Nova Scotia Freedom of Information and Protection of Privacy
Report of Review Officer
Catherine Tully

REVIEW REPORT FI-10-59M

June 15, 2015

Town of Wolfville

Summary: An applicant sought access to a copy of an agreement between the Town of Wolfville and a third party regarding the transfer of property. The Town of Wolfville gave third party notice. When the third party failed to respond, the Town withheld the entire agreement as confidential business information. The Review Officer determined that the information in the agreement was not supplied in confidence within the meaning of s. 481(1)(b) of the *MGA* and the third party failed to show evidence of harm sufficient to meet the requirements of s. 481(1)(c). The Review Officer recommended disclosure of the agreement.

The Review Officer clarified the approach to be taken by public bodies with respect to the requirement for third party notice.

Statutes Considered: *Access to Information Act*, RSC 1985, c A-1, *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, s. 2, s. 21; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 21; and *Municipal Government Act*, SNS 1998, c 18 , ss. 462, 467, 481, 482, 490(2)(b) and 498.

Authorities Considered: BC Orders 331-1999, 03-02, F08-22, F15-04; NS Review Reports FI-03-37, FI-06-13(M), FI-06-37, FI-07-38.

Cases Considered: *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD); *Atlantic Highways Corp. v. Nova Scotia* (1997) 1997 CanLII 11497 (NSSC), 162 N.S.R. (2d) 27 (*Atlantic Highways*); *Chesal v. Nova Scotia (Attorney General) et. al.*, 2003 NSCA 124 *Halifax Herald Ltd. v. Nova Scotia (Workers' Compensation Board*), 2008 NSSC 369; *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (CanLII) (Imperial Oil); *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII); ***O'Connor v. Nova Scotia,* 2001 NSCA132;** *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, [2014] 1 S.C.R. 674.

Other Sources Considered: *Canadian Oxford Dictionary*, (Toronto: Oxford University Press, 1998), "commercial", "financial"; Sullivan, Ruth. *Statutory Interpretation*, 2nd ed. Toronto: Irwin Law, 2007., quoting E. A. Driedger, Construction of Statutes (2nd ed. 1983) at p. 41.

INTRODUCTION:

[1] On June 4, 2010 the applicant requested a copy of an agreement between the Town of Wolfville and a third party regarding the transfer of the property in Wolfville. The Town of Wolfville decided that it would withhold the entire agreement citing the need to protect confidential third party information. The applicant filed a request for review with this office arguing that the disclosure of the information was in the public interest.

ISSUE:

[2] Was the Town of Wolfville ("the Town") required by s. 481 of the *Municipal Government Act* ("*MGA*") to withhold the agreement?

DISCUSSION:

Background

[3] When the Town received the applicant's request it promptly sent a notice to the third party seeking its consent to the release of the agreement. It requested a response within 14 days but did not receive a response. By way of letter dated June 29, 2010 the Town denied access to the requested record citing s. 481(1) of the *MGA*. In its letter to the applicant the Town stated, "The third party has been duly advised of your application for access and has not consented to the disclosure of the record."

[4] On July 8, 2010 the applicant filed a request for review with this office. However, it was not until the fall of 2014 that the review file was finally assigned for investigation by this office. At that time this office contacted all parties – including the Town, the applicant and the third party and sought submissions from each regarding the application of s. 481 of the *MGA* to the requested agreement.

[5] Section 481 of the *MGA* states:

> **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,
> (ii) result in similar information no longer being supplied to the municipality when it is in the public interest that similar information continue to be supplied,
> (iii) result in undue financial loss or gain to any person or organization, or
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.

(2) The responsible officer shall refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax, unless the third party consents.

(3) The responsible officer shall disclose to an applicant a report prepared in the course of inspections by an agency that is authorized to enforce compliance with an enactment. 1998, c. 18, s. 481.

Burden of Proof

[6] This review was filed by the original access applicant. In that circumstance, it is the municipality that bears the burden of proving that the applicant has no right to access the withheld records:

498(1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the responsible officer to prove that the applicant has no right of access to the record or part.

[7] In accordance with s. 490(2)(b) the third party was included as a party to the review. Section 498(3) of the *MGA* provides that in the case of third party confidential information as described in s. 481, it is the third party who bears the 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; and

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

[8] Typically the burden placed on the third party arises when the third party files the request for review. In this case it is my view that because it is the access applicant who has filed the request for review, the burden of proof lies ultimately with the municipality.

Interpretation and Application of Third Party Business Exemption - s. 481

General approach

[9] The purpose of access to information legislation is well established. Section 462 sets out the purposes of the *MGA* which are identical to those set out in section 2 of Nova Scotia's *Freedom of Information and Protection of Privacy Act* ("*FOIPOP*"). The Nova Scotia Court of Appeal in *O'Connor v. Nova Scotia,* 2001 NSCA132 highlighted the uniqueness of the purpose provisions in Nova Scotia's *FOIPOP*:

[54] (…) I find that the purpose clause in the Nova Scotia statute is unique (among FIPPAs). This is the only province whose legislation declares as one of its purposes a commitment to ensure that public bodies are "fully accountable to the public" (underlining mine)…

> [55] In summary, not only is the Nova Scotia legislation unique in Canada as being the only Act that defines its purpose as an obligation to ensure that public bodies are *fully* accountable to the public; so too does it stand apart in that in no other province is there anything like s. 2(b)…
>
> [57] I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada…

[10] So how does the third party business exemption fit into the scheme of access legislation? Former Review Officer Dwight Bishop considered the *O'Conner* decision's influence on the interpretation of s. 481 and said this,

> While recognizing some specific and limited exemptions, an obligation is placed on the public body to favour the concepts of openness, accountability and accessibility.[1]

[11] Likewise former Review Officer Darce Fardy determined that the details of a contract to supply transportation services to students had an inherent public interest. In considering the purposes provisions of *FOIPOP* he determined that the *Act* requires that public bodies be "fully accountable" to the public to ensure fairness in decision-making and to facilitate informed public participation in policy formulation. His view was that the details of contracts to transport students would be of considerable public interest requiring full accountability.[2]

[12] In examining the federal *Access to Information Act*[3] third party business exemption, the Supreme Court of Canada determined that:

> The Act strikes this balance between the demands of openness and commercial confidentiality in two main ways. First, it affords substantive protection of the information by specifying that certain categories of third party information are exempt from disclosure. Second, it provides procedural protection. The third party whose information is being sought has the opportunity, before disclosure, to persuade the institution that exemptions to disclosure apply and to seek judicial review of the institution's decision to release information which the third party thinks falls within the protected sphere.[4]

[13] The Alberta Court of Appeal recently considered the application of Alberta's third party business exemption to a remediation agreement. The court noted the two protections identified by the Supreme Court of Canada but also highlighted a public interest in protecting third party business information:

> …when the information at stake is third party, confidential commercial and related information, the important goal of broad disclosure must be balanced with

[1] For example NS Review Report FI-06-13 at p. 5 and FI-06-37 at p. 5.
[2] NS Review Report FI-03-37 at p. 9.
[3] RSC 1985, c A-1.
[4] *Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at para. 23.

the legitimate private interests of third parties and the public interest in promoting innovation and development.[5]

[14] The Nova Scotia Supreme Court considered the meaning and application of third party confidential information in *Atlantic Highways Corp. v. Nova Scotia*.[6] *Atlantic Highways* dealt with s. 21 of *FOIPOP* which is the *FOIPOP* equivalent to s. 481 of the *MGA*.

[15] The court in *Atlantic Highways* determined first that the three requirements in s. 21 of *FOIPOP* must be read conjunctively not disjunctively and secondly that the third party has the burden under that section to satisfy the court:

> (a) that the disclosure of the information would reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party;
>
> (b) that the information was supplied to the government authority in confidence either implicitly or explicitly; and,
>
> (c) that there is a reasonable expectation that the disclosure of the information would cause one of the injuries listed in s. 21(1)(c).[7]

Position of the parties

[16] In her[8] request for review, the applicant argued that there was "missing proof that all (a), (b) and (c) of s. 481(1) of *MGA* are met". Further the applicant noted that it was publicly known that the land at issue was once a service station valued in 2009 at $277,200 according to the Property Valuation Services website. She further noted that the land remained unsold and empty for a number of years and suggested that the land could not be sold on the regular market, "because it contained contaminated soil due to the (driving) service station's activity, or underground tanks (leakage) and such." While not specifically addressing the requirements of s. 481(1) of the *MGA* the applicant stated, "knowing all this…I want to know what if any conditions were made and attached by the [third party] upon agreement and to complete the transfer of this particular piece of land to the Town of Wolfville…I want to know that this land is safe and continues to be safe for this kind of park activity. I …believe in such things as transparency, accountability and ethical responsibility."

[17] The third party provided submissions through its legal counsel. Counsel addressed each of the relevant subsections of s. 481(1) and so I will discuss them under each of the three requirements of s. 481(1) below.

[18] The municipality acknowledged our request for submissions but decided that it had nothing further to add given that the third party would be supplying its own submissions.

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[5] *Merck Frosst* at para. 23 as cited in *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 at para. 67.

[6] *Atlantic Highways Corp. v. Nova Scotia (1997)* 1997 CanLII 11497 (NS SC), 162 N.S.R. (2d) 27 (*Atlantic Highways*).

[7] *Atlantic Highways* at paras. 28-29.

[8] The selected gender is not necessarily indicative of the actual gender of the applicant.

(a) Reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party

[19] The record at issue is an agreement between the third party and the Town of Wolfville related to the transfer of land. In their submissions the third party stated that the agreement contains commercial and financial information intrinsically sensitive to the third party pursuant to s. 481(1)(a)(ii). They provided one example they said fell within this subsection. Later they point to one schedule they identified as reflecting "commercial terms between the parties".

[20] The terms "commercial" and "financial" are not defined in the *MGA*. Former Review Officers MacCallum, Fardy and Bishop adopted definitions set out in early Ontario Information and Privacy Commission decisions.[9] More recently, it has been generally accepted that dictionary meanings provide the best guide and that it is sufficient for the purposes of the exemption that information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood.[10]

[21] The *Canadian Oxford Dictionary*, (Toronto: Oxford University Press, 1998) provides the following definitions:

> Commercial: of, engaged in, or concerned with commerce…of, relating to, or suitable for office buildings etc. (commercial land)
>
> Financial: of or pertaining to revenue or money matters

[22] In addition, in order to constitute financial or commercial information, "the information at issue need not have an inherent value, such as a client list might have for example. The value of information ultimately depends upon the use that may be made of it, and its market value will depend upon the market place, who may want it and for what purposes, a value that may fluctuate widely over time".[11]

[23] I conclude that the agreement here contains commercial and financial information. The agreement relates to a land transaction, the land has value and certain terms and conditions relate to the business interests of both parties.

[24] However, it is not clear that the information is "of a third party" as required by s. 481(1)(a). In *Atlantic Highways*, the public body argued that the commercial information contained in an Omnibus Agreement (for the construction of a toll highway), was not proprietary to the third party because in the form it appeared in the Omnibus Agreement, it was the product of negotiation with the Province. The province further argued that portions of the agreement simply reflected the Province's requirements as set out in its Request for Proposal. The court agreed stating:

> I thus conclude that the information AHC seeks to protect has either been already exposed to publication or is so intertwined with the Provincial input by way of the

[9] See for example: NS Review Officer Reports FI-06-13(M) at p. 5, FI-03-37 at p. 7 and FI-07-38 at p. 11.
[10] *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD) at 268 cited with approval in *Merck Frosst* at para. 139.
[11] *Merck Frosst* at para. 140, citing *Air Atonabee*, at pp. 267-68).

> requirements of the 'Request for Proposal' or modified by the negotiation process that it clouds AHC's claim to a proprietary interest in the information. I am therefore not satisfied by the Appellant AHC, after reviewing the evidence, including the specific clauses referred to by them in the Omnibus Agreement, that the information they seek to protect is one of the categories of information listed in 21(1)(a).

[25] In previous Review Reports, former Review Officer Bishop determined that contracts can contain terms that fit within the definition of commercial and financial information, but may also contain terms that do not fit either because they are matters of a standard nature or because they are so intertwined with input from the public body during the negotiation process that it is difficult to state with a degree of confidence how the information would fall under one of the categories listed in s. 481(1)(a).[12]

[26] In this case it is the third party's submissions which state clearly: *"The Agreement represents a unique agreement which was negotiated between the parties over several months. The unusualness of the Agreement represents the discussion, compromise and settlement between the parties on terms agreeable to each.*"

[27] As in the agreement under consideration in *Atlantic Highways*, any commercial and financial information of the third party was modified by the negotiation process to the point that it clouds the third party's claim to a proprietary interest in the information. The two specific examples provided by the third party in its submissions are, in my opinion, as much or more the commercial information of the municipality as they are of the third party.

[28] I am aware of the Alberta Court of Appeal's recent decision that the test is whether disclosure of the document would "reveal" commercial or financial information of a third party and further that just because the public body (or municipality) used the information to negotiate or vary a settlement agreement or other disposition, the information would not necessarily lose its nature as commercial or financial information of a third party.[13] However, in the Alberta case the court was considering five schedules to the agreement that the evidence established were created by experts retained by the third party, supplied to the public body by the third party and incorporated unchanged into the agreement.

[29] In this case there is no evidence that any term of the agreement or any schedule to the agreement was created or included in this way. In fact, as noted above, the third party's own submission supports the conclusion that all of the terms and conditions were a result of "discussion, compromise and settlement" between the parties.

[30] The third party highlighted two terms of the agreement that contained "commercially sensitive information".

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[12] NS Review Report FI-06-13(M) at p. 6.

[13] *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner),* 2014 ABCA 231 (CanLII) *(Imperial Oil),* at paras. 71-71. (leave to appeal denied *Information and Privacy Commissioner of Alberta v. Imperial Oil Limited, et al*., 2015 CanLII 7336 (SCC)).

[31] The first term highlighted by the third party was Schedule E. Schedule E sets out negotiated terms and conditions and relates more to the land now owned by the municipality and the municipality's use of the land than it does to the third party. In my opinion, Schedule E is of the type of information described by the court in *Atlantic Highways* – so modified by the negotiation process that it clouds the proprietary interest of the third party. I find that Schedule E therefore does not contain financial or commercial information of the third party as required by s. 481(1)(a) of the *MGA*.

