



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1981

Appeal MA-030034-2

Regional Municipality of Peel



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NATURE OF THE APPEAL:

The Regional Municipality of Peel (the Municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of a wide range of records relating to the contract for the Clarkson WPCP Primary Treatment Expansion, Project Number 91-2929, excluding any records which the requester had already received.

The Municipality located a number of responsive records and issued a decision in which it provided the requester with some of them, denying access to others on the basis that they are exempt from disclosure under the following exemptions in the *Act*:

- sections 7(1) – advice or recommendations;
- section 10(1) – third party information;
- section 11 – valuable government information; and
- section 12 – solicitor-client privilege

The Municipality also indicated that a number of records were not within its custody or control, and noted that with respect to two aspects of the request, it had no responsive records. The Municipality also issued a fee estimate in the amount of \$ 1318.00 to recoup the cost of the time that would be required to separate those records which the appellant had already received from those not yet disclosed.

The requester, now the appellant, appealed this decision on a number of grounds, and the Commissioner's office opened Appeal Number MA-030034-1. That appeal was resolved by Orders MO-1829-I and MO-1846-F in which former Assistant Commissioner Tom Mitchinson upheld certain portions of the Municipality's decision, ordered it to disclose some records to the appellant and ordered the Municipality to issue a decision respecting access to certain additional identified records.

In the course of responding to the order provisions of Order MO-1829-I, the Municipality discovered approximately 20 documents that it had not previously identified as responsive to the request. These records were not, accordingly, covered by the decision letters and subsequent appeal in Appeal Number MA-030034-1. The Municipality issued a decision respecting access to these records, denying access to portions of them on the basis that they were exempt under the discretionary exemptions in sections 7(1), 11 and 12 of the *Act*. The appellant appealed this decision and also indicated his belief that additional records beyond those identified by the Municipality ought to exist. As a result, this office opened the present appeal.

During the mediation stage of the appeal, the Municipality indicated that it was also relying on the mandatory exemptions in sections 10(1) for the majority of the records and 14(1) (invasion of privacy) for portions of Records 34 and 38. No further mediation was possible and the file was moved to the adjudication stage of the process.

I decided to seek the representations of the Municipality and four corporations (the affected parties) whose interests may be affected by the disclosure of the information contained in the records, initially, by providing a Notice of Inquiry to them setting out the facts and issues in the appeal. I received representations from the Municipality and one of the affected parties and shared the non-confidential portions of them with the appellant, along with a Notice of Inquiry. I

did not receive representations from the appellant in response to the Notice. The Municipality did not provide any submissions on the possible application of the discretionary exemption in section 11 to the records. Because section 11 is not a mandatory exemption, I will not consider its possible application in the absence of representations from the Municipality. Because the sole exemption claimed for Record 39 was section 11, I will order that it be disclosed to the appellant.

One of the affected parties indicates that Record 26 is, in fact, not responsive to the request as it relates to certain payments made for an entirely different project from that which is the subject of the request. I have examined this document and agree that because it does not relate to the specified construction project described in the request, it is not responsive to it. I will not, accordingly, consider it further in this decision.

RECORDS:

The records consist of various correspondence, invoices, facsimiles, emails, meeting notes, and memoranda, as well as an Agreement between the provincial Ministry of the Environment and a corporation dating back to 1991. These include the records identified by the Municipality in the course of responding to the order provisions in Order MO-1829-I and are numbered from 1 to 41 in an Index provided to this office and the appellant by the Municipality during mediation.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

In order to determine whether the records contain information that is exempt under the “invasion of privacy” provision in section 14(1) of the *Act*, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,

- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The meaning of “about” the individual

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The Municipality takes the position that the undisclosed portions of Records 34 and 38 contain the home address and telephone numbers of two identifiable individuals and that this information qualifies as their personal information by virtue of section 2(1)(d).

I have reviewed the undisclosed portions of Records 34 and 38 and agree that they contain the personal information of two identifiable individuals.

Does the undisclosed personal information in Records 34 and 38 qualify under the mandatory exemption in section 14(1)?

Where a requester seeks the personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. In the circumstances, it appears that the only exception that could apply is paragraph (f).

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 14(1)(f). If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

The Municipality submits that the disclosure of the personal information contained in Records 34 and 38 would result in an unjustified invasion of the personal privacy of these individuals under section 14(1). The appellant has not made any submissions or raised any considerations under section 14(2) which might favour a finding that disclosure would not, in fact, give rise to an unjustified invasion of personal privacy.

Accordingly, I find that the undisclosed address and telephone numbers in Records 34 and 38 are exempt from disclosure under section 14(1). The disclosure of this personal information would constitute an unjustified invasion of the personal privacy of the two individuals about whom the information relates.

ADVICE OR RECOMMENDATIONS

The Municipality argues that Records 3, 5, 14, 15, 19, 23, 30 and 36, in their entirety, contain information that falls within the ambit of the advice or recommendations exemption in section 7(1) of the *Act*, which reads:

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 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.) and on appeal (Court of Appeal Doc. C42061 and C42071, September 26, 2005)].

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 (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.) and on appeal (Court of Appeal Doc. C42061 and C42071, September 26, 2005)].

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 (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.) and on appeal (Court of Appeal Doc. C42061 and C42071, September 26, 2005)].

I will review each of the records to which the Municipality has applied section 7(1) to determine whether they qualify under that exemption.

Record 3

Record 3 is a three-page letter dated December 19, 1994 addressed to an engineer with the Ontario Clean Water Agency (the OCWA) from one of the affected parties to this appeal, a firm

of consulting engineers. Attached to the letter is a one-page cost estimate and a six-page analysis of various options "For Emergency Power Control and Plant Wide Control". All of these documents relate directly to the Clarkson WPCP Primary Treatment Expansion which is the subject matter of this request and the subsequent appeal.

The Municipality indicates that the record was prepared by "an engineering consultant company retained by the Region of Peel for the Clarkson WPCP Project". It has not, however, provided me with any evidence as to how this document, addressed to an official with the OCWA, arrived in the Municipality's record-holdings. Nor have I been provided with any evidence describing the nature of the relationship between the Municipality, the OCWA and the consulting engineers. In my view, while the record may contain certain recommendations concerning a course of action to be followed respecting the installation of equipment in the plant under construction, any such recommendations were made to the OCWA, not to the Municipality.

In the absence of any evidence from the Municipality as to how the recommended course of action contained in Record 3 related to it or its involvement in the construction project, I am unable to conclude that the exemption in section 7(1) applies.

I find that in order for the record to qualify for exemption under section 7(1), the recommendation contained therein must be addressed to the institution. As a result, I find that the section 7(1) exemption has no application to Record 3.

Record 5

Similarly, Record 5 is a letter dated May 28, 1996 from the consulting engineers to the OCWA responding to an earlier written inquiry respecting "some additional costs incurred phasing out the various project activities". I have not been provided with any evidence to demonstrate that the advice or recommendations were directed to the Municipality or that it formed part of the Municipality's decision-making process. In any event, Record 5 appears to provide a breakdown of additional costs and does not, in any event, appear to contain advice or recommendations.

Record 14

This document is a letter dated September 10, 1999 and is addressed to an engineer employed by the Municipality from the engineering consulting firm. The letter sets out a number of issues requiring clarification in a tender process and includes some suggested courses of action to clarify some of the information in the call for tenders. In my view, portions of Record 14 contain specific advice to the Municipality from its consulting engineers regarding the procedure to govern the tendering of bids. I find that these portions of Record 14 qualify for exemption under section 7(1) as they "suggest a course of action that will ultimately be accepted or rejected by the person being advised", in this case the Municipality's engineer. Specifically, I find that the items numbered 1 through 5 in the letter are exempt from disclosure under section 7(1) and need not be disclosed to the appellant. The remaining portions of Record 14 do not contain "advice or

recommendations” for the purpose of section 7(1) and, as no mandatory exemptions apply to this information, they ought to be disclosed to the appellant.

Record 15

Record 15 consists of a one-page facsimile cover page, a two-page letter dated October 6, 1999 from the consulting engineers to the Municipality’s engineer and a letter dated October 5, 1999 to the Municipality’s engineer from one of the manufacturers of certain equipment required for the subject project. I find that both the October 5th and 6th letters contain specific recommendations from the consulting engineers to the Municipality which it could either act upon or reject. In my view, these portions of Record 15 qualify for exemption under section 7(1). Specifically, I find that the exemption in section 7(1) applies to the final paragraph on page one and the first two paragraphs of page two of the October 6th letter and the final sentence of the first page of the October 5th letter. The remaining portions do not, however, contain any advice or recommendations and cannot, therefore, qualify for exemption under section 7(1).

Record 16

Record 16 is an earlier facsimile dated October 4, 1999 and an earlier version of the October 6th letter contained in Record 15 that is dated October 1, 1999. I find that the same information is contained in both the October 1st and October 4th versions of the letter and that the final paragraph on page one and the first two paragraphs of page two of the October 6th letter qualify for exemption under section 7(1), as was the case with Record 15. The facsimile and the remaining portions of the October 1st letter do not qualify for exemption under section 7(1) and I will order that they be disclosed to the appellant.

Record 19

Record 19 consists of a four-page letter from the consulting engineers to the Municipality’s technical analyst dated February 24, 2000 containing a number of options respecting a portion of the construction project. I find that the record contains advice or recommendations within the meaning of section 7(1) and thereby qualifies for exemption under that section.

Record 23

Record 23 consists of a one-page facsimile to which is attached a nine-page letter dated May 17, 2000 from the consulting engineers to the Municipality’s engineer. The letter outlines the process of evaluation of the two lowest bidders on the project, one of whom is the appellant. I find that the Recommendations section on pages 8 and 9 of the letter contain advice or recommendations on a course of action to be followed by the Municipality and for this reason, that portion of the record is exempt from disclosure under section 7(1). The remaining portions of Record 23 do not contain advice or recommendations and, because no other exemptions have been claimed for them and no mandatory exemptions apply, they should be disclosed to the appellant.

Record 30

Record 30 is a facsimile dated May 29, 2001 to which is attached a two-page letter and a one-page hand-written field inspection report dated April 18, 2001. They were prepared by another firm of consulting engineers for the engineering firm that had been retained by the Municipality and contain this firm's recommendations regarding a particular engineering problem encountered during construction. The final paragraph of page 2 of the April 18, 2001 letter includes a recommended course of action with respect to the project and this information qualifies for exemption under section 7(1).

Record 36

Record 36 is a five-page letter from the engineering consultants to the Municipality dated January 31, 2002 describing in detail the consultants' views on the best method of proceeding with the project in light of certain engineering difficulties. On pages four and five of the record the engineering firm sets out a recommended course of action which qualifies, in my view, for exemption under section 7(1). The remaining portions of this record do not, however, contain information which falls within the ambit of the section 7(1) exemption and should, accordingly, be disclosed to the appellant.

By way of summary, I find that Records 3 and 5, in their entirety, do not contain information that qualifies for exemption under section 7(1). Portions of Records 14, 15, 16, 23, 30 and 36, as described above, qualify for exemption under the advice or recommendations exemption while the remainder does not. I have also found that all of Record 19 qualifies for exemption under section 7(1). Furthermore, I find that none of the exceptions in sections 7(2) or (3) apply to the information found to be exempt under section 7(1).

SOLICITOR-CLIENT PRIVILEGE

The Municipality claims the application of the solicitor-client privilege exemption in section 12 to Records 27, 37, 40 and 41. 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.

Section 12 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to “solicitor-client privilege” at common law. The term “solicitor-client privilege” encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

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.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the “dominant purpose” test as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

To meet the “dominant purpose” test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer’s brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was “prepared by or for counsel employed or retained by an institution for use in giving legal advice.”

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution “in contemplation of or for use in litigation.”

Findings

Record 27 is a handwritten note prepared by staff of the Municipality's Public Works Department in the course of a meeting with its legal counsel. The notes refer to specific communications passing between the solicitor and her clients, as well as the advice provided by counsel. In my view, the record qualifies for exemption under section 12 as it represents a confidential communication between a solicitor and client that relates directly to the seeking and giving of legal advice.

Record 37 is a complex and detailed Schedule of Disputed Payments that was prepared by the Municipality's solicitors for use in litigation with the appellant. The document sets out the details of the appellant's claims and the Municipality's position with respect to each. In my view, Record 37 qualifies for exemption under the statutory litigation privilege aspect of Branch 2 of the section 12 exemption as it represents a document that was prepared by counsel employed by the Municipality for use in litigation.

Records 40 and 41 are handwritten memoranda from the Municipality's Project Manager to its solicitor requesting specific action be taken with respect to a litigation matter. In my view, these records represent part of the "continuum of communications" between the solicitor and his client, the Project Manager, and they qualify for exemption, accordingly, under the solicitor-client communication privilege component of Branch 1 of section 12.

To summarize, I find that Records 27, 37, 40 and 41 are all exempt under section 12.

THIRD PARTY INFORMATION

The Municipality and one of the affected parties claim the application of the mandatory exemption in section 10(1) of the *Act* for the remaining records at issue. Section 10(1) states:

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, if 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; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

General principles

Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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, the institution 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 the institution 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), (c) and/or (d) of section 10(1) will occur.

To meet the third part of the test, the institution 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.)].

Representations of the parties

In support of its contention that the section 10(1) exemption applies to the undisclosed portions of Records 1-13, 17-18, 20-22, 24-25, 28-29, 31-33 and 35, the Municipality submits that:

. . . the contents of the records contain unit pricing which could prejudice significantly the competitive position of the named company. The records were supplied implicitly in confidence as part of a tendering process, remittance of payment or cost evaluation. The disclosure of this information may cause harm to a company and potentially may result in information no longer being supplied in

the future by companies who have contributed in the success of the Region of Peel capital projects.

I also received representations respecting the application of the section 10(1) exemption to Records 3, 5, 14, 15, 16, 19, 23 and 30 from the consulting engineering firm, which I will refer to as the affected party. I found in my discussion of sections 7(1) and 12 that Records 19 and 37 are exempt in their entirety and that portions of Records 14, 15, 16, 23 and 30 are also exempt. I will, accordingly, only address the possible application of section 10(1) to those portions of Records 14, 15, 16, 23 and 30 which I found were not exempt under sections 7(1) or 12; all of Records 3, 5 and 9 and the undisclosed portions of Records 1, 2, 4, 6, 7, 8, 10, 11, 12, 13, 18, 20, 21, 22, 24, 25, 26, 28, 29, 31 (which is the same as Record 33), 32 and 35.

Records 1, 2, 4, 6, 7, 8, 10, 11, 12, 13, 18, 20, 21, 22, 24, 25, 26, 28, 29, 31 (which is the same as Record 33), 32 and 35

Neither the affected party nor the Municipality have provided me with any representations which specifically address the application of the mandatory section 10(1) exemption to the undisclosed information contained in these records. The appellant was provided with access to the vast majority of the information in each of these documents, while access was denied primarily to various unit costs, estimated fees, capital costs, hourly rates, cost estimates and other, similar information.

I have reviewed the undisclosed information in each record and find that it falls within the ambit of the term “commercial information” as that phrase has been defined in previous orders. However, the Municipality and the affected party have failed to provide me with the kind of “detailed and convincing” evidence required to enable me to make a finding that the harms contemplated by section 10(1) could reasonably be expected to result from the disclosure of this information. In particular, I note that the information is now between four and fourteen years old and relates to a construction project which has long since been completed. In my view, the disclosure of this particular information cannot reasonably be expected to give rise to the harms described in section 10(1).

Accordingly, I find that the exemption does not apply to the undisclosed portions of these records, and that they ought to be disclosed to the appellant.

Records 3 and 5

The affected party objects to the disclosure of “how we estimate our fees or the volume of fees”, arguing that such information is confidential. I note that Records 3 and 5 are dated December 20, 1994 and May 28, 1996 respectively. In my view, the fees referred to in these records were the fees being charged by the affected party at that time. In light of the passage of nearