498(1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the responsible officer to prove that the applicant has no right of access to the record or part.

[2] For a thorough discussion of why a third party review does not suspend the duty to respond with respect to records not subject to the third party review see BC OIPC Decision F08-07 at paras. 5 – 45.

[3] A copy of the *Municipal Government Act, Part XX* is available on our website at foipop.ns.ca.

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.

Submission of the Parties

[11] HRM provided no submission in support of its proposed severing. The applicant likewise provided no submission. The third party relied on a submission it provided in 2012 arguing that the entire record should be withheld pursuant to s. 481 of the *MGA*.

Duty to Sever

[12] Before evaluating whether any of the information contained in the records qualifies for exemption under s. 481, it is first important to emphasize a fundamental aspect of access to information law. The Supreme Court of Canada has stated that access legislation creates a presumption in favour of disclosure.[4] How that works in practice in Nova Scotia is reflected in part in s. 465(2) of the *MGA*. That provision makes clear that municipalities must only exempt information as authorized pursuant to the *MGA* and further, where the information can reasonably be severed, municipalities are obliged to release the remainder of the record to the applicant.

[13] The third party argues that the entire record should be withheld under s. 481. Even at a glance it is clear that s. 481 cannot apply to all the records at issue because the records include 112 pages of correspondence including email exchanges. With only rare exceptions, such exchanges will inevitably include information that does not fall within s. 481 because email exchanges generally include salutations, brief references to attachments, plans to meet, headers, and footers with no substantial information. It is both surprising and unfortunate that the third party in this matter appears to be unfamiliar with this fundamental aspect of access to information law.

Is HRM required to refuse access to information under s. 481 of the *MGA* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

General Approach

[14] Nova Scotia's access legislation is unique in that it declares as one of its purposes a commitment to ensure that municipalities are fully accountable to the public.[5] It is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada.[6] The *MGA* and similar access legislation across Canada strikes a balance between the demands of openness and commercial confidentiality in two ways: it affords substantive protection of information by specifying that certain categories of third party

[4] *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at para. 41.
[5] See *Municipal Government Act* s. 462.
[6] *O'Connor v. Nova Scotia*, 2001 NSCA 132 (CanLII) at paras. 54 – 57.

information are exempt from disclosure and it gives procedural protection through the third party notice process.[7]

[15] As I have previously discussed, courts have recognized that the important goal of broad disclosure must be balanced against the legitimate private interests of third parties and the public interest in promoting innovation and development.[8]

[16] It is well established in Nova Scotia that in order for the third party business information exemption to apply, the three requirements of s. 481 must be read conjunctively and that the third party has the burden of proving that s. 481 applies to the withheld information.[9]

[17] In evaluating this part of the s. 481 test, it is necessary to consider three questions:

1. Does the withheld information constitute trade secrets, commercial, financial, labour relations, scientific or technical information of the third party?
2. Was the information supplied implicitly or explicitly in confidence?
3. Would disclosure reasonably be expected to cause harm listed in s. 481(1)(c)?

[18] The information at issue here consists of the following general types of information:

- Email exchanges and correspondence discussing various requirements, setting meeting dates, attaching documents, and answering questions (112 pages).
- Two copies of a Wetland Assessment Report (196 pages).[10]

Step 1: Does the withheld information reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party (s. 481(1)(a))?

[19] The terms commercial, financial and labour relations are not defined in the *MGA*. It has been generally accepted that dictionary meanings provide the best guide and that it is sufficient for the purposes of the exemption that information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood.[11]

[20] Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. I have, in previous Reports, determined that such things as expert opinions from individuals with particular technical expertise (engineers and architects for example) and site plans can qualify as technical information within the meaning of s. 481(1) of the *MGA*.[12]

