REPORT **FI-04-43(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 a copy of the waiting list for taxi owner licenses.

REVIEW OFFICER: Darce Fardy

REPORT DATE November 17, 2004

ISSUE: Whether disclosing a list of the names of those awaiting taxi owner licenses is an unreasonable invasion of privacy of those on the list and therefore exempt under **Sections 480(1)** and **485(2)**.

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

The Applicant wants the **Halifax Regional Municipality** (HRM) to provide him with the waiting list for taxi owner licenses. His request was refused pursuant to **Section 480(1)** and **485(2)(b)** of the MGA.

S.480(1) reads:

> 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.

S.485(2)(b) reads:

> A municipality may disclose personal information if the individual the information is about has identified the information and consented in writing to its disclosure.

Background:

HRM restricts the number of taxi owner licenses. It maintains lists of names of individuals waiting for licenses to own taxi rooflights in Halifax and Dartmouth, in accordance with By-Law T-108. The person at the top of the list will get the available license after she/he is tested again and meets certain qualifications, i.e., satisfactory criminal records report. Although there is no requirement under the by-law to do so, HRM provides the list of names, regularly, to the Taxi and Limousine Committee for their meetings. HRM expects the list of names to be kept confidential and to be returned at the close of the meetings.

HRM told the Applicant that disclosure of the names, beyond the Taxi Committee, would constitute an unreasonable invasion of the personal privacy of those on the list.

Section 498(2) places the burden of proof on the Applicant to show that disclosing the names on the list would not be an unreasonable invasion of personal privacy.

It may be helpful to describe the make-up of the subsections of s.480. Sub-section (1) is a general statement that the public body shall refuse to disclose personal information if the disclosure would be an unreasonable invasion of the third party's personal privacy. Sub-section (2) lists circumstances to consider when determining whether the disclosure of personal information would be an unreasonable invasion of privacy. Sub-section (3) lists the categories

of personal information which, if disclosed, would constitute an unreasonable invasion of personal privacy. Sub-section (4) lists categories of personal information which, if disclosed would be deemed not to be an unreasonable invasion of privacy.

The Applicant's submission:

In support of his position, the Applicant cites **Sections 462(b)(ii), 480(2)(a)** and **(c)** and **480(4)(i)** of the MGA.

Section 462 lists the purposes of Part XX of the MGA. One purpose is "to ensure fairness in government decision making."

With regard to s.480(2), the two sub-sections referred to by the Applicant are:

> (a) the disclosure is desirable for the purpose of subjecting the activities of a municipality to public scrutiny;
>
> (c) the personal information is relevant to the fair determination of an applicant's rights.

Section 480(4)(i) reads:

> A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> (i) the disclosure reveals details of a license, permit or other similar discretionary benefit granted to the third party by a municipality, not including personal information supplied in support of the request for the benefit.

The Applicant believes HRM's decisions on the granting of taxi owner licenses cannot be subject to public scrutiny if the names on the waiting list are kept secret.

The Applicant wrote:

> "It is crucial to the effective and honest and trustworthy administration of the taxi license system that taxi owner's licenses be awarded to the next person on the waiting list, without favour or exception. For the people on the waiting list, the integrity of the list is of fundamental importance. The system of awarding of a taxi license has to be fair, and has to be seen to be fair."

At the moment, he says, license applicants can find out where they are on the list only if they ask and they are not told how many are on the waiting list nor are they updated on their progress to the top of the list. The Applicant believes HRM should provide assurance that an owner's license has been awarded to the proper person and that this assurance would be there if the names on the list were disclosed.

It is the Applicant's opinion that if **s.480(4)(i)** refers to a "license"then it also applies to a waiting list for a taxi owner license. "It does not follow, either logically or legally, that any information supplied prior to the granting of a license is presumed to be an unreasonable invasion of privacy."

The Municipality's submission:

The Municipality argues that since the protection of personal privacy is a mandatory exemption under the **Act**, and since the individuals on the waiting list have not consented to disclosure of their personal information, the Municipality must refuse to disclose the information requested.

The Municipality also argues that the waiting list, which contains the names of those applying for a license and their place on the list, constitutes their "employment history."

Disclosing the "employment history" of individuals is an unreasonable invasion of their privacy pursuant to **s.480(3)(d)**.

In support of its decision, the Municipality also cites various sub-sections of 485(2) and (3): a municipality may disclose personal information only for the purpose for which it was collected, for a use compatible with that purpose, or with the consent of those people on the waiting list.

HRM says the purpose of the list is to provide an administrative mechanism for distributing taxi owner licenses as they become available. Disclosure, it says, would not meet the purpose for compiling the list and would not constitute a use compatible with the purpose.

HRM denies that the list is kept secret because individuals can find out their position and the total number of names on the list. The number of licenses awarded are also made public. The process of awarding licenses, HRM believes, is subject to public scrutiny through the Taxi and Limousine Committee.

Nor does HRM accept the view that it is not showing accountability for the way licenses are awarded. It says those concerned about the process can make a submission to the Taxi and Limousine Committee, and those with concerns about the awarding of the licenses can make a submission to the License and Permits Appeals Committee.

The Taxi and Limousine Committee, comprising representatives of the taxi industry, Regional Council and HRM staff, is authorized to receive recommendations and submissions, conduct investigations and ultimately make recommendations to Council. (Although the members of the taxi industry on the committee have access to the names, in my

view, providing the list to them constitutes a use compatible with the purpose for which it was collected.)

Although HRM does not bear the burden of proof to show why the information cannot be disclosed (that burden is on the Applicant when third party personal information is involved to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy) it provided evidence of harm:

> The imposition of limitations has created a high demand for taxi owner licenses. The Taxi By-Law allows leasing arrangements to be made between a driver and a taxi license owner . . . With respect to the question of harm, if a person is leasing a vehicle to a rooflight owner and if that owner can determine from the list that the leasing person will soon receive their own rooflight, the current owner may drop the person with the vehicle for a new person. Even though a person may be near the top of the waiting list, there is no way of determining when they may receive a rooflight. By releasing their placement, the individual could be exposed to financial harm.

Conclusions:

The Nova Scotia Supreme Court in *The Application for Information of Cyril House and 144900 Canada Inc. and An Appeal Pursuant to Section 41 of the Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c.5*, S.H.No. 160555 has provided guidance in interpreting s. 480 by posing four questions for public bodies to consider:

1. Does the information meet the definition of "personal information" found in **s.461(f)**?

2. Are any of the conditions of **s.480(4)** met?

3. Is the personal information presumed to be an unreasonable invasion of personal privacy pursuant to **s.480(3)**?

4. Does the balancing of all relevant circumstances found in **s.480(2)** lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy?

The information is personal information as it meets the definition of personal information as defined in s.461(f) of the **Act**.

If s.480(4) applies there is no need to consider the other sub-sections. Section 480(4) contains ten circumstances which, if any one applies, would mean disclosure of the names on the waiting list would not be an unreasonable invasion of the individual's personal privacy. The Applicant believes s.480(4)(i) applies because the list contains details of a license and a discretionary benefit.

In Review FI-04-15, I provided a definition of a license: "permission to act" and "permission granted by a competent authority to engage in a business or occupation otherwise unlawful." In my view, the list does not contain details of a license or any other discretionary benefit because no license or other benefit has been awarded to those on the list. It does not follow that details of a waiting list should be made public if the details of a "license" or "discretionary benefit" are.

I have also concluded that none of the other nine factors in ss 480(4) apply and the Applicant has not claimed that any others do.

I do not support the opinion of HRM that s.480(3)(d) applies. With respect to the HRM claim that the information contains the "employment history" of the individuals on the list, the Nova Scotia Court of Appeal [*Dickie v. Nova Scotia (Department of Health)* (1999) N.S.J.

No.116] said " . . . employment history is used as a broad and general term to cover an individual's work record."

In Report FI-02-84 I cited the Alberta Government's Guidelines and Practice Manual on its access and privacy legislation:

> "employment history refers to any information regarding an individual's work record, including the name of the employer, past or present, the term of employment, the duties associated with the position, the individual's salary, reason for leaving, and any evaluation of job performance."

The British Columbia Information and Privacy Commissioner in Order P-1180, interpreted "employment history" to mean what individuals did in their workplaces on particular projects.

I find that the name of an individual and his/her place on the list of those waiting for a taxi license does not constitute employment history. In my view, s.480(3)(d) does not apply.

This leaves only s.480(2) to consider. This subsection requires consideration of eight "relevant" circumstances. For the purposes of this review the relevant ones are:

(a) is disclosure desirable to subject HRM to public scrutiny?

(c) is the personal information relevant to a fair determination of the applicant's rights?

(e) will the third party be exposed unfairly to financial or other harm?

(f) was the personal information supplied in confidence?

Section 480(2)(a) - while the process of granting taxi owner licenses may be open to unfair decisions, and impede public scrutiny, it is not clear that disclosing the names of the people on the list would satisfactorily address that concern.

Section 480(2)(c) - with respect to the applicant's rights, while it is true that those who apply for licenses have a right to be treated fairly, disclosing the names on the list would not, of itself, ensure fairness.

Section 480(2)(e) - in my view HRM put forward a reasonable case for probable financial harm to those on the list if their names are disclosed.

Section 480(2)(f) - it is difficult to determine whether those who put their names on the list were expecting that the list remain confidential. The application form neither promises confidentiality nor suggests that the names may be made public. There are too many names for it to be practicable for HRM to notify all those on the list to ask if they would consent to disclosure.

The balance here is between protecting the privacy of individuals and holding HRM accountable for its method of awarding taxi owner licenses. In considering every application for access to information, municipalities, and all public bodies, are expected to heed the words of Justice Saunders of the Nova Scotia Court of Appeal who drew attention to the uniqueness of the language in the FOIPOP Act and the M.G.A. These Acts expect public bodies to be <u>fully</u> accountable to the public. (my emphasis) He noted no other similar legislation in the country imposes such a

> "positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exception, to disclose all government information so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard."[*O'Connor v. Nova Scotia* (2001) NSCA 132]

Protecting personal information in certain circumstances is one of those "limited exception(s)."

My conclusions with respect to the initial four questions above are:

1. The information requested is personal information.
2. None of the circumstances in s.480(4) are met.
3. None of the circumstances in s.480(3) are met.
4. A balancing of all the relevant circumstances in s.480(2) leads to the conclusion that disclosing the names on the taxi owner license waiting list would be an unreasonable invasion of personal privacy.

That being said I believe there are weaknesses in the process as far as accountability is concerned. HRM has not, in my view, set up the proper mechanism to open the process of awarding taxi owner licenses to public scrutiny.

I urge HRM to explore ways of making the process more open to the public so that all can be satisfied that the granting of taxi owner licenses is fair.

Recommendation:

That HRM confirm its original decision to the Applicant.

Section 493 of the Act requires HRM to confirm its decision on these recommendations within 30 days of receiving them and to notify the Applicant and the Review Officer, in writing, of that confirmation.

Dated at Halifax, Nova Scotia this 17th of November, 2004.

Darce Fardy, Review Officer