

**THE NOVA SCOTIA FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY ACT
(MUNICIPAL)**

A REQUEST FOR REVIEW of a decision of the **HALIFAX REGIONAL MUNICIPALITY** to deny access to the unit prices contained in a successful tender submitted to the Municipality.

REVIEW OFFICER: Darce Fardy

REPORT DATE: September 11, 2003

ISSUE: Whether Section 481(1) of the Municipal Government Act supports the decision to deny access to unit prices from a successful tender.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act (Municipal)**, dated July 14, 2003, the Applicant asked that I recommend to the Halifax Regional Municipality (HRM) that it disclose the unit prices submitted by the successful bidder for traffic signal maintenance.

The Applicant had asked for the “unit prices” for Tender #03-315. In accordance with **Section 482**, HRM sent notice of the Application to a third party inviting it to provide consent or to give reasons why the information should not be disclosed. After considering objections from the third party HRM denied the Application citing the mandatory exemption under **Section 481(1)(a)(b)** and **(c)**. This exemption requires a public body to refuse to disclose to an Applicant confidential information that would reveal:

- trade secrets or commercial, financial, scientific or technical information of a third party;
- that was provided explicitly or implicitly in confidence;
- and that if disclosed would do significant harm to the third party's competitive position or result in undue financial loss or gain to any person or organization.

The third party explained in a letter to HRM that “the unit prices are a product of work practices developed over many years in the industry. Providing the information could negatively impact on our ability to provide best value to the tender calling authority in the future.”

HRM told the Applicant that because the “unit prices” would reveal trade secrets of a third party, providing the unit prices to the Applicant would harm the third party's current and future competitive position and cause undue financial loss.

The Applicant's oral submission:

The Applicant maintains that, in the past, it was the practice of HRM to disclose unit prices of her own company as well as others.

The third party's submission to Review:

The third party repeated the argument it made to HRM when notified of the Application. It also said, it had an expectation that its unit prices would be kept confidential because HRM would understand that disclosing them could allow a competitor to compare them

with its own unit prices. Disclosure would also provide the kind of detail that a competitor could use to its own advantage and to the disadvantage of the third party.

The third party said it had no problem with HRM disclosing its overall tender costs as long as they are not broken down into unit pricing. HRM has already provided the Applicant with the “bid price” of the winning bidder. On another level the third party said it would be unfair to have its unit prices disclosed “when we are not given the same privilege of seeing our competitors’ pricing breakdown.”

HRM submission:

HRM agreed with the Applicant that unit prices have been disclosed in the past but only when “quotes” were issued. It explained that this was the first occasion when a tender for this work had been awarded as a lump sum. In previous years it was awarded by line item. HRM does release unit prices on price agreements where the intent of the award is the lowest price per line item, not the total contract.

With respect to the exemption cited, HRM said that it agreed with the third party that s. 481(1)(a), (b) and (c) applies. It is satisfied that the information contains trade secrets and financial information and that disclosure could reasonably be expected to do significant harm to the competitive position of the third party and cause it undue financial loss. With respect to the requirement that the unit prices be supplied “explicitly or implicitly in confidence,” HRM stated that this is made clear in its tender policy, which describes a request for tenders as “a formal, competitive, sealed-bidding process.”

Conclusions:

HRM understands that all three of the components of Section 481 must be met in order for the exemption to apply.

I agree that the unit prices contain financial and commercial information belonging to the third party. This satisfies the first part of the three-part test.

Because the third party understood that the tender policy promised confidentiality, then I agree it supplied the unit prices with the expectation they would not be disclosed.

In determining whether I agree that disclosure would do “significant harm” to the interests of the third party, I look to the Federal Court of Canada judgement in *Culver v. the Minister of Public Works and Government Services* (1999) (Docket: T-1390-98); and Orders *M-511* and *M-602* of the Ontario Information and Privacy Commission.

In *Culver* Justice McGillis specifically addressed the disclosure of “unit prices” and referred to the testimony of a spokesperson for the third party:

“In his evidence, Mr. Ozog indicated that the information in question would enable its competitors ‘to calculate various pricing scenarios in order to undercut’ it on the contract with the Department ‘or on other contracts.’ Furthermore the release of the information would provide its competitors . . . with ‘an important piece of financial and commercial information and intelligence.’ The prejudicial effect of the disclosure of that information would be magnified by virtue of the fact that Standard Aero would have no access to similar information on the part of its competitors. As a result, ‘Standard Aero would be placed in a position of competitive disadvantage.’”

Justice McGillis said this evidence was not “challenged or undermined in any manner of cross-examination.”

In Order M-511, the Inquiry Officer accepted the argument that disclosure of the unit prices would prejudice significantly the competitive position of the affected parties and result in their experiencing undue losses.

In Order M-602, the Inquiry Officer upheld the decision of the Toronto Transit Authority to deny access to unit prices.

I am satisfied HRM’s decision passes the three-part test of s.481(1) and that by disclosing the “Award of Tender” to the Applicant, it has met its legislated obligation to be open and accountable to the public.

NOTE:

While carrying out this Review I was left with the view that HRM should be concerned that it has been unable to convince the Applicant that the process followed while awarding this tender has been fair. Unless it is prepared to tender without any assurances of confidentiality, it might consider setting up an ombudsman-like process where an independent overseer would handle any complaints about the tendering process.

RECOMMENDATIONS:

- That the Halifax Regional Municipality confirm its decision to deny access to unit prices; and

- that it give consideration to the suggestion to establish independent oversight of the awarding of contracts and tenders.

Section 493 of the Act requires the responsible officer to make a decision on these recommendations within 30 days of receiving them and to notify the Applicant and the Review Officer, in writing, of that decision.

Dated at Halifax, Nova Scotia this 11th day of September, 2003.

Darce Fardy, Review Officer