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[7] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) [*Merck Frosst*] at para. 23.
[8] NS Review Report FI-10-59(M) paras. 9-15, NS Review Report 16-01 para. 14, *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (CanLII) at para. 67.
[9] *Atlantic Highways Corp. v. Nova Scotia*, 1997 CanLII 11497 (NS SC) [*Atlantic Highways*].
[10] I have disclosed the nature of this report here because, as will be discussed later, wetland assessments are a requirement of the Department of Environment. Their content and form are mandated by the Department.
[11] *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD) [*Air Atonabee*] at p. 268 cited with approval in *Merck Frosst* at para. 139.
[12] See NS Review Report FI-12-01 at paras. 58 to 64 which refers to Ontario Order P-454 [1993] O.I.P.C. No. 112 (as quoted in B.C. Order F09-14 at para. 27).

[21] As noted above, the municipality has an obligation to sever information subject to an exemption and release the remainder to the applicant. Virtually every page of the 112 pages of correspondence includes information that cannot be characterized as revealing trade secrets, commercial, financial or technical information of a third party. I include in this category salutations, email headers that include dates and email footers that include business contact information.

[22] In addition, of the 112 pages of correspondence, I have identified 82 full pages that contain no information that would reveal commercial, financial, labour relations, scientific or technical information of the third party. Records that fall into this category include the following:[13]

- Cover emails or cover pages, sometimes with brief descriptions but with no details and emails that consists of messages such as "see attached" or "as requested".
- Progress notes, next steps, status updates and due dates to meet HRM requirements. These documents may contain some technical information but only of HRM, not of any third party.
- Provincial approval requirement notes, status updates, explanation of progress, requests from HRM. Again, these may contain some commercial or technical information of HRM but not of any third party.
- Pages that consist only of signature blocks or portions of signature blocks.
- Emails setting up meetings, no other content.
- Maps of HRM property.

[23] I have included in this category documents written by a third party that summarizes steps taken by others on the projects and that may provide time estimates and options. While it is clear that technical expertise was needed to make the estimates and design the options, the actual technical information of a third party is not disclosed. The information disclosed describes characteristics of HRM's assets and/or timing issues relating to the projects caused by HRM's actions or decisions.

[24] I have also included in this category responses the third party provided to HRM in answer to provincial government ministry questions. Some of the answers simply describe the characteristics of HRM's property, others give a very high level description of the road construction plans in general terms that, in my opinion, do not qualify as "technical" information.

[25] The third party submitted that 10 pages of correspondence and the Wetland Assessment Report all satisfy the definition of "trade secrets". Aside from making this assertion, the third party provided no evidence or even explanation for why this may be true.

[26] "Trade secret" is defined in the *MGA* and has four requirements.[14] I have no evidence before me to establish that the information in question "derives independent economic value" or

[13] Throughout this Review Report I have provided general descriptions of the types of records at issue. I have not disclosed the actual content of the records themselves.
[14] *MGA* s. 461(l).

that it is "subject to reasonable efforts to prevent it from becoming generally known" or that disclosure would result in harm or improper benefit. Since the burden of proof rests with the third party, absent evidence on this issue, I cannot find that the information in question qualifies as a trade secret within the meaning of the *MGA*.

[27] I find that the 82 pages listed in Appendix 1 to this Report do not qualify as trade secrets or commercial, financial, labour relations, scientific or technical information of a third party.

[28] Thirty pages of correspondence and the Wetland Assessment Report remain that I find contain some commercial, financial or technical information as follows:

- Project cost estimates
- Work plans
- Technical design drawings & schematics
- Project schedules with activity lists
- Contract Supplementary Agreement
- Impact mitigation strategies and data sheets

[29] The pages that contain some commercial, financial or technical information are listed in Appendices 2 and 3 to this Report.

[30] The two documents listed in Appendix 2 require a more detailed analysis in terms of whether or not they fully satisfy the requirements of s. 481(1)(a) of the *MGA*: a Supplementary Agreement and two copies of a Wetlands Assessment Report.

