

Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum

REVIEW REPORT FI-13-50(M)

Report Release Date: October 1, 2013

Issues:

Public Body: Halifax Regional Municipality

Record at Issue: Pursuant to s. 491 of *Part XX* of the *Municipal Government Act*

["MGA"], the Halifax Regional Municipality ["HRM"]

provided the Freedom of Information and Protection of Privacy Review Officer with a copy of the Record. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the Review Officer or her delegated staff.

The Record is a "Schedule of Insurance", attached to and made part of the insurance policy covering firefighters in the Halifax Regional Professional Firefighters Association, Local 268.

The issues the Review Officer must decide are the following:

1. Whether the HRM is required by s. 480 of the *MGA* to withhold information because disclosure would be an unreasonable invasion of a third party's privacy.

Or

Whether the Third Party Applicant has met the burden of proof that third party personal information would be disclosed by the HRM's decision to release the Record [with names and signatures severed], and that such disclosure would be an unreasonable invasion of a third party's privacy.

2. Whether the HRM is required by s. 481 of the *MGA* to withhold information because its release would result in the disclosure of confidential business information.

Recommendation: The Review Officer made the following Recommendation to

the HRM:

The HRM release the Record to the HRM Original Applicant with names and signatures severed in a manner consistent with

its decisions made February 24, 2011 and June 3, 2013.

Key Words Considered: abuse of process, consent, delay, discretion, duplicitous

proceedings, firefighter, insurance, mutatis mutandi.

Statutes Considered: Part XX of the Municipal Government Act ss. 480(1), 481

Case Authorities Cited: FI-11-27(M)

REVIEW REPORT FI-13-50(M)

Background

For reasons that will become apparent, I find it necessary to review the history of this matter and to issue this Review Report publicly. A prior Review Report involving the same parties, the same Application for Access to a Record and the identical issues, *FI-11-27(M)*, was issued as a Privately-Issued Letter Review Report because there was sufficient information contained in the report to potentially identify the Applicant. Many cases that come before the Review Officer involve balancing the sometimes competing interests of access and privacy. I have obtained the consent of the Original Applicant to release this Review Report with the Privately-Issued Letter Review Report attached, publicly, notwithstanding his/her identity may become known. I find in this case, particularly since the matter is now before the courts, the balance of interest tips in favour of openness.

On February 2, 2011 the Original Applicant made an Application for Access to a Record under the custody and control of the Halifax Regional Municipality [HRM], which read as follows:

I am applying for access to the following record: Master Policies (Insurance Contracts) which cover my healthcare, dental care, long term disability and on job injury. No financial details only the coverage details (Master Policies). As per article 32.02 the employer should have access to this info. (Collective Agreement between HRM and Local 268 Firefighters). HRM contributes approx. 50% to these policies. Requesting electronic or paper copies. HRM corporate or HRM fire should have the documents.

The HRM determined it had custody or control of the Record, and made a decision to disclose it, with all names and signatures [personal information] severed. As is required by the *Part XX* of the *Municipal Government Act* ["*MGA*"], the Third Party was given Notice by the HRM of its intention to release the Record with names and signatures redacted. The Third Party opposed that decision, and filed a Request for Review as the Third Party Applicant to the Review Officer.

A Review was conducted and concluded with a Letter Review Report, FI-11-27(M), on October 22, 2012. A copy of that Letter Review Report is attached. In summary, I found that the Record did not contain any personal information (other than the names and signatures, which were to be withheld, under s. 480), and the Third Party Applicant had not met its burden of proof as it failed to demonstrate that the information in the Record could meet the three-part test in s. 481 of the MGA. I recommended the HRM proceed with its decision to release the Record as proposed.

The HRM accepted my Recommendation and notified the Third Party Applicant that it intended to follow the Recommendation of the Review Officer.

The Third Party Applicant appealed the HRM's decision to the Nova Scotia Supreme Court ["NSSC"]. The Review Officer is not a party to any NSSC appeal, but it has been made known to me that during that appeal, it was discovered that unbeknownst to the HRM, it had not processed a document that should have been considered as part of the responsive Record to the original Application for Access to a Record. Specifically the "On Job Injury" insurance policy.

The Third Party Applicant never raised the issue of search/incompleteness of the Record at any time with the HRM or with the Review Office during the Review. I am advised that until the matter reached the NSSC, the HRM was unaware there was something the Third Party Applicant considered responsive that had not been identified as part of the responsive Record.

As a result of this matter arising, I understand the NSSC directed the HRM to process that document as part of the Record and to issue a decision in response to the Original Applicant's access request. The NSSC appeal was adjourned "without day"; the NSSC indicating that it felt a decision by the HRM regarding the "new" document to be necessary prior to the appeal continuing.

On June 3, 2013, the HRM provided the Third Party with Notice of the following decision:

A registered letter dated the 29th of May, 2013 was sent advising you of the processing of an additional insurance policy that is responsive to this request, specifically the On Job Injury Policy, and we asked that you communicate your position regarding its release. You subsequently responded on May 31, 2013 and advised that you object to the release of this policy. This letter is to advise that a decision has been made to grant partial access to the applicant. Although access is being given, within the records some information will be severed in accordance with section:

Section 480(1) – the responsible officer shall refuse to disclose personal information to an applicant, if the disclosure would be an unreasonable invasion of a third party's personal privacy (signatures only).

The HRM's "new" decision was identical to its decision which I had reviewed in *FI-11-27(M)*. The Third Party Applicant was again notified of the HRM's "new" decision. While it knew it could have chosen to return to the NSSC to continue its appeal, the Third Party Applicant chose to file a new Request for Review on June 6, 2013. This Request for Review reads as follows:

The Third Party requests that the review officer recommend that the head of the public body not give access to any part of the records requested in the Application for Access to a Record that contains information the disclosure of which may affect the interests or invade the personal privacy of the Third Party.

The Third Party Applicant cited five subsections of section 480 [protection of personal information] and all three parts of section 481 [confidential business information] in its Representations that the HRM should not release the Record as proposed. These are the identical exemptions relied upon by the Third Party Applicant in the previous Review. The Representations provided by the Third Party Applicant are identical to those provided in the previous Review.

Record at Issue

The Record is a "Schedule of Insurance", attached to and made part of the insurance policy covering firefighters in the Halifax Regional Professional Firefighters Association, Local 268.

Issues

The issues I must decide are the following:

- 1. Whether the HRM is required by s. 480 of the *MGA* to withhold information because disclosure would be an unreasonable invasion of a third party's privacy.
 - Whether the Third Party Applicant has met the burden of proof that third party personal information would be disclosed by the HRM's decision to release the Record [with names and signatures severed], and that such disclosure would be an unreasonable invasion of a third party's privacy.
- 2. Whether the HRM is required by s. 481 of the *MGA* to withhold information because its release would result in the disclosure of confidential business information.

Findings

Duplicitous Proceedings

- 1. I find the decisions by the HRM in response to the Original Applicant's Application for Access to a Record and the one made in response to the "new" document in this Review are identical.
- 2. I find the contents of the Record in this Review are identical *in nature* to the contents of the Record in the previous Review, *FI-11-27(M)*.
- 3. I find the issues raised by the Third Party Applicant's Request for Review are identical to the ones raised in *FI-11-27(M)* and the Third Party Applicant has not raised any new issues in this Review.
- 4. With respect to the Issues listed above, I find my Findings in *FI-11-27(M)* can be applied *mutatis mutandi* in this Review [See attached Letter Review Report].

Personal Information

5. I also make the following additional Finding with respect to personal information. This Third Party Applicant cannot rely on s. 480 of the *MGA*. Only a third party who is an individual can argue that a public body's decision to disclose personal information would be an unreasonable invasion of his/her privacy. It is not available to either an organization or a group of individuals attempting to protect the privacy of someone else. Personal information protection means just that – something personal. Right to privacy protection belongs to the individual whose personal information is at stake. The *MGA* says, at s. 482(1)(a), notice is to be given to the Third Party whose personal privacy may

be affected. An organization is not an individual and therefore has no privacy interests. As such, an organization such as the Third Party Applicant cannot make Representations on this exemption.

6. I find s. 480 of the *MGA*, therefore, has no application to this Record because the Third Party Applicant is not an individual person who has a right to privacy and, regardless, there is no personal information in the Record other than the information which the HRM has indicated in its decisions would be severed.

Delay

It is worth pointing out that the Third Party made a reference to the fact that it had never seen what the HRM proposed to send to the Original Applicant though it could have chosen to do so at any time. That was rectified at Intake when this Request for Review was received. At the Third Party Applicant's request as they had not seen, up to that point, what the HRM intended to release, the HRM sent a copy of the proposed severing. At that point, the Third Party Applicant was given the opportunity to reconsider its Request for Review and it chose to reiterate its initial position. The Third Party Applicant did not change its position or raise any new issue, made it clear that it wanted to go through all what it referred to as "due process" and did not want its Review expedited despite the fact that the NSSC appeal had simply been adjourned. The Third Party Applicant is fully aware of the fact that there are no new issues raised by the newly found part of the Record.

In fact, it was the Third Party Applicant at the appeal to the NSSC after the first Review that identified the "new" document, which it had failed to mention to either the HRM or myself during FI-11-27(M). When asked about expediting this Review, the Third Party Applicant claimed that despite there being an existing NSSC appeal, it wanted to be able to advise the NSSC that it had exhausted all other avenues and minimize the cost to its client. With respect, I am satisfied that the Third Party Applicant likely intends to return to its appeal before the NSSC after this Review and that in fact the Request for Review will add rather than lessen the costs.

- 7. Based on the evidence, I find the Third Party Applicant has filed this second Request for Review for the sole purpose to further delay the release of this Record to the Original Applicant. This Finding with respect to delay is consistent with the evidence of all the other steps Third Party Applicant has taken to cause inordinate delay since the initial access request in 2011.
- 8. I find that any party who treats the access process in this manner impugns the credibility of the legislative regime and shows considerable disregard and disrespect for the time and resources of the other parties involved: the Original Applicant, the HRM, and the Review Officer.

Discretion to Refuse a Request for Review

9. From the information on the file, I find that it was the Third Party Applicant who has pushed for this process – another Request for Review to the Review Officer – to be

- followed, instead of wrapping this one outstanding document from the responsive Record up in the existing NSSC appeal. I find this Request for Review is unnecessary and constitutes a misuse of the access regime contemplated by the legislation.
- 10. Under both access statutes both the *MGA* and the *FOIPOP Act* a party is prohibited from having an appeal in the NSSC and a Review Request before the Review Officer at the same time. The Third Party Applicant was entitled to have the HRM revisit its original decision regarding the "new" document within the court proceedings, particularly given that the NSSC thought this a necessary next step. I am less inclined to believe, however, that the Third Party Applicant had a right to request a new Review after the HRM revisited its original decision because of the "new" part of the Record. The Third Party Applicant's ongoing appeal had simply been adjourned to give the HRM time to consider any changes to its original decision based on the "new" part of the responsive Record. The decision by the HRM regarding the "new" document was still a decision about the Application for Access to a Record filed by the Original Applicant and I find, therefore that it is not a "new" decision but a *revised* decision by the HRM to the original access request. Once the HRM made its revised decision, I find it would have been a reasonable course for the matter to return to the NSSC to advise it of the revised decision and continue with the appeal in place.
- 11. I have called for the Legislative Assembly to amend the *MGA* [and the *FOIPOP Act*] to give the Review Officer the power to exercise her discretion to refuse a Request for Review. This Review aptly makes the case for that amendment. Presently if a Request for Review is received, I must undertake and complete a Review. What would be more appropriate is for the *MGA* to empower me to exercise my discretion to refuse to accept a Request for Review where there is another available remedy, the request is frivolous, vexatious, or an abuse of process and/or the Review would be of no benefit. I find that this Review would not have been accepted, possibly for all three reasons, if I had this statutory power.
- 12. As I stated in *FI-11-27(M)*, it bears repeating that the basis on which the Third Party Applicant is opposing the HRM decision defies logic. Evidence in this Review supports that conclusion. The Third Party Applicant conceded to my office that the Original Applicant has a right to access the information in the Record at any time, as a member of the Union. Its position is that despite that right, the Third Party Applicant does not want the Original Applicant to be able to leave with a copy of the Record. It is important to note that this argument has no merit and is not a justification reflected in any exemptions under the *MGA* for a municipality to withhold the Record from the Applicant. Having conceded that the Original Applicant is entitled to see the information in the Record, for the Third Party Applicant to go on and make Representations based on claims the information was provided on a confidential basis and/or breached someone's privacy is very disturbing.

If I had the statutory discretion, I would have exercised it to dismiss this second Request for Review on the basis it had I had already made a decision on the exact same issues in response to the same Application for Access to a Record and there was no hope of the

Third Party Applicant succeeding a second go-round based on what amounts to fallacious Representations about exemptions that have no application whatsoever.

13. I have called for the Legislative Assembly to amend the *MGA* [and the *FOIPOP Act*] to give the Review Officer the power to issues Orders rather than Recommendations to public bodies. This Request aptly makes the case for that amendment. It is my hope that the NSSC, if the existing appeal continues, recognizes, based on these Findings, how this matter should be disposed of and dismiss the Third Party Applicant's appeal and Order access to the Record to the Original Applicant in keeping with the HRM's decisions.

Recommendation

I conclude with the same conclusion reached in FI-11-27(M) that the Third Party Applicant has not made out the claims under the exemptions relied upon and that the HRM's decision to release the Record to the HRM Original Applicant with all names and signatures severed was correct. On that basis, I recommend the following:

The HRM release the Record to the Original Applicant with names and signatures severed in a manner consistent with its decisions made on February 24, 2011 and June 3, 2013.

Respectfully submitted,

Dulcie McCallum Freedom of Information and Protection of Privacy Review Officer

Attachment: *FI-11-27(M)*



Nova Scotia Freedom of Information and Protection of Privacy Review Office

Dulcie McCallum
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October 22, 2012

CONFIDENTIAL

By Email and by Mail

Angie Williams
Access and Privacy Coordinator
Halifax Regional Municipality
PO Box 1749
Halifax, NS
B3J 3A5

REDACTED: NAME
AND ADDRESS OF
THEO PARTY APPLICANT

Confidential - Privately Issued Letter Review Report

Dear Angie Williams and (THIR) PARTY:

RE: Request for Review under the Part XX of the Municipal Government Act ['MGA"] to Halifax Regional Municipality "HRM" — Public Body File 493: Review Office File FI-11-27(M). This file is now closed.

Focus of this Review

The Halifax Regional Municipality [HRM]'s original applicant made an Application for Access to a Record to the HRM on February 2, 2011. The responsive Record at issue, as identified in the Form 1, is the Group Insurance Policy for members of the Halifax Professional Firefighters Association, Local 268. On February 24, 2011, the HRM made a decision to disclose the complete Record to the HRM original applicant with only minimal severing – names and signatures of the Union and the Insurer representatives. The HRM gave notice to a Third Party.

On March 30, 2011, the Third Party Applicant filed a Request for Review to the Freedom of Information and Protection of Privacy Review Officer. The Third Party Applicant represents

that it objects to HRM's planned disclosure of the Record claiming that both sections 480 and 481 of *Part XX* of the *Municipal Government Act* apply and, therefore, the HRM is required to withhold the entire Record.

Summary of Issues under Review

- Does the Record contain personal information, the disclosure of which would lead to an unreasonable invasion of personal privacy pursuant to s. 480 of the MGA?
- 2. Does the Record contain financial and labour relations information, which was supplied in confidence, the disclosure of which could reasonably be expected to harm to the negotiating position of the Third Party Applicant pursuant to s. 481 of the MGA?

Relevant Facts

- The Third Party Applicant asked the HRM to seek consent from the HRM's original applicant if his/her identity could be made known to them. The HRM's original applicant consented to letting the Third Party Applicant know that s/he was a member of the Union. The HRM's original applicant has also consented to be identified as such in this Review Report.
- The Record is made up of the Group Insurance Policy for members of the Halifax Professional Firefighters' Association, Local 268.
- The Third Party Applicant provided detailed Representations to the HRM during their Third Party consultations, and in filing their Request for Review with the Review Officer.

Third Party Applicant's Representations

- With respect to s. 480 of the MGA, the Third Party Applicant represents that disclosure of the Record will disclose firefighters' insurabilities for various ailments and injuries, and thereby implicitly invade the health history of firefighters unreasonably.
- In its initial Representations to the HRM [dated March 16, 2011], the Third Party Applicant indicates that a copy of the Insurance Policy is "freely obtain[able]" to a member of the union.
- The HRM's original applicant, who has consented to being identified as a member of the Union, has claimed that s/he has had difficulty in "freely obtaining" his/her copy and that the insurer has required him/her to attend a meeting in order to get the copy.
- The Third Party Applicant, in its initial Representations to the Review Officer [dated March 30, 2011] also represents that the contract contains financial information, that was supplied in confidence, and that would harm the negotiating position of the Third Party Applicant by disclosing what the union pays for group insurance.

Analysis of the Applicable Exemptions

A. Section 480 - Personal Information

- The equivalent section to s. 480 of the MGA in the Freedom of Information and Protection of Privacy Act is s. 20. Section 20 was considered by the Supreme Court of Nova Scotia in Re House which analysis has been consistently applied by the Review Officer and the Courts. Re House provides the following instructive analysis. For convenience of the parties, I have inserted the corresponding sections from the MGA in square brackets.
 - 1. Is the requested information "personal information" within s.3(1)(i)[s. 461(f)]? If not, that is the end. Otherwise, I must go on.
 - 2. Are any of the conditions of s.20(4)[s. 480(4)] satisfied? If so, that is the end. Otherwise . . .
 - 3. Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s.20(3)[s. 480(3)]?
 - 4. In light of any s.20(3)[s. 480(3)] presumption, and in light of the burden upon the appellant established by s.45(2)[s. 498(3)], does the balancing of all relevant circumstances, including those listed in s.20(2)[s. 480(2)], lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?
- The Representations from the Third Party Applicant has failed to follow the analysis from the Supreme Court, which has been consistently applied in Nova Scotia by Courts and the Review Officer [Refer to FI-09-29(M)].
- With respect, the Representations began on the wrong footing. The Third Party Applicant began with the assumption the Record contains personal information. Other than the names and signatures of the parties to the agreement that makes up the Record, there is no personal information. Personal information is defined in the MGA and reads as follows:

"personal information" means recorded information about an identifiable individual,

There is nothing in the Record other than the personal information of those who signed on behalf of the Union and the Insurer and then it was only names and signatures, all of which the HRM planned to redact. There is no other personal information in the entire Record that falls within the definition of personal information – recorded information about an identifiable individual.

B. Findings re: Section 480 Exemption

I have reviewed the complete Record. I find that there is absolutely no "personal information" in the Record other than the names and signatures of the parties to the

agreement. HRM made it clear in its decision that it intended to redact all names and signatures at the time of disclosure to the HRM's original applicant so this personal information is not in issue.

- I find that the Third Party Applicant has failed to meet the first step of the Re House test. It is impossible to conclude that the disclosure of the Record would unreasonably invade the privacy of the individual firefighter members. The Third Party Applicant conceded there was no particular medical or dental records of firefighters at issue in the Application for Access to a Record, but claimed that "nevertheless, the disclosure of the policies and the coverage details will implicitly be a disclosure of the insurability of the firefighters which is determined by their medical and dental histories." This claim is without merit.
- Ironically, the Third Party Applicant's Representations make a claim under s. 480 of the MGA ostensibly to protect the privacy of the individual firefighter members of the union, when in fact it is a member of the union seeking access to the Record and the Record contains no personal information of any other firefighters.
- In an arbitration in which access to the same Record was at issue, the arbitrator made the following statement:

Herein lies part of the difficulty that gives rise to this grievance. There appears to be a disconnect among the insurer, the Union as the insured, and through it, the member firefighters and the Employer. Why the Union, as the insured, and its member firefighters for whom the insurance coverage is intended would not have ready access to the insurance policy that clearly defines coverage limits and terms defies reason.

[International Association of Firefighters, Local 268 v. Halifax Regional Fire and Emergency, May 13, 2008, Arbitration under the Trade Union Act, RSNS, c. 451

As the first step of Re House cannot be met, it is unnecessary to continue with the analysis under s. 480 of the MGA. I find the Third Party Applicant has no hope of successfully concluding all the required conditions to meet the Re House test.

C. Section 481 - Financial and Labour Relations

Turning to the second exemption relied upon by the Third Party Applicant to argue the Record should not be released to the HRM original applicant. This involves s. 481 of the MGA, which provides as follows:

The responsible officer shall, unless the third party consents, refuse to disclose to an applicant information

- (a) that would reveal
 - ti. commercial, financial, labour relations ... 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.

The requirements in s. 481 of the MGA are to be read conjunctively. That means the Third Party Applicant, who bears the onus, must show that all three elements apply: information about finances and labour relations, supplied in confidence and disclosure could reasonably be expected to harm the negotiating position of the Third Party

 The first claim by the Third Party Applicant is that revealing the contents of the Record would significantly harm its competitive position to negotiate. For clarity, I will note that the Third Party Applicant represents that disclosure will harm its negotiating position because it will allow Third Parties to see the coverages the union was willing to pay for and, therefore, restrict the union's ability to negotiate different coverages. This gets the market exactly backwards - if the preferred coverages are disclosed, competitors to the existing insurance provider have an incentive to design superior coverage at better rates than to demand the customer stick to the existing policy [Refer to ON Order MO-1705].

How much is paid for the insurance is not recorded in the Insurance Policy. HRM posts the Collective Agreement between it and the Union on the HRM's website. In s. 32 of that Agreement, the amount that HRM is required to pay into the Group Insurance Policy are detailed, so a motivated competitor could obtain the financial information on-line.

Second the Third Party Applicant claims the information in the Record was provided in confidence. No evidence was provided to demonstrate the information in the Record was provided in confidence [Refer to FI-08-39 citing Chesal 2003 NSCA 124].

The evidence is to the contrary. The Record has no markings or stamps indicating that it is confidential. Nothing in the Record indicates any restriction on the disclosure of the contents of the Agreement. The Record is an insurance policy that is made available to all insured members so they know what coverage applies to them. It is supposed to be freely accessible to all Union members.

Further, it was clear that the Record is available to all four hundred plus members of the Union of which HRM's original applicant is a member. On that basis, it is impossible to reconcile the claim that the Record is confidential and that the Union or the insurer, parties to the insurance agreement, could possibly police subsequent distribution of the document once it is given to union members.

Findings re: Section 481 Exemption D.

- The Representation from the Third Party Applicant of s. 481 is, with respect, an unusual analysis and does not support the claim under s. 481 of the MGA. I find there is no evidence to support the claim that disclosure would reveal financial and/or labour relations. Indeed there is an argument that the release of a standard form insurance agreement may well assist the Union to negotiate better coverages in the future, not the opposite.
- I find there is no evidence the Record was supplied implicitly or explicitly in confidence.
- I find it is unnecessary to consider this matter further. I find that two parts of the test in s. 481 cannot be met and the reliance on the part of the Third Party Applicant on s. 481 of the MGA must fail.

- I find that the Third Party Applicant has no hope of making out the claims under the exemptions relied upon and that the HRM's decision to release the Record to the HRM original applicant with all signatures and names redacted was correct.
- As a final comment, I agree with the arbitrator cited above only applying it now to the HRM original applicant's Application for Access to a Record. Why the Third Party Applicant is opposing the decision by HRM to release the Record to the HRM's original applicant, a document to which s/he is ostensibly entitled to have, defies logic.

On that basis, I make the following Recommendation:

Recommendation

The HRM release the Record to the HRM's original applicant, with names and signatures redacted in a manner consistent with its decision made February 24, 2011.

Respectfully submitted,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer