ORDER MO-1752

Appeal MA-030091-2

Regional Municipality of Peel

NATURE OF THE APPEAL:

The Regional Municipality of Peel (Peel) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (*the *Act)* for the following information:

1. Records within the Peel Health Department, of illness or possible illness from possible contaminated municipal drinking water for a period of time between January 1, 2002 and December 31, 2002 and the approximate location of the possible incidents of possible illness. We also require a diagram or map of the extent of distribution of the municipal water from the East Brampton Reservoir.

2. Records that disclose the financial details for the particular repair work in question, including consultants, inspections, water testing and analysis and cost for the work undertaken, this is in addition to the information sought under the other request.

3. The soil chemical analysis reports performed on the existing earth covering the reservoir, the latest version available before the contamination was discovered. If none were done after the contamination was discovered please advice of this fact and any records dealing with doing, or not doing one, after discovering the contamination.

4. Reports or records which disclose or identify the chemicals used on the grass over the earth above the reservoir such as pesticides or weed control or similar possible contaminates, both those in hand before the contamination was discovered and any obtained afterwards. Please include any correspondence or records gaining or attempting to gain this information.

5. Water quality tests performed to identify contaminates in the reservoir's water other than pathogens (namely heavy metals and chemical compounds), this should be for the period following the discovery that surface water runoff contaminated the already treated water in the reservoir.

Peel did not respond within the required 30 day time period, and the requester appealed the "deemed refusal". Appeal MA-030091-1 was opened and Order MO-1631 was issued ordering Peel to issue a decision letter regarding the request. Peel issued a decision in compliance with the order, denying knowledge of any contamination of drinking water and stating that there were no records responsive to items 1, 3, 4 and 5 of the request. The requester did not appeal this decision.

Peel identified 12 pages of records responsive to item 2 and issued a separate decision letter. Peel provided the requester with access to 11 pages and denied access to the 12th page, which is page 3 of a 4-page document. Peel relied on the following exemption in the *Act* as the basis for denying access to this one remaining page:

- section 7 - advice and recommendations
- section 10 - third party commercial information
- section 11 - economic interests of the municipality

The requester (now the appellant) appealed this second decision.

During mediation, Peel withdrew the section 11 exemption claim.

Further mediation was not successful, and the appeal was transferred to the adjudication stage. I initiated my inquiry by sending a Notice of Inquiry to Peel and the author of the withheld page, as a representative of an organization that may have interest in disclosure (the affected party). Peel responded with representations but the affected party did not.

I have decided it is not necessary for me to seek representations from the appellant before proceeding to deal with the various issues in this appeal.

RECORDS:

The record is page 3 of a four-page document faxed by the affected party to Peel, dated September 27, 2002. The document consists of a 1-page cover sheet with handwritten notes, a 1-page cover letter, and a 2-page attachment. The cover sheet, cover letter and second page of the attachment have been disclosed. The first page of the attachment is the only page that remains at issue in this appeal.

THIRD PARTY INFORMATION

General principles

Section 10(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central

purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace (Orders PO-1805, PO-2018, PO-2184, MO-1706).

For section 10(1) to apply, Peel and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to Peel in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

I have decided to deal first with the harms component of section 10(1).

Part 3: Harms

General principles

To meet this part of the test, Peel and/or the affected party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Representations

As noted earlier, the affected party declined to provide representations in response to the Notice of Inquiry.

Peel's representations on the harms component of section 10(1) consist of the following:

> The information severed for disclosure could be considered a 'recipe' for competitors to develop solutions competitive with those proposed by the affected company. As such, disclosure of the information contained in the record could present the Appellant's company and others with a significant competitive advantage, thereby prejudicing the position of the affected company. Furthermore, disclosure of this record could potentially jeopardize Peel's dealings with this and subsequent business partners. Companies will understandably be reluctant to participate in Peel tender competitions and/or share critical information with Peel for fear that important commercial information will be publicly disclosed.

Elsewhere in its representations, Peel makes similar statements reinforcing its position that disclosure would result in competitive harm to the affected party and could result in the refusal of companies "to partake in proposal requests or conduct business with Peel to the detriment of the competitive public tender process and Peel taxpayers".

Based on these representations and my review of the page withheld by Peel, I am not persuaded that disclosing the information on this page could reasonably be expected to significantly prejudice the competitive position of the affected party or result in similar information no longer being supplied to Peel in the context of the selection of suppliers to undertake work on behalf of Peel.

A considerable amount of detail regarding the affected party's proposal has already been disclosed to the appellant through the release of the cover letter submitted to Peel by the affected party and the second page of the 2-page proposal. This information includes the fees to be charged, the individuals assigned to the project, the proposed timeline and the specific sub-contractors involved with the roof replacement undertaking. The withheld information consists of a description of the "present condition" of the roof, followed by a section titled "options" that consists of a general outline of the approach the affected party intends to take for the construction project. No technical or proprietary information is contained in the "options" section, nor is it clear to me why that heading is used since there are no actual options discussed. The final section on the withheld page is titled "proposed application outline", and consists of the first six steps the affected party intends to take in approaching the assignment. Steps 7-17 of the same section of the proposal are listed on the following page, which has been disclosed, and I can see no reasonable basis for distinguishing the first six steps from the subsequent 11.

In my view, the evidence and argument put forward by Peel are speculative and not supported by my review of the content of the withheld page, particularly when compared to the type of similar information already disclosed to the appellant through the release of the other pages of the record.

In order MO-1736, Senior Adjudicator David Goodis made the following comments regarding a situation in which affected parties chose not to provide representations in the context of an inquiry:

> Regarding the harms under sections 10(1)(a) and (c), the affected parties are in the best position to provide evidence and argument explaining why it is reasonable to expect disclosure will result in prejudice to those companies' competitive position, interfere significantly with their negotiations or result in undue loss to them. The only affected party to submit representations clearly has no such concerns. I also find it significant that the remaining affected parties, although notified, chose not to submit representations. In my view, this undermines the "harm" arguments of the Municipality, although I do not take the absence of representations from the other affected parties [to] constitute their consent to disclosure (see Order PO-1791). In the end, I am left with little if any guidance as to how the information in the records would be useful to a competitor or otherwise could reasonably be expected to cause section 10(1)(a) or (c) harm.

In my view, the absence of representations from the affected party in this appeal puts me in a similar position.

In my view, I do not have the necessary detailed and convincing evidence required to support any of the harms components of section 10(1)(a), (b) or (c), and I find that part 3 of the test for this exemption has not been established. Because all three parts must be established in order for the exemption to apply, I find that it does not.

ADVICE TO GOVERNMENT

General principles

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service or retained in a consulting capacity are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-1894, PO-1993].

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders P-1037, P-1631, PO-2028 - upheld on judicial review (*Ministry of Northern Development and Mines v. Tom Mitchinson, Assistant Commissioner, and John Doe, Requester*,(Tor. Doc. 433/02 (Div. Ct.))]

Peel submits:

> The affected company provided explicit guidance and advice to Peel regarding the roof restoration of the East Brampton Reservoir. The specific advice included an analysis of the roof's condition as well as recommendations regarding corrective actions. This deliberative process involved Peel's Project Manager and his team who completed an assessment of the available proposals specifically with a view to picking the preferred options and arranging for its implementation. As such, Peel respectfully submits that it is properly exempt from disclosure.

I do not accept Peel's position. The record at issue in this appeal is a proposal submitted by the affected party to Peel for a specific construction project. The purpose of the document is to present an approach to the job that will meet the institution's identified construction needs. The record does not include any specific advice or recommendations, and is simply not part of the deliberative process of decision-making or policy-making within government. Further, it is not a record that has been prepared by the affected party in the capacity of retained consultant, as required in order to fall within the scope of section 7(1). Rather, the record is a proposal presented by an outside third party to Peel and falls squarely within the type of record intended for consideration under section 10(1) of the *Act*, not section 7(1), which speaks to a different purpose and context. I have determined that the withheld portion of the record does not qualify for exemption under section 10(1) for the reasons outlined, and it clearly does not satisfy the requirements for exemption under section 7(1).

ORDER:

1. I order Peel to disclose the record to the appellant by **March 3, 2004**.

2. In order to ensure compliance with this order, I reserve the right to require Peel to provide me with a copy the record disclosed to the appellant under Provision 1 of this order, only upon request.

Original signed by: February 11, 2004
Tom Mitchinson
Assistant Commissioner