Supplementary Agreement:

[31] Section 481 requires not only that the withheld information be commercial, financial or technical information but that the information be "of a third party". As I have noted before, in Nova Scotia we have the benefit of a decision of the Supreme Court in which the Court determined that information in an omnibus agreement to construct a toll highway was not commercial or financial information <u>of a third party.</u> This is because the information had either already been exposed to publication or was so intertwined with the Provincial input by way of the requirements of the request for proposal or modified by the negotiation process that it clouded the third party's claim to a proprietary interest in the information.[15]

[32] The access applicant sought a copy of the cell 6 construction agreement. That agreement was one of the documents sent to the third party in this consultation and so subject to this review. The third party seeks to have the signed Supplementary Agreement for the construction of cell 6[16] entirely withheld under s. 481 of the *MGA*. This agreement is supplementary to a contract

[15] *Atlantic Highways* at p. 9 as discussed in NS Review Report FI-13-28.

[16] HRM originally supplied a second Supplementary Agreement to the third party in its consultation process. However, during the course of the review process, HRM determined that, in its view, the second agreement was not within the scope of the original request. I have therefore not dealt with the second Supplementary Agreement in this matter. The scope of the responsive records may become an issue once the applicant finally receives a response to his access request.

dated July 25, 1997 for the design, construction and operation of the Halifax Regional Municipality's solid waste facilities.

[33] HRM proposes to withhold only the unit prices, cost per item and margin listed in Appendix B to the cell 6 construction agreement. HRM proposes disclosing the total value of the Supplementary Agreement. The third party highlights in particular the fact that the final budget price and quantity of product required for the construction of cell 6 is the third party's commercial information. The third party did not address the issue of whether a negotiated agreement can be said to be "of a third party".

[34] Based on the terms of the agreement itself, in particular the use of language such as "agrees" or "agrees and accept", it is clear that the terms were the result of a negotiation between the parties. The document is an agreement between the parties. Fundamental to such negotiation is of course the price, including the price HRM was willing to pay in total for the project and for the individualized items listed in Appendix B to the cell 6 construction agreement. The items on the list plus the margin make up the total value of that Supplementary Agreement.

[35] HRM provided no submission in this matter and the third party provided no evidence as to the source of the information in the Appendix to the cell 6 construction agreement. The listed items clearly relate to the steps necessary to construct a cell and include one line descriptions of materials to be used or tasks to be completed. The Appendix appears to be based on a document submitted in April of 2011 by the third party to HRM. In other words, the original source of the information may have been the third party. However, a comparison between the two documents reveals that unit prices are different and in some cases quantities are different. I have no evidence as to why exactly the changes occurred but a reasonable assumption would be that the amounts changed during the course of the negotiation process between April 2011 when the third party submitted the proposed budget and November 2011 when the agreement was signed. Appendix B is incorporated into the agreement in a provision that makes clear that the parties are agreeing to pay and accept the amounts specified.

[36] I find that the Supplementary Agreement is so intertwined with the HRM input by way of the negotiation process that it clouded the third party's claim to a proprietary interest in the information. I find that the Supplementary Agreement does not contain information "of the third party" within the meaning of s. 481(1)(a).

Wetland Assessment Report

[37] The access applicant sought copies of all communications between HRM staff and the provincial Department of Environment (Department) relating to the application for the permit to construct an access road. The road was necessary in order to access clay reserves for the construction of the new cell. One of the Department's requirements was that HRM complete a Wetland Assessment Report. Two versions of HRM's Wetland Assessment Report were forwarded to the third party as part of the consultation.

[38] A description of the Department of Environment report requirements is available on its website.[17] The Department's website makes clear that the content of the report is prescribed by

[17] Department of Environment: http://www.novascotia.ca/nse/wetland/assessing.wetland.function.asp.

the Department and not left to permit applicants to create. The website also states that permit applicants must hire an experienced professional with appropriate wetland expertise to complete the wetland evaluation.

