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

REVIEW REPORT 19-07

August 22, 2019

Halifax Regional Municipality

Summary: Nova Scotia's access to information law is intended to both protect personal privacy and promote transparency and accountability. The law includes rules on how to evaluate the balance between these two interests. With respect to performance-based payments to municipal employees, the law makes clear that the balance falls in favour of accountability and transparency. The public has the right to know the amount of bonuses paid to individuals even though the disclosure reveals personal information of those individual employees. In this case, the Halifax Regional Municipality ignored an essential provision of the *Municipal Government Act* – s. 480(4). The Commissioner finds that s. 480(4) of the Act applies and so disclosure of performance-based payments to municipal employees would not constitute an unreasonable invasion of any third party's personal privacy under the law. The Commissioner therefore recommends that Halifax Regional Municipality disclose the amount of yearly bonuses paid to non-union employees.

Statutes Considered: *Municipal Government Act*, SNS 1998 c 18, ss. 461, 462, 480, 498; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, s. 20; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 22; *Public Sector Compensation Disclosure Act*, SNS 2010, c 43, s. 2.

Authorities Considered: British Columbia: Order F10-05, 2010 BCIPC 8 (CanLII); **Ontario:** Order PO-2641, 2008 CanLII 4966 (ON IPC).

Cases Considered: *House (Re)*, 2000 CanLII 20401 (NS SC).

Other Sources Considered: *Black's Law Dictionary*, 5th ed (St. Paul: West Publishing Co., 1979); Halifax Regional Municipality, "Administrative Order Number 2015-006-ADM, Respecting Disclosure of Employee Salaries", November 24, 2015, https://www.halifax.ca/sites/default/files/documents/city-hall/legislation-by-laws/2015-006-ADM.pdf; Halifax Regional Municipality, "Information Report: Non Union Compensation", June 15, 2015, http://www.numea.org/wp-content/uploads/2015/08/Non-Union-Compensation.pdf; *The Canadian Oxford Dictionary* (Toronto: University of Oxford Press, 1998).

INTRODUCTION:

[1] The applicant sought a copy of the list of non-union employees of the Halifax Regional Municipality (HRM) Planning Department who received salary increases over a five year period. HRM provided a list of increases paid to each individual non-union employee for each year but refused to disclose the names of individual employees. As a result, the applicant received a two-column document divided by year indicating only the business unit and amount of increase for each unidentified individual in each of the years. HRM claims that disclosure of the withheld information would be an unreasonable invasion of the third parties' personal privacy.

ISSUE:

[2] 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?

DISCUSSION:

Background

[3] In 2016 the applicant sought a copy of the names and amount paid to each individual in the HRM Planning Department who received payments for the calendar years 2011 through 2015 under the individual salary adjustment increases as part of the non-union compensation process. These increases were described in the June 15, 2015 Information Report prepared for the HRM Council meeting on August 4, 2015 which is publicly available.[1] That report makes clear that since 2010, the individual salary adjustment increases (ISA) for non-union employees have been 100% based on performance. Prior to that time, a portion of the ISA was based on either cost of living or wage inflation.

[4] In response to the applicant's request, HRM provided a two-column list that indicates the business unit and the amount of increase. Each line of the two-column document represents an individual employee. HRM withheld the first and last name of every employee and his or her organizational unit. HRM advised the applicant that this information was withheld because disclosure of the information would be an unreasonable invasion of third party personal privacy within the meaning of s. 480(1). HRM also cited two provisions of s. 480(3) as relevant. HRM made no reference to s. 480(4) in its decision.

Burden of Proof

[5] Section 498(3) of the *MGA* provides that in the case of personal information as set out in s. 480, it is the applicant who bears the burden of proof.[2]

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[1] Halifax Regional Municipality, "Information Report: Non Union Compensation", June 15, 2015 (online: http://www.numea.org/wp-content/uploads/2015/08/Non-Union-Compensation.pdf).
[2] *MGA*, SNS 1998 c 18, s. 498(3).

