



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

REVIEW REPORT 17-06

July 31, 2017

Municipality of the County of Kings

Summary: Nothing is more central to the goals of accountability and transparency than the right to information about what municipalities and public bodies are spending public money on, and what they are receiving in return. Where terms of a contract incorporate the pricing proposal of the winning bidder to a request for proposal, that pricing information becomes part of a negotiated agreement and cannot be withheld as third party business information. With respect to access to the proposal of an unsuccessful bidder, neither the Municipality of the County of Kings nor the affected third party provided any evidence in support of the application of the exemption. The Commissioner determines that s. 481 cannot apply in the absence of any evidence of harm.

Statutes Considered: *Municipal Government Act*, [SNS 1998, c 18](#), ss. 461, 480, 481, 498; *Privacy Act*, [RSC 1985, c P-21](#) s. 3.

Authorities Considered: **Alberta:** Order F2009-026, [2010 CanLII 98647 \(AB OIPC\)](#); **British Columbia:** Orders 01-53, [2001 CanLII 21607 \(BC IPC\)](#); F17-14, [2017 BCIPC 15 \(CanLII\)](#); **Newfoundland and Labrador:** Reports A-2016-001, [2016 CanLII 9490 \(NL IPC\)](#); A-2017-014, [2017 CanLII 37267 \(NL IPC\)](#); **Nova Scotia:** Review Reports FI-02-113, [2003 CanLII 43707 \(NS FOIPOP\)](#); FI-06-21(M), [2006 CanLII 15615 \(NS FOIPOP\)](#); FI-10-19, [2015 CanLII 54095 \(NS FOIPOP\)](#); FI-10-95, [2015 CanLII 79097 \(NS FOIPOP\)](#); FI-11-71, [2015 CanLII 79099 \(NS FOIPOP\)](#); FI-13-28, [2015 NSOIPC 9 \(CanLII\)](#); 16-03, [2016 NSOIPC 3 \(CanLII\)](#); 16-02, [2016 NSOIPC 2 \(CanLII\)](#); 16-04, [2016 NSOIPC 4 \(CanLII\)](#); 17-05, [2017 NSOIPC 5 \(CanLII\)](#); **PEI:** Orders FI-16-003, [2016 CanLII 48834 \(PE IPC\)](#); FI-17-002, [2017 CanLII 19215 \(PE IPC\)](#); **Saskatchewan:** Review Report 195-2015 & 196-2015, [2016 CanLII 3619 \(SK IPC\)](#).

Cases Considered: *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD); *Atlantic Highways Corp. v. Nova Scotia* (1997) [1997 CanLII 11497 \(NS SC\)](#); *Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 403 [1997 CanLII 358 \(SCC\)](#); *Dickie v Nova Scotia (Department of Health)*, [1999 CanLII 7239 \(NSCA\)](#); *House, Re*, [2000 CanLII 20401 \(NS SC\)](#); *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, [2012 SCC 3 \(CanLII\)](#).

Other Sources: Canadian Oxford Dictionary, (Toronto: Oxford University Press, 1991).

INTRODUCTION:

[1] In 2013, the Municipality of the County of Kings (Municipality) issued a request for proposal (RFP) for legal services. In response, it received six proposals. In due course, a selection of the successful bidder was made and a contract was entered into. The applicant originally sought a copy of all of the proposals and all records relating to the Municipality's request for proposal for legal services. Initially, the Municipality withheld a significant amount of information citing a variety of exemptions under the *Municipal Government Act (MGA)*. In response, the applicant filed a request for review with this office.

[2] After an extensive and fruitful informal resolution process with this office, the only outstanding issues relate to the pricing information provided by the successful and one unsuccessful bidder and the identity of staff members on a summary of a proponent rating table.

ISSUES:

[3] There are two issues under review:

- (a) Is the Municipality 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?
- (b) Is the Municipality required by s. 480 of the *MGA* to refuse access to the record or any part thereof because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

DISCUSSION:

Background

[4] In April 2013, the Municipality issued a request for proposals for legal services. On June 18, 2013, the successful proponent was selected. In February 2014, the applicant sought a copy of all of the proposals and of all records relating to the request for proposal.