[39] In this case, as noted above, there are two versions of the Wetland Assessment Report. The text of the reports are virtually identical in all substantive matters and are dated just a few days apart. According to the report itself, it was produced as part of the Nova Scotia Environment wetland approval process. The "proponent" is identified as HRM and the report, produced by a subcontractor of the third party, is on behalf of and in support of HRM's application to construct the borrow pit access road. The document itself consists of a detailed description of the land and species in the area. It describes the proposed access road route and provides a typical access road section schematic. The report identifies impact mitigations including considerations of alternative routes and final route design. Other documents in the file indicate that the report was submitted to Nova Scotia Environment in support of HRM's application for a permit to build the borrow pit access road.

[40] Based on the content of the report and its use, I find that the report consists of technical information relating to the land affected by the proposed access road. While it took technical expertise to create the report, the content of the report itself is about HRM's asset and about its strategies to mitigate environmental impacts of the proposed road. Further, the report has no indication that it was produced in confidence and indeed it was further disclosed to Nova Scotia Environment. While the form and structure of the reports now required by the Department are somewhat different than the one at issue here, it is clear from its website that the form and structure of these reports are prescribed by the Department. I find that the Wetland Assessment Reports do not consist of commercial or technical information of a third party.

[41] The following remaining information listed in Appendix 3 and found in the correspondence documents satisfies the first part of the s. 481 test:

- project cost estimates,
- work plans,
- technical design drawings,
- project schedules with activity lists.

[42] I am satisfied that the project cost estimates qualify as "commercial" information of a third party in the form that they appear in the records. Work plans, technical design drawings and project schedules and activity lists qualify as "technical" information of a third party.

Step 2: Was the information supplied implicitly or explicitly in confidence?

[43] The second requirement of s. 481 is that the information must be supplied in confidence.

[44] In previous Review Reports I have listed a number of considerations when determining whether or not information has been supplied implicitly or explicitly in confidence within the meaning of s. 481.[18] In summary those considerations are:

"supplied"

- The use of the word "supplied" focuses more on whether the supplier of the information expected it to be kept confidential. This does not mean the intention or understanding of the recipient of information is irrelevant to s. 481; it simply means that the Legislature intended that the focus under this section should be more on the intention or expectation of the information supplier.
- Whether information was "supplied" does not depend on the use that is made of it once it is received.
- Where the information at issue is a negotiated document, the third party's proprietary interest in any confidential information may be so clouded by the negotiating process and by the significant and evidenced input of municipal information that only strong proof evidencing such information as a distinct and severable part of the agreement will suffice.

"in confidence"

- Factors relevant to determining whether information has been supplied in confidence include:
  - The nature of the information: Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?
  - The purpose of the information: Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
  - Explicit statements: Was the record in question explicitly stated to be provided in confidence? This may not be enough but it is a relevant consideration.
  - Voluntary or compulsory supply: Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in the legislation relevant to the compulsory supply that establish confidentiality.
  - Agreement or understanding between the parties: Was there an agreement between the parties with respect to confidentiality? Keep in mind that identifying a record as "confidential" does not automatically exempt it from disclosure and that no public body can be relieved of its responsibilities under access legislation merely by agreeing to keep matters confidential. In other words, no municipality or public body can "contract out" of access legislation.
  - Actions of the municipality and supplier: Do the actions of the parties provide objective evidence of an expectation of confidentiality?

[45] The Federal Court[19] has summarized the meaning of "confidential" in the context of an analysis of s. 20(1)(b) of the *Access to Information Act* (*ATIA*). Section 20 of the *ATIA* is the

[18] As noted in NS Review Report FI-10-59(M) at paras. 83 and 84.
[19] *Stenotran Services v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15464 (FC) at [9] citing *Air Atonabee.*

federal third party business information exemption.[20] In summary, the Court states the following with respect to the requirement that information be confidential:

- It is an objective standard.
- It is not sufficient that the third party state, without further evidence, that it is confidential.
- Information has not been held to be confidential even if the third party considered it so, where it has been available to the public from some other source or where it has been available at an earlier time or in another form from government.
- Information is not confidential where it could be obtained by observation albeit with more effort by the requestor.

[46] In support of its position that the information was supplied in confidence, the third party argues that:

- The information was not available to anyone other than the third party, its consultant and HRM.
- The third party maintains the records in the strictest of confidence.
- The information was disclosed for the sole purpose of negotiations which the third party understood were confidential.
- The evidence of confidentiality can be found in the confidentiality notices at the end of emails used during the negotiations.

[47] With respect to the four types of records remaining at issue, it is also necessary to evaluate the evidence of confidential supply. The records consist of project cost estimates, work plans, technical design drawings and project schedules with activity lists. All of these records are contained in correspondence between the third party and HRM or between a subcontractor of the third party and HRM in a time period leading up to the completion of the Supplementary Agreement.

[48] Taking into consideration the nature of the information, its purpose, and the circumstances of its supply to HRM, I find that there is no evidence to support that the following information was supplied implicitly or explicitly in confidence:

- Information publicly available in HRM council meeting minutes. Included in this category are:
    - Road construction options and the cost of the selected option– disclosed in council minutes September 28, 2010 and included as an Appendix to Supplementary Agreement 12.

[20] Section 20 of the *ATIA* has several important differences from s. 481 of the *MGA*, not the least of which is that the requirements are not conjunctive. However, the discussion of the meaning of "confidential" in the context of a business exemption in access law is still informative.

- Correspondence from the third party and its subcontractors that was intended to be disclosed to government departments by HRM in response to the departments' request for information which includes:
    - Technical road design plans and information.

- Information supplied as required by section 15.5 of the 1997 agreement. As noted by the access applicant in his original request to HRM, section 15.5 of the 1997 agreement requires that the third party provide a notice of cell construction along with specified additional information. Compulsory supply of information will not ordinarily be confidential. Nothing in the records suggests that the information was supplied in confidence and the records specifically reference section 15.5 of the 1997 agreement. Aside from the assertion of the third party in its submissions, there is nothing to support a finding that this information, required by the contract, was supplied in confidence. Further, information such as the design plan for the liner system is consistent with commonly known liner system plans such as those set out in the publicly available Municipal Solid Waste Landfill Guidelines[21] and in the Waste Resource Strategy Update produced for HRM in 2013.[22] With respect specifically to the cost breakdown included in the section 15.5 notice documents, I note that this document was incorporated into the final Supplementary Agreement (with some changes to cost and quantity) and further, that the margin specified is as mandated by the existing 1997 agreement. These records are:
    - Notice of cell 6 construction.

- Cell 6 construction schedule options. In addition to the records that specifically reference the section 15.5 notice, there are two proposed construction schedules produced in response to a question from HRM regarding potential construction scheduling options. The steps in cell construction revealed by the schedule are already contained in the compulsory information supplied in the section 15.5 notice. The scheduling options are identified by HRM, not the third party. The potential construction schedules are attached to a letter that has no confidentiality notice although the information was transmitted by an executive assistant who had a standard confidentiality statement in her email cover. I find that the evidence is insufficient to support a finding of confidentiality of this information. These records are:
    - Cell 6 construction schedule options.

- Information supplied as required by section 15.2 of the 1997 agreement. As noted by the access applicant, section 15.2 of the 1997 agreement requires that the third party provide a notice of cell closure along with specified additional information. The documents at pages 30 through 34 appear to serve this purpose although they do not specifically reference section 15.2 of the 1997 agreement. The documents do, however, consist of the information required under section 15.2. Nothing in the documents themselves suggests the information was supplied in confidence; the schematic is consistent with commonly

[21] Nova Scotia Department of Environment, *Municipal Solid Waste Landfill Guidelines* (October 1997) at p. 8: http://www.novascotia.ca/nse/dept/docs.policy/guidelines-municipal.solid.waste.landfill.pdf (Guidelines).
[22] Stantec Consulting Ltd., *Waste Resource Strategy Update* (January 2013) at pp. 42-43: https://www.halifax.ca/council/agendasc/documents/130205ca1222.pdf.

known cap system plans.[23] Unlike the cell 6 construction material, the cell closure cost estimates do not appear to have been incorporated in a public document that I was able to locate. However, overall I am satisfied that the information supply was compulsory and as such I find it was not supplied in confidence. In case I am wrong on this conclusion, I have assessed below the evidence of harm from the disclosure of this information. These records are:

- Cell closure notification information.

