



Nova Scotia

**Freedom of Information & Protection of Privacy Review Office
Review Officer Report FI-06-37(M)**

A **REQUEST FOR REVIEW** of a decision of the **HALIFAX REGIONAL MUNICIPALITY** to deny access to the estimated domestic budget for hosting the 2014 Commonwealth Games.

October 17, 2006

ISSUE:

Whether Section 481 of Part XX of the *Municipal Government Act (MGA)*, Freedom of Information and Protection of Privacy, supports the decision of Halifax Regional Municipality to withhold the requested budget information for the 2014 Commonwealth Games.

In a Request for Review, dated April 23, 2006 the Applicant requested I recommend to the Halifax Regional Municipality (“Municipality”) that the Municipality release the domestic bid estimate for hosting the 2014 Commonwealth Games. Specifically, the Applicant asked for the bid budget that was submitted to the Commonwealth Games of Canada in relation to selecting the Canadian Candidate City. In its decision letter to the Applicant, the Municipality stated it would not disclose the requested information on the basis of s.481 of the *MGA*.

During the Review Office’s mediation process, the Mediator, the Applicant, the Municipality, and one of the affected Third Parties (Third Party A) met to discuss the bidding process. Third Party A informed those present that the budget was an estimate and may not be representative of the final budget submission to the International Commonwealth Games Federation. Subsequently, the Applicant clarified and narrowed the request to three documents: the Budget Summary Report (Expenses), the Budget Work Package Report (Revenues) and the Budget Work Package Report (Expenses). All three documents were part of the domestic bid to Commonwealth Games of Canada. The Municipality reiterated that if the domestic budget estimate were to be made public, it would give other competing cities an unfair advantage.

LEGISLATION:

Relevant sections of Part XX of the *MGA* for consideration 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
 - (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) result in the 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 the 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.

SUBMISSION OF THE APPLICANT:

It is the Applicant's view that as one of the largest projects the Municipality might ever undertake, it should "be coupled with impeccable scrutiny and public transparency." The Applicant continued by responding to Third Party A's assertion that the budget estimate is not likely representative of the final budget. The Applicant stated:

"If this is the "old" budget, and likely not representative of the final budget, what competitive advantage does that give? . . . [The Municipality] and [Third Party A] should not be swayed by how the two other cities conduct their business . . . Our democratic institutions – the expected transparency of government and related organization – is different from those cities. It should not be compromised because of fears that a competitive advantage might be created should certain documents be made public.

. . .

[Third Party A] says they will make their budget public – but only when it is submitted to the International Federation. That will be too late. The bid is out of our hands. There will be no public discussion about one of the biggest projects this city has ever undertaken. It will simply be left to others to decide the merits and the fate of this project."

SUBMISSION OF THE PUBLIC BODY:

The Municipality acknowledged that the requested records were provided to the Municipality in confidence and that the records contained financial information that if released would harm significantly Third Party's A competitive position.

SUBMISSION OF THIRD PARTY A:

Third Party A submitted that the requested records are at the foundation of Halifax's bid in a highly competitive process and should not be disclosed. The following statements were made in relation to s.481(1) of the *MGA*:

Section 481(1)(a)

The budgets contain financial information as defined by the Ontario Information and Privacy Commissioner as "information relating to money and its use or distribution and [it] must contain or refer to specific data" [Orders P-47, P-87, P-113, P-228, P-295 and P-394]. Third Party A continued by stating a budget, as defined in Black's Law Dictionary, 6th ed., is a "statement of estimated revenues and expenses for a specified period of time", fits the definition of financial information.

Section 481(1)(b)

The information included in the Agreement was explicitly supplied in confidence and the Municipality signed an agreement indicating such.

Section 481(1)(c)

Disclosure of the information would reasonably be expected to harm significantly the negotiating position to obtain the Games and in turn would result in undue financial loss. Third Party A stated, "the process for bidding for the Commonwealth Games is a very competitive one. Bidding countries do not release their bid books, containing the bid financial information, until they have lodged the bid with the Commonwealth Games Federation on May 9, 2007."

Third Party A continued:

The disclosure of the financial underpinnings of a bid for the world's second largest multi-sport event will harm the competitive position of [Third Party A] is self-evident. Strategic positioning is critical in a competition that is highly political. Seventy-one Commonwealth Games Associations will vote on November 9, 2007 in Sri Lanka to determine who will host the 2014 Games. Each city vying to host the Games is interested to know as much as possible about the others in order to tailor their bid to be the most appealing to the greatest number of members. Releasing these documents would have a significant impact on [Third Party A's] ability to position itself strategically relative to other bids.

Third Party A informed the Review Office that even those Canadian cities that did not win the domestic bid do not release their proposals because of concern that it may harm Canada's international bid prospects. "This is not just Halifax's bid: it is Canada's."

SUBMISSION OF THIRD PARTY B:

Third Party B was identified by both the Municipality and Third Party A as a third party to this review.

Third Party B informed the Review Office that all parties were reminded, during the domestic competition process, to keep all documentation confidential even beyond the December 15, 2006 domestic selection decision. “This is a highly competitive bidding process and to lose any potential advantage by the release of confidential information would seriously harm Canada’s chance to win the bid.”

ANALYSIS AND FINDINGS:

Part XX of the *MGA* governs access to records possessed by municipal bodies. The underpinning philosophy of the *MGA*, found in Section 462(a) and (b), is to ensure that municipalities are fully accountable to the public by giving the public a 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 limited and specific exemptions, an obligation is placed on the public body to favour openness, accountability and accessibility.

All submissions were based upon s.481 of the *MGA* and the issue has been addressed in this context. As discussed 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 Third Party to establish the Applicant has no right of access to a record. For additional information on the application and interpretation of s.481 and s.498, I would draw your attention to *Atlantic Highways Corp. v. N.S.* (1997), 162 N.S.R.(2d) 27 (SC), *Shannex Health Care Management Inc. v. Attorney General of Nova Scotia representing the Department of Health*, 2004 NSSC 054, and previous Review Reports.

In approaching this matter, one is also guided by the following: the domestic budget bid has a public interest component (financial impact on the Municipality and other public bodies); the public knowledge that the cost of hosting the Games will be shared among the federal,

provincial and municipal governments and the private sector; that all three levels of government have stated their support for Halifax's bid; the process is highly competitive and recognizes the need for confidentiality; the process involves various stages; the final bid made to the International Commonwealth Games Federation, including the budget and funding partners contributions will be made public in May 2007; and in this instance the Third Parties do not operate at arms length of the Public Bodies. (From Third Party A's website, its Memorandum of Association and its By-Laws, it is apparent this party is not in an arms length relationship with the Municipality and the Province of Nova Scotia; Third Party B states that it has strong partner relations with the Government of Canada on its website). Both third parties serve public functions.

Application of Section 481(1)

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

I agree the budget information requested contains financial information of Third Party A. This finding is consistent with the interpretations used in previous Reports.

(b) Supplied in Confidence

To fall within this requirement the budget information must be "supplied, implicitly or explicitly, in confidence." The Municipality and both third parties provided information to the Review Office that the domestic budget estimate was provided to the Municipality in confidence, that this confidence was tied to the May 2007 date, and the overriding confidence requirement was generally accepted as part of the process. I concur.

(c) Harm of Disclosure

Section 481(1)(c)(I) of the *MGA* requires the Third Party to demonstrate that disclosure of the information would "harm significantly" the competitive position of or "interfere significantly" with the negotiating position of Third Party A. 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]

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) v. Canada (Prime Minister) (T.D.), [1993] 1 F.C. 427, 1992 CanLII 2414(F.C.)]

In this particular situation, I believe it is relevant to recognize that all steps in the bidding process are closely interrelated. The Domestic Budget is part of a work in progress. The actual

monetary costs of the Games are being submitted through a separate document to the International Commonwealth Games Federation. The time of the release of information is an extremely important factor. Disclosure of proposed monetary spending when negotiations are still underway may seriously inhibit Third Party A's ability to secure the Games. As such, I conclude the standard set out in the *MGA* for limiting access to records on the basis of harm (s.481(1)(c)) has been met with respect to certain information being requested.

At issue is the extent to which severance principles can be employed to ensure openness, accountability and confidence prior to May 2007. Given the purpose of the *MGA*, the Municipality's role vis-à-vis the make up of Third Party A, the third parties public service component and the previous release of budget information, I believe there is room for severance. Any information dealing with the financial monetary figure and the list of non-mandatory sports chosen by Third Party A prior to its public release in May 2007 is considered confidential and needs to be protected during the bidding process. Following May 2007, arguments supporting confidentiality would cease to exist. Information contained in the documents, such as the mandatory sports, is already in the public domain. The approximate cost of the Games, likewise has been publicly released (on April 6, 2006). Neither the Municipality nor Third Parties A and B discussed the relationship or effect the April 6 release might have with regards to the requested budget information. Arguments for not releasing the budget estimate are therefore diffused. It is also my view that disclosure of most of the line items, though generic in nature, may enable the Applicant to further understand what factors are taken into consideration when submitting a bid.

RECOMMENDATION:

That the Halifax Regional Municipality disclose to the Applicant in part the Budget Summary Report (Expenses), the Budget Work Package Report (Revenues) and the Budget Work Package Report (Expenses), severing the names of the non-mandatory sports; and the Cash, %, VIK, and Total columns with the exception of the total cash expense amount.

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 17th day of October 2006

Dwight Bishop, Acting Review Officer