[5] In response, the Municipality provided a package of information to the applicant that was initially heavily redacted. The applicant filed a request for review of this initial decision with my office in May 2014.

[6] Both parties actively engaged in the informal resolution process which ultimately resulted in a further seven disclosure decisions. What remains is, perhaps, the heart of the matter. That is, after consulting with the third party bidders, the Municipality continues to withhold the pricing information contained in the proposal of the successful and unsuccessful bidders citing harm to third party business interests (s. 481 of the *MGA*). To test this decision, the applicant requested that the formal review proceed with respect to only the proposals of the successful bidder and two sample unsuccessful bidders. One of these unsuccessful bidders consented to the full disclosure of its proposal just prior to this formal review.

[7] The second type of information remaining at issue is the identity of the staff members who conducted the evaluation of the bids. Specifically, the record at issue is an evaluation summary

table which discloses the marks given by identified staff members to each proponent. The Municipality has disclosed the ratings and the identity of the proponents. In its submission, the Municipality states that the identity of the evaluation team members were publicly disclosed. What the Municipality has continued to withhold are the evaluation team member identities on the form which would reveal the exact rating each member gave to each proponent. The Municipality cites s. 480 of the *MGA* (unreasonable invasion of a third party's personal privacy) as the basis for its decision.

Burden of Proof

[8] In accordance with ss. 498(1) and 498(3) of the *MGA*, the Municipality and third parties bear the burden of proving that s. 481 applies. With respect to information withheld under s. 480 as third party personal information, it is the applicant who bears the burden of proof.¹

(a) Is the Municipality 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?

[9] There are two types of pricing information at issue in this case. Pricing information of the successful bidder and pricing information of one unsuccessful bidder.

[10] The test for the application of s. 481 of the *MGA* and the equivalent provision in the *Freedom of Information and Protection of Privacy Act (FOIPOP)* (s. 21) is clearly set out in the provision. The burden is on the Municipality and third parties to establish that the disclosure of the requested information:

1. Would reveal 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).

[11] In this case, the Municipality provided no submission with respect to the proper application of s. 481 to the withheld pricing information. It stated instead, "We note that the Municipality takes no position and makes no submissions on the other records subject to this review relating (sic) third party proponents." The Municipality communicated its position to each of the third parties in advance of this review. Each third party was well-positioned to understand the consequences of the Municipality's approach. Each third party was given the opportunity to make submissions to this review; only one chose to do so.

Unsuccessful Bidder

[12] In this case the third party who was a losing bidder failed to provide any argument or evidence in support of the application of s. 481 to the information withheld on its losing proposal. That information consisted of pricing information including details of the fee structure, hourly rates, flat rates, and the identity of three references. As noted above, it is the

¹ A complete copy of the *MGA, Part XX* is available at:
<http://nslegislature.ca/legc/statutes/municipal%20government.pdf>

Municipality and the third party who bear the burden of proving that s. 481 applies to the withheld information. In this case, not only did the third party not provide any evidence as noted above, the Municipality also did not offer any evidence or argument in support of its application of s. 481 to this third party's proposal.

[13] A key element of the three-part test in s. 481 is the requirement that there be evidence of harm from the disclosure. Even if the withheld information satisfied the first two parts of the s. 481 test, I have no evidence before me that any harm would result from the disclosure, let alone harm of the type required by s. 481(1)(c) of the *MGA*. Since I have no evidence before me, I find that the Municipality and third party have failed to meet their burden of proof. Therefore, I find that s. 481 does not apply to the proposal of the unsuccessful third party.

Successful Bidder

[14] Below is an analysis of the application of s. 481 to information contained in the proposal of the successful bidder and in similar information on three pages of correspondence with that bidder. The correspondence consists of one page of notes from a phone call intended to clarify pricing elements of the proposal, the letter of offer from the Municipality to the third party and a follow up clarification on price from the third party to the Municipality.