Is HRM required by s. 480 of the *Municipal Government Act* 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?

[6] The approach to the analysis of the meaning of an "unreasonable invasion of personal privacy" under s. 480 of the *MGA* is well established by the Supreme Court of Nova Scotia. In his decision in *Re House,*[3] Justice Moir set out a four-step process:

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?

i. Is the requested information "personal information" within s. 461(1)(f)?

[7] The withheld information consists of the first and last names of employees and their organizational units. Clearly, names qualify as personal information and are listed in the definition of "personal information" found in s. 461(1)(f). Organizational units could qualify as personal information to the extent that the information could be used to identify an individual. In this case, from the unsevered list, it is clear that some organizational units have only one or two non-union employees during the years in question. Others have more than five non-union employees. Where there is only one individual non-union employee in an organizational unit, information that only identifies the unit could reasonably be used to identify the individual even without the individual's name because the roles individuals play within the unit would be publicly known. As the number of non-union employees in the unit rises, the ability to identify individuals from the unit becomes more difficult.

[8] For the purposes of this discussion, I am satisfied that the withheld information qualifies as personal information within the meaning of s. 461(1)(f).

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

[9] The next step in any evaluation of the s. 480 test is whether any of the conditions in s. 480(4) are satisfied. In the scheme of s. 480, the purpose of s. 480(4) is to stipulate disclosures of personal information that are permitted under the law.[4] These disclosures vary in kind. Some depend on circumstances – e.g. whether the third party has consented to the disclosure (s. 480(4)(a)), whether there are compelling circumstances affecting anyone's health or safety (s. 480(4)(b)) or whether the disclosure is for research or statistical purposes (s. 480(4)(d)).

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[3] *House (Re)*, 2000 CanLII 20401 (NS SC) [*Re House*]; The Court in this case was dealing with s. 20 of the *Freedom of Information and Protection of Privacy Act* which is, for the purposes of this discussion, identical to s. 480 of the *MGA*.

[4] This discussion is taken, in part, from a similar discussion found in BC Order F10-05, 2010 BCIPC 8 (CanLII) at paras 35-36.

[10] By contrast, the bulk of the disclosures which s. 480(4) stipulates are not unreasonable invasions of personal privacy involve classes of personal information, not circumstances pertaining to disclosure. Sections 480(4)(e), (f), (h), (i) and (j) all involve information about or revealing money or benefits an individual receives from a municipality. These include information about remuneration, financial details of a contract to supply goods or services to a municipality, information about travel expenses and details of licences, permits or discretionary benefits granted to a third party by the municipality.

[11] Consistent with the legislative goal of openness and accountability, s. 480(4) in large measure aims at ensuring that personal privacy considerations do not impede disclosure of information about how municipalities remunerate or benefit employees and others.[5]

[12] In this case, HRM has completely ignored s. 480(4). It has, in effect, pretended it does not exist. During the informal resolution process with this office, HRM was invited to explain why it had not considered or applied s. 480(4). It declined to do so. In its submissions for this hearing, it makes no reference to s. 480(4), instead repeating its references to s. 480(3).

[13] Justice Moir, in *Re House*, clearly and definitively addresses how public bodies must apply s. 20(4) of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*) which is the equivalent to s. 480(4) in the *MGA*. In *Re House*, the public body argued that s. 20(4)[6] created a "rebuttable presumption". In other words, the public body argued that even if s. 20(4) applied, it is still necessary to go on to consider the presumptions against disclosure in s. 20(3).

