REPORT **FI-03-64(M)**

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

A REQUEST FOR REVIEW of a decision of the **TOWN OF SPRINGHILL** to deny access to a record related to a financial settlement between the town and a construction company.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **June 8, 2004**

ISSUE: Whether the decision of the town to deny access to the record is supported by the exemptions found in **Section 476** (solicitor-client privilege) and **Section 477** (harm to the financial and economic interests of the town).

In a Request for Review under **Part XX of the Municipal Government Act**, dated December 29, 2003, the Applicant asked that I recommend to the Town of Springhill (the Town) that it disclose the record in dispute.

In an application for access, dated September 3, 2003, the Applicant asked for copies of "all memos, e-mails, documents as well as bank statements, transaction receipts & cheque receipts" between the Town of Springhill, a construction company and the Town's solicitor. The Town refused the application, applying three exemptions found in the **Act**: solicitor-client privilege (**Section 476**); harm to the financial and economic interests of the town (**Section 477**); and the protection of personal privacy (**Section 480**).

Some 30 records were found to be relevant to the application. During the mediation stage this office was able to reduce the number of records at issue to one.

Background:

The lone record provides details for settling a lawsuit between the Town and the construction company. The Applicant wants to know the amount of the settlement.

The Town's submission:

The Town explained that the lawsuit was settled without any admission of liability on the part of the Town. It said that disclosure of the terms of the settlement could encourage other bidders for the same project, and there were several, to present claims at a future date. The submission noted, as well, that the settlement requires the construction company to keep the terms confidential.

The Applicant's submission:

The Applicant says the issue is one of accountability. He believes the Town, in order to live up to its obligations under the **Act** to be accountable to the public, must disclose the amount of the settlement.

Conclusions:

Solicitor-client privilege:

Solicitor-client privilege consists of two branches [*Solicitor-client privilege in Canadian Law*, Manes and Silver, pgs 7 & 8]:

1. Legal Professional Privilege, where a client is seeking legal advice; and

2. Existing contemplated litigation privilege.

From the Town's submission it is clear that it is claiming litigation privilege, Branch 2. In order MO-1184 of the Ontario Access and Privacy Commission, the Assistant Commissioner said for Branch 2 to hold, the record in dispute must satisfy two criteria:

1. The record must have been prepared by or for counsel employed or retained by the Town; and

2. The record must have been prepared for use in giving legal advice, or in contemplation of litigation or for use in litigation.

The record in dispute (the financial settlement) is a contract executed by the Town and the construction company to settle the litigation. I agree with the Assistant Ontario Commissioner that "(o)nce agreement was reached and the document was executed by the parties, no litigation privilege for this record was possible."

Protection of personal information:

Section 480 forbids a municipality from disclosing personal information if disclosure constituted an unreasonable invasion of personal privacy. The only personal information in the record at issue here is the names of the two signatories. The Town has not claimed that disclosing these names would constitute an unreasonable invasion of privacy.

Harm to the financial and economic interests of the Town:

Section 477, is a discretionary exemption which allows a municipality to refuse to disclose information if disclosure "could reasonably be expected to harm the financial or

economic interests of a municipality." **Section 498** requires a municipality to "**prove** that the applicant has no right of access to the record."

The Town, in its submission, said that disclosing this record could encourage other bidders to take the same step and expose the Town to financial harm.

The Supreme Court of Canada in *Lavigne v. Canada (Office of the Commissioner of Official Languages)* 2002 S.C.C. 53 at paragraph 58 said, with respect to harm:

> "...There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged."

In *Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124, Justice Bateman endorsed the view of Justice Coughlin in the lower court's decision in *Chesal* that:

> "...the legislators, in requiring "a reasonable expectation of harm," must have intended that there is more than a possibility of harm to warrant refusal to disclose a record. Our **Act** favours disclosure and contemplates limited and specific exemptions and exceptions."

Justice Coughlin also set out (para 23)factors the Federal Court has considered in assessing whether there is a reasonable expectation of harm, including:

> "Evidence that relates to consequences that could ensue from disclosure that describe the consequences in a general way falls short of meeting the burden of entitlement to an exemption from disclosure."

The matter between the Town and the construction company arose in 2001 after the company submitted a bid to rebuild the Springhill Community Rink. The settlement was signed in April 2003. Given that the limitation period for an action or proceeding against a

municipality is twelve months [section 512(1) of the *Municipal Government Act*], none of the other bidders on the community rink could initiate action at this time.

The Town provided no information that would indicate it gave any weight to the "purpose" of the **Act** as laid down in **Section 462**. The two Court cases cited above, and my Review FI-03-20, drew attention to a statement by the Nova Scotia Court of Appeal which noted that, unlike any other similar legislation in the country, the Nova Scotia **Freedom of Information and Protection of Privacy Act** and **Part XX of the Municipal Government Act**, requires public bodies and municipalities to be **fully** accountable to the public. Justice Saunders, speaking for the Court said:

> "Thus the **FOIPOP Act** in Nova Scotia is the only statute in Canada declaring as its purpose an obligation both to ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to "necessary exemptions that are limited and specific".
>
> I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation; ensure fairness in government decision making; and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives." [*O'Connor v. Nova Scotia* NSCA 132 (2001), paras 56 and 57]

The disclosure of the spending of public funds is an important part of a municipality's accountability to the public. I support the Applicant' request for a copy of the record in dispute.

Recommendations:

That the Town of Springhill disclose the terms of settlement it made with the construction company.

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. If a written decision is not received within 30 days, the Town os Springhill is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 8th day of June, 2004.

Darce Fardy, Review Officer