

Item No. 14.1
Halifax Regional Council
August 6, 2013

TO: Mayor Savage and Members of Halifax Regional Council

SUBMITTED BY: Original signed by 

Richard Butts, Chief Administrative Officer

Original Signed by 

Mike Labrecque, Deputy Chief Administrative Officer

DATE: July 31, 2013

SUBJECT: Non-Disclosure Agreement with the Province of Nova Scotia

ORIGIN

On June 25, 2013, Regional Council authorized the CAO to negotiate and execute an agreement for SAP support services with the Province of Nova Scotia.

LEGISLATIVE AUTHORITY

Under section 58(5) of the HRM Charter, Regional Council has the power to make and carry out a contract. Under section 10(3) of the HRM Charter, the Mayor and Clerk may sign any document to which the Municipality is a party on behalf of the Municipality.

RECOMMENDATION

It is recommended that Regional Council authorize the Mayor and Clerk to sign a Non-Disclosure Agreement with the Province of Nova Scotia with terms and conditions substantially similar to the draft agreement attached hereto as Attachment "A".

BACKGROUND

In furtherance of the June 25, 2013 directive of Regional Council, staff entered into negotiations with the Province of Nova Scotia (“PNS”) on those terms and conditions that were not already agreed to during transition planning.

DISCUSSION

It became apparent during these negotiations that HRM staff needed to be made aware of certain key terms of the PNS’ agreement with its SAP service provider in order to understand and be in a position to negotiate for appropriate service level standards. The PNS has taken the position that it cannot disclose this and other information to HRM unless HRM and the PNS enter into a mutual Non-Disclosure Agreement.

On July 26, 2013, the PNS forwarded a proposed Non-Disclosure Agreement to staff. This Non-Disclosure Agreement permits the PNS and HRM to disclose confidential information to each other during the period of negotiations. Any confidential information exchanged between HRM and the PNS “shall only be used for the purposes of facilitating the business relationship between the Parties” and once the agreement terminates each party must “promptly return or destroy” all confidential information received from the other party.

It is the intention of HRM and the PNS to execute an agreement for the provision of SAP support services before September 9, 2013. As a result, staff is seeking direction on this matter from Regional Council on August 6, 2013, rather than waiting for the next scheduled meeting of Regional Council on September 10, 2013.

FINANCIAL IMPLICATIONS

N/A

COMMUNITY ENGAGEMENT

N/A

ENVIRONMENTAL IMPLICATIONS

N/A

ALTERNATIVES

Regional Council could decline to authorize execution of the Non-Disclosure Agreement, in which case staff will, in accordance with the June 25, 2013 directive of Regional Council, request that the PNS continue to negotiate with HRM with the goal of executing an agreement for SAP support services, notwithstanding HRM's refusal to sign the Non-Disclosure Agreement.

If negotiations are permitted to continue despite HRM's refusal to sign the Non-Disclosure Agreement, it is anticipated that the PNS will refuse to provide HRM with certain confidential information that might assist HRM in formulating and pursuing an appropriate negotiation position.

ATTACHMENTS

Attachment "A": Draft Non-Disclosure Agreement

A copy of this report can be obtained online at <http://www.halifax.ca/council/agendasc/cagenda.html> then choose the appropriate meeting date, or by contacting the Office of the Municipal Clerk at 490-4240, or Fax 490-4208.

Report Prepared by: David Greener, Senior Solicitor, Legal Services, 490-3960

Report Approved by: Martin Ward, Q.C., Acting Director, Legal Services, 490-3960

MUTUAL NON-DISCLOSURE/CONFIDENTIALITY AGREEMENT

THIS AGREEMENT effective the day of , 2013.

BETWEEN:

HER MAJESTY THE QUEEN in right of the Province of Nova Scotia, as
represented by the Minister of Finance

OF THE FIRST PART

-and-

HALIFAX REGIONAL MUNICIPALITY, as represented by the Chief
Administrative Officer

OF THE SECOND PART

WHEREAS the Province of Nova Scotia (the “Province”) and Halifax Regional Municipality (the “HRM”) hereinafter referred to as the “Receiving or Disclosing Party” or “Parties”, may be facilitating the potential transaction of business related to the provision of SAP Services by the Province to the HRM where each Party may disclose certain confidential information to each other.

AND WHEREAS each Party wishes to ensure that the other treats this information in the strictest confidence.

NOW THEREFORE in consideration of the promises and mutual covenants contained herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. The confidential, proprietary and trade secret information of the Disclosing Party (hereinafter "Confidential Information") provided hereunder is any and all information, in whatever form (including electronic data) that will be disclosed to facilitate the potential transaction of business (related to the provision of SAP Services to HRM) between the Parties, including, but not limited to, **portions or parts of the November 1, 2012 Agreement (including any schedules or appendices) between the Province of Nova Scotia and IBM**, each Party's disclosure of intellectual property, techniques, sketches, drawings, models, inventions, know-how, processes, apparatus, equipment, algorithms, software programs, software source documents, and formulae related to the current, future and proposed products, documents and services, research, experimental work, development, design details and specifications, engineering, financial information, procurement requirements, purchasing, manufacturing, licensing, sales or service customer lists, business forecasts, sales and merchandizing, and marketing plans and information. For purposes of this Agreement confidential, proprietary and trade secret information of **the Province's SAP Service Provider or any other Province's Service Provider**, any parent company, subsidiary or affiliate of the Disclosing party shall be considered Confidential Information of the Disclosing Party for purposes of this Agreement.
2. The term Confidential Information shall not include information, which is:
 - (a) in the public domain other than by a breach of this Agreement by the Receiving Party; or

- (b) rightfully received from a third party with no duty of confidentiality; or
 - (c) rightfully known to the Receiving Party without any limitation on use or disclosure prior to its receipt from the Disclosing Party; or
 - (d) independently developed by employees, agents or consultants of the Receiving Party; or
 - (e) generally made available to third parties by the Disclosing Party without restriction on disclosure.
3. The Receiving Party agrees that Confidential Information shall be used only for the purposes of facilitating the business relationship between the Parties. Additionally, subject to section 4 below, the Receiving Party shall not disclose Confidential Information to any third party without the prior written approval of the Disclosing Party. The Receiving Party shall maintain the Confidential Information with at least the same degree of care that the Receiving Party uses to protect its own similar categories of confidential and proprietary information, but no less than a reasonable degree of care under the circumstances. The Receiving Party shall not make any copies of Confidential Information except as necessary to perform hereunder. Each Party shall be responsible for any breach of this Agreement by such Party, its employees, agents, officials, representatives or consultants acting within the scope of their engagement or employment.
 4. The HRM acknowledges and agrees that the Province may disclose the Confidential Information received from the HRM to its external or internal auditors, as well as the Province's SAP Service Provider or Province's other service providers for the purpose of provision or extension of the SAP Services to HRM.
 5. The Receiving Party will adhere to all Canadian export laws, rules and regulations, and will not export or re-export any technical data or products received from the Disclosing Party, nor will the receiving party export or re-export the associated products of such technical data, to any restricted country and/or to any company, individual or government entity listed in the Table of Denial Orders published from time to time by the Canadian Government (called denied persons).
 6. This Agreement will be effective as of the date of this Agreement, but will apply to any Confidential Information disclosed to the Receiving Party from the Disclosing Party prior to such date and will continue in perpetuity.
 7. Each Party agrees that the harm resulting from improper disclosure of Confidential Information may be irreparable; therefore, the Disclosing Party shall be entitled to seek injunctive and other equitable relief to prevent or restrain breaches of any of the provisions of this Agreement by the Receiving Party or any of its employees, agents, officials, representatives or consultants, or to enforce the terms and provisions hereof, by an action instituted in a court of competent jurisdiction, which remedy or remedies are in addition to and not in substitution for any other remedy to which the Disclosing Party may be entitled at law or in equity.
 8. Title to, interest in, and all other rights of ownership to Confidential Information shall remain with the Disclosing Party. The information provided hereunder, including Confidential Information, is provided

strictly "as is" and without representation and warranty of any kind as to its accuracy, completeness, freedom from error, value, merchantability, fitness for a particular purpose or non-infringement.

9. This Agreement will terminate on the date and time the Agreement between the Parties over the provision of SAP Services is terminated. In the event this Agreement is terminated, and the Disclosing Party so requests, the Receiving Party shall promptly return or destroy (and certify destruction of) all Confidential Information which it received from the Disclosing Party along with all copies. The obligations of the Receiving Party under this Agreement shall survive the termination of this Agreement or the return of the Confidential Information to the Disclosing Party.
10. The Parties acknowledge and understand that all documentation and information, including Confidential Information, provided to the Province of Nova Scotia or HRM, as the case may be, pursuant to this Agreement shall be kept confidential, subject to the provisions of the *Freedom of Information and Protection of Privacy Act*, Province of Nova Scotia, and such other laws of the Province of Nova Scotia and Canada which may apply from time to time.
11. This Agreement shall not be construed as creating a joint venture, partnership or other form of business association between the Parties, nor an obligation to buy or sell products using or incorporating the Confidential Information, nor to create an implied or express license from either Party to the other.
12. The failure of either Party to enforce any right resulting from breach of any provision of this Agreement by the other Party shall not be deemed a waiver of any right relating to a subsequent breach of such provision or of any other right hereunder.
13. This Agreement shall be governed by, and construed in accordance with the laws of the Province of Nova Scotia and the laws of Canada applicable therein.
14. This Agreement constitutes the entire agreement, written or verbal, between the parties with respect to the terms set forth herein. This Agreement may not be amended except in writing signed by a duly authorized representative of the respective parties.

[The space below is intentionally left blank.]

15. Time shall be of the essence in this Agreement.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed by its duly authorized officers as of the day and year first above written.

SIGNED, SEALED AND DELIVERED

in the presence of:

Witness

**HER MAJESTY THE QUEEN in right of the
Province of Nova Scotia as represented by the
Minister of Finance**

Per: _____

**HALIFAX REGIONAL MUNICIPALITY as
represented by the Chief Administrative Officer**

Witness

Per: _____