REPORT **FI-03-54(M)**

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 sever records related to a successful proposal for an animal control contract.

REVIEW OFFICER: Darce Fardy

REPORT DATE: February 16, 2004

ISSUE: Whether the decision of the Halifax Regional Municipality to sever parts of a proposal for animal control is supported by the exemptions cited: **Section 480(1)** (disclosure of personal information) and **Section 481(1)** (disclosure of the confidential information of a third party).

In a Request for Review under the **Part XX of the Municipal Government Act**, (the MGA) received September 24, 2003, the Applicant asked that I review the decision of the **Halifax Regional Municipality** (HRM) to deny him access to parts of the successful proposal submitted by a third party for an animal control contract.

The Applicant, an unsuccessful bidder on the contract, asked for a copy of the proposal as well as the Record of Clarification and questions and answers to HRM's Request for Proposals for the contract. He received two decisions from HRM. In a letter dated May 30, 2003, the Applicant was told his request was being partially granted but that parts that contained "personal information" of others and "confidential information" of a third party were severed.

A letter dated June 17, 2003 notified the Applicant he was being provided with another document that had been inadvertently missed.

Background:

HRM issued a call for tenders for "Animal Control Services and/or Operation of an Animal Pound" in April 2002. Both the Applicant and the third party provided bids on the tender. In September of 2002, the Applicant received a letter from HRM telling him the tender had been cancelled and "a new document will be prepared and advertised." The reason given for cancelling the tender was that HRM found that it did not contain the "required scope and breadth of these services." Subsequently, it issued a "Request for Proposals," in January 2003. HRM said in a submission to the Review that the bids received as a result of the tender call were not satisfactory.

Tenders and Requests for Proposals are among four methods of procurement found in HRM's publicly available procurement policy. Tenders are used "when detailed specifications are available that permit the evaluation of tenders against clearly stated criteria and specifications." When detailed specifications are not available, a "two phase bid may be issued." In Phase One, bidders submit proposals for evaluation with or without prices; in Phase Two, only those bidders whose bids were determined to be acceptable will be entitled to submit priced bids for consideration. HRM explained that tenders are based on the lowest qualified bidder meeting HRM's specifications.

Tenders differ from proposals. In tenders HRM tells bidders what to do and gives them the specifications and the company gives a price. They are opened in public and the price

read. Proposals are detailed submissions written by interested companies explaining how they are going to do something and why they should be selected to do it. Proposals often contain information about the company including financial statements, references and technical information. There is no public reading on the price of a proposal. As the Procurement Policy puts it, proposals "need not be opened in public."

In accordance with **Section 482(1)** HRM notified the third party of the application. The third party agreed with the disclosure of some of the documents but not all. It had no objections to the disclosure of the parts HRM intended to give the Applicant.

HRM, in its letter of decision to the Applicant, in response to his request for information on the winning proposal, cited two exemptions:

> 480(1) The responsible officer shall refuse to disclose personal information to an applicant, if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information
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> (d) relates to employment or educational history.
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> 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;

> (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 . . . of the third party.

The Applicant's position:

The Applicant doesn't understand why he could not see the proposal at issue here because, he says, he was provided with the tender of this same third party in 1999. He believes he has a right to know why the other bidder won the contract. He suspects a Request for Proposal was issued this time because HRM did not want to disclose as much information as it would have had to if it stayed with its call for tenders.

HRM's submission:

HRM denies this allegation. It explained that the records provided to the Applicant were severed of staff lists of names, in accordance with s.480(1), because disclosing them would be an unreasonable invasion of personal privacy. It further explained that, after consulting with the third party, other information in the records was denied the Applicant, under s.481(1) because:

- disclosure would reveal trade secrets and commercial and financial information of the third party;
- disclosure would "harm significantly the competitive position of the third party" and;
- the third party believed its proposal was supplied in confidence.

HRM said the information severed under s.481(1) related directly to the third party's proposal and that "(the) severed parts did not strictly represent a concurrence with the proposal requirements but rather was developed by the third party in response to the requirements."

It explained that it replaced the call for tenders with the "Request for Proposals" because it wanted to determine how parties would go about completely fulfilling the objectives of the contract.

In response to my request for evidence of proof of significant harm to the third party, HRM said the third party's proposal was

> "... developed solely by (the third party) based on their experience and knowledge and was in response to HRM's RFP (Request for Proposal). If their proposal was released in its entirety, then other future bidders could potentially benefit from (the third party's) knowledge and experience, use it for their own benefit in developing a proposal - both from an operational and financial perspective. The impact on (the third party) would certainly be negative."

The third party:

Although HRM appears to have relied on the objections of the third party to deny the Applicant some of the information he seeks, no submission to this review was received from the third party although a written invitation to do so was sent by fax.

In accordance with **Section 491** of the **Act** I have been provided with copies of all the records at issue.

Section 498(1) requires HRM to show proof that disclosing names would be an "unreasonable" invasion of privacy; and that disclosing more of the third party's proposal would do "significant" harm to the interests of the third party.

Conclusions:

All public bodies are obliged to follow the purpose of the MGA to "ensure that municipalities are fully accountable to the public by giving the public the right of access to records . . . 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." **[S.462(a)** and **(b)** of the **MGA]**.

Although the Applicant questions motives in his submission, the role of the Review Officer is to determine whether the two exemptions cited support HRM's decision to sever the records; and whether HRM provided the Applicant with enough information to fulfill its legislated obligation to be "fully accountable."

With respect to the information denied under s.480, I am satisfied that it meets the definition of "personal information" found in **Section 461(f)** of the **MGA** The personal information is found in appendices 1 and 2 of the records at issue. Appendix 2 contains the "employment history" of members of the staff of the third party. Appendix 1 contains names, titles, addresses and telephone numbers which, in my view, do not constitute employment history but which is still personal information.

In determining whether disclosure of this personal information would constitute an unreasonable invasion of personal privacy, subsection 480(4) must be considered first. If any of these categories apply to the information cannot be withheld. These categories are:

- consent of the parties;
- reasons of health or safety;
- an enactment authorizes it;
- the disclosure is for research;
- the information relates to an individual's position as a public servant;
- the information contains contract details of a public body;
- the information contains the expenses of someone travelling at public expense;
- the disclosure reveals details of a discretionary benefit granted by a public body; or
- the disclosure reveals details of a discretionary financial benefit granted by a public body.

None of the records I have been provided with fall within any of these categories.

Subsection 480(3) lists the kinds of personal information which if disclosed would be presumed to be an unreasonable invasion of personal privacy. HRM cited subsection (3)(d): the personal information relates to employment or educational history. The personal information in these records are contained in the resumes of prospective third party staff members. Having examined subsection 480(3), there are relevant circumstances found in subsection 480(2) to be considered. However, given that the Applicant has not made a case for disclosing the personal information and that the names, addresses and phone numbers are not an issue in this Review, I will not recommend that any of the personal information be disclosed.

With respect to s.481, HRM's letter of decision to the Applicant confines itself to citing the various parts of the exemption. The Nova Scotia Supreme Court has said that

public bodies "should detail for the applicant the reasons why the particular exemption is operative. Mere recital of the words of the relevant section is not enough." [*McCormack v. Nova Scotia* (1993)123 N.S.R. (2d)(271)].

In order for s.481(1) to stand there must be evidence that the records contain trade secrets or commercial, financial or technical information of the third party; that the records must have been provided to HRM implicitly or explicitly in confidence; and that disclosure would do significant harm to the interests of the third party. All three subsections of s.481(1) must apply.

"Trade secret" is defined in the **Act** as information, including a formula, pattern, compilation, program, device, product, method, technique or process that:

- is used, or may be used, in business or for any commercial advantage;
- derives independent economic value, actual or potential, from not being generally known;
- is the subject of reasonable efforts to keep it from being generally known; and
- the disclosure would result in harm or improper benefit.

The Federal Court has said that a trade secret must be something that is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure. [*Societe Gamma Inc. v. Canada (Secretary of State)*(1994), 79 F.T.R. 42 at p.45(F.C.T.D.)]

Neither HRM's decision letter to the Applicant, nor its submission to the Review Officer argued in favour of the "trade secret" exemption. I am not satisfied that the records I have been provided with contain trade secrets.

The **Act** does not offer definitions for "commercial"or "financial"information which are the types of information specified by HRM in this case. The Ontario Information and Privacy Commission offers some assistance. It defines commercial information as information which relates solely to the buying, selling or exchange of merchandise or services. Financial information is defined as information relating to money and its use or distribution and must contain or refer to specific data. Because this proposal relates to the selling of services, I am satisfied it contains commercial information. That meets the first of the three-part test found in s.481(1).

With respect to ss.481(1)(b), I agree with HRM that the proposal was provided implicitly in confidence because HRM's Procurement Policy suggests that.

However, HRM has not, in my view, provided proof that disclosure of the proposal would reasonably be expected to "harm significantly" the interests of the third party. The Nova Scotia Court of Appeal in *Chesal,* while considering the phrase "reasonably be expected to harm significantly" said:

> In reading the FOIPOP Act as a whole, and considering the interpretation by this Court, particularly in *O'Connor*, supra, I have concluded that the legislators, in requiring 'a reasonable expectation of harm', must have intended that there be more than a possibility of harm to warrant refusal to disclose a record. (*Chesal v. Atrtorney General of Nova Scotiam (2003)* NSCA 124)

In *Chesal* the Court was considering s.12 of the FOIPOP Act, but I am satisfied the Court's comments on burden of proof and evidence can be applied to other sections of the FOIPOP Act and the MGA. Madam Justice Bateman approved the comments of Justice

Rothstein in *Canada (Information Commissioner v. Canada (Prime Minister) [1993]1 F.C.R. 427 at p.478:*

> Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At least there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information.

While I agree with HRM that disclosure might have a negative effect on the third party I am not satisfied that the evidence put forward proves that the third party would be harmed significantly and that is what the Act requires.

Recommendations:

That HRM disclose to the Applicant

- the entire proposal for the Animal Control Services Contract, with the exception of the names, addresses and employment history of the individuals named.

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 16th day of February, 2004.

Darce Fardy, Review Officer