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

INTERIM ORDER MO-1829-I

Appeal MA-030034-1

Regional Municipality of Peel

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NATURE OF THE APPEAL:

The Ministry of the Environment entered into an agreement dated January 14, 1991 with a consulting engineering company (company #1) to provide design and supervision services relating to a project titled "Clarkson Water Pollution Control Plant Primary Treatment Expansion, Project number 91-2920" (the Project). The Project is located in the Region of Peel (Peel).

The appellant, who was involved as a contractor for the Project, made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to Peel for records relating to the Project. Following discussions with Peel, the request was clarified to include:

1. Copies of all correspondence relating to the contract, excluding records which the appellant had already received, between Peel, company #1, a named Peel employee and "his superiors and subordinates".

2. Records regarding the installation of uni-flanges, including communications with the Ontario Clean Water Agency.

3. Records regarding the late start of the job and issuance of the letter to commence.

4. Records regarding the labour and material payment bond premiums.

5. Records regarding the winter shut down.

6. Records regarding the maintenance holdback.

7. Records regarding the extension of the contract time.

8. Copies of the daily job diaries of company #1.

9. Copies of the original engineering agreement including the portions that show the original engineering and supervision contract amounts for the Project and two other identified projects.

10. Records regarding additional engineering fees which includes approval, explanations and justifications for each additional fee for the Project that the two other projects identified in item 9.

Peel responded to the appellant as follows:

- it agreed to provide the appellant with access to 294 pages of records responsive to parts 1-7 of the request, and the two other projects identified in parts 9 and 10;

- it advised the appellant that there were no records responsive to part 8 of the request, or to parts 9 and 10 as they relate to the Project.

Peel also identified a number of other records responsive to parts 1-7 of the request, and denied access to these records on the basis of the following exemption in the *Act*:

section 7	-	advice and recommendations
section 10	-	third party information
section 11	-	economic harm to the institution
section 12	-	solicitor-client privilege

The Region also charged the appellant fees in the amount of $1,318.80, comprised of:

$58.80	-	photocopying
$60	-	document preparation
$1,200	-	search time

The appellant appealed portions of Peel's decision and accepted other portions. Specifically, the appellant accepted the photocopying and document preparation fees, but appealed the search fees. He paid $400 as a fee deposit. The appellant also appealed the various exemptions claimed by Peel for the undisclosed records. He also took issue with Peel's position that there are no records responsive to part 8 of the request, maintaining that the job diaries referred to in part 8 are within the control of Peel, pursuant to section 4 of the *Act*. Finally, the appellant maintained that there were more records responsive to the portion of part 9 relating to the Project.

During mediation, Peel clarified its original decision letter as it relates to parts 8 and 9 (which need not be discussed in greater detail here) and also provided the appellant and this office with an index of records, identifying the specific exemptions claimed for each undisclosed record. Peel also identified section 6(1)(b) as a new exemption claim for 3 records.

Mediation was otherwise not successful, and the file was transferred to the adjudication stage. I initiated my inquiry by sending a Notice of Inquiry to Peel. Peel responded with representations. I then sent the Notice to the appellant, together with the non-confidential portion of Peel's representations, and he too provided representations. Finally, I provided Peel with a copy of the appellant's representations, and received further reply representations.

In its representations, Peel withdrew the section 6(1)(b) exemption and agreed to disclose the records covered by this exemption to the appellant, specifically Records 38, 61 and 77. Peel also withdrew the section 12 exemption claims for Records 108 and 149. No other exemptions were claimed for these records, so I will order that they be disclosed.

RECORDS:

The following twelve records and corresponding exemptions remain at issue in this appeal:

Record - 29-page agreement between the Ministry of the Environment and company #1 for design and construction supervision services relating to the Project - section 10(1) for the entire record

Record 2 - 11-page agreement between Peel and a named consulting company (company #2) for construction services associated with a number of identified projects - section 10(1) for unit pricing information only

Record 3 - 17-page agreement between Peel and company #2 for construction services associated with other identified projects - section 10(1) for unit pricing information only

Record 11 - 2-page memorandum from company #1 to Peel relating to the Labour and Material Payment Bond on a project - section 7(1) for the entire record

Record 36 - 1-page memorandum from company #1 to Peel relating to an invoice payment - section 10(1) for the entire record

Record 113 - 2-page memorandum from company #1 to Peel, with 1-page attachment, relating to an outstanding issue on a project - section 7(1) for the entire record

Record 116 - 2-page letter from company #1 to Peel reporting on an aspect of the Project - section 10(1), in part

Record 119 - 1-page memorandum from company #1 to Peel reporting on an aspect of the Project, involving the appellant - section 7(1), in part

Record 135 - 1-page cover sheet attaching 1-page memo from company #1 to Peel regarding an aspect of the Project - cover page disclosed, attachment withheld - section 7(1)

Record 140 - 1-page fax sheet and 7-page attached Payment Certificate for work undertaken by the appellant on the Project - section 7(1)

Record 142 - 1-page internal e-mail message outlining activities on the Project involving the appellant - section 12

Record 151 - 1-page memorandum from company #1 to Peel, with 1-page attached Claims Table involving the Project - section 12

DISCUSSION:

ADVICE OR RECOMMENDATIONS

The index of records created by Peel identifies five records that were exempt under section 7(1), in whole or in part: Records 11, 113, 119, 135 and 140. However, Peel's representations deal only with Records 11 and 135. In the absence of evidence and argument from Peel regarding the application of the section 7(1) discretionary exemption to Records 113, 119 and 140, and having reviewed the records themselves, I find that the requirements of this exemption have not been established and these records should be disclosed to the appellant. I will consider whether this exemption applies to Records 11 and 135.

General principles

Section 7(1) states:

> A head may refuse to disclose a record if 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 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-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), leave to appeal granted ??].

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 PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner), supra*]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Orders P-434, PO-1993, PO-2115, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.), PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)].

Representations

Peel's representations on section 7(1) are brief, and consist of the following:

> Document number 11 includes advice from [company #1], regarding [the Project]. The content of the letter includes [company #1's] comments on labour and material payment bond and recommendations to reduce the value of the bond or eliminate it in its entirety. The advice provided was key to [Peel's] decision to reduce or eliminate the labour and material payment bond. Further, [Peel] was advised to consider legal action regarding this matter. Document number 135, includes advice from [company #1] regarding the damage to south primary effluent channel. The content of the document includes an observation from [company #1] regarding work performed by the Appellant. Recommendations regarding work to be performed are also stated.

The appellant's representations do not deal specifically with the requirements of section 7(1), stating: "I trust that [the Commissioner] will review each record. Without reviewing the contents of the records it is difficult for me to make any representations on such exemptions."

Analysis and Findings

Having reviewed Record 11, I find that certain portions contain "advice and recommendations", while others consist primary of factual and evaluative information and therefore do not. That being said, the actual "advice" and "recommendations" contained in this record are revealed in Peel's representations, which have been shared with the appellant. In the circumstances, it is not reasonable for Peel to hold to a technical application of section 7(1) as it relates to the portions of Record 11 that meet the requirements of section 7(1), since the information at issue has already

been disclosed. Therefore, I find that section 7(1) does not apply to Record 11, and it should be disclosed to the appellant.

Peel has agreed to disclose the first page of Record 135. As far as the undisclosed second page is concerned, I find that it does not consist of any "advice or recommendations", nor would disclosing it permit one to accurately infer any advice or recommendations. This record, a memorandum from company #1 to Peel, consists primarily of a factual description of a phone conversation between an official of company #1 and a representative of the Ontario Clean Water Agency, observations made by the official relating to the issue under discussion, and an outline of the next steps company #1 intended to follow in dealing with the issue. Company #1 seeks no approval from Peel for any suggested course of action, and no decision is required from Peel in response to the memo. As the first page of Record 135 indicates, the second page is essentially a status report made by company #1 for the purpose of keeping its client informed on ongoing work relating to the Project. Company #1 offers Peel the opportunity to "call if you have any questions", but Peel is not asked to provide direction to company #1 or to respond to anything that could accurately be characterized as "advice or recommendations". Therefore, I find that Record 135 does qualify for exemption under section 7(1) and should be disclosed to the appellant.

In summary, I find that no records qualify for exemption under section 7(1) of the *Act*.

SOLICITOR-CLIENT PRIVILEGE

General principles

Section 12 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

As noted earlier, Peel withdrew the section 12 claim for Records 108 and 149 in its representations, leaving only Records 142 and 151 for me to consider in this order.

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Representations

The Ministry submits:

> … Document number 142 is authored by the Manager, Capital Works in response to an inquiry from [Peel's] Senior Counsel. Document number 151 consists of a list of claims, where a legal interpretation or advice has been requested. As such, both documents are protected by Solicitor-Client and or litigation privilege.

Again, the appellant relies on my review of these records to determine whether the requirements of section 12 are present.

Analysis and Findings

Record 142 is a 2-paragraph e-mail message sent by Peel's Manager, Distribution Capital Works to a number of other Peel employees, including, as Peel identifies in its representations, the region's Senior Counsel. Peel has agreed to disclose the address information at the top of the message, the address information about the author appearing at the bottom of the page, the first paragraph of the message in its entirety, and the last sentence of the second paragraph.

As far as the remaining information in the second paragraph is concerned, it consists of the Manager's view of the then-current situation involving work undertaken by the appellant on the Project. The last sentence, which has not been withheld, makes it clear that the Manager is seeking advice: "Please advise on your recommendations." In my view, the Manager, as client, has initiated a communications with his counsel, for the purpose of obtaining professional legal advice. Although there is no express indication of confidentiality on the face of the record, given the nature of its contents, confidentiality can reasonably be inferred. Therefore, I find that the requirements of common law solicitor-client communication privilege have been established for all portions of the second paragraph of Record 142, with the exception of the last sentence.

Record 151 is a 1-page memorandum with an attached chart, that appears to have been sent by Peel's Senior Counsel to his client, the author of Record 142. For the same reasons as outlined for Record 142, I find that Record 151 qualifies for exemption under common law solicitor-client communication privilege component of section 12. It is a communication from counsel to his client, reporting in a preliminary way on an issue he has been asked to look into. Although not clear from the record or Peel's representations, it would appear that Record 151 may have been sent in direct response to the request outlined in Record 142. As with Record 142, I find that the circumstances warrant a reasonable inference that the communication reflected in Record 151 was confidential.

Therefore, I find that the withheld portions of Record 142 and Record 151 in its entirety qualify for exemption under section 12 and should not be disclosed to the appellant.

THIRD PARTY INFORMATION

Peel's representations include the following brief statement regarding section 10(1):

> [Peel] objects in full to releasing document numbers 1, 2, 3, 36 and 116 as the contents include unit pricing, percentage of mark-ups the release of which would prejudicially reveal financial information of another company.

It would appear from the content of these records that there are actually two "companies" at issue: company #1 retained by the Ministry of the Environment to provide design and construction supervision services on the Project (Records 1, 36 and 116); and company #2 retained by Peel to provide construction services for the Project (Records 2 and 3).

Neither of the two companies was notified by Peel at the request stage, nor were the companies provided with notice pursuant to section 21(1) of the *Act* that Peel intended to disclose Records 2, 3 and 116, subject to the severance of small portions of these records containing unit prices and "mark-up" figures.

In the circumstances, I have decided to defer my consideration of section 10(1) as it relates to these 5 records, pending notification of company #1 and company #2, who may have an interest in the disclosure of the records. I will be issuing a Supplementary Notice of Inquiry to these two companies, and they will be given an opportunity to provide representations before I make my decisions on Records 1, 2, 3, 36 and 116.

FEES

Background

There is considerable disagreement and confusion regarding the fees charged by Peel in this matter.

After submitting his initial request to Peel, the appellant appears to have had follow-up discussions where he clarified it. The clarified request was outlined in a letter sent by Peel to the appellant. In it, Peel indicates that there are approximately 4,000 pages of records responsive to the request, and estimates that there would be an $800 fee to "search for, prepare and reproduce" these records. The basis for this fee, as identified by Peel in its letter, is the $0.20 per page photocopy charge for 4,000 pages of records permitted under Regulation 823. Peel asked for a $400 deposit, explained that it would process the request once the payment was made, and advised the appellant:

> Please note that we will [then] provide a revised fee estimate and will require payment of the full amount of search, preparation and reproduction costs (less your $400 deposit) prior to providing access.

The appellant paid the $400 fee deposit.

Peel then issued its decision letter to the appellant. In it, Peel increased the number of pages of records from 4,000 to 4,800, and revised the fee estimate to:

> $58.80 for photocopying charges ($0.20 for each of the 294 pages of records it was disclosing)
>
> $60 for document preparation charges (2 hours @ $30 per hour)
>
> $1,200 for search charges (4,800 pages - 40 hours @ $30 per hour)

The appellant appealed the search fee, pointing out that he had expected to receive approximately 4,000 pages of records, not 294 pages, and that he had made the $400 deposit on that assumption.

The fee issue was not resolved during mediation, so I included it within the scope of my inquiry.

Representations

As I understand it, based on representations provided by both Peel and the appellant, the reason for the significant search fees and the relatively small number of records provided to the appellant stems from the fact that the appellant's request specifically states that any responsive records addressed or copied to his company should be excluded from the scope of the request. As Peel explains in its representations:

> The Appellant was aware that there would be a voluminous amount of correspondence between his company and [Peel]. The custodian of the information was required to not only search through information with the Appellant's company letterhead, but also correspondence copied to him or his company. The intent of the thorough search was to ensure that no documents were excluded from this process. [Peel] maintains that it has responded entirely

> within the boundaries set up by [the *Act*] and [the Commissioner's] instructions notwithstanding that, this request has generated a large volume of responsive documents many of which, in [Peel's] opinion, were already in the possession of the Appellant. …

The appellant offers a different perspective:

> In Peel's decision … they advised that there are approximately 4,800 pages of records, which were found all in one reverse chronologically ordered file. I revised my request to just those, of the 4,800 records, that were not already received by [the appellant's company] during its work [on the Project].
>
> … Peel provided a fee estimate based on 4,000 pages at $800 for photocopies at $0.20, which they said would included … "to search for, prepare and reproduce" … the estimated 4,000 pages. Peel specifically acknowledged that search and preparation time would be included in the $0.20 per page fee. The file was already assembled and needed only to be photocopied as per their letters at that time.
>
> My revision eliminated some 800 pages which were the ones I already had. The 800 pages eliminated, I confirm, would roughly coincide with the approximate number of pages I did receive from Peel during the work. The 4,000 pages of records are the expected number of responsive pages in this request.
>
> I accepted the estimate and fee based on my receiving approximately 4,000 pages and I forwarded 50% of the estimated fee … This left a balance (for the 4,000 pages expected) of around $400 to be paid.

The appellant states that he was surprised to receive a decision letter indicating extensive charges for search time and a significant reduction in the number of records disclosed to him. He states:

> There was no requirement to do any search, since all of the responsive records were initially found in one file, in reverse chronological order, as per the initial decision letter … At this point, very early in the request, I asked that all records be copied to avoid search time and related costs. Peel originally agreed to this and proceeded on this basis, thus obtaining a deposit from me [of] $400 for around 4,000 pages to be copied.
>
> Once significant moneys were obtained from me, Peel then refused to conclude the request in the manner originally agreed upon so as to deter and avoid granting access by the claiming [of] improper fees and reneging on the prior agreement reached on the number of records and on the method for disclosure.

The appellant points out that he offered to pay photocopying charges for all 4,800 pages in order to avoid extensive search fees, which Peel declined, and he takes the position that the time spent

segregating documents to determine which ones were originally addressed to or copied to him, was "simply to create a larger fee to deter or hinder the release of records and consume my deposit fee, and create arguments over the final fee, by its unreasonable conduct".

In its reply representations, Peel submits that "… any offer made by the appellant to pay for the photocopying of 4,800 pages was not a practical solution given that Peel would have to review all 4,800 papers prior to release in any event".

Analysis and Findings

I am essentially in agreement with the appellant on the fee issue.

It is clear that Peel's original fee estimate was intended to cover search, preparation and photocopy charges for the approximately 4,000 pages of records it identified as being responsive. Peel indicated at that time that certain exemptions might apply to some records, but did not identify any estimated costs specifically for search fees. The fact that the overall fee was based exclusively on actual photocopy charges is a strong indication that the search activities and preparation times would be minimal.

After completed its searches, Peel identified 294 pages of records that had not previously been addressed or copied to the appellant, and provided the appellant with access to them. Other records, which I dealt with earlier in this order, were denied, in whole or in part. Peel's decision letter to the appellant does not explain why the overall number of records was reduced, and the only explanation that emerged during the course of this appeal was that many records originally identified as being responsive ended up falling outside the scope of the request because they had previously been addressed or copied to the appellant during the course of his work on the Project.

In my view, Peel's approach to determining the fee in this case cannot be supported. The appellant, in apparent good faith, made efforts to reduce the fees associated with obtaining responsive records by limiting the scope of his request to records not already in his possession. At no point did Peel indicate that this category of records, which had already been provided to the appellant in a different context, would somehow now qualify for exemption. Also, based on my assessment of the representations and my review of the large volume of documentation submitted to me in the course of this inquiry, I am unable to understand why Peel would need to "review all 4,800 pages prior to release in any event", since severing would not appear to be an issue for previously disclosed records. In addition, it would appear that the appellant made efforts during the course of this appeal (and certainly in his representations, which were provided to Peel) to reduce overall costs by paying photocopy fees for all 4,800 records, even though he already has copies of many of them.

It would be contrary to the intent of the *Act* and the fee regime it establishes to, in effect, allow an institution to increase fees based on an effort by an appellant to reduce them. In my view, that is what Peel has done here. Instead of working with the appellant to find an expeditious way of providing access, which might include giving the appellant copies of records already within his

possession, Peel instead incurred considerable costs in the fruitless exercise of categorizing otherwise accessible records into those that had already been provided to the appellant and those that had not. Search fees of this nature are not reasonable and cannot be permitted.

Accordingly, I do not allow the $1,200 fee charged by Peel for search activities. Instead, I will order Peel to provide the appellant with copies of the 4,800 pages of identified records, which would include those originally addressed or copied to him or his company and those that were not. The permitted fee for these records will be based on the $0.20 per page photocopy charge permitted by Regulation 823, for a total of $960. The appellant's $400 deposit will be applied to these charges, leaving a balance owing of $560.

As noted earlier, the appellant has accepted the $60 document preparation fee.

SCOPE OF THE REQUEST/ADEQUACY OF SEARCH

The parties disagree on what constitutes the scope of the appellant's request, and whether Peel has done an adequate search for all responsive records. After reviewing the extensive documentation provided by the parties on these two issues, I have concluded that they are linked to the fee issue I just dealt with.

It would appear that, had the appellant not restricted his request by eliminating responsive records that were addressed or copied to him or his company, the 4,800 pages of records identified by Peel would have been the package of records responsive to the appellant's request. It would also appear that, had the appellant received access to these 4,800 pages of records, many if not all of his issues regarding the adequacy of Peel's search activities would have been resolved.

I determined in dealing with the fee issue that the appellant should be provided with copies of all 4,800 pages of records, subject to his payment of the outstanding fee charges. In my view, this effectively disposes of the issue relating to the scope of the request, and may well resolve the issue of the adequacy of Peel's search for all responsive records. If, after receiving and reviewing the records, the appellant still has reason to believe that additional responsive records may exist, I will include a provision in this order permitting him to continue this appeal, subject to the appellant satisfying me that there is a reasonable basis for concluding that additional records exist, as required by section 39(2.1) of the *Act*.

CUSTODY AND CONTROL

The appellant argues that the daily job diaries for staff of company #1 and the original engineering agreement for the Project are in the custody and control of the Peel.

Peel disagrees, and submits:

> The job diaries are under the custody and control of a third party. The job diaries were created by [company #1], external to [Peel]. [Peel] does not have any authority to dispose of the diaries. [Peel] is privy to the diaries on request. However, reproducing the diaries, will require an extensive amount of work by [company #1] with no financial return. Please note that the original contract for work between the Ministry of Environment and [company #1] was completed in the early 1990s. The contract was inherited by [Peel] in 1998, and conditions/criteria stipulated in the contract remained the same.
>
> The creator and custodian of the diaries is [company #1]. [Company #1] is not an "institution" as defined in the *Act*. The contents of the records may include: weather conditions, temperature conditions, number of workers, work performed, unusual or significant events, safety violations, visitors, testing, delivery of major equipment, etc. The contents of the diaries do not relate to [Peel's] mandate, nor does [Peel] regulate the diaries. They remain in the control of [company #1].

In response, the appellant submits:

> … Peel claims that [the daily job diaries] are not under their custody and control. [Company #1] was the Contract Administrator on the Project. … The records sought are daily activity reports generated in the administration of the contract by the Contract Administrator. The Contract Administrator was stationed specifically on our jobsite, on a full time daily basis, to oversee our work for [Peel]. One of his main duties was to create a daily record of events on the job for [Peel's] employees as described by Peel in its submissions. In a sense Peel clearly shows that [company #1] was their eyes and ears on the job. The main purpose of these records was for Peel to obtain and maintain a record of daily events on the job.
>
> … Peel claims that it does not have custody or control of the original engineering agreement Peel executed on the … Project. How can Peel not have custody or control over an agreement they executed, and for a significant multi-million dollar contract? Either there was never an agreement (which is not likely) or a copy must be obtainable by Peel. If none exists? Then, how can [company #1] request additional fees to an agreement that does not exist.

The appellant provides excerpts from a Peel council meeting that refer to extra fees requested by company #1 for work on the Project.

In its reply representations, Peel appears to change its position, claiming that "… [company #1] was employed as the contract administrator whose activities are beyond the scope of [the appellant's request] for "engineering" agreements.

As far as the original engineering agreement for the Project is concerned, unless I am mistaken, it was identified as a responsive record by Peel and is included as Record 1 in the index of records provided to this office and the appellant. As such, it is clearly within Peel's custody.

If I am incorrect in assuming that Record 1 is the original engineering agreement, then I accept the appellant's submissions that the agreement must be within Peel's custody. The fact that the agreement was originally entered into by company #1 and the Ministry of Environment is not relevant to the question of whether the record is now within Peel's custody. Peel acknowledges that the agreement was "transferred to Peel in 1998", and simple logic dictates that any such transfer would include the transfer of the agreement that governs the relationship between company #1 and the public institution taking on responsibility for the Project from the Ministry of the Environment. The fact that Peel entertained a request for extra fees from company #1 for work on the Project, as the appellant points out, is also a strong indicator that Peel has custody of the agreement, absent which there would be no legal authority to make payments of this nature.

As far as the daily job diaries are concerned, it would appear that Peel does not have custody of these records. However, as stated in its representations, "[Peel] is privy to the diaries on request". In my view, this would appear to represent an acknowledgment that Peel has control of these records. There are also other indicia of control present:

- As Contract Administrator, company #1 was discharging responsibilities on behalf of Peel. I agree with the appellant that company #1 was, in effect, the "eyes and ears of Peel on the Project", performing a role under contract that could alternatively have been handled directly by Peel employees.

- The work undertaken by company #1 in administering the Project relates directly to a core function of Peel, namely the expansion of a water pollution control plant located in the Region.

- It could be said that company #1 was acting as an agent of Peel in this context. The company's authority as described in the excerpt from the contract provided by the appellant with his representations includes a list of authorized activities that is broad and extensive, essentially representing Peel in all aspects of contract administration on the Project. These activities are all matters that could have been handled by Peel directly, if it chose to do so, and the decision to outsource contract administration in the manner reflected in the agreement created a relationship of agency sufficient, in my view, to compel the production of any records relevant to the discharge of these contractual responsibilities, upon request.

- The daily job diaries, as the appellant notes, are key records of activity taking place on the Project. In my view, they are the type of record that Peel would require in order to deal with any disputes arising during the course of construction work on the Project, and Peel acknowledges that it can request that they be made available by company #1. This is a strong indicator of control.

I should also add that the amount of work required by company #1 in reproducing the job diaries for Peel and the fact that this would result in "no financial return" to company #1, are not relevant considerations in determining whether records are under the control of Peel for the purpose of dealing with the appellant's request under the *Act*.

For all of these reasons, I find that Peel has custody and/or control of the original engineering agreement with company #1 for the Project, as well as the various daily job diaries created and maintained by company #1 during the course of discharging its responsibilities for contract administration on the Project on behalf of Peel.

INTERIM ORDER:

1. I uphold Peel's decision to deny access to Record 151 and all portions of the second paragraph of Record 142, with the exception of the last sentence.

2. I order Peel to disclose Records 11, 38, 61, 77, 108, 113, 119, 135, 140, 149 and the portions of Record 142 not covered by Provision 1, to the appellant by **October 4, 2004**. I further order Peel to provide me with a copy of the covering letter sent to the appellant in compliance with this provision.

3. I defer consideration of Records 1, 2, 3, 36 and 116, pending notification of company #1 and company #2.

4. I do not uphold the search fees charged by Peel. I uphold photocopy fees in the revised amount of $960, based on photocopy charges for 4,800 pages of responsive records identified by Peel, plus $60 in preparation fees agreed to by the appellant. I order Peel to provide copies of all 4,800 pages not already disclosed to the appellant by **21 days** from the date Peel receives payment of the outstanding fee charges of $$620 ($960 + $60 - $400 deposit). I further order Peel to provide me with a copy of the covering letter sent to the appellant in compliance with this provision.

5. I find that the original engineering agreement with company #1 for the Project and the daily job diaries for staff of company #1 are within the custody and/or under the control of Peel. I order Peel to provide the appellant with a revised access decision for these records, using the date of this interim order as the date of the request, without recourse to a time extension under section 20 or the frivolous or vexatious request provisions under section 20.1 of the *Act*.

6. After receiving access to the records pursuant to Provisions 2 and 4, the appellant will have 30 days to decide whether to pursue the issue of the adequacy of Peel's search for responsive records, but writing to me outlining his reasons for believing that additional responsive records should exist. If I do not receive correspondence from the appellant within this 30-day period, I will presume that the adequacy of search issue has been resolved.

7. I remain seized of this appeal in order to deal with any issues stemming from Provisions 1-6 of this interim order.

Original Signed by: September 13, 2004
Tom Mitchinson
Assistant Commissioner