Would the disclosure reveal trade secrets of a third party or commercial, financial, labour relations or technical information of a third party?

[15] Section 481(1)(a) of the *MGA* contains two elements: whether the disclosure would reveal commercial, financial, labour relations or technical information and whether the information is "of the third party".

Commercial Information

[16] The information at issue here is pricing information. The RFP directed proponents to set out their proposed costs and recommended method of billing payment. The RFP required that the cost information be reported in the following manner:

- Retainer fee requested and services to be covered by retainer.
- Details on services or projects to be billed on a flat fee, lump sum fee for service, or an hourly basis.
- Services to be charged at an hourly rate and rates to be charged (firm member, rate, and area of responsibility).
- Disbursement items and costs associated with referrals and other specific items that were not reported elsewhere.
- Regular invoice structure and other charges or charging methods proposed.

[17] Does the pricing information, including details of the fee structure, hourly rates and flat rates, constitute commercial or financial information of a third party? The terms "commercial" and "financial" are not defined in the *MGA*. With respect to the equivalent provision in *FOIPOP*, I have noted on a number of occasions that 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.²

[18] “Commerce” is defined in the Concise Oxford English Dictionary as, “the activity of buying and selling, especially on a large scale.”³

[19] Prince Edward Island’s access law contains a provision virtually identical to s. 481. In a recent decision, Commissioner Rose provided the following definition of the term “commercial”:

"commercial information" - Relates to the buying, selling or exchange of merchandise or services. Commercial information includes third party associations, history, references, and insurance policies, as well as pricing structure, market research, business plans, and customer records.⁴

[20] In the same case, Commissioner Rose concludes that information that reveals pricing and billing details of the service provided by a third party to a public body satisfied the definition of commercial information.⁵

[21] While Saskatchewan’s access law has a differently structured third party business exemption, it does apply to “commercial” information. In a recent decision, Commissioner Kruzeniski provided the following definition:

Commercial information is information relating to buying, selling or exchange of merchandise or services.⁶

[22] After citing that definition Commissioner Kruzeniski concludes that hourly rates qualify as commercial information.⁷

[23] I agree with this approach and I find that pricing information, including fee structure, hourly rates, and flat rates all qualify as commercial information within the meaning of s. 481(1)(a) of the *MGA*.

Of a Third Party

[24] Section 481(1)(a) requires not only that the withheld information be commercial or financial information, but that the information be “of a third party”. In Nova Scotia we have the benefit of the Supreme Court’s decision in *Atlantic Highways Corp. v. Nova Scotia (1997)*. In that decision, the Court determined that information in an omnibus agreement to construct a toll highway was not commercial or financial information of a third party because the information had either already been exposed to publication or was so intertwined with the Provincial input by

² *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD) at p. 268 cited with approval in *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at para 139.

³ Canadian Oxford Dictionary, (Toronto: Oxford University Press, 1991), “commerce” at p. 287 [Oxford].

⁴ OIPC PEI, Order FI-17-002 at para 11.

⁵ OIPC PEI Order FI-17-002 at para 12.

⁶ OIPC Sask, Review Reports 195-2015 & 196-2015 at para 24.

⁷ OIPC Sask, Review Reports 195-2015 & 196-2015 at para 26.

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.⁸

[25] In this case, the disclosed records reveal that once the successful proponent was selected, the Municipality wrote to the successful proponent and suggested that the letter and the third party's proposal for the provision of legal services would form the contractual basis for the provision of services. The offer letter clarifies two elements of the proposed billing. In response, the third party wrote back stating, "We are in agreement with the contents of the letter and, of course, stand by all elements of our proposal."⁹

[26] It is not uncommon for municipalities or public bodies to incorporate some or all of the successful proposal into the final contract. This occurs in other jurisdictions and a number of decisions specifically address the incorporation of pricing proposals. Three recent examples can be found in PEI, Newfoundland and Labrador, and British Columbia. These decisions determine that pricing information from proposals incorporated into a contract is either not "of the third party" (as required under s. 481(1)(a) of the *MGA*) or is not "supplied" (as required under s.481(1)(b) of the *MGA*).¹⁰

[27] In fact, public expenditures are a key type of government information to which access law is intended to provide access. I agree with my colleagues in Newfoundland and Labrador and PEI that nothing is more central to the goals of accountability and transparency than the right to information about what public bodies and municipalities are spending public money on, and what they are receiving in return.¹¹

[28] The applicant made this point by highlighting a term of the RFP which provided:

The work described in any RFP is being conducted with public funds, and the fees and expenses proposed in the Contractor's submissions will be made public.

[29] In this case, the successful proponent did not provide any submission on how the pricing information, once incorporated into a contract, could qualify as "of the third party" in light of the decision in *Atlantic Highways* noted above. The records available to me make clear that a negotiation occurred at the end of the RFP process. The Municipality proposed that the contract be made up of the successful proposal as clarified in the telephone conversation and the cover letter. The third party agreed.

[30] I find that the pricing information withheld on pages 20, 65, 66, 67, 73 and 75 was not "of the third party" once it was incorporated into the final agreement with the Municipality.

⁸ *Atlantic Highways Corp. v. Nova Scotia* (1997) [1997 CanLII 11497 \(NSSC\)](#) at p. 9. I made the same point in NS Review Report FI-13-28 at para 16.

⁹ The Municipality's letter is dated June 19, 2013 and the third party's letter is dated June 20, 2013. The contents revealed above were disclosed to the applicant.

¹⁰ OIPC NFLD Report A-2016-001 at para 11, OIPC PEI Order No. FI-17-002 at para 15, and BC OIPC Order F17-14 at para 18. The BC OIPC case has an interesting discussion regarding the use of a pricing schedule incorporated into a contract.

¹¹ This point was made by PEI Commissioner Rose in Order No. FI-17-002 at para 15 and Newfoundland and Labrador Commissioner Molloy in Report 17-014 at para 16.

[31] Since the three parts of s. 481(1) must all be satisfied (read conjunctively) I conclude that s. 481 does not apply to the withheld information of the successful proponent. Since the first part of the test is not met, it is not necessary for me to consider the remaining requirements of s. 481.

(b) Is the Municipality required by s. 480 of the MGA to refuse access to the record or any part thereof because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

[32] The Municipality takes the position that the identity of the employees associated with the evaluations they gave to each proponent is the personal information of the employees. It is the attribution of the scores to an identifiable employee that the Municipality is concerned with protecting.

[33] In order for s. 480 to apply to information, the Municipality must conduct a four-part analysis as follows:¹²

1. Is the requested information “personal information” within the meaning of s. 461(f)? If not, that is the end. Otherwise the Municipality must go on.
2. Are any of the conditions of s. 480(4) satisfied? If so, that is the end.
3. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 480(3)?
4. In light of any s. 480(3) presumption, and in light of the burden upon the applicant established by s. 498(2), does the balancing of all relevant circumstances, including those listed in s. 480(2), lead to the conclusion that the disclosure would constitute an unreasonable invasion of privacy or not?

1. Is the requested information “personal information” within the meaning of s. 461(f)? If not, that is the end. Otherwise the Municipality must go on.

[34] The information at issue is the names of employees. The MGA defines personal information in s. 461(f) as including an individual's name. Therefore, the information at issue qualifies as personal information.

2. Are any of the conditions of s. 480(4) satisfied? If so, that is the end.

[35] The Municipality says that none of the conditions of s. 480(4) are satisfied. In particular, the Municipality states that s. 480(4)(e) does not apply to the withheld information. Section 480(4)(e) provides:

480(4) A disclosure of personal information is not an unreasonable invasion of the third party's personal privacy if:

- (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of the municipality

¹² I have applied this test in a number of NS Review Reports including FI-10-95, FI-11-71, 16-03 and 16-04 which are based on the Nova Scotia Supreme Court decision in *House, Re*, [2000 CanLII 20401 \(NS SC\)](#) at p. 3.

