Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner
Catherine Tully

REVIEW REPORT 19-04

June 6, 2019

Halifax Regional Municipality

Summary: The access to information provisions of the *Municipal Government Act* are meant to ensure that information concerning municipal employee remuneration is available and that personal privacy considerations do not impede disclosure of this information. As a result, terms contained in an employment contract of a former Chief Administrative Officer cannot be withheld under the privacy provisions of the *Act*. In addition to applying the personal privacy exemption, Halifax Regional Municipality also claimed that disclosure of the terms of the employment contract could harm the economic interests of the municipality but provided no evidence to support its assertions of harm. On that basis, the Commissioner recommends full disclosure of the terms of the employment contract with a former Chief Administrative Officer.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, s. 17; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 22; *Municipal Government Act*, SNS 1998 c 18, ss. 461, 477, 480, 498; *Public Sector Compensation Disclosure Act*, SNS 2010, c 43, s. 2.

Authorities Considered: Alberta: Order F2006-008, 2007 CanLII 81638 (AB OIPC); **British Columbia:** Orders 02-56, 2002 CanLII 42493 (BC IPC); F06-03, 2006 CanLII 13532 (BC IPC); F-08-22, 2008 CanLII 70316 (BC IPC); F09-15, 2009 CanLII 58553 (BC IPC); F14-41, 2014 BCIPC 44 (CanLII); **Nova Scotia:** Review Reports 18-02, 2018 NSOIPC 2 (CanLII);18-11, 2018 NSOIPC 11 (CanLII); 19-01, 2019 NSOIPC 19 (CanLII).

Cases Considered: *A.B. v. Griffiths*, 2009 NSCA 48 (CanLII); *House (Re)*, 2000 CanLII 20401 (NS SC); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII).

Other Sources Considered: *Black's Law Dictionary* (5th Edition) (St. Paul, Minn.: West Publishing Col, 1979), "remuneration"; Halifax Regional Municipality, "Administrative Order Number 2015-006-ADM, Respecting Disclosure of Employee Salaries", November 24, 2015, (online: https://www.halifax.ca/sites/default/files/documents/city-hall/legislation-by-laws/2015-006-ADM.pdf).

INTRODUCTION:

[1] The applicant sought a copy of the employment contract Halifax Regional Municipality (HRM) had with a former Chief Administrative Officer (CAO). Initially, in response to the request, HRM declined to provide access to the letter of offer which includes the terms of the former CAO's employment contract. During the informal resolution process with this office, HRM completed two further releases of the letter of offer. The information remaining at issue relates to the terms found in eight provisions in the contract/letter of offer. HRM cited third party personal information and harm to the economic interests of HRM as the basis for refusing access to the remaining information.

ISSUES:

[2] There are two issues in this case:

1. Is HRM required by s. 480 of the *Municipal Government Act* (*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?
2. Is HRM authorized to refuse access to information under s. 477 of the *MGA* because disclosure could reasonably be expected to harm the economic interests of the municipality?

DISCUSSION:

Background

[3] The former CAO's employment contract was recorded in the form of a letter of offer that was accepted by the former CAO. When the applicant asked for a copy of the "employment contract", HRM informed her that there was no employment contract per se, but that there was a letter of offer containing the terms agreed upon. This allowed the applicant to confirm that the letter of offer was then the document she sought. HRM met its duty to assist by not interpreting the original request so narrowly as to thwart the applicant's access rights. HRM understood the nature of the information the applicant was seeking and quite properly informed her that the information could be found in a different document than the one identified in the original request. This is best practice and an approach that is consistent with the duty to assist.

Burden of Proof

[4] At a review of a decision to refuse an applicant access to a record, the burden is on the municipality to prove that the applicant has no right of access to the record or part of the record. However, 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.

Is HRM 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?

[5] Initially, HRM relied on s. 480 to support withholding the letter of offer. In its most recent response to the applicant, HRM has determined that s. 480 only applies to two signatures, a home address and one paragraph of the agreement – paragraph 10.

