REPORT **FI-04-30(M)**

PART XX OF THE MUNICIPAL GOVERNMENT ACT -
FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY

A **REQUEST FOR REVIEW** of a decision of the **HALIFAX REGIONAL MUNICIPALITY** to deny access to parts of a workplace rights investigation report.

REVIEW OFFICER: Darce Fardy

REPORT DATE: December 3, 2004

ISSUE: Whether the "protection of privacy" exemptions of Part XX of the Municipal Government Act (Section 480) supports the decision of the Halifax Regional Municipality to sever parts of an investigation report before providing it to the complainant.

In a Request for Review under **Part XX of the Municipal Government Act** (MGA), dated May 26, 2004, the Applicant asked that I review the decision of the Halifax Regional Municipality (HRM) and recommend it disclose some of the parts it severed from an investigation report into his complaint against his supervisor.

Background

The Applicant, an employee of HRM, made a harassment complaint against a supervisor. The complaint initiated an investigation under a "Workplace Rights" policy, during which witnesses were interviewed and a report was prepared. The Applicant received most of the report. Witness statements, the respondent's statement, recommendations and one

paragraph regarding the respondent were severed. Mediation resulted in reducing the number of parts in dispute to the recommendations and the paragraph related to the respondent.

The decision:

HRM relied on sub-sections 480(1), 480(2)(f), 480(2)(h) and 480(3)(g) in making its decision to delete the recommendations and the paragraph noted above. It said that disclosing the severed parts would be an unreasonable invasion of the personal privacy of the witnesses and the respondent because the information was supplied in confidence and because disclosure would unfairly damage the reputation of the supervisor. The cited sub-sections read:

> 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.
>
> (2) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the responsible officer shall consider all the relevant circumstances, including whether
>
> (f) the personal information has been supplied in confidence;
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (3) The disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information
>
> (g) consists of personal recommendations or evaluations, character references or personal evaluations.

The Applicant's position:

The Applicant expressed concerns that the Workplace Rights Policy (P-011)

was not followed, particularly with respect to the time lines. He said that based on the "violations" of the policy those who participated in the investigation should have access to the entire report. He did not address the exemptions cited.

Conclusions:

While HRM's "Workplace Rights" policy may not have been adhered to during the investigation that cannot be considered a reason to recommend disclosing the withheld information. The MGA is the guide in determining whether disclosure of parts of the report at issue would constitute an unreasonable invasion of the third party's personal privacy.

The Nova Scotia Supreme Court**,** *[Cyril House and 144900 Canada Inc. (Abacus Security Consultants and Investigators* (2000) S.H. No. 160555] has laid down the procedures to follow when interpreting Section 480 of the MGA (s.20 of FOIPOP). Having first determined the information at issue is in fact personal information as defined in the Act, a public body must first examine the 10 circumstances in sub-section 480(4). If any one of those apply then disclosing the personal information would be deemed <u>not</u> to be an unreasonable invasion of personal privacy and the information must be disclosed. There is then no need to consider sub-sections (3) or (2).

If (4) does not apply, then (3) is examined. Sub-section (3) contains a list of nine types of personal information which, if disclosed, would be presumed to constitute an unreasonable invasion of personal privacy. At the same time a public body must weigh the circumstances in (2).

There is no question that the recommendations and the paragraph still at issue contain the personal information of the complainant.

HRM gave no indication it considered sub-section (4). However, I am satisfied none of the factors in that sub-section apply.

While, in matters respecting personal information exemptions, the burden of proof is on the Applicant, it is incumbent on a public body to explain why it thinks the exemptions cited apply to the records.

HRM concluded that sub-section s.480(3)(g) applies. In *Dickie v. Nova Scotia (Department of Health)* Justice Cromwell for the Court of Appeal determined that the terms "personal recommendations," "evaluations," "character references" and "personnel evaluations" appear to

> "relate to types of documents which are common in the hiring and ongoing evaluation of employees. I agree with the judge (of the Supreme Court) and the respondent that this language does not contemplate disciplinary investigations or recommendations made as a result of them." (My emphasis) [*Dickie v. Nova Scotia (Department of Health)* (1999) N.S.J. No. 116, Docket C.A. No. 148941]

I find that s.480(3)(g) does not apply to the remaining parts of the investigation report still in dispute.

With respect to sub-section 2(f), I do not agree with HRM that the personal information in those parts of the investigation report were supplied in confidence. Only the witness statements were supplied in confidence and they are no longer an issue.

With respect to sub-section 2(h), the respondent is the only individual whose reputation would be harmed by the disclosure of the information. In view of the fact that the

complaint was determined to be well-founded and that the part of the investigation report confirming this has already been disclosed to the Applicant, it would not be unreasonable to question whether the respondent's reputation would be "unfairly" damaged if the recommendations were disclosed.

However, I am satisfied that disclosing the paragraph at issue, which does contain the third party's personal information, would unfairly harm the respondent's reputation.

Because section 480 is one of the few mandatory exemptions in Part XX of the M.G.A, I am obliged to consider if sections not cited by HRM may apply. Sub-section 480(3)(d) makes it clear that the disclosure of personal information relating to an individual's employment history would constitute an unreasonable invasion of that individual's personal privacy. "Employment history" is not defined in the Act. In *Dickie*, cited above, the Court of Appeal said

> "the words (employment history) themselves and the context in which they are used suggest that the ordinary meaning of the words in the employment context is intended. In the employment context, employment history is used as a broad and general term to cover an individual's work record."

The Appeal Court agreed with the Information and Privacy Commissioner of British Columbia that

> "the employment history includes information about an individual's work record. I emphasize the word 'record' because in my view this incorporated significant information about an employee's performance and duties." (Order 41-1995)

Given the content of the recommendations and the fact that the investigation report itself becomes part of the respondent's personal employment file, I am satisfied that sub-section 480(3)(d) applies.

I find nothing in s.480(2), which must be considered even if (3) applies, that would lead me to conclude the recommendations in the investigation report should be disclosed.

Recommendations:

That HRM reconfirm in writing to the Applicant its decision to deny access to the Recommendations and the paragraph in question.

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, HRM is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 3rd day of December 2004.

Darce Fardy, Review Officer