[14] Justice Moir is crystal clear on this point. He states, "Subsection 20(4) does not create rebuttable presumptions. As I read it, <u>if any of the nine circumstances specified in s. 20(4) applies, then there is no unreasonable invasion of privacy and the information would have to be produced.</u>" [emphasis added][7] It is for this reason that Justice Moir articulated step 2 of the s. 20 test as, "Are any of the conditions in s. 20(4) satisfied? Is so, <u>that is the end</u>." [emphasis added]

[15] The relevant provision in s. 480(4) is s. 480(4)(e) which provides:

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

[16] What is clear from s. 480(4)(e) is that it contemplates the disclosure of some personal information, including the identity of the third party. What good would come of revealing information about a third party's position, functions or remuneration without revealing the person's name?[8] The purpose behind this provision is that information about a third party's

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[5] This is the same conclusion reached by Adjudicator Francis in BC Order F10-05, 2010 BCIPC 8 (CanLII) at para 36.
[6] *Re House* actually dealt with s. 20(4) of *FOIPOP* which, for the purposes of this discussion, is identical to s. 480(4) of the *MGA*.
[7] In *Re House* at p. 4.
[8] This is a paraphrase of Justice Moir's similar comment with respect to s. 20(4)(h) in *Re House* at pp. 4-5.

position, functions or remuneration as an officer, employee or member of a municipality is not just information about an individual, it is information about the municipality and how it spends taxpayer money. Such information is essential to ensuring that the public has the municipal information it needs to facilitate informed public participation in policy formulation, to ensure fairness in government decision-making and to permit the airing and reconciliation of divergent views.[9]

[17] In this case, s. 480(4)(e) applies if the individual salary adjustments qualify as information "about the third party's…remuneration as an officer, employee or member of a municipality."

[18] There are three reasons why the individual salary adjustment increases in this case fall within the meaning of "remuneration" in s. 480(4).

1. The common definition of remuneration includes "reward".[10]
2. The definition of compensation in other Nova Scotia statutes include "bonuses".[11]
3. The word "remuneration" used in provisions identical to s. 480(4) in other Canadian access laws have been interpreted to included performance-based bonuses.[12]

The common definition of remuneration

[19] The term "remuneration" is not defined in the *MGA*. According to Black's Law Dictionary,[13] remuneration means "reward; recompense; salary; compensation." Compensation then, is a synonym for remuneration. The Canadian Oxford Dictionary defines reward as "a return or recompense for service or merit."[14]

[20] HRM's Information Report from August 2015 makes clear that the individual salary adjustment increases are performance-based.[15] The purpose of this approach is to promote a performance-based culture. In other words, individual salary adjustments are compensation or reward for good performance. This type of pay could also be characterized as a merit-based reward. Compensation and rewards, including merit-based rewards, all fall within the definition of "remuneration".

The definition of compensation in other Nova Scotia statutes

[21] This approach to the meaning of remuneration is further supported by looking at the definition of compensation (a synonym for remuneration) in other Nova Scotia statutes. 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.

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[9] These are three of the essential purposes of the *MGA* as set out in s. 462.
[10] *Black's Law Dictionary*, 5th ed (St. Paul: West Publishing Co., 1979) "remuneration" at p. 1165.
[11] See *Public Sector Compensation Disclosure Act*, SNS 2010, c 43, s. 2(b).
[12] See British Columbia's *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 22.
[13] *Black's Law Dictionary*, 5th ed (St. Paul: West Publishing Co., 1979) "remuneration" at p. 1165.
[14] *The Canadian Oxford Dictionary* (Toronto: University of Oxford Press, 1998) "reward" at p. 1235.
[15] Halifax Regional Municipality, "Information Report: Non Union Compensation", June 15, 2015 (online: http://www.numea.org/wp-content/uploads/2015/08/Non-Union-Compensation.pdf).

[22] 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 compensation of over $100,000.[16] 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…

[23] This definition is almost identical to the definition of compensation found in Nova Scotia's *Public Sector Compensation Disclosure Act*.[17]

[24] The definition above begins with a reference to bonuses. The Canadian Oxford Dictionary defines bonuses to include "an amount of money given in addition to normal pay, in recognition of exceptional performance or as a supplement at Christmas etc."[18]

[25] Certainly then, individual annual salary adjustment increases based on performance fit within the meaning of "bonus" as money given in recognition of exceptional performance.

Interpretation of the meaning of remuneration in other Canadian access laws

[26] British Columbia's *Freedom of Information and Protection of Privacy Act* contains the following provision:

> 22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if …
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> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff, … .

[27] As with Nova Scotia's law, the term "remuneration" in British Columbia's law is not defined. In a decision in 2010, a public body argued that disclosure of performance-based annual increases was an unreasonable invasion of personal privacy because it allowed inferences to be drawn about the performance of individuals.[19] The public body further argued that because there was an existing statutory scheme mandating the disclosure of total salary amounts, the public body should not be required to disclose individual salary elements such as bonus payments. Finally, the public body argued that a fundamental purpose of British Columbia's law is to protect personal privacy, and that in the case of bonuses, public accountability does not outweigh the right to privacy. The adjudicator disagreed.

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[16] 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).
[17] *Public Sector Compensation Disclosure Act*, SNS 2010, c 43, s. 2(b).
[18] *The Canadian Oxford Dictionary* (Toronto: University of Oxford Press, 1998) "bonus" at p. 157.
[19] BC Order F10-05, 2010 BCIPC 8 (CanLII) at para 49.

[28] In rejecting the public body's argument, the adjudicator determined that the term "about…remuneration" requires an expansive interpretation consistent with the manner in which provisions like s. 480 are written:

> The Legislature has provided that FIPPA aims for both accountability and openness, on the one hand, and privacy on the other. But in implementing these goals, it chose in s. 22(1) to prohibit only "unreasonable" invasions of personal privacy. ICBC's argument merely raises the question of whether the Legislature intended "remuneration" to refer only to global amounts of remuneration or to specific, itemized breakdowns. A comprehensive and expansive interpretation of "information about…remuneration" is, to my mind, more consistent with FIPPA's goals of transparency and accountability in the expenditure of public funds on employee compensation. It also accords better with the wording in s. 22(4)(e), "information about…remuneration", which suggests a broader reading of the term.[20]

[29] In Ontario, the Information and Privacy Commissioner determined that bonus payments do not qualify as employment history but were "benefits" within the meaning of Ontario's equivalent to the *MGA* s. 480(4)(e). On that basis, the Commissioner ordered disclosure of performance-based bonus payments.[21]

[30] As noted above, HRM completely ignored s. 480(4) in its letter to the applicant during the investigation phase of this review and in its submissions. In support of its position, HRM simply cites two provisions of s. 480(3) and argues that there is no requirement under HRM Administrative Orders for an itemized listing of salary and benefits. HRM claims that this supports its position that an itemized listing of what has made up the salary would be an unreasonable invasion of its staff's privacy.

[31] The fact that HRM has chosen not to proactively release performance-based bonus payments is not a relevant consideration under s. 480(4). The question is simply, are the payments "remuneration" for the purposes of s. 480(4)(e)? HRM has provided no argument or evidence that the payments do not fit this definition.

[32] I find that annual individual salary adjustment increases based on performance are bonuses or rewards and as such fall within the meaning of remuneration as it is used in s. 480(4)(e) of the *MGA*. As a result, I find that pursuant to s. 480(4)(e), the disclosure of the individual salary adjustment increases would not be an unreasonable invasion of a third party's personal privacy within the meaning of s. 480.

[33] As set out by Justice Moir, if s. 480(4)(e) applies, that is the end. No further analysis is required. Section 480 cannot apply to the withheld information.

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[20] BC Order F10-05, 2010 BCIPC 8 (CanLII) at para 40.
[21] Ontario Order PO-2641, 2008 CanLII 4966 (ON IPC) at p. 12.

FINDINGS & RECOMMENDATIONS:

[34] I find that the disclosure of the individual salary adjustment increases would not be an unreasonable invasion of a third party's personal privacy within the meaning of s. 480.

[35] I recommend full disclosure of the withheld information.

August 22, 2019

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

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