Freedom of Information & Protection of Privacy Review Office
Review Officer Report FI-06-39(M)

A Third Party **REQUEST FOR REVIEW** of a decision of **HALIFAX REGIONAL MUNICIPALITY** to release in part a contract to design, plan, engineer, construct and transfer Sewage Treatment Plants.

July 28, 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 the Halifax Regional Municipality to release the contract in part.

In a Request for Review dated May 5, 2006, the Third Party requested I recommend to the Halifax Regional Municipality ("Municipality") that it not release any portion of the contract ("Contract") between the Municipality and the Third Party.

On February 20, 2006, the Municipality 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 contract(s) between the Municipality and the Third Party. 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. However, in a letter dated April 21, 2006, the Municipality informed the Third Party of its decision to grant partial access to the Applicant. The Municipality based its decision on the fact that Article 30.06 of the Contract provides "consent to HRM making copies of this Agreement and other Project Agreements available for review by members of the public."

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 in this instance pertains to a company. Section 498(3) 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 it "is not subject to the *Municipal Government Act* and, therefore, is under no obligation to disclose any agreements which it has entered into with 'major subcontractors'." The solicitor further stated:

Section 481(1)(a)
The Contract contains commercial, financial and technical information, including, but not limited to, intellectual property, insurance and bond fees, specific test examples, bonds and letters of credit, inflation indexes, payment schedules, performance bonds, and monthly progress reports.

Section 481(1)(b)
Article 26.01 of the Contract sets out "that confidential information shall be held in the strictest confidence, and no confidential information shall be disclosed to any person subject to limited exemptions. None of these exemptions apply and, therefore, the information should not be disclosed."

Section 481(1)(c)
The Nova Scotia Court of Appeal in *Chesal v. Attorney General of Nova Scotia*, 2003, NSCA 124, established that the Third Party does not need to "show a probability of harm, but rather only more than a possibility of harm." The design submissions, plans and manuals, in combination with the pricing information if disclosed, would allow competitors to "reverse engineer" [the Third Party]'s bid. Competitors could also use [the Third Party]'s bonding capacity and its capability to obtain insurance coverage against [the Third Party] in future bidding and undermine [the Third Party]'s competitive position.

ANALYSIS AND FINDINGS:

As outlined in earlier Review Reports (FI-06-13(M) and FI-06-35(M)), s.481 is to be interpreted in light of the general 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*]. Furthermore, *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, established that third parties must meet all listed requirements of s.481(1).

Application of Section 481(1)

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

It is my opinion some portions of the Contract contain financial, technical and commercial information of the Third Party, while other portions of the Contract contain information one would not describe in those terms (FI-03-37(M) for definitions).

(b) Supplied in Confidence

To fall within s.481(1)(b) of Part XX of the *MGA*, the Third Party is required to establish the Contract was "supplied, implicitly or explicitly, in confidence." It is difficult to determine who "supplied" the information contained in the Contract. The general difficulty in determining who "supplied" information in contracts and agreements is highlighted by Judge Kelly of the Nova Scotia Supreme Court:

> 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. [*Atlantic Highways Corp. v. N.S.* (1997), 162 N.S.R.(2d) 27 (SC), para. 40]

The Third Party also adopts the position that Article 26.01 of the Contract supports the conclusion that the Contract is confidential. I note, however, that confidential information is defined in Schedule A, which in turn is incorporated in Article 1.01 of the STP Developmental Agreement and amended STP Agreements and does not appear to encompass all the information suggested by the Third Party's solicitor. The definition found in Schedule A is worded as follows:

> "Confidential Information" means all proprietary information including technical and commercial information and any other information developed by or on behalf of, disclosed to or received by HRM or the Company in connection with the Sewage Treatment Plants; for clarification, the Project Agreements, the Schedules thereto and any and all reports, documents and information delivered by the Company to HRM in accordance with the terms of the Project Agreements and the Schedules are <u>not</u> Confidential Information. [emphasis added]

Article 30.05 of the Contract also contains the following language, "The Company and the Guarantors hereby consent to HRM making copies of this Agreement and other Project Agreements available for review by members of the public." Articles 26.01 and 30.05 do not contemplate a complete and broad exclusion of contractual information from disclosure.

(c) Harm of Disclosure

Section 481(1)(c)(i), requires the Third Party establish 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 in keeping with the standards set out in several court cases including *Chesal*.

The Third Party advance the position that the release of the information would harm its competitive advantage through the process of "reverse engineering" and knowledge of specific information. These statements in themselves, without clarification or detail do not, in my opinion, meet the standard set out in the *MGA* for limiting access to records on the basis of harm.

To summarize, this case has similarities to two recent decisions issued by the Review Office (FI-06-13(M) and FI-06-35(M)). The difference being the Contract currently under review contains several explicit provisions addressing what is and what is not confidential information. The Contract itself appears exempt based on the definition of Confidential Information as defined in Schedule A. Also, the "supplied" requirement outlined in s.481(1)(b) cannot be clearly established. I do not believe the Contract and its attachments, nor the information provided by the solicitor for the Third Party can identify which party supplied what information. In terms of the harm requirement (s.481(1)(c)), I believe the threshold as contemplated by the *MGA* has not been met. The arguments provided to the Review Office do not support withholding the Contract in its entirety or in part.

With regard to the application of the *MGA* to the Third Party, I believe it is clear that the *MGA* applies to situations of this nature. Section 463(1) outlines the application of the *MGA*, which "applies to all records in custody or under control of a municipality." It is apparent that the Municipality has custody of the record at issue.

RECOMMENDATION:

That the Halifax Regional Municipality 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 28th day of July 2006.

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Dwight Bishop
Acting Review Officer