[32] The third party also highlighted provisions relating to the potential financial implications of the transaction (found in clauses 2.0 and 7.0). Clause 2.0 in particular assigns a value to the transaction. Numerous decisions have consistently determined that information in agreements relating to global contract amounts, or prices, expenses and fees can qualify as commercial or financial information of third parties.[14] Therefore, in the case of the information found in clauses 2.0 and 7.0, I find that this information is commercial or financial information of the third party.

[33] I find that a portion of the agreement in question contains the commercial or financial information of the third party as required by s. 481(1)(a) of the *MGA*.

[34] As noted above, all three requirements of s. 481 must be true therefore I will examine the remaining two elements of s. 481.

(b) Supplied implicitly or explicitly in confidence

[35] To obtain the protection of s. 481(1)(b) the municipality and the third party must also establish that the commercial or financial information was supplied implicitly or explicitly in confidence. There are two elements that must be established:

1. That the information was supplied by the third party; and,
2. That the information was supplied in confidence.

"supplied"

[36] The Supreme Court of Canada in *Merck Frosst* has said that the governing legal principles for the application of provisions such as s. 481(1)(b) are:

> [155] The first is that a third party claiming the s. 20(1)(b) exemption must show that the information was supplied to a government institution by the third party.
>
> [156] A second principle is that where government officials collect information by their own observation, as in the case of an inspection for instance, the information they obtain in that way will not be considered as having been supplied by the third party…
>
> [157] A third principle is that whether or not information was supplied by a third party will often be primarily a question of fact.

[14] *Interior Health Authority (re)*, 2015 BCIPC 4, BC Order F15-04 at para. 11.

[37] The Nova Scotia Court of Appeal considered the meaning of "received in confidence" in the context of s. 12(1)(b) of *FOIPOP*. The court considered British Columbia Order 331-1999 and noted that the Commissioner there had considered the meaning of "received" in confidence as contrasted with "supplied" in confidence. In doing so the court noted that "received" in confidence requires that there be evidence of an expectation of confidentiality on the part of both the supplier and the receiver of the information.[15]

[38] In the case of s. 481(1) of the *MGA* the term used is "supplied". The British Columbia Privacy Commissioner in Order 331-1999[16] had this to say about the difference between "received" and "supplied":

> In my view, however, use of the word "supplied" in ss. 21 and 22 - which deal with information provided to a public body by a non-public body third party - focuses more on whether the supplier of the information expected it to be kept confidential. By contrast, I think s. 16 focuses on the intention of both the receiver and the supplier of the information. This does not mean the intention or understanding of the recipient of information is irrelevant to ss. 21 or 22. It simply means that the Legislature intended, to my mind, that the focus under those two sections should be more on the intention or expectation of the information supplier.

[39] The Alberta Court of Appeal in *Imperial Oil v. Alberta (IPC)*[17] recently clarified this part of the test further by making clear that "supplied" relates to the source of the information, and whether information was "supplied" does not depend on the use that is made of it once it is received. The court states that there would be room to argue that negotiated contracts themselves are not "supplied" by either party to the agreement. But in the case before them the third party was seeking to prevent disclosure of the agreement not simply because it was an agreement but rather because of what the agreement disclosed. The court stated:

> To suggest that information loses its protection just because it ends up "in an agreement that has been negotiated" is not one that is available on the facts and the laws. It cannot be the rule that only information that is of no use to the public body is "supplied".[18]

[40] In the *Imperial Oil* case an applicant sought a "Remediation Agreement" that included five technical letters attached as exhibits to the Remediation Agreement. The court found as a fact that these five letters were commercial and technical information of the third party, supplied in confidence by the third party.

[41] In discussing the effect negotiation has on the requirement that information be supplied implicitly or explicitly in confidence the court in *Atlantic Highways* stated:

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[15] *Chesal v. Nova Scotia (Attorney General) et. al.*, 2003 NSCA 124 at para. 71.
[16] *Vancouver Police Board's Refusal to Disclose Complaint-Related Records, Re*, 1999 CanLII 4253 (BC IPC) (BC Order 331-1999).
[17] *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner),* 2014 ABCA 231 (CanLII) (*Imperial Oil*).
[18] *Imperial Oil*, at paras. 83-84.

> However, the [third party's] proprietary interest in any such confidential information is now so clouded by the negotiating process and by the significant and evidenced input of Provincial information that only strong proof evidencing such information as distinct and severable part of the agreement would suffice.[19]

[42] In *Halifax Herald v. Nova Scotia (Workers' Compensation Board*) the court agreed with Kelly J. in *Atlantic Highways* noting that where information sought is so intermingled with government input, standards and proposals it clouds anyone's ability to determine, as distinct and severable, any confidential information supplied by the third party.[20]

[43] In this case the evidence is that a portion of the agreement is clearly public. The third party provided a copy of the publicly available deed and restrictive covenant that were registered in the public records. They concede that s. 481 does not apply to these publicly available records and the information contained within. I agree. The description of the land and a portion of the description of the restrictive covenant are publicly available and so cannot meet the test that the information be "supplied in confidence".

