



Nova Scotia

**Freedom of Information & Protection of Privacy Review Office  
Review Officer Report FI-06-35(M)**

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A Third Party **REQUEST FOR REVIEW** of a decision of **HALIFAX REGIONAL MUNICIPALITY** to release a contract to design, finance, construct, engineer, manage and operate a new landfill.

August 1, 2006

**ISSUE:**

Whether Section 481(1) of Part XX of the *Municipal Government Act*, Freedom of Information and Protection of Privacy, supports the decision of Halifax Regional Municipality to release the contract.

In a Third Party Request for Review dated April 18, 2006 the Third Party requested I recommend to the Halifax Regional Municipality (“HRM”) that it reverse its decision to release a copy of the contract (“Contract”) between the Municipality and the Third Party. On February 14, 2006, HRM received an application for access to a record under Part XX of the *Municipal Government Act* (“MGA”). The Applicant sought access to a copy of the contract between HRM and the Third Party “regarding regional solid waste processing at the Otter Lake facility.” In accordance with Section 482(1) of the *MGA*, HRM notified the Third Party of the application. The Third Party did not consent to the disclosure of the Contract. However, in a letter dated April 12, 2006, HRM informed the Third Party of its decision to grant access to the Applicant. HRM based its decision on the fact “the contract is 9+ years old; the funding formulas noted in the contract are no longer being used; and the specific designs and plans of the facility are not being requested.”

All parties were asked to make a submission to the Review Office. Only the Third Party made a submission.

**LEGISLATION CONSIDERED:**

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...

**Burden of proof**

**498(3)** At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party

(a) in case of personal information, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy;

(b) in any other case the burden is on the third party to prove that the applicant has no right of access to the record or part.

The information requested pertains to a company. This provision places the burden of proof on the Third Party to establish that the Applicant does not have a right to access all or part of the record(s).

**SUBMISSION OF THE THIRD PARTY:**

Through its solicitor, the Third Party submitted that “regardless of the Agreement’s age and the fact that funding formulas are no longer being used” the Agreement should not be disclosed and that:

*Section 481(1)(a)*

The Contract contained commercial, financial and technical information. The solicitor specifically referred to intellectual property in the form of plans and specifications, the performance bond, construction fees, period service fees, equipment purchase price, the operating period performance bond and the service fee formula.

*Section 481(1)(b)*

The information included in the Agreement was implicitly supplied in confidence and that it contained no provision that provided for public disclosure.

The solicitor also submitted that *Jill Schmidt Health Service Inc. v. British Columbia (Information and Privacy Commissioner)* 11 C.P.R. (4<sup>th</sup>) 58 (B.C.S.C.), applied two exceptions to the rule that contracts and leases result from a give and take between the parties, making it difficult to determine which party “supplied” what information. The two exceptions are (1) “where the information [in the contract] remains relatively unchanged”; and (2) “where an accurate inference can be made of underlying, supplied confidential information.” (para.. 32). The Third Party submitted that the intellectual property, purchase price of mobile equipment and its bonding capacity and ability to obtain insurance falls within these two exceptions.

*Section 481(1)(c)*

Disclosure of the information would reasonably be expected to harm significantly the Third Party's competitive or negotiating position or result in undue financial loss or gain. The solicitor submitted "that it is only required to show that there is a foundation for finding that there is more than a possibility of harm or undue financial loss." According to the solicitor, if the intellectual property, in combination with the pricing information were disclosed, it would allow competitors to "reverse engineer" the Third Party's bid. The purchase price of certain equipment reflect the Third Party's purchasing power. "This information is very useful to [the Third Party's] competitors and will be used against [the Third Party] in future bidding." The Third Party's bonding capacity and its ability to obtain insurance coverage is also a source of competitive advantage. If the Third Party's competitors "obtained the bond and insurance information contained in the Agreement, they could use this information against [the Third Party] in future bidding and undermine [the Third Party's] competitive position."

**ANALYSIS AND FINDINGS:**

During the mediation process, the Review Office asked that the Third Party consider consenting to the release of the contract in severed form. The Third Party objected to the disclosure of any portion of the Contract.

As evidenced by the court's comments in *O'Connor v. Nova Scotia*, 2001 NSCA 132, 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 Third Party to establish the Applicant has no right of access to a record [Section 498(3)(b) of the *MGA*]. 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 Third Party must establish that all listed requirements of s.481(1) have been met in order to exempt records from disclosure.

**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)) following the interpretations used in previous Reports such as FI-06-13(M). The Contract also contains a lot of information that cannot be described in those terms.

*(b) Supplied in Confidence*

To fall within s.481(1)(b) of Part XX of the *MGA*, the Third Party is required to show that the Contract was "supplied, implicitly or explicitly, in confidence." In FI-03-47(M), the previous Review Officer noted that the HRM's tender policy may ensure confidentiality. However, as noted in FI-06-13(M), contracts of this nature are a result of negotiations between the parties.

Section 3.6 of the Contract itself acknowledges that some information contained in the Contract “are or may become part of the public domain.” Information contained in the agreement such as the time line, facility life and approximate cost is available on the Municipal Group of Companies website.

*(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 established in accordance with the following standard, 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.)]

In conclusion, I believe the standard set out in the *MGA* for limiting access to records on the basis of harm (s.481(1)(c)) has not been met by the Third Party. In this instance, the information is more than nine years old and as such is quite dated. A reasonable person can assume, without contrary evidence, that pricing and insurance costs have changed in the past nine years. The Third Party did not detail how the release of the information may harm its competitive advantage. Simply stating that a competitor could use the information to undermine the Third Party’s competitive position does not show a “clear and direct connection” to the harm requirement.

**RECOMMENDATION:**

That the Halifax Regional Municipality reaffirm its decision to disclose 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 Halifax Regional Municipality 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 18<sup>th</sup> day of July 2006.

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Dwight Bishop  
Acting Review Officer