



Nova Scotia

**Freedom of Information & Protection of Privacy Review Office
Review Officer Report FI-06-26(M)**

A **REQUEST FOR REVIEW** to determine whether **SOUTH WEST SHORE DEVELOPMENT AUTHORITY** is subject to Part XX of the *Municipal Government Act*, Freedom of Information and Protection of Privacy.

July 18, 2006

ISSUE:

Whether the South West Shore Development Authority is subject to Part XX of the *Municipal Government Act*, Freedom of Information and Protection of Privacy.

 In a Request for Review dated February 23, 2006 the Applicant asked that I review the position of the South West Shore Development Authority (“SWSDA”) that it is outside the jurisdiction of Part XX of the *Municipal Government Act* (“MGA”).

On January 15, 2006, the Applicant requested “[a]greements between SWSDA and TransCanada Pipelines related to options to purchase all or part of the former SPDA property now owned by SWSDA.” In a decision letter dated February 20, 2006, SWSDA stated, “[t]he Act is not applicable to the Authority, which, as a result, declines your application.”

LEGISLATION CONSIDERED:

The relevant sections of Part XX of the *MGA* are Sections 461(d), 461(e) and 463(1). Section 463(1) indicates the *MGA* applies to all records in the custody or under the control of a municipality. A municipality is defined under s.461(e): “municipality” means a regional municipality, town, county or district municipality, village, service commission or municipal body. According to s.461(d), a "municipal body" means a committee, community council, agency, authority, board or commission, whether incorporated or not

- (i) a majority of the members of which are appointed by, or
- (ii) which is under the authority of, one or more municipalities

SUBMISSION OF THE APPLICANT:

The Applicant provided the Review Office with a copy of the May 16, 2005 meeting minutes from the Municipality of the District of Shelburne. On the fifth page of the minutes was a motion to approve the appointments to the Boards/Committees of the Municipality of the District of Shelburne for the fiscal year 2005/2006 as per the attached list. The attached list consisted of a list of boards and committees including the South West Shore Development Authority.

The Applicant also provided the Review Office with a copy of the November 3, 2004 meeting minutes from the Town of Shelburne. On the second page of the minutes was a motion to adopt the Proposed List of Committees for 2004/05 as attached to the minutes as per Schedule A. Schedule A contained a list of committees including the South West Shore Development Authority.

The Applicant stated at the present time SWSDA has “14 voting members according to its web page, nine of whom represent municipalities, suggesting that a majority of the members are appointed by or are under the authority of, one or more municipalities.”

SUBMISSION OF THE PUBLIC BODY:

SWSDA informed the Review Office that it is a non-profit society, incorporated under the *Societies Act*, and was established to carry out community economic development activities in the region. It reiterated that s.461(d) of the *MGA* did not apply, as its members are not appointed by one or more municipalities and SWSDA is not under the authority of one or more municipalities.

SWSDA continued by stating that on an annual basis, the Board of Directors select an ad hoc Nominating Committee to recommend members for executive and director positions on the Board of Directors. They are tasked to identify a Chairman, Vice-Chairman, Secretary, Treasurer, Past Chairman, Personnel Chair and eight Directors. The Nominating Report is presented at the Annual General Meeting for approval.

ANALYSIS AND FINDINGS:

Under s.462 of the *MGA* and as discussed in *O'Connor v. Nova Scotia*, 2001 NSCA 132, the underlying purpose of the Freedom of Information and Protection of Privacy provision is to ensure municipalities are fully accountable to the public and provide for disclosure of all government information, subject to certain exemptions said to be limited and specific. As previously mentioned the operative provision of the *MGA* is s.461; the provision defines Municipality rather broadly including and defining a municipal body through member appointment or operational authority. In this definition, one or both forms of municipal involvement is contemplated.

On August 11, 1995, the Registry of Joint Stock Companies (“RJSC”) reviewed and approved the Memorandum of Association and By-Laws of the Authority, pursuant to Section 5 of the *Societies Act*. When incorporated, paragraph 2 of SWSDA’s Bylaws stated:

Membership in the Society shall consist of One member appointed from each of the following municipal units annually at the annual meeting of the council of the municipal unit, or as hereinafter provided:

- (a) Municipality of the District of Yarmouth
- (b) Municipality of the District of Argyle
- (c) Municipality of the District of Shelburne

- (d) Municipality of the District of Barrington
- (e) Town of Yarmouth
- (f) Town of Shelburne
- (g) Town of Lockeport
- (h) Town of Clarks Harbour

and two (2) members appointed by the Yarmouth Area Industrial Commission.

Paragraph 3 stated:

In the event of any vacancy by reason of death or resignation or incapacity or for any other reason, the Municipality whose position has become vacant may appoint a replacement member at any time...

On December 12, 2002 SWSDA through 'Special Resolution', resolved the Bylaws of the South West Shore Development Authority be amended by, replacing paragraph 2 with the following:

Membership in the Society shall consist of Twelve (12) members appointed by the membership on an annual basis and selected by the membership as follows:

- (i) one person approved by [each of the eight area municipalities];...
- (ix) three persons approved by the Yarmouth Area Industrial Commission;
- (x) one person from the business community of Shelburne County approved by the five Shelburne County Municipal Councils.

This is the last amendment to the Bylaws on file at the RJSC.

The SWSDA Strategic Plan: 2006-2011, prepared in February 2006, indicates there are nine municipalities in the SWSDA's board of directors, rather than eight as outlined in the 2002 Special Resolution. Page 3 of the Strategic Plan states:

SWSDA's board of directors is comprised of 14 voting members, with representatives from all nine municipal units, as well as five business persons from the region... Board meetings rotate throughout the region; each municipal unit has an equal vote on the board; and municipal funding is based on population only.

The website for the SWSDA (www.swsda.com) states the following on its home page:

The South West Shore Development Authority (SWSDA) is also known as the RDA (Regional Development Authority). Created by the Province of Nova Scotia in the mid-1990s, the RDA, equally funded by three levels of government, is the economic and community development arm of the municipal units in Shelburne and Yarmouth counties and Municipality of Clare, the focus is helping the community increase economic stability and growth. Its board of directors as representation from all nine municipal units in the three counties and five business persons from the region.

Collectively these documents indicate membership and control of SWSDA is strictly limited and directly linked to the area municipalities. SWSDA's own publications and website acknowledge that "each municipal unit has an equal vote on the board" of SWSDA and SWSDA is an "arm of municipal units" in question. Seats are directly linked to the area municipalities, which comprise the majority of the board.

Against this background and bearing in mind guidance provided by the Nova Scotia Court of Appeal on the overarching intent or purpose of the *MGA*, and level of presence of municipalities in the selection and designation of members to SWSDA, I believe the SWSDA falls squarely under the *MGA* for the purpose of records. For an individual to conclude otherwise, without clear language limiting the scope of the *MGA* in these types of situations, would be inconsistent with the *MGA*, particularly given its stated purpose.

I am aware that some might argue a two-step appointment process exists and therefore limit the municipal influence. I note that paragraph 3 of the Bylaws did not change during the Special Resolution. This paragraph continues to use the term "appoint" as opposed to the term "approve." Ultimately management and control is routed in the municipalities through their designation of board candidates and the fact the board must select those designated by the municipalities.

RECOMMENDATION:

That the SWSDA accept and process the Application for Access to a Record under Part XX of the *Municipal Government Act*, Freedom of Information and Protection of Privacy.

Section 40 of the FOIPOP 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 South West Shore Development Authority 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 18th day of July 2006.

Dwight Bishop
Acting Review Officer