REPORT **FI-04-31(M)**

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

A REQUEST FOR REVIEW of a decision of the **MUNICIPALITY OF THE COUNTY OF RICHMOND** to deny access to a proposal made by a third party for a subdivision development in the County as well as to parts of the evaluation committee's scoring process.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **October 6, 2004**

ISSUE: Whether access to the records requested can be denied under exemptions found in Section 480 (personal privacy protection) and 481 (confidential information of a third party).

In a Request for Review under **Part XX of the Municipal Government Act** (the **MGA**) dated June 4, 2004, the Applicant asked that I recommend to the **Municipality of the County of Richmond** (the County) that it disclose the records he requested.

Background:

The Applicant asked for copies of the proposals for a subdivision made by a losing bidder and the winning bidder. He also wanted a copy of the "Evaluation Committee Average Score for Proposals." The bidders are considered third parties in accordance with the **MGA**. **Section 482(1)** of the **MGA**, requires a municipality to notify affected third parties of an

application for access when it believes the application should be refused. The third parties were asked if they wished to consent to the disclosure of their proposals or make written representations to the responsible officer explaining why the information should not be disclosed. In this case one of the third parties, a losing bidder, consented to the disclosure of its proposal to the Applicant. The winning bidder refused consent on grounds that the proposal was submitted in confidence and that disclosing it "could affect the marketability of the lots."

The County provided the Applicant with a copy of the proposal of a losing bidder who had no objections to the disclosure of that company's proposal. It also provided the Applicant with the Evaluation Committee's average score sheet with the names of the bidders removed.

The Applicant was told that the winning bidder's proposal and the names on the scoring sheets were denied in accordance with **Sections 480(1)**, **480(2)(f)** and **Sections 481(1)(a)(ii)**, **(b)**, and **(c)(I)** of the **MGA**.

Section 480(1), a mandatory exemption, requires a municipality to deny access to the personal information of a third party if the disclosure would be an unreasonable invasion of the third party's personal privacy. Section 481, another mandatory exemption, requires a municipality to deny access to the confidential information of a third party if certain conditions are met.

Neither the County nor the third party replied to the Review Office's invitation to make a submission in support of their views.

The Applicant's submission:

The Applicant, in a written and oral submission, said the County should be obliged to provide him with the information he wants so that taxpayers can satisfy themselves that the contracting proposal was fair and that taxpayer's money was spent appropriately, given that the County was providing financing to the development.

Conclusions:

In my Review FI-03-54(M), I reminded another municipality of its obligations to follow the purposes 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 third parties must be notified of an access to information application and offered an opportunity to give consent or object to disclosure, the decision on disclosure is made by the public body, in this case the municipality, not the third party. Section **498(1)** lays the burden of proof on the municipality "to prove that the applicant has no right of access to the record." In the case of "personal information" about a third party the burden of proof is on the Applicant.

I will first consider the exemption under confidential information. To successfully exempt information under s.481(1), a three-way test must be passed. The County must show proof that:

- disclosing the proposal would reveal trade secrets or commercial or financial information of the winning bidder;
- the proposal was submitted in confidence; and
- the disclosure must "reasonably be expected to harm significantly the competitive position of the third party."

All these conditions must be met for the exemption to stand.

As noted, the County made no submission to the Review Office offering proof of harm to the third party.

Having read the third party's proposal, I am satisfied it contains commercial and financial information of the winning bidder. The first part of the test is met.

With respect to the confidentiality of the winning proposal I note that on page 6 of the County's Request for Proposals it reads:

> "All submissions will remain confidential and shall not be provided to any third party without prior written approval from the Chief Administrative Officer of the Municipality."

While confidentiality was addressed in the request for proposals, it is clear it was not promised. Given the particular wording of the above and the County's obligations under the **MGA**, I have concluded that there is no reason for the winning bidder to feel confident that its proposal would not be disclosed. As I have said before, private companies doing business with public bodies cannot expect the same confidentiality they might expect in transactions outside the public sphere.

The second part of the three-way test has not been met.

Although there is now no need to consider the "harms" part of s.481, I will do so for the benefit of the Applicant, the County and other readers.

In *Chesal*, the Nova Scotia Court of Appeal 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 there be more than a possibility of harm to warrant refusal to disclose a record. (*Chesal v. Nova Scotia (Attorney General) et al.,* 2003 NSCA 124).

In *Chesal*, the Court was discussing s.12 of the *Nova Scotia Freedom of Information and Protection of Privacy Act* (*FOIPOP Act*), but I am satisfied that its comments on burden of proof and evidence can be applied to all sections of the FOIPOP Act and **Part XX** of the **MGA**, where a claim for exemption requires a "harms test." In *Chesal* Madam Justice Bateman found support in a Federal Court ruling [*Canada (Information Commissioners) 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 the 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.

Absent any attempt by the County to prove harm, and given the views of the Court, I have concluded that even if the second part of the three-way test were satisfied (submitted in confidence), there is no evidence of "significant" harm to the third party if the winning bid were disclosed.

With respect to the claim of s.480 (unreasonable invasion of personal privacy), I note the definition of "personal information" found in **Section 461(f)** of the **MGA**: "Personal information means recorded information about an identifiable individual" (emphasis added). The information in the records is about a company, not an individual. Therefore, s.480 does not apply.

Recommendations:

That the County disclose to the Applicant a copy of the winning proposal as well as the names on the score sheet.

Section 493 of the **MGA** 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 Municipality of the County of Richmond is deemed to have refused to follow these recommendations, and the Applicant has a right to appeal to the Nova Scotia Supreme Court.

Dated at Halifax, Nova Scotia this 6th day of October, 2004.

Darce Fardy, Review Officer