



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INTERIM ORDER MO-1442-I

Appeal MA-010026-2

Regional Municipality of Peel



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NATURE OF THE APPEAL:

The Regional Municipality of Peel (the Region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all files for the following projects:

1. Etobicoke Creek Sanitary Trunk Sewer - Contract 2, Region of Peel Project 99-2960; and
2. Etobicoke Creek Sanitary Trunk Sewer crossing Burnhamthorpe Road (sewer was constructed approximately 25 years ago).

The Region responded by advising that records responsive to the second part of the request were not in its custody or control, but were held by the Ontario Clean Water Agency (OCWA). With respect to the first part of the request, the Region indicated that its search revealed approximately six files containing approximately 400-500 documents and that some of these records may be subject to certain exemptions or exclusions under the *Act*. The Region also provided the requester with a fee estimate of \$510 and requested payment of this amount in full prior to it undertaking a review of the records on a document-by-document basis.

The requester, now the appellant appealed the Region's decision on the basis that:

1. The reply is not responsive to the request, as framed.
2. The search for records was inadequate.
3. As no litigation has been commenced with respect to this project, the Region is unjustified in claiming litigation privilege for the records.
4. The search fees are excessive.
5. The Region cannot require the payment of 100% of the search fee "up-front".

During the mediation of the appeal, the Region reconsidered its decision to require 100% of the fee before commencing the searches necessary to locate the records and agreed to require the payment of 50% of the fee, in accordance with section 7(1) of Regulation 823. The Region also agreed to transfer Part 2 of the request to the OCWA.

The issue to be determined in this appeal is the appropriateness of the fee estimate provided by the Region to the appellant. The Region's fee estimate is based on the time required for it to review each of the estimated 400-500 documents which are responsive to the request and make the necessary severance to them. This review was estimated to take 2 minutes per page over the 500 pages of responsive records, for a total of 17 hours. The fee is based on a charge of \$30 per hour for a total of \$510.

I sought and received the representations of the Region, initially. The Region objects to the disclosure of portions of their representations to the appellant, arguing that parts of it are subject to litigation privilege.

ISSUE:

The Region requests that I withhold specific identified portions of its representations from the appellant. The purpose of this Interim Order is to rule on this request.

DISCUSSION:

Sharing of representations procedure

The Notice of Inquiry cover letter to the Region states:

The representations you provide to this office may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in the attached document entitled *Inquiry Procedure at the Adjudication Stage*. Please refer to this document when preparing your representations.

The Inquiry Procedure document states:

Adjudicator initiates inquiry

The Adjudicator will initiate an inquiry by sending a Notice of Inquiry to the party bearing the initial onus, as determined by the Adjudicator. The Notice of Inquiry sets out the issues in the appeal and seeks representations on these issues.

First party submits representations

The first party then has **three weeks** to submit representations. In its representations, the first party must indicate clearly, and in detail:

1. Which information in the representations, if any, the party wishes the Adjudicator to withhold from the second party; and
2. Its reasons for this request (see confidentiality criteria below).

The document later sets out the criteria for withholding representations, as follows:

The Adjudicator may withhold information contained in a party's representations where:

- (a) disclosure of the information would reveal the substance of record claimed to be exempt or excluded;
- (b) the information would be exempt if contained in a record subject to the *Freedom of Information and Protection of*

Privacy Act or the Municipal Freedom of Information and Protection of Privacy Act; or

- (c) the information should not be disclosed to the other party for another reason.

For the purposes of paragraph (c) above, the Adjudicator will apply the following test:

- (i) the party communicated the information to the IPC in confidence that it would not be disclosed to the other party; and
- (ii) confidentiality must be essential to the full and satisfactory maintenance of the relation between the IPC and the party; and
- (iii) the relation must be one which in the opinion of the community ought to be diligently fostered; and
- (iv) the injury to the relation that would result from the disclosure of the information would be greater than the benefit thereby gained for the correct disposal of the litigation.

The Region objects to the disclosure to the appellant of those portions of its representations which refer by name to two of its employees and to those portions which cite advice given to the Region by counsel. I note that none of the information contained in the representations refers to the contents of the records which are at issue in this appeal. Rather, several portions of these submissions refer to the legal advice provided by the Region's counsel to the staff persons responding to the request.

In my view, only a small portion of the representations provided by the Region contain information which may be subject to solicitor-client privilege. I find that this information satisfies the criteria set forth above as it "would be exempt if contained in a record subject to the *Act*". The remaining portions of the Region's submissions do not, however, meet the criteria for withholding representations. The names of the Region's staff who assisted in the processing of the appellant's request would not be exempt from disclosure under the *Act* if found in a record. Nor are the remaining portions of the representations subject to litigation privilege, thereby qualifying for exemption under section 12 of the *Act*.

I find that the portions of the representations which do not specifically make reference to the legal advice provided by counsel do not, on their face, fall within the scope of paragraphs (a), (b) or (c) of the Confidentiality Criteria.

Because I have found that the confidentiality criteria do not apply to portions of the Region's representations, I intend to provide the appellant with a copy of the non-confidential portions of

the Region's representations, together with a Notice of Inquiry, no earlier than **July 4, 2001**. I have attached a copy of a highlighted version of the Region's representations with the copy of this order provided to the Region which indicates the portions that **do meet** the Confidentiality Criteria and will not be disclosed to the appellant.

Original Signed By: _____ June 20, 2001 _____
Donald Hale
Adjudicator