[49] A number of documents were part of negotiations but, unlike the records noted above, the evidence available does not support a finding that they were incorporated into the final agreement or otherwise publicly available. One of the challenges in this matter is that the records are obviously not complete. They are made up only of those records sent to the third party for consultation. It is of course a further challenge that neither HRM nor the applicant provided any submissions in support of their positions. I find that the evidence supports, on the balance of probabilities, that the following records were supplied in confidence:

- A proposed work plan, schedule and costs for a project that does not appear to have been undertaken.
- Preliminary road construction cost estimate discussion.
- Proposed access road schedule.

Step 3: Would disclosure reasonably be expected to cause harm listed in s. 481(1)(c)?

[50] The burden of proof lies with the third party applicant to prove the harm he alleges. I recently examined the test for "reasonable expectation of harm" in s. 481(1) in Review Report FI-10-59(M).[24] As I have previously stated, what is clear from the cases is that evidence of speculative harm will not meet the test, certainty of harm need not be established; rather the test is a middle ground requiring evidence well beyond a mere possibility of harm but somewhat lower than harm that is more likely than not to occur.

[51] In its submission, the third party stated that the records provide a detailed outline of how the third party operates its business. It states that the records would permit the third party's competitors to determine precisely how it negotiated its contractual arrangement with HRM, how it conducts its affairs with HRM, its pricing practices and the manner in which it operates generally.

[52] In support of its position, the third party cites *Bitove Corp. v. Canada (Minister of Transport)* 1996 CarswellNat 1418 (T.D.).[25] This is a case decided under s. 20 of the *Access to Information Act* (*ATIA*) which has two significant differences from Nova Scotia's *MGA*. First, the *ATIA* third party business interest test is disjunctive not conjunctive. Second, the harms test is different referring to "material financial loss or gain" and "expected to prejudice the competitive position of a third party". Nova Scotia's tests are "undue financial loss or gain" and "harm significantly the competitive position...of a third party". In addition, in the *Bitove* case,

[23] See for example page 9 of the Guidelines at FN 19.
[24] See NS Review Report FI-10-59(M) paras. 60 - 65 for a full discussion of the 'reasonable expectation of harm' test.
[25] *Bitove Corp. v. Canada (Minister of Transport)* 1996 CarswellNat 1418 (T.D.).

the records at issue consisted of minutes of negotiating meetings and detailed financial reports including sales information and projections. The third party's assertions of harm in that case were supported by affidavit evidence.

[53] In this case the records that remain at issue include:

- cell closure notification information,
- a proposed work plan, schedule and costs for a project that does not appear to have been undertaken,
- preliminary road construction cost estimate discussion, and
- the proposed access road schedule.

[54] In my opinion, these records provide only the briefest of overview of the steps the third party proposed to take to complete the work described. As I noted earlier, the information required in order to reach the Supplementary Agreement was mandated by the overarching 1997 agreement. Records that reveal some negotiation related information reflect this mandated process. Further, with respect to cost estimates, these estimates were given for a specific project undertaken or considered more than four years ago. Without further evidence it is unclear how disclosing the unit cost for a type of material or individual task in this context could have any effect whatsoever on the competitive position of the third party.

[55] The third party also referenced a decision of my predecessor in Review Report FI-07-12.[26] However, that decision related to a request for a copy of an unsuccessful proponent's bid before a selection of the winning proposal had been made. That situation is not comparable to this.

