

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

A REQUEST FOR REVIEW of a decision of the **TOWN OF WOLFVILLE** to provide some records but deny others related to an application for access to correspondence between the Town and its auditor.

REVIEW OFFICER: Darce Fardy

REPORT DATE: January 5, 2005

ISSUE: Whether the exemption found in Section 481 (b) and (c)(iii) supports the decision of the Town of Wolfville to deny records related to an audit.

In a Request for Review under **Part XX** of the **Municipal Government Act** (the MGA), dated November 3, 2004, the Applicant asked that I review the decision of the Town of Wolfville (the Town) to deny his application for access to records, and to recommend to the Town that it provide them to him.

The Applicant asked for copies of correspondence between the Town and its auditor from April 1 to August 6, 2004 regarding the audit for the year 2003-2004. He was provided with copies of five records with a total of 11 pages and denied copies of 10 records for a total of 35 pages.

As a result of the Review Office's mediation efforts most of the withheld records were disclosed, leaving only one record, described as a "variance analysis," now in dispute.

In its decision, the Town cited the exemption under Section 481(1)(b) and (c)(iii) for refusing to disclose the record:

Confidential information

481(1) The responsible officer shall, unless the third party consents, refuse to disclose to an applicant information

- (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
- (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position, or interfere significantly with the negotiating position, of the third party,
 - (ii) result in similar information no longer being supplied to the municipality when it is in the public interest that similar information continue to be supplied,
 - (iii) result in undue financial loss or gain to any person or organization, or
 - (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.

Before the successful mediation of this Office began, the Town, in accordance with **Section 482(1)** of the *MGA*, notified the auditing firm, as the third party, asking if it consents to the disclosure of the records or if it wishes to make a representation to the Town objecting to the disclosure. The auditor raised specific objections to the disclosure of the “variance analysis.”

(Although Section 482(3B)(b) obliges the Town not to reveal the identity of third parties to applicants, and while third parties are normally not identified by the Review Officer, the Applicant is aware the third party is the auditor since he identified the auditor in his application.)

The third party's submission:

The auditor, in an oral submission to the Review Office, described the “variance analysis” as a working paper it used to prepare the Town’s audit. He said such a record is not normally provided to a client but was, in this case, as a courtesy. He said if it were disclosed it would no longer be provided to the Town in future audits.

The auditor referred to a letter he wrote to the Mayor of Wolfville, dated July 13, 2004, stating that “[t]he working papers prepared in conjunction with our audit are the property of our firm, constitute confidential information and will be retained by us in accordance with our firm’s policies and procedures.”

The Town's submission:

The Town also refers to the letter of July 13, 2004 noted by the third party. It is a four-page document confirming the terms of agreement covering the audit. The town says it regards the document, which the Mayor signed to formally accept the terms, as a contract between the Town and the auditor. The submission said that disclosing the document could have the following negative impact on the interests of the town:

- The auditor would discontinue providing such records to the town;
- Town staff would be inconvenienced by having to continually visit the auditor’s office to review the records;

- ❑ The auditor may stop servicing the Town's financial statements; and
- ❑ The auditor could bring an action against the Town if it discloses the record.

The Town concluded that disclosing the document in dispute could reasonably be expected to result in similar information no longer being made available to the Town and this could harm the financial interests of the Town.

The Applicant's submission:

Much of the submission of the Applicant contains complaints about delays in getting a decision on his application from the Town. He said the Town used Part XX of the MGA as a tool to avoid releasing records in a timely fashion. He called this a misuse of the legislation.

The Applicant argued that the Town did not have an acceptable reason for the delay because the records should have been easy to locate.

The Applicant also addressed the third party's concerns. The Applicant does not see how disclosure of any of the records could harm the auditor's financial position unless the audit is flawed.

Conclusions:

Although the Town cited only two of the three sub-sections of s.481, all three must apply for this subsection to stand. Under sub-section (a) I am satisfied that the record at issue contains financial information compiled by the third party. Under (b) the letter to the Mayor referred to above, confirms that the record provided to the Town was done so, explicitly in confidence. Under (c), specifically part (ii), the auditor makes it clear that the "variance analysis" will no longer be

provided if this record is disclosed. Since the Town acquired the analysis it is reasonable to conclude that it did so in the public interest and would wish to acquire a similar record in the future.

Consequently it is my view that the Town's refusal to disclose the analysis is supported by s.481.

I agree with the Applicant that his application should have been dealt with more expeditiously and efficiently. There were a number of problems:

- The application was received by the Town on August 6, 2004; on August 26, the Town wrote the applicant to say it needs more time to make a decision and extended the time by 30 days, to October 5.
- On October 5, this Office received a request for review because the Town was deemed to have refused the application since no decision had been made. Section 488(2) reads: "The failure of the responsible officer to respond in time to a request for access to a record is to be treated as a decision to refuse access to the record."
- The Town did not notify the third party of the Application until October 7.
- On October 15, the Review Office called on the Town to process the application.
- The Town made its decision on October 18 subject to a third party request for review.
- On November 2 the Town released some of the records.

- At first the Town did not make a submission to the Review Officer in support of its decision but later did so.

The Applicant's complaint is justified with respect to the time delays. However, the Town did cooperate with the Review Office during mediation and as a result much of the material was disclosed to the Applicant.

Recommendations:

That the Town

- write to the Applicant affirming its decision to deny access to the "variance analysis" and
- review its procedures with respect to the timely processing of applications for access and notify the Review Officer in writing of the results of that review.

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 is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 5th day of January, 2005.

Darce Fardy, Review Officer