Freedom of Information & Protection of Privacy Review Office
Review Officer Report FI-06-13(M)

A **REQUEST FOR REVIEW** of a decision of the **MUNICIPALITY OF THE DISTRICT OF WEST HANTS** to deny access to a contract to design, finance, construct, engineer, manage and operate a new landfill.

June 20, 2006

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ISSUE:

Whether Section 481(1) of Part XX of the *Municipal Government Act (MGA)* supports the decision of the Municipality of the District of West Hants to withhold the contract.

In a Request for Review dated February 2, 2006 the Applicant requested I recommend to the Municipality of the District of West Hants ("Municipality") that it release a copy of the contract ("Contract") between the Municipality and a private company ("Third Party") to construct and operate a new landfill. In accordance with Section 482(1) of the *MGA*, the Municipality notified the Third Party of the application. The Third Party did not consent to the disclosure of the Contract. In its decision letter to the Applicant, the Municipality attached the response of the third party outlining their opposition to disclosure of the contract. Although no exemption was cited in the decision letter, the Public Body was relying on s.481 of the *MGA* to withhold the contract.

The relevant sections of Part XX of the *MGA* are:

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, ...
  (iii) may result in undue financial loss or gain to any person or organization...

SUBMISSION OF THE PUBLIC BODY:

Through its solicitor, the Municipality acknowledged all three conditions (a, b, and c) of s.481(1) must be met and that:

Section 481(1)(a)

The Contract contained trade secrets, commercial, technical and/or financial information of the Third Party. The solicitor specifically referred to the tipping fees, host community fees, terms involved with the selling of services and the names of subcontractors.

Section 481(1)(b)

The information "was not in any way supplied in a public forum and it was expected by all parties (whether under solicitor client privilege or otherwise) that the information provided would be kept confidential." The solicitor stated "the information that ultimately made it into the Contract was supplied by the Third Party under this meeting process put in place by the Municipality and is therefore information supplied implicitly or explicitly in confidence." Furthermore the "information obtained through those meetings was managed and translated into written form primarily by counsel to the Municipality, who was under an obligation of confidence with respect to the matter in any event." The solicitor noted there was a confidentiality provision within the Contract itself and this Article of Confidentiality contained a very broad definition of what constituted "Confidential Information."

Section 481(1)(c)

The information in the Contract, if disclosed, "would reasonably be expected to (a) harm significantly the competitive position, or interfere significantly with the negotiating position of the Third Party or (b) result in undue financial loss or gain to any person or organization." The solicitor stated there are only seven municipal-run landfills in Nova Scotia and the market for managing second-generation landfills is very small and highly competitive. Disclosure of the Contract would very likely be a detriment to the Third Party in bidding on future work and negotiating with other municipalities on similar sized undertakings. Since the Municipality competes with other municipal landfills, the tip fees charged by the Municipality, if released, may provide the Applicant with a competitive advantage.

The solicitor stated there is a risk that disclosing such information would put the Municipality in breach of its obligations under the Contract. The Contract permits disclosure of such information only if "required by Law," to which the solicitor noted the Review Officer has no powers of enforcement. If the Review Officer recommends full or even partial disclosure of the Contract and the Municipality complies (but is essentially acting in its own free will), the Municipality may be in breach of the Contract and the Third Party would be "entitled to claim indemnity from the Municipality for all 'Losses' as defined in the Contract."

Section 465(2)

The solicitor indicated the Municipality carefully considered the issue of severance and concluded given the above-mentioned factors regarding s.481 the Contract cannot be reasonably severed.

SUBMISSION OF THE THIRD PARTY:

The Third Party objected to the disclosure of the Contract because it contains vital commercial and financial information that would cause the company damage. The Third Party further stated if the information was given to another party, it would significantly compromise the company, "exploiting future business opportunities in relations to the site." Release of the Contract would also give its competitors the advantage of understanding the company's operational and financial constraints. The Third Party stated disclosure of the Contract "can reasonably expect to harm significantly the competitive position of our company and interfere significantly with our negotiating position."

SUBMISSION OF THE APPLICANT:

The Applicant referred to the purpose of Part XX, of the *MGA,* "to ensure that municipalities are fully accountable to the public by giving the public the right of access to records . . . and to ensure fairness in government decision making." The Applicant continued by stating, "approximately $3,000,000 of federal infrastructure funding was received by West Hants in 2005 to assist with the construction of the new second generation landfill." The Applicant believed releasing the contract would clarify the roles and responsibilities of the Third Party and promote accountability and fairness of the Municipality to enter into this agreement.

ANALYSIS AND FINDINGS:

Purpose of *Part XX of the MGA* - Section 462

Part XX of the *MGA* governs access to records possessed by municipal public bodies. The philosophy or the purpose of the Statute found in Section 462(a) and (b) "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." In *O'Connor v. Nova Scotia,* 2001, NSCA 132 the Court in discussing the *Freedom of Information and Protection of Privacy Act*, the mirror of Part XX of the *MGA,* commented:

> ...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".[para 56]

While recognizing some specific and limited exemptions, an obligation is placed on the public body to favour the concepts of openness, accountability and accessibility.

Interpretation of Section 481(1)

As evidenced by the court's comments in *O'Connor*, and in keeping with s.462 of the *MGA*, s.481 is to be interpreted in light of the overall purpose of the *Act*. The burden of proof rests with the Municipality to establish the Applicant has no right of access to a record [Section 498(1) of the *MGA*]. The onus is also on the Municipality to prove the Contract it seeks to withhold from disclosure falls within the specific and limited exemptions of the *Act*. According to the courts in *Atlantic Highways Corp. v. N.S.* (1997), 162 N.S.R.(2d) 27 (SC) and *Shannex Health Care Management Inc. v. Attorney General of Nova Scotia representing the Department of Health*, 2004 NSSC 054, the Municipality must establish that all listed requirements of s.481(1) have been met in order to exempt records from disclosure.

Policy considerations were also subject to comment in *Shannex* at paragraph 18, where the Nova Scotia Supreme Court referenced the British Columbia Information and Privacy Commissioner's comment in Order 03-02 at paragraph 34:

> "It is accepted that a broad exemption for all information relating to business would be both unnecessary and undesirable. Many kinds of information relating to business concerns can be disclosed without harmful consequences to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served."

Application of Section 481(1)

(a) Trade Secrets, Commercial, Financial, or Technical Information

I agree the Contract contains financial, technical and commercial information of the Third Party (s.481(1)(a)) as accepted in previous Reports such as FI-03-37. In these reports the definitions set out by the Ontario Information and Privacy Commissioner were adopted, as the *Act* does not define the terms. That being said, the Contract also contains a great deal of information that cannot be described in those terms. The Contract details the negotiated agreement between the Municipality and the Third Party for providing a service. As mentioned in the Municipality's submission, the Municipality was directly involved in the management and translation of the

Contract. Some of the information sought has been disclosed to the public in press releases and various websites. For example some of the tipping fees can be viewed at: http://www.ecomom.org/EMwebdocuments/EMdocuwastecollection/EMwesthantslandfilusersguide.pdf and http://www.gov.ns.ca/enla/waste/solidwastedisposal.asp#info14.

It would appear a significant amount of information the Third Party seeks to protect has already been made public, is of a standard nature, or is so intertwined with the Municipality's input during the negotiation process, it is difficult to state with a degree of confidence how the information falls under one of the categories of information listed in 481(1)(a).

(b) Supplied in Confidence

To fall within s.481(1)(b) of Part XX of the *MGA*, the Third Party must show that the Contract was "supplied, implicitly or explicitly, in confidence." There is no doubt both the Municipality and the Third Party involved in the negotiation process sought to keep much of the information confidential. This implicit assurance of confidentiality appears to have occurred during the negotiation stage of the contract. In terms of whom "supplied" the information contained in the Contract, I refer to Order 01-39 (upheld on judicial review, in *Canadian Pacific Railway v. British Columbia*, 2002 BCSC 603, 2002) where the Office of the Information and Privacy Commissioner for British Columbia concluded in paragraph 44, that contractual information, despite a reasonable expectation of confidentiality, was not supplied in confidence:

> A number of cases have addressed the difference between negotiated and supplied information (see Orders 00-09, 00-22, 00-39, 01-20). The thrust of the reasoning in all these decisions is that the information contained in contractual terms is generally negotiated. Information may be delivered by a single party or the contractual terms may be initially drafted by only one party, but that information or those terms are not "supplied" if the other party must agree to the information or terms in order for the agreement to proceed.

The Nova Scotia Supreme Court in *Atlantic Highways* at paragraph 40 stated:

> I accept that AHC appears to have submitted certain confidential information to the Province as part of the negotiations process and, if the process had not resulted in a contract, that they would likely have been able to keep such information confidential through the effects to the *Act*. However, the AHC proprietary interest in any such confidential information is now so clouded by the negotiating processes and by the significant and evidenced input of Provincial information that only strong proof evidencing such information as a distinct and severable part of the agreement would suffice.

In terms of the Contract itself, there is an Article of Confidentiality that contains a very broad definition of "Confidential Information." The former Review Officer, in Review Report FI-05-54 addressed the issue of "Confidential Information" while examining s. 21(1) of the *Freedom of Information and Protection of Privacy Act,* which mirrors s. 481(1) of the *MGA*. The Review Officer stated, "It is obvious that if public bodies could escape *FOIPOP's* requirements under s. 21(1) merely by agreeing to hold third party records in confidence, that exemption would be rendered meaningless."

(c) *Harm of Disclosure*

According to s.481(1)(c)(i), the Third Party must show that disclosure of the Contract would "harm significantly" the competitive position of or "interfere significantly" with the negotiating position of the Third Party. This harm must be proven and a standard is required as evidenced in several court cases:

> ". . . the legislators, in requiring a 'reasonable expectation of harm' must have intended that there be more than a possibility of harm to warrant refusal to disclose a record. " [*Chesal.v. Attorney General of Nova Scotia* (2003) NSCA 124 at para 38]

> There must be "a clear and direct connection between the disclosure of specific information and the injury that is alleged." [*Lavigne v. Canada (Office of the commission of Official Languages*) (2002) S.C.C. 53 at para 58]

The Federal Court believes evidence of harm

> "must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever." [*Canada (Information Commissioner of Canada) v. Canada (Prime Minister)* (T.D.), [1993] 1 F.C. 427, 1992 CanLII 2414(F.C.)]

To summarize, the *Act* supports the concept of an open and accountable government through broad access to information subject to a few specific and limited exemptions. I believe the standard set out in the *MGA* for limiting access to records on the basis of confidentiality (s. 481(1)(b)) and harm (s.481(1)(c)) have not been met by the Municipality and the Third Party. Absent evidence affecting competition, stating disclosure of a record will cause undue harm or loss does not alone constitute harm. In this instance, a clear and direct connection to the harm requirement of the provision has not been shown. Similarly, the presence of a statement indicating something was supplied in confidence with no direct reference to the *Act*, or a detailed explicit confidentiality clause in the Contract with clear language and rationale, does not

automatically make it confidential or supplied in confidence. In this situation, it is also unclear as to what information was supplied in confidence.

Having concluded that the standard limiting access to a record on the basis of confidentiality and harm has not been met, I do not believe it is necessary to address the issue of severance.

In its submission, the Municipality raised the issue of the Review Officer having the power to make recommendations as opposed to the authority to issue orders. This in turn having a liability impact in the regards to the act of disclosure. I would simply mention that the Review Officer's mandate is governed by statute. The statute also sets out principles for public bodies to apply in access situations.

RECOMMENDATION:

That the Municipality of the District of West Hants discloses to the Applicant the Contract in whole.

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 West Hants is deemed to have refused to follow these recommendations, and the Applicant has a right to appeal to the Supreme Court of Nova Scotia.

Dated at Halifax, Nova Scotia this 20 day of June 2006.

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Dwight Bishop
Acting Review Officer