[6] The proper approach to applying s. 480 is well established in Nova Scotia and was set out by the court in *Re House*:[1]

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

[7] HRM stamped "s. 480(3)(d)" on the document released to the applicant. In its submission, HRM only addresses whether or not s. 480(3)(d) applies saying simply that the information relates to employment or education history and that the former CAO has not consented to the release of the information.

[8] In making this submission, HRM fails to properly apply the test in s. 480. The test is not whether s. 480(3)(d) applies, nor is it whether the former CAO has consented to the disclosure, the test is whether or not disclosure of the withheld information would be an unreasonable invasion of a third party's personal privacy.

[9] There are four analytical steps that must be completed before a municipality can determine that s. 480 requires it to withhold third party personal information.

Step 1: Is the requested information "personal information"?

[10] The first step is to determine whether or not the withheld information is personal information within the meaning of s. 461(1)(f). I find that paragraph 10 of the offer letter does contain third party personal information.

[1] *House (Re)*, 2000 CanLII 20401 (NS SC), at para 14.

Step 2: Are any of the conditions of s. 480(4) satisfied?

[11] The second step is to determine whether any of the conditions of s. 480(4) are satisfied. If they are, that ends the inquiry and the information cannot be withheld under s. 480. HRM has not addressed the application of s. 480(4) to paragraph 10. Two subsections of s. 480(4) are relevant here:

> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
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> (a) the third party has, in writing, consented to or requested the disclosure;
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a municipality;

[12] The fact that the third party has not consented to the disclosure of the personal information means only that s. 480(4)(a) does not apply. The fact that the third party was asked to consent and did not may be an indication that the third party considers the information confidential which is a relevant consideration in step 3. But it is only relevant if no other provision in s. 480(4) applies.

[13] The information at issue here is found in the letter of offer that served as an employment contract. According to s. 480(4)(e) if the information is about the third party's position, functions or remuneration as an employee of the municipality then the disclosure of the information would not be an unreasonable invasion of a third party's personal privacy. In general terms, s. 480(4)(e) is meant to ensure that information concerning municipal employees' remuneration, functions or positions is available and that personal privacy considerations do not impede disclosure of this information.[2]

[14] The withheld information does not, in my view, relate to the third party's position or functions, but it may qualify as "remuneration".

[15] The term "remuneration" is not defined in the *MGA*. According to Black's Law Dictionary,[3] remuneration means: reward; recompense; salary; compensation. Compensation then is a synonym for remuneration.

[16] While the definition of compensation in other Nova Scotia statutes is of course not determinative of the definition in the *MGA*, it is informative. In the absence of a specific definition in the *MGA*, it is worthwhile to consider how the term "remuneration" is used in other Nova Scotia statutes.

[17] Under the "Administrative Order 2015-006-ADM", HRM determined that it would disclose compensation paid in respect of employment by HRM to employees who receive

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[2] This is consistent with the British Columbia Information and Privacy Commissioner's decisions in relation to the similarly worded s. 22(4)(e) of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165. See for example BC Order F14-41, 2014 BCIPC 44 (CanLII), at para 24 and BC Order F09-15, 2009 CanLII 58553 (BC IPC), at para 38.

[3] *Black's Law Dictionary* (5th Edition) (St. Paul, Minn.: West Publishing Col, 1979), "remuneration" at p. 1165.

compensation of over $100,000.[4] "Compensation" is defined in the Administrative Order as follows:

> (b) "compensation" means the total amount or value of all cash and non-cash salary, wages, payments, allowances, bonuses, commissions and perquisites, other than a pension, pursuant to any arrangement, including an employment contract, and includes, without restricting the generality of the foregoing,
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> (i) all overtime payments, retirement or severance payments, lump-sum payments and vacation payouts,
>
> (ii) the value of loan or loan-interest obligations that have been extinguished and of imputed-interest benefits from loans,
>
> (iii) long-term incentive plan earnings and payouts,
>
> (iv) the value of the benefit derived from vehicles or allowances with respect to vehicles,
>
> (v) the value of the benefit derived from living accommodation provided or any subsidy with respect to living accommodation,
>
> (vi) payments made for exceptional benefits not provided to the majority of employees,
>
> (vii) payments for memberships in recreational clubs or organizations, and

[18] This definition is almost identical to the definition of compensation found in Nova Scotia's *Public Sector Compensation Disclosure Act*.[5]

[19] So, "compensation" in Nova Scotian statutes could reasonably be interpreted to include "payments made for exceptional benefits not provided to the majority of employees".

[20] HRM also applied s. 477 to the information withheld in paragraph 10. In its submission, HRM notes that the amount of the benefit "exceeds what the policy currently in place permits". Therefore, based on HRM's submission, the information relating to a benefit withheld in paragraph 10 of the letter of offer was "an exceptional benefit not provided to the majority of employees". On that basis, I find that s. 480(4)(e) applies to all of the withheld information in paragraph 10 that describes the negotiated benefit. In order to describe the benefit, some amount of the third party's personal information is, by necessity, disclosed. The law is clear that the balance to be struck between privacy and transparency where the information relates to remuneration is on the side of transparency. Therefore, with the exception of three words in paragraph 10, I find that s. 480(4)(e) applies and so the information cannot be withheld as an unreasonable invasion of a third party's personal privacy.

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[4] Halifax Regional Municipality, "Administrative Order Number 2015-006-ADM, Respecting Disclosure of Employee Salaries", November 24, 2015, (online: https://www.halifax.ca/sites/default/files/documents/city-hall/legislation-by-laws/2015-006-ADM.pdf).

[5] *Public Sector Compensation Disclosure Act*, SNS 2010, c 43, s. 2(b).

Step 3: Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 480(3)?

[21] While the requirements of s. 480(4)(e) have been met for most of the withheld information in paragraph 10, a small portion – three words – does not fall within that section because it does not describe the benefit. And so, for those three words, I must go on to determine whether or not a presumption in s. 480(3) applies.

[22] To be clear, if I had found that s. 480(4)(e) applies to all of the information in paragraph 10, there would be no need to discuss the application of s. 480(3)(d) even if the information clearly qualifies as educational or employment history. As the Nova Scotia courts have repeatedly determined, if s. 480(4) applies, s. 480 does not apply and the discussion ends there.

[23] HRM relies on s. 480(3)(d). The argument presented by HRM is simply that the information relates to the employment or educational history of the former CAO and so s. 480(3)(d) applies.

[24] Section 480(3) creates a presumed unreasonable invasion of personal privacy for certain categories of records. When the presumption applies, this adds an additional burden on the applicant to establish that the disclosure of the withheld information would not be an unreasonable invasion of a third party's personal privacy. Given that the purpose of the *MGA, Part XX* is to ensure full accountability, making a finding that the presumption applies should be done with care. A review of that subsection reveals that the information listed in that subsection has a common theme. The information listed is sensitive. The list includes medical information, tax return information, bank balances, sexual orientation and political beliefs along with employment history. The term "employment history" should be interpreted in light of the purposes of the law and consistent with the sensitivity of the other information listed in s. 480(3).

[25] The Nova Scotia Court of Appeal had this to say about the proper interpretation of the term "employment or educational history":

> [36] In order to be found to be employment or educational history, the information must do more than simply have some sort of link to employment or education. The words "employment and educational" are not nouns, but adjectives which describe the word "history". The presumption against disclosure will only arise if the information relates to "employment or educational history" in the fuller sense set out in the jurisprudence.[6]

[26] In order to avoid disclosing the withheld information, I can only say that I agree that three of the words withheld in paragraph 10 fall under s. 480(3)(d).

Step 4: Would the disclosure constitute an unreasonable invasion of privacy or not?

[27] The final step in the process with respect to the three words to which s. 480(3)(d) applies is to determine whether or not, based on all of the relevant considerations, the disclosure of the information would result in an unreasonable invasion of a third party's personal privacy. There are three relevant considerations. First, the third party did not consent to the disclosure of the information. On that basis, it is reasonable to conclude that the third party believed that the

[6] *A.B. v. Griffiths*, 2009 NSCA 48 (CanLII), at para 36.

information had been supplied in confidence within the meaning of s. 480(2)(f). This consideration weighs against disclosure. The three words are, in my view, factual and non-sensitive. This factor weighs in favour of disclosure. Finally, the withheld information is otherwise publicly available.[7] This factor weighs heavily in favour of disclosure.

[28] On balance, I find that the disclosure of the three words that relate specifically to the applicant in paragraph 10 would not be an unreasonable invasion of third party personal privacy. HRM also applied s. 477(1)(e) to this paragraph and so I will now consider the application of that exemption to this information.

Is HRM authorized to refuse access to information under s. 477 of the *MGA* because disclosure could reasonably be expected to harm the economic interests of the municipality?

[29] HRM withheld all or part of nine paragraphs of the letter of offer citing s. 477(1)(e) as authority to withhold the information. Section 477(1)(e) provides:

> 477 (1) The responsible officer may refuse to disclose to an applicant information, the disclosure of which, could reasonably be expected to harm the financial or economic interests of the municipality, another municipality or the Government of the Province or the ability of the Government of the Province to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:
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> (e) information about negotiations carried on by or for the municipality or another municipality or the Government of the Province.

[30] In order to rely on s. 477(1), HRM must establish that the disclosure of the withheld information could reasonably be expected to harm the financial or economic interests of the municipality. Section 477 provides that such harm may arise from the non-exhaustive list of enumerated circumstances set out in s. 477(1)(a) to (e).[8] In this case, HRM points to s. 477(1)(e) as being a relevant consideration.

[31] HRM bears the burden of proving that the test in s. 477 has been satisfied. Harms-based exemptions require a reasoned assessment of the future risk of harm. The leading case in Canada on the appropriate interpretation of the reasonable expectation of harms test found in access to information laws determined that access statutes mark out a middle ground between that which is

[7] I will provide HRM with a link to the publicly available information. To avoid disclosing the withheld information, I will not provide the link in this review report.

[8] I make these same observations about the application of s. 17 of the *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5 [*FOIPOP*] (the equivalent to s. 477 of the *MGA*) in NS Review Report 19-01, 2019 NSOIPC 19 (CanLII), at para 58.

probable and that which is merely possible.[9] A municipality must provide evidence well beyond or considerably above a mere possibility of harm in order to reach that middle ground.[10]

[32] HRM points in particular to s. 477(1)(e) to support withholding information in the responsive record. There are two elements that must be established for s. 477(1)(e) to apply. First, the withheld information must be "information about negotiations carried on by or for a municipality." Secondly, the disclosure of the information could reasonably be expected to harm the financial or economic interests of a municipality.

[33] What is "information about negotiations"? Information that might be collected or compiled for the purpose of negotiations, that might be used in negotiations or that might, if disclosed, affect negotiations, is not necessarily about negotiations. Information about negotiations includes analysis, methodology, options or strategies in relation to negotiations.[11]

[34] In this case, the information withheld is the outcome of the negotiations. There is nothing directly referencing options, strategies or methodology in relation to negotiations. I suppose one might say that the outcome of the negotiations reveals something of the strategy of HRM. In this case, I do not see any information in the withheld portion of the record that would allow an assiduous reader to be able to glean information about HRM's strategy or methodology in relation to the negotiations.

[35] More importantly, HRM has not provided any evidence to support the application of s. 477. HRM has only provided assertions of harm, in essence, argument, that harm will occur. Those arguments were provided in the submission authored by the Access and Privacy Officer. They were not supported with any evidence from any person with direct experience in negotiating these types of contracts or with direct historical knowledge about how previously negotiated terms had influence on new contract negotiations.

[36] The assertions of harm in the submission consist simply of stating that, "the disclosure of this information prejudices Council's ability to negotiate fairly and in the best interests of its residents for subsequent Chief Administrative Officers, resulting in harm to the financial interests of the municipality; applicants would be aware of both the types of benefits that are available for negotiation as well as the extent thereof." In HRM's view, "Providing these specific terms of the contract, in this level of detail (which is not otherwise publicly available), prejudices the municipality's ability to negotiate these items in the future." HRM also asserts that some of the withheld terms are not a standard benefit for municipal employees and would have financial implications for HRM.

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[9] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII), at para 54. I have relied on this test in a number of previous decisions including NS Review Report 18-02, 2018 NSOIPC 2 (CanLII), at para 38. The former British Columbia Commissioner referred to this as a "reasoned assessment of the future risk of harm" in Order F-08-22, 2008 CanLII 70316 (BC IPC), at para 44.

[10] This summary of the application of s. 17 of *FOIPOP* (equivalent to s. 477 of the *MGA*) also appears in NS Review Report 18-11, 2018 NSOIPC 11 (CanLII), at paras 33-34.

[11] I am paraphrasing former Commissioner Loukidelis in BC Order 02-56, 2002 CanLII 42493 (BC IPC), at paras 43-44 as applied more recently in Order F06-03, 2006 CanLII 13532 (BC IPC), at para 66.

[37] As a former Alberta Information and Privacy Commissioner found when he analyzed a similar exemption in relation to a similar executive employment contract, the harm alleged must relate to the specific information at issue.[12] The question that must be answered then is, how does the release of this specific information prejudice the municipality's future ability to negotiate and are the future financial implications of negotiating benefits such as these attributable to the disclosure of this information?

[38] HRM describes the negotiation process for its CAO position as being on a case-by-case basis. The very nature of individual negotiations means that a range of factors may influence the outcome of the negotiation, including the skill of each negotiator. In this case, this former CAO candidate negotiated discretionary benefits which cover a very typical range of employment benefit categories. The financial implication of these benefits was accepted by HRM at the time that it negotiated with this individual. It goes without saying that an employment contract has financial implications.

[39] Implicit in HRM's argument is that a future candidate may gain knowledge from the disclosure of this information that would inform his or her negotiation strategy. HRM has not provided evidence that any of the benefits negotiated are extraordinary or unique in terms of executive compensation within the sector or in relation to other CAO's hired by HRM. Although the benefits may exceed current municipal policies and the benefits provided to other municipal employees, HRM provided no evidence that these benefits exceed standard ranges of executive compensation in the sector or that they could not be anticipated by a candidate for the position. Further, HRM provided no evidence that its analysis, methodology, options or strategies in relation to future negotiations would be diminished.

[40] A seasoned executive who could potentially qualify for the position of Chief Administrative Officer for HRM would not require disclosure of these employment contract terms to know that issues such as pay, vacation, severance and other various benefits and expenses could potentially be on the table for discussion. Any experienced executive qualified enough to receive a job offer would most certainly be able to negotiate all manner of benefit and expense coverage at issue in this employment contract, as this candidate did. HRM has not provided evidence that its negotiating position in relation to a case-by-case negotiation process would be weakened by disclosure of the information. The fact that HRM may previously have paid a similar type of benefit or expense is not, of course, binding on HRM, and without any evidence to prove otherwise, would not prejudice HRM's ability to simply say no to the next candidate.

[41] I find that HRM has failed to satisfy the burden of proof and so I find that s. 477 does not apply to any of the withheld information.

[12] Alberta Order F2006-008, 2007 CanLII 81638 (AB OIPC).

FINDINGS & RECOMMENDATIONS:

[42] I find that neither s. 480 nor s. 477 apply to any of the withheld information.

[43] I recommend that HRM release the withheld information in full.

June 6, 2019

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

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