[56] It is not uncommon for third parties to merely assert harm with no evidence or specific explanation for how disclosure of the exact information in the record could result in the asserted harm. This case is no different. As a practical matter, mere assertions of harm will rarely be sufficient. Independent evidence of expectations of harm, or at least evidence of harm, from all third parties and the public body is helpful, evidence of previous harm from similar disclosures is also useful, and evidence of a highly competitive market would all assist a decision maker in determining whether the test has been satisfied. In all cases, it is evidence of a connection between the disclosure of the type of information at issue and the harm that is necessary.

[57] I find that the third party has failed to satisfy its burden of proof. On that basis I find that the disclosure of the information would not reasonably be expected to cause a harm listed in s. 481(1)(c) of *FOIPOP*.

[26] NS Review Report FI-07-12.

FINDINGS & RECOMMENDATIONS:

[58] I find that:

1. Records listed in Appendix 1 to this Report do not qualify as trade secrets or commercial, financial, labour relations, scientific or technical information of a third party within the meaning of s. 481(1)(a).
2. The Supplementary Agreement is so intertwined with the HRM input by way of the negotiation process that it clouded the third party's claim to a proprietary interest in the information. I find that the Supplementary Agreement does not contain information "of the third party" within the meaning of s. 481(1)(a).
3. The Wetland Assessment Reports do not consist of commercial or technical information of a third party within the meaning of s. 481(1)(a).
4. Information publicly available in HRM council meeting minutes was not supplied in confidence within the meaning of s. 481(1)(b).
5. Correspondence from the third party and its subcontractors that was intended to be disclosed to government departments by HRM in response to these departments' requests were not supplied in confidence within the meaning of s. 481(1)(b).
6. Records supplied as mandated by the 1997 agreement were not supplied in confidence within the meaning of s. 481(1)(b).
7. There is insufficient evidence to establish that the cell 6 construction schedule options were supplied in confidence within the meaning of s. 481(1)(b).
8. With respect to the remaining records, the third party failed to satisfy the burden of proof to establish that disclosure of the information could reasonably be expected to cause any of the harms set out in s. 481(1)(c).

[59] I recommend that the withheld information be disclosed in full.

August 8, 2016

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

Appendix 1: Contains no commercial, financial information of a third party	
Information type	**Pages**
Cover letters & emails, no details included, generally – "see attached" Cover pages	4, 5, 13, 14, 35, 41, 53, 54, 70, 296
Progress notes, next steps in general terms, status and due dates to meet HRM requirements no technical, commercial or financial information included Delay ramifications and change in schedule	2, 3, 11, 12, 17, 18, 19, 20, 21, 51, 55, 76, 287, 288, 289, 291, 292, 299, 306, 307 44, 46, 47, 48, 49, 50
Provincial approval process notes, status updates, explanation of processes & next steps, requests from HRM or requirements of Province & responses	28, 29, 40, 61, 62, 63, 64, 65, 66, 67, 68, 69, 78, 79, 80, 81, 82, 83, 84, 282, 283, 284
Page consists **only** of end of email strings or letter – some portion of the signature block or confidentiality type notices	26, 36, 42, 45, 52, 71, 77, 85, 290, 295, 303
Let's meet emails	1, 23, 24, 25, 27, 285, 286
Maps of HRM property	38, 39, 43, 297, 298, 305

Appendix 2: Supplementary Agreement and Wetland Assessment Report	
Supplementary Agreement	6, 7, 8, 9, 10
Wetland Assessment Reports	86-182, 183-281

Appendix 3: Contains some commercial, financial or technical information of a third party	
Information type	**Pages**
Cost estimates & road construction options, design explanations, schedule with task list	22, 37, 293, 294, 308
Road design technical drawings	72, 73, 74, 75
Work plans & project costs for borrow source investigation	300, 301, 302, 304
Work plans for cell 6 construction, technical drawings, budget, schedule with task list	15, 16, 56, 57, 58, 59, 60
Design information regarding Cover for cell 5A, unit prices, map of proposed cap areas and cap schematic, construction schedule	30, 31, 32, 33, 34