[36] The Municipality believes that the attribution information is not information “about” the employees’ positions or functions. In relation to the proposal evaluation committee, the Municipality says the information about positions or functions is simply the identity of the employees appointed to the committee. This information was made public. The attribution of the scores, according to the Municipality, is not about the position.

[37] The applicant says that the disclosure of names of public servants is not considered an unreasonable invasion of those persons’ personal privacy. He cites a decision of Former Acting Review Officer Bishop in a case where a municipality withheld each evaluation member’s score results. In deciding that s. 480 did not apply, Review Officer Bishop stated,

With respect to the claim of s.480 (unreasonable invasion of personal privacy), I note the “personal information” contained within the score results are the names of the committee members. In *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R.403, 1997 CanII 358 (S.C.C), the Supreme Court of Canada accepted the argument that the names of public servants are information relating to their position and functions as public servants, and should be disclosed. It is a function of each committee member to score the proposals.

I conclude that s.480 and s.481 of Part XX of the *MGA* do not apply to each Evaluation Committee member’s score results.¹³

[38] In *Dagg*, the Supreme Court of Canada was considering an access to information request for copies of logs with the names, identification numbers and signatures of employees entering and leaving the workplace. The majority determined that the number of hours spent at the workplace is information that is “related to” the position or function of the individual in that it permits a general assessment to be made of the amount of work required for a particular employee’s position or function.¹⁴ In evaluating other related cases the Court made the point that there was neither a subjective aspect nor an element of evaluation contained in a record of an individual’s presence at the workplace beyond normal working hours. Rather, the Court determined the record discloses information generic to the position itself.¹⁵

[39] I agree with my predecessor that *Dagg* stands for the proposition that names of public servants that appear strictly in a work-related context are information relating to their positions and functions as public servants. This is true so long as there is no subjective or evaluative element with respect to the performance of the public servant.

¹³ NS Review Report FI-06-21(M) at p. 3.

¹⁴ *Dagg v. Canada (Minister of Finance)*, [1997 CanLII 358 \(SCC\)](#), [1997] 2 S.C.R.403 at para 8.

¹⁵ *Dagg* at para 12.

[40] An interesting aspect of the federal *Privacy Act* is that the exclusion of information that is related to position or function in the *Privacy Act* is followed by a list of examples which includes:

- (iv) the name of the individual on a document prepared by the individual in the course of employment and
- (v) the personal opinions or views of the individual given in the course of employment.¹⁶

[41] Nova Scotia's *MGA* does not have the benefit of a list of examples of what constitutes information "related to" a position or function. But cases found in other jurisdictions with provisions similar to s. 480(4)(e) are informative.

[42] Other Information and Privacy Commissioners have reached the following conclusions regarding the scope of this type of provision:

- Any third party identifying information that in some way relates to the third party's job duties in the normal course of work-related activities falls into this provision. Objective, factual statements about what the third party did or said in the normal course of discharging her or his job duties, but not qualitative assessments or evaluations of such actions, fall within this provision.¹⁷
- One must consider whether the severed information is about the employee acting on behalf of the public body, or whether it is information conveying something personal about the employees. Disclosure of information relating to employees acting in a representative capacity is deemed not to be an unreasonable invasion of personal privacy.¹⁸
- The unreasonable invasion of personal privacy exemption does not apply to personal information that merely reveals that an individual did something in a formal, representative, professional, official, public or employment capacity. It has also been stated that records of the performance of work responsibilities by an individual is not, generally speaking, personal information about that individual, as there is no personal dimension.¹⁹

[43] In Review Report 16-02, I determined that the identity of an employee who signed a true copy stamp fell within the meaning of s. 20(4)(e) of *FOIPOP* (equivalent to 480(4)(e) of the *MGA*) because the sole purpose for the signature was to attest to the accuracy of the document. The employee signed the document in that context as one of his or her work duties.²⁰ In Review Report FI-10-19, I determined that the identity of employees described as being present during a workplace incident also fell within the meaning of s. 20(4)(e) of *FOIPOP*.²¹ In Review Report 17-05, I determined that the disclosure of opinions given by municipal employees in a work-

¹⁶ *Privacy Act*, s. 3(j).

¹⁷ BC OIPC Order 01-53 at para 40.

¹⁸ PEI OIPC Order FI-16-003 at para 91 – found that the equivalent to s. 480(4)(e) applied to the identity of employees referenced in their professional capacity only while carrying out their employment responsibilities.

¹⁹ Alberta OIPC Order F2009-026 at para 10.

²⁰ NS Review Report 16-02 at para 58.

²¹ NS Review Report FI-10-19 at para 25.

related context would not result in an unreasonable invasion of the privacy of a municipal employee.²²

[44] The information at issue here is the names of employees who were members of the proposal evaluation committee associated with the scores they assigned to each proponent. The scoring of the proposals was a workplace duty undertaken on behalf the Municipality. Certainly, the employees exercised judgement and used their experience and expertise to conduct the scoring. But this is exactly what they were hired to do in their capacity as employees of the Municipality. They were clearly acting on behalf of the public body when they undertook the proposal rating exercise. There is no qualitative assessment or evaluation of the actions of the employees. The record simply contains the outcome of the employees' work-related function.

[45] I find that s. 480(4)(e) of the *MGA* applies to the withheld information and so disclosure of the employees' identity on the scoring sheets (attribution information) would not result in an unreasonable invasion of a third party's personal privacy.

3. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 480(3)?

[46] Because I have found that s. 480(4)(e) applies to the withheld information, I need not consider whether or not s. 480(3) applies. However, the Municipality raised a number of concerns with the disclosure using the s. 480(3)(g) argument and so I have set out a brief analysis.

[47] The Municipality submits that the disclosure of the information would be a presumed unreasonable invasion of personal privacy under s. 480(3)(g) of the *MGA*. Section 480(3)(g) provides:

480(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information
(g) consists of personal recommendations or evaluations, character references or personnel evaluations.

[48] The Municipality argues that the attribution information ought to be caught by s. 480(3)(g) for a number of reasons:

- In a small rural community, employees conducting the procurement scoring can expect to routinely deal with and interact on a variety of personal, social and professional levels with proponents and tenderers. If the scorer knows that his or her score would be attributable, the individual may feel pressure to score based on external factors which may taint the process.

²² NS Review Report 17-05 at para 88. I note that in this case I determined, on the facts of the case and given the exact nature of the records at issue, that s. 480(4)(e) did not apply to the three documents that contained municipal employee opinions but I nevertheless determined overall that s. 480 did not apply to opinions of municipal employees in a work context.

- The release of the attribution information may prejudice the selection of staff appointed to a future scoring committee.
- The release of the attribution information may have a chilling effect on the staff willing to participate on a future scoring committee.
- The committee members had an expectation of confidentiality with respect to the attribution information.

[49] The suggestion that professional judgements made in the context of day-to-day work-related activities can fall within s. 480(3)(g) is not supported by the wording of the provision. Section 480(3)(g) refers to *personal* recommendations or evaluations, *character* references or *personnel* evaluations.

[50] The definition of “personal information” in the *MGA* includes the individual’s *personal* views or opinions, except if they are about someone else.²³

[51] The use of the word “personal” in this part of the definition modifies the word “opinions”. It is not all views or opinions that fall within the definition of personal information, it is only *personal* views of opinions. In the context of this case, an employee providing an opinion in a work setting, based on the exercise of professional judgement and as part of his or her normal work-related functions, cannot be said to be providing a “personal” opinion.

