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Item No. 15.1.5
Halifax Regional Council
April 4, 2023

TO: Mayor Savage and Members of Halifax Regional Council

SUBMITTED BY: Original Signed

Cathie O'Toole, Chief Administrative Officer

DATE: March 16, 2023

SUBJECT: **Approval of Non-Disclosure Agreements**

ORIGIN

November 8, 2022, Halifax Regional Council motion (Item No.16.2):

MOVED by Deputy Mayor Lovelace, seconded by Councillor Stoddard

THAT Halifax Regional Council direct the Chief Administrative Officer to prepare a staff report to amend Administrative Order 58, the Delegation of Certain Authorities Administrative Order, the purpose of which is to establish the requirement for Regional Council to receive a written copy of all Non-Disclosure Agreements prior to HRM's Chief Administrative Officer and any staff member signing NDAs.

MOTION PUT AND PASSED

LEGISLATIVE AUTHORITY

Halifax Regional Municipality Charter, c. 39, S.N.S.

10(3) The Mayor and Clerk or the persons designated by the Council by policy may sign a deed or other document to which the Municipality is a party on behalf of the Municipality.

34(2) The Council shall communicate with the employees of the Municipality solely through the Chief Administrative Officer, except that the Council may communicate directly with employees of the Municipality to obtain or provide information.

58(5) The Council may make and carry out a contract, perform an act, do any thing or provide a service for which the Municipality or the Council is authorized by an Act of the Legislature to spend or borrow money.

59(3) In addition to matters specified in this Act or another Act of the Legislature, the Council may adopt policies on any matter that the Council considers conducive to the effective management of the Municipality

Recommendation on Page 2

Administrative Order 58 - *Delegation of Certain Authorities Administrative Order*

10. (1) Council hereby delegates the authority to approve and sign non-disclosure agreements to the CAO, where in the opinion of the CAO:

- (a) such agreements are necessary to advance contractual negotiation; or
- (b) such agreements are in the best interests of the Municipality;

RECOMMENDATION

It is recommended that Halifax Regional Council:

1. Adopt the proposed amendments to Administrative Order 58, the *Delegation of Certain Authorities Administrative Order*, as set out in Attachment A of this report, to modify the process for approval of non-disclosure agreements.

EXECUTIVE SUMMARY

Section 10 of Halifax Regional Municipality's [Administrative Order 58](#) currently authorizes the Chief Administrative Officer to approve and sign NDAs on behalf of the Municipality. On November 8, 2022, Regional Council requested that staff prepare a report with proposed amendments to Administrative Order 58 to require that Regional Council first receive a written copy of all NDAs prior to HRM's Chief Administrative Officer and any staff member signing NDAs. The effect of such an amendment would be that all NDAs would essentially need to be approved by Regional Council.

A non-disclosure agreement ("NDA") is a legal contract between at least two parties that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes but wish to restrict access to. Given legislative requirements, and the public's expectations of transparency, the use of NDAs by the Municipality is relatively limited. There are, however, certain scenarios in which entering into an NDA is appropriate and/or necessary. Occasionally, an NDA must be executed within a short timeframe.

For the reasons outlined in this report it is recommended that the Chief Administrative Officer continue to be authorized to sign NDAs on behalf of the Municipality, provided that the terms of the NDA permit any confidential information exchanged thereunder to be shared with Regional Council. It is recommended, however, that the Administrative Order be amended to require Council approval if the terms of the NDA limit or restrict the sharing of any confidential information with Regional Council.

Administrative Order 58 only pertains to NDAs to which HRM is a party. It does not apply to NDAs signed by individual employees in their personal capacity. Council does not have the authority to regulate or prohibit individual employees from signing legal contracts in their personal capacity, nor to request copies of NDAs that employees sign in their personal capacity. Employees should be aware, however, that entering into certain agreements, including NDAs, can sometimes give rise to conflicts of interest vis-à-vis their work obligations at HRM. Employee conflicts of interest are addressed through HRM's *Code of Conduct for Municipal Employees*.

Additionally, Administrative Order 58 only addresses the authority to approve and sign standalone NDAs. Obligations of confidentiality are also frequently included as contractual provisions within other agreements, including procurement contracts for goods and services, certain real estate transactions, and legal settlement agreements. The authority to approve and sign such other agreements is set out in other policies of Council.

BACKGROUND

On November 8, 2022, Regional Council requested that staff prepare a report with proposed amendments to Administrative Order 58 to require that Regional Council first receive a written copy of all NDAs prior to HRM's Chief Administrative Officer and any staff member signing NDAs. During the discussion at Regional Council, some Council members expressed concerns about HRM staff entering into NDAs that would limit or restrict the sharing of confidential information with Council.

DISCUSSION

Non-Disclosure Agreements Generally

It is common practice for one or more parties in a commercial relationship to agree not to disclose confidential information that is provided to it by the other party. Often, if one party is providing sensitive information to the other in the course of a transaction or potential transaction, the disclosing party will require the receiving party to sign an NDA. An NDA can be *mutual* if both parties are exchanging confidential information, or *unilateral* if only one party is disclosing confidential information to the other.

An NDA outlines the parties' respective rights and obligations with respect to the confidential information and defines the purposes for which the confidential information may be used. While every organization has its own preferred form of agreement, an NDA will typically include at least the following provisions:

- Parties to the Agreement
- Definition of "Confidential Information"
 - e.g., business information; trade secrets; financial data; etc.
- Exclusions
 - Information that is already publicly available
 - Information that was already in the recipient's possession
 - Information that becomes available from a third party
 - Information that is independently developed by the receiving party
- Restrictions on use and non-disclosure obligations
 - Recipient to use Confidential Information only for the stated purpose
 - Recipient to maintain confidentiality subject to a defined standard of care
 - Recipient permitted to disclose Confidential Information only to its representatives and advisors who have a need to have access, or if otherwise required by law
- Term
 - e.g., Indefinitely; for a set duration; or until the conclusion of the defined purpose
- Remedies
 - Injunctive or other equitable relief in addition to damages
- Boilerplate
 - Entire agreement
 - Governing law
 - Assignment
 - Severability
 - Notice

Legislative Framework

As a public sector entity, HRM is subject to a variety of legislation which requires a balancing of transparency, access to information, and confidentiality. HRM's obligations in this regard can be found in

numerous statutes, including the *Halifax Regional Municipality Charter*; Part XX of the *Municipal Government Act* (with respect to Freedom of Information and Protection of Privacy); the *Public Procurement Act*; and the *Personal Information International Disclosure Protection Act*.

This legislative framework imposes restrictions on the type and extent of information the Municipality may keep confidential. For example, section 465 of the *Municipal Government Act* provides that, subject to limited exceptions, HRM is required to provide access to all records in HRM's custody or control upon request. For this reason, HRM includes the following provision in its standard-form NDAs when HRM is the recipient of confidential information:

HRM is required to comply with Part XX of the *Municipal Government Act* regarding Freedom of Information and Protection of Privacy. Any disclosures made by HRM pursuant to its obligations thereunder shall not be deemed to be a breach of this Agreement.

This is not to say that HRM cannot maintain information as confidential in some circumstances. In fact, section 481 of the *Municipal Government Act* states that the Municipality is required not to disclose certain third-party information if a three-part test is met:

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.

While an NDA is not necessarily required in order to meet the three-part test, it can be useful for satisfying part 2 of the test (i.e., that the information is supplied, implicitly or explicitly, in confidence).

HRM's Use of Non-Disclosure Agreements

Given the legislative requirements and the public's expectations of transparency, the use of NDAs by the Municipality is relatively limited. There are, however, certain scenarios in which entering into an NDA is appropriate and/or necessary. A common scenario is when HRM requires confidential information from a third party in the course of negotiations or to conduct due diligence for a potential future transaction. Other examples include:

- Collaboration on projects with other levels of government
- Feasibility studies
- Consideration of unsolicited proposals
- Facility rentals for public announcements
- Technology/software demonstrations
- Data Sharing arrangements
- Commercial opportunities

Most NDAs, including HRM's standard form agreement, include a provision that the receiving party may disclose the disclosing party's confidential information to its officers, directors, employees, agents, advisors and consultants provided that such individuals have a need-to-know the information, and provided such individuals are bound to protect the confidential information. In most instances, this means that any information provided to HRM pursuant to an NDA can be shared with the Mayor and Councillors; however, such information must only be provided to Councillors privately (i.e. in-camera).

Occasionally, an NDA must be executed within a short timeframe. For example, as described in a public [staff report dated July 31, 2013](#), it became apparent during negotiations with the Province of Nova Scotia for SAP support services, that HRM required certain confidential information which the Province was only willing to provide upon execution of an NDA. Regional Council's reduced meeting schedule in the summer months presented some challenges for getting the NDA approved in sufficient time for HRM's operational requirements. This is one of the reasons why Administrative Order 58 was adopted in 2014 to delegate authority to the CAO to approve and sign NDAs on behalf of HRM.

NDAs signed by employees in their personal capacity

Regional Council can only establish policies regulating agreements signed on behalf of the Municipality. Council does not have the authority to regulate or prohibit individual employees from signing legal contracts in their personal capacity, nor to request copies of NDAs that employees sign in their personal capacity. Employees should be aware, however, that entering into certain agreements, including NDAs, can sometimes give rise to conflicts of interest with respect to their work obligations.

Conflicts of interest are addressed in HRM's *Code of Conduct for Municipal Employees* (which is a corporate policy, not a Council policy). Section 9(1)(d) of the Code states that "An employee will to the extent possible, avoid a conflict of interest". Conflicts of interest can arise in a variety of ways. This can include situations where the employee owes a duty of confidentiality to another person or entity, whether because of an NDA, fiduciary obligations or other legal requirements. In some instances, this may mean that the employee is unable to share certain information with Council or colleagues and the employee might have to recuse themselves from certain discussions. In some circumstances this may be incompatible with the employee's role with the Municipality and in exceptional circumstances could frustrate the terms of the employee's contract of employment.

Complicated situations can sometimes arise when HRM employees are appointed to serve on external boards and committees. Employees who serve as directors of external boards and committees are bound by the confidentiality policies of those organizations. They may be privy to confidential information related to that organization's operations, financials, strategy, and other sensitive matters (whether or not an NDA is signed). Sharing this information with external parties, including Regional Council, is typically prohibited unless the organization provides express permission or there is a legal requirement to do so. Examples of

external boards and committees include the Housing Task Force and the Joint Regional Transportation Agency.

It should be noted that some conflicts of interest are to be expected, are of a minor nature, and can be managed. The *Code of Conduct* requires employees to disclose all potential conflicts to senior management. Section 8 of the *Code of Conduct* provides that “If there are any questions about the application of this Code to any situation, the employee should ask their manager(s) for clarification. Guidance may also be sought from Human Resources and Legal Services.”

Limitations on the use NDAs and Confidentiality Clauses

There have been some recent legislative developments regarding the use and enforceability of NDAs and confidentiality clauses in certain contexts. For example, in 2021, Prince Edward Island became the first province in Canada to significantly restrict the use and enforceability of NDAs in settlements related to allegations of harassment or discrimination, by enacting the [Non-Disclosure Agreements Act](#). The Act largely prohibits the inclusion of clauses in settlement agreements that would have the effect of silencing victims of harassment or discrimination, including allegations related to sexual misconduct. Similar legislation has since been introduced in several other jurisdictions, including [Bill 144](#) which was introduced by the NDP in the Nova Scotia Legislature in April 2022. It, however, is not a government bill and therefore remains at first reading.

Such legislation, if enacted in Nova Scotia, would not have any direct application to the types of NDAs approved pursuant to HRM’s Administrative Order 58. It would, however, apply to settlement agreements approved pursuant to [Administrative Order 49](#), the *Settlement of Claims Administrative Order*.

Proposed Amendments to Administrative Order 58

As explained in this report, it is a commercial reality that NDAs are required in certain situations, some of which are time-sensitive. For this reason it is recommended that the CAO continue to be delegated the authority to enter into NDAs on behalf of the Municipality in most instances.

It is, however, a legitimate concern of Council if the terms of an NDA would not allow HRM staff to share the confidential information obtained thereunder with Councillors (even if discussed in camera). It is therefore recommended that Administrative Order 58 be amended, in accordance with Attachment 1 of this report, to require the CAO to seek Council approval for any NDAs that would restrict the sharing of confidential information with Council.

It is also recommended that the definition of “Non-Disclosure Agreement” be revised for clarity purposes.

FINANCIAL IMPLICATIONS

No financial implications at this time.

RISK CONSIDERATION

No risk considerations were identified.

COMMUNITY ENGAGEMENT

No community engagement was required.

ENVIRONMENTAL IMPLICATIONS

No environmental implications were identified.

ALTERNATIVES

Regional Council could choose to:

1. Repeal section 9(g) and section 10(1) of Administrative Order 58, the *Delegation of Certain Authorities Administrative Order*. The effect of repealing these provisions would be that all standalone Non-Disclosure Agreements would require approval of Regional Council.
2. Direct the Chief Administrative Officer to prepare amendments to Administrative Order 58, the *Delegation of Certain Authorities Administrative Order* other than as recommended in this report.

ATTACHMENTS

Attachment A - Amendments to Administrative Order 58, *the Delegation of Certain Authorities Administrative Order*

Attachment B - Showing Proposed Changes to Administrative Order 58

A copy of this report can be obtained online at halifax.ca or by contacting the Office of the Municipal Clerk at 902.490.4210.

Report Prepared by: Colin Taylor, Senior Solicitor, Legal & Legislative Services 902.483.7471

**HALIFAX REGIONAL MUNICIPALITY
ADMINISTRATIVE ORDER NUMBER 58
RESPECTING THE DELEGATION OF
CERTAIN AUTHORITIES**

BE IT RESOLVED by Council of the Halifax Regional Municipality that Administrative Order 58, *the Delegation of Certain Authorities Administrative Order*, is amended as follows:

1. clause 9(g) is amended by:
 - (i) striking out the words “an agreement relative to an exchange of confidential information between the Municipality and other persons, whether or not the Municipality is negotiating or has entered into an agreement with such person” after the word “means” and before the semi-colon; and
 - (iii) adding the words “a legal contract between the Municipality and one or more parties that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to” after the word “means” and before the semi-colon.
2. Subsection 10(3) is added immediately after subsection 10(2) as follows:
 - (3) Notwithstanding subsection 10(1), a non-disclosure agreement must be forwarded to Council for approval if the terms of the non-disclosure agreement would preclude the sharing of confidential information exchanged thereunder with Council.

Done and passed by Council this day of , 2023.

Mayor

Municipal Clerk

I, Iain MacLean, Municipal Clerk of the Halifax Regional Municipality, hereby certify that the above noted amendments were passed at a meeting of the Halifax Regional Council held on , 2023.

Iain MacLean, Municipal Clerk

HALIFAX REGIONAL MUNICIPALITY
ADMINISTRATIVE ORDER NUMBER 58
RESPECTING THE DELEGATION OF
CERTAIN AUTHORITIES

...

Interpretation

9. In this Administrative Order,

...

(g) “non-disclosure agreement” means ~~an agreement relative to an exchange of confidential information between the Municipality and other persons, whether or not the Municipality is negotiating or has entered into an agreement with such person~~ a legal contract between the Municipality and one or more parties that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to;

...

Non Disclosure Agreements

10 (1) Council hereby delegates the authority to approve and sign non-disclosure agreements to the CAO, where in the opinion of the CAO:

- (a) such agreements are necessary to advance contractual negotiation; or
- (b) such agreements are in the best interests of the Municipality;

(2) Repealed.

(3) Notwithstanding subsection 10(1), a non-disclosure agreement must be forwarded to Council for approval if the terms of the non-disclosure agreement would preclude the sharing of confidential information exchanged thereunder with Council.