[44] At a minimum then, all of the publicly known information in the agreement – including the description of the land, the names and addresses of the parties and public portions of the restrictive covenant do not satisfy the s. 481 test.

[45] Many of the terms and conditions of the agreement appear to be standard contractual terms. No evidence has been supplied by the third party to suggest that these were supplied by the third party. They could easily have been supplied by the Town. In fact the third party's position is not that any of the provisions contain information supplied by the third party but rather, the third party argues that these terms and conditions are the result of "discussion, compromise and settlement between the parties". The resulting agreement it says, is commercially sensitive to the third party. Therefore, unlike the third party in the *Imperial Oil* case, the third party here is arguing that it is the agreement itself that it wishes protected. It does not point to any third party information supplied in confidence that would be revealed by the disclosure of the agreement.

[46] I find that the third party has not satisfied its burden of proof and has failed to establish that any identifiable portion of the agreement was "supplied" by the third party. Nor is there any evidence that the provisions of the agreement could reveal information supplied by the third party or allow for a reasonable inference to be drawn about confidential third party information. Even if any confidential information was supplied by the third party, the negotiation process itself clouds anyone's ability to determine as distinct and severable any such information.

"in confidence"

[47] To complete the analysis I will examine whether or not information was supplied "in confidence". The challenge of course is that there is no evidence that any information was actually supplied by the third party. However, in case I am wrong and that some portion of the agreement reveals some commercial or financial information supplied by the third party, I will examine evidence of confidentiality.

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[19] *Atlantic Highways*, at para. 40.

[20] *Halifax Herald Ltd. v. Nova Scotia (Workers' Compensation Board*), 2008 NSSC 369 at para. 74.

[48] Previous Review Officer Reports have determined that:

- Identifying a record as "confidential" does not automatically exempt it from disclosure; and,
- No public body can be relieved of its responsibilities under *FOIPOP* merely by agreeing to keep matters confidential.[21]

[49] The courts have agreed with this approach. It is well established that no municipality or public body can "contract out" of access legislation.[22] In other words, confidentiality clauses cannot be determinative of the issue. In addition, simply labelling documents as "confidential" does not make the documents confidential.[23]

[50] The Alberta Court of Appeal in *Imperial Oil* determined that the requirement that the information was "supplied, explicitly or implicitly, in confidence" is substantially a subjective test; if a party intends to supply information in confidence, then the second part of the test is met.[24]

[51] The Nova Scotia Court of Appeal in *Chesal*[25] relied in part on a list of factors developed by the British Columbia Privacy Commissioner in Order 331-1999. Likewise former Review Officer MacCallum adopted that list in her review of the application of s. 21 of *FOIPOP* to a request for a copy of a number of winning proposals.[26] Keeping in mind the fact that the use of the term "supplied" means that it is necessary to focus on the intention of the supplier, I am of the view that the following factors from *Chesal* and BC Order 331-1999 are relevant to considering whether information is supplied in confidence:

> 1. What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?
>
> 2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
>
> 3. Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may not actually have understood there was a true expectation of confidentiality.)
>
> 4. Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)

[21] NS Review Report FI-05-54 at p. 4.
[22] See for example, *Imperial Oil* at para. 75.
[23] *Halifax Herald* at para. 65.
[24] *Imperial Oil* at para. 75.
[25] *Chesal* at para. 71.
[26] NS Review Report FI-07-12.

> 5. Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?
>
> 6. Do the actions of the public body and the supplier of the record - including after the supply - provide objective evidence of an expectation of or concern for confidentiality?
>
> 7. What is the past practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers? [27]

[52] The third party points to paragraph 9.20 of the agreement as evidence of the parties' intentions to keep the information in the agreement confidential. It says further that the third party, a private company, consistently treats the commercial information reflected in the proposed disclosure as confidential. It offered no evidence in support of this assertion.

[53] It seems clear that the third party certainly intended that portions of the agreement remain confidential – based on paragraph 9.20 and on the submission of the third party. The Town, for its part, could not guarantee confidentiality because it is subject to *Part XX* of the *MGA* which requires that it make all of the records under its custody and control available for access subject only to limited and specific exceptions and exemptions. The Town provided no evidence or argument with respect to the confidentiality of the information.

[54] The Information and Privacy Commissioner for British Columbia made an important point regarding the effects of a confidentiality clause:

> [62] To be clear, I accept that a confidentiality clause can greatly assist the determination of whether the parties to a contract intend information related to it to be confidential. In this respect, I support my predecessor's call for public bodies to address intentions of confidentiality in their contracts for products and services. Public bodies should also address their confidentiality intentions in records that govern tenders, requests for proposal and other procurement processes. Similarly, where third parties voluntarily supply information to a public body, they ideally should do so knowing the public body's confidentiality practices. Since a public body cannot guarantee confidentiality if the Act mandates disclosure, it should frame any contract provisions, representations or policies accordingly.[28]

[55] The court in *Atlantic Highways* noted a section of agreement where the province "recognizes" that certain information "is seen" by the parties to be confidential but the court concluded that this was not a concession by the Province:

> [40] 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 of 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 the Provincial

[27] BC Order 331-1999 at para. 37, cited with approval in *Chesal* at para 72 and NS Review Report FI-07-38 at p. 13.
[28] University of British Columbia Order 03-02; 2003 CanLII 49166 (BC IPC) at para. 62.

information that only strong proof evidencing such information as a distinct and severable part of the agreement would suffice. [29]

[56] In this case, there are clearly portions of the agreement that are publicly available – such as the names and addresses of the parties, the description of the land at issue and information relating to the restrictive covenant. Evidence to this effect was provided by the third party in the form of a copy of the deed and schedules.

[57] Based on the third party's submissions it appears it formed the intention to keep portions of the agreement confidential as evidenced by the inclusion of clause 9.20. As a practical matter however, the third party knew that portions would be publicly available as a result of the filing of the deed and restrictive covenant. The Town for its part could not guarantee confidentiality but could, at best, agree to abide by the provisions of the *MGA Part XX*.

[58] I find that the evidence supports that the third party wished to keep confidential elements of the negotiated agreement. However, I also find that the evidence does not support a finding that any identifiable information in the agreement was "supplied" by the third party. Therefore I conclude that the requirements of s. 481(1)(b) have not been satisfied.

[59] All three requirements of s. 481 must be true. When one element fails, the exemption does not apply. However, in case I am wrong about whether or not the requirements of s. 481(1)(b) have been met, I will evaluate the remaining element of s. 481 of the *MGA*.

(c) Reasonable expectation of harm

[60] The third requirement of s. 481(1) is that the disclosure of the information could reasonably be expected to cause one or more of the harms listed in s. 481(1)(c) of the *MGA*. The reasonable expectation of harm test in Nova Scotia's legislation is consistent with other access to information legislation in Canada.

[61] Decisions by former Review Officers have consistently held that a number of factors are relevant in determining whether or not a reasonable expectation of harm exists. Those factors are:

- There must be more than a possibility of harm;[30]
- There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged; [31]
- 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;[32] and,
- Stating disclosure of a record will cause undue harm or loss does not alone constitute harm.[33]

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[29] *Atlantic Highways*, at para. 40.
[30] NS Review Report FI-06-13(M) at p. 7 citing *Chesal v. Attorney General of Nova Scotia* (2003) NSCA 124 at para. 38.
[31] NS Review Report FI-06-13(M) at p. 7 citing *Lavigne v. Canada (Office of the Commission of Official Languages)* (2002) S.C.C. 53 at para. 58.
[32] NS Review Report FI-06-13(M) at p. 7 citing *Canada (Information Commissioner of Canada) v. Canada (Prime Minister) (T.Dl.),* [1991] 1 F.C. 427.
[33] NS Review Report FI-06-13(M) at p. 7.

[62] In examining the British Columbia version of s. 481(1),[34] former Commissioner Loukidelis said this:

> [44] Civil law conventionally applies the balance of probabilities for determining what happened in the past, with anything that is more probable than not being treated as certain. This approach is not followed for hypothetical or future events, which can only be estimated according to the relative likelihood that they would happen. Disclosure exceptions that are based on risk of future harm, therefore—as in other areas of the law dealing with the standard of proof for hypothetical or future events—are not assessed according to the balance of probabilities test or by speculation. Rather, the chance or risk is weighed according to real and substantial possibility.
>
> [45] Real and substantial possibility is established by applying reason to evidence. This is distinct from mere speculation, which involves reaching a conclusion on the basis of insufficient evidence. To my mind, the FHA's idea of 'reasoned speculation' is a contradiction in terms that has no place in the analysis. Certainty of harm need not be established, but, again, "[e]vidence of speculative harm will not meet the test." A rational and objective basis for the conclusion that fully considers the context of the particular disclosure exception lies at the heart of the concept of reasonable expectation of harm.[35]

[63] In a recent decision the Supreme Court of Canada took a similar approach when it stated:

> [52] (…) The reasonable expectation of probable harm formulation simply captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm. [citation omitted].
>
> [54] This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in Merck Frosst emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground […].[36] [citations omitted]

[64] What is clear from the cases is that evidence of speculative harm will not meet the test, certainty of harm need not be established, rather the test is a middle ground requiring evidence well beyond a mere possibility of harm but somewhat lower than harm that is more likely than not to occur.

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[34] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 21(1)(c).
[35] *Fraser Health Authority (Re),* 2008 CanLII 70316 (BC IPC), BC Order F08-22.
[36] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31, [2014] 1 S.C.R. 674.

> [204] This interpretation serves the purposes of the Act. A balance must be struck between the important goals of disclosure and avoiding harm to third parties resulting from disclosure. The important objective of access to information would be thwarted by a mere possibility of harm standard. Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason.[37]

[65] One of the biggest challenges in assessing whether or not a harms based exemption applies to a particular circumstance is the fact that, in general, the evidence supplied by the parties tends to go no farther than mere assertions of harm. Consistent with the purposes of the *Act*, there is an expectation of openness with respect to financial and commercial information held by municipalities. Section 481 speaks of undue loss and significant harm. Therefore the *Act* clearly contemplates that some harm may occur from a disclosure. It is only harm that can satisfy the tests set out in s. 481(1)(c) that can support a claim that the information must be exempted from disclosure.

[66] As a practical matter mere assertions of harm will rarely be sufficient. Independent evidence of expectations of harm or at least evidence of harm from all third parties and the public body is helpful, evidence of previous harm from similar disclosures is also useful and evidence of a highly competitive market would all assist a decision maker in determining whether the test has been satisfied. In all cases it is evidence of a connection between the disclosure of the type of information at issue and the harm that is necessary.

[67] The Town provided no evidence or argument in relation to potential harms arising from the disclosure of the information. Their brief submission focussed solely on the fact that the third party declined to give permission to release the agreement to the applicant.

[68] The third party argues that public knowledge of the terms and conditions could materially affect its negotiating position in relation to present and future agreements of this nature and further that disclosure could lead to the third party suffering financial loss or a third party competitor obtaining an improved bargaining position resulting in financial gain. The third party also submits that the disclosure of the agreement could discourage further similar agreements which, in the opinion of the third party, would not be in the public interest.

[69] The agreement at issue relates to a piece of land in a small town in Nova Scotia. The location, size, condition of the land and the state of the local real estate market were all no doubt some of the essential and unique elements used in determining the value of the land and for determining what use, if any, the Town might have for the particular piece of land. The third party provided no evidence as to how exactly the terms and conditions specific to this one piece of land could have any application to another unspecified potential land transaction in an unspecified location at some unknown future date. Further, with respect to the potential that a competitor could gain an advantage over this third party, no information or argument was provided as to what role a competitor might have in a land donation agreement and how the competitor might use the information to the disadvantage of the third party in this case.

[37] *Merck Frosst.*

[70] With respect to the potential that the third party might be unwilling in future to engage in these types of agreements to the detriment of other municipalities, no evidence was offered to support this argument. For example there was no evidence as to how frequently the opportunity to donate land to municipalities has occurred, how disclosure in this one particular case could result in some undue financial loss to any organization, in what circumstances it might arise or what that undue loss might be.

[71] I find that the evidence at best establishes a mere possibility of harm that is speculative in nature. As a result, I find that the requirements of s. 481(1)(c) were not met.

General approach to giving third party notice

[72] Section 481 of the *MGA* is worded in such a way that municipalities often mistakenly believe that the place to start is by seeking the consent of third parties. In fact, the place to start is to first determine whether or not section 481 applies to the record or a portion of the record. This approach is made clearer by section 482 of the *MGA* which describes when and how third party notice is to be given. In particular, section 482 makes clear that notice is to be given: "When a responsible officer receives a request for access to a record that contains or may contain information of or about a third party that cannot be disclosed."

[73] To be clear, the essential conditions precedent to the issuance of the notice is that the municipality has reason to believe the disclosure of the record might be contrary to the obligation set out in s. 481 not to disclose the record.

[74] In order to determine whether the record "contains or may contain" third party information, it is necessary to first evaluate whether or not s. 481 applies to the record. There must be some basis for believing that the record "contains or may contain" information that must be withheld. If, upon examination of the record the municipality concludes that there is no reason to believe that the information might fall within the exemption under s. 481, third party notice is unnecessary. The requirement for third party notice has a low threshold. Observing a low threshold for third party notice ensures procedural fairness and reduces the risk that exempted information may be disclosed by a mistake.[38]

[75] Notices sent to third parties must include the information set out in s. 482(1). Practically such notices should always include a copy of the record at issue with any notations from the municipality indicating those portions of the record to which s. 481 might apply. Failing to provide a copy of the relevant record generally guarantees that the third party will not consent to the disclosure since they are not in a position to know exactly what information is at stake and what the municipality proposes to disclose.

[76] The third party is in a unique position in terms of its specific knowledge of its own confidential business information and its ability to provide evidence of potential harm to its business interests from the disclosure. Further, whether the information is confidential cannot be determined without representations from the third party. Upon receipt of this information the municipality can make a final decision as to whether or not the three part test set out in s. 481 has been satisfied.

[38] *Merck Frosst* at para. 80.

[77] Once a response is received to the third party notice or if no response is received at all, it is up to the municipality to decide if all three parts of the s. 481 test have been satisfied. To be clear, the fact that a third party does not consent to the disclosure does not end the matter, nor does the fact that the third party fails to respond at all. It is the municipality's obligation to determine whether or not s. 481 of the *MGA* applies. If the third party objects or does not provide any response to the third party notice in the time period allowed under s. 482 the municipality must then determine whether the three part test has been satisfied and must only withhold information under s. 481 that meets the test by severing only those pieces of information. If the third party consents to the disclosure then the municipality is not required to withhold any information that satisfies the test set out in s. 481.

[78] Without representations from the third party it will often be very difficult to establish that all three parts of the s. 481 test have been satisfied. As noted above, it is also possible that despite the third party's objections, the municipality is satisfied that s. 481 does not apply. The *MGA* contemplates this possibility by requiring that the municipality give notice of its final decision to the third party so that they may ask for a review if they object.

[79] One final comment, municipalities are responsible for providing applicants with reasons for refusal.[39] In doing so, it is not sufficient to simply state the section applied. Nor is it sufficient when applying s. 481 to simply state that the third party has not consented to disclosure. The failure of the third party to consent to disclosure is not one of the three factors that must be established in order for s. 481 to apply to a record.

Summary

[80] Below I have summarized the tests outlined in this Report for the application of s. 481(1):

s. 481(1)(a)

[81] "commercial or financial"

- Dictionary meanings provide the best guide and it is sufficient for the purposes of the exemption that information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood.
- The information at issue need not have an inherent value, such as a client list might have for example. The value of information ultimately depends upon the use that may be made of it, and its market value will depend upon the market place, who may want it and for what purposes, a value that may fluctuate widely over time.
- Information in agreements relating to global contract amounts, or prices, expenses and fees can qualify as commercial or financial information of third parties.

[82] "of a third party"

- Information that has already been made public, is of a standard nature, or is intertwined with the public body's input during the negotiation process may not qualify as being "of the third party".
- Information that reveals information belonging to a third party may qualify as information "of the third party".

[39] *MGA*, s. 467(2)(a)(ii).

s. 481(1)(b)

[83] "supplied"

- The use of the word "supplied" focuses more on whether the supplier of the information expected it to be kept confidential. This does not mean the intention or understanding of the recipient of information is irrelevant to s. 481 it simply means that the Legislature intended that the focus under this section should be more on the intention or expectation of the information supplier.
- Whether information was "supplied" does not depend on the use that is made of it once it is received.
- Where the information at issue is a negotiated document, the third party's proprietary interest in any confidential information may be so clouded by the negotiating process and by the significant and evidenced input of municipal information that only strong proof evidencing such information as distinct and severable part of the agreement will suffice.

[84] "in confidence"

- Factors relevant to determining whether information has been supplied in confidence include:
  - The nature of the information: Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?
  - The purpose of the information: Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
  - Explicit statements: Was the record in question explicitly stated to be provided in confidence? This may not be enough but it is a relevant consideration.
  - Voluntary or compulsory supply: Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in the legislation relevant to the compulsory supply that establish confidentiality.
  - Agreement or understanding between the parties: Was there an agreement between the parties with respect to confidentiality? Keep in mind that identifying a record as "confidential" does not automatically exempt it from disclosure and that no public body can be relieved of its responsibilities under access legislation merely by agreeing to keep matters confidential. In other words, no municipality or public body can "contract out" of access legislation.
  - Actions of the municipality and supplier: Do the actions of the parties provide objective evidence of an expectation of confidentiality?

s. 481(1)(c):

[85] Reasonable expectation of harm

- Evidence of speculative harm will not meet the test, certainty of harm need not be established, rather the test is a middle ground requiring evidence well beyond a mere possibility of harm but somewhat lower than harm that is more likely than not to occur.
- There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged.

- Evidence of harm must be more than just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever.
- Stating disclosure of a record will cause undue harm or loss does not alone constitute harm.

FINDINGS & RECOMMENDATION:

[86] In applying the three part test set out in s. 481(1) of the *MGA* to the records at issue here, I have attempted to balance the important goal of ensuring that municipalities are fully accountable to the public with the legitimate private interests of the third party and the public interest in promoting innovation and development.

[87] I find that portions of the agreement in question contain the commercial or financial information of the third party as required by s. 481(1)(a) of the *MGA.*

[88] The evidence supports that the third party wished to keep confidential elements of the negotiated agreement. However, the evidence does not support a finding that any information was "supplied" by the third party. Therefore I conclude that the requirements of s. 481(1)(b) have not been satisfied.

[89] The evidence at best establishes a mere possibility of harm that is speculative in nature. As a result, I find that the requirements of s. 481(1)(c) have not been met.

[90] I recommend that the Town of Wolfville disclose the record at issue in its entirety.

June 15, 2015

Catherine Tully
Freedom of Information and Protection of Privacy Review Officer for Nova Scotia