[52] Further, the Municipality says that the third party, for the purposes of s. 480(3)(g), is the employee and that the “recommendation or evaluation” is the score the employee attributed to a proponent (a business entity). While the evaluation was conducted by a municipal employee, the nature of the opinions or evaluations were not of the character contemplated by s. 480(3)(g) of the *MGA*. That is, they were not *personal* evaluations, *character* references or *personnel* evaluations. They were professional evaluations in the context of a work-related activity.

[53] This view is consistent with the findings of the Nova Scotia Court of Appeal. In *Department of Health v. Dickie*, the Nova Scotia Court of Appeal considered the meaning of s. 20(3)(g) of the *Freedom of Information and Protection of Privacy Act*. This provision is substantively identical to s. 480(3)(g) of the *MGA*. The Court was considering in part whether s. 20 applied to the identity of employees who participated in an investigation by providing responses to investigation questions. In deciding that s. 20(3)(g) did not apply to the identity of employees in this circumstance, the Court said:

Each of the terms used in subsection 20(3)(g) appears to me to relate to types of documents which are common in the hiring and ongoing evaluation of employees. I agree with the judge, and the respondent, that this language does not contemplate disciplinary investigations or recommendations made as a result of them.²⁴

²³ *MGA* s. 461(f)(ix).

²⁴ *Dickie v Nova Scotia (Department of Health)*, [1999 CanLII 7239 \(NSCA\)](#) at para 51.

[54] Former Review Officer Fardy adopted this approach and concluded that “personal recommendations” and “evaluations” within the meaning of s. 20(3)(g) of *FOIPOP* are generally offered by a supervisor in managing staff.²⁵

[55] The information in this case has nothing to do with hiring or ongoing evaluation of employees.

[56] The Municipality raises concerns that in a small community, committee members might feel pressure to score based on external factors if they know that their scoring will be made public. In my view, the opposite effect is equally likely. That is, if committee members know that their scores are likely to be made public, they will make every effort to conduct their evaluation in a fair manner consistent with and supported by the evaluation criteria.²⁶ That is, after all, one of the core purposes of the *MGA, Part XX* – to ensure fairness in government decision making.

[57] I am uncertain how the publication of the attribution information could affect the selection of the committee members or have a chilling effect on the willingness of staff to participate. If participation is a job duty then the Municipality will assign the duty and staff will participate as required. I would think perhaps the most likely effect publication of attribution information would have is that the Municipality will take care to only select individuals who have no conflict of interest or appearance of conflict and who have the experience and expertise to fully and professionally evaluate bids.

[58] Finally, with respect to the expectation of confidentiality, the Municipality offered no evidence in support of this assertion. But to be fair, even if it had, it is not a relevant consideration with respect to the application of s. 480(3)(g) to professional opinions. If staff had an expectation of confidentiality, they were mistaken. The evaluation of bids is an important workplace activity likely to be subject to public scrutiny.

[59] Given my finding with respect to the application of s. 480(4) above, I need not make a finding with respect to s. 480(3)(g). However, I conclude that s. 480(3)(g) would not apply to the attribution information.

FINDINGS & RECOMMENDATIONS:

[60] I find that:

1. Section 481 does not apply to the proposal of the unsuccessful third party.
2. Section 481 does not apply to the proposal of and records relating to the proposal of the successful bidder.
3. Section 480 does not apply to the attribution information.

²⁵ NS Review Report FI-02-113 at p. 2.

²⁶ To be clear, there is no suggestion or indication that committee members in this case acted in anything other than a professional, fair and competent manner in their assessments. This is a general observation only.

[61] I recommend that the Municipality

1. Disclose all information withheld under s. 481 contained in the proposal of the unsuccessful third party.²⁷
2. Disclose all information withheld under s. 481 contained in the proposal of and records relating to the proposal of the successful bidder.²⁸
3. Disclose the identity of the employees contained on the scoring sheet.²⁹

July 31, 2017

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

OIPC File FI-14-46(M)

²⁷ Pages 251, 252, 253 and 254 of the records.

²⁸ Found on pages 20, 65, 66, 67, 73 and 75 of the records.

²⁹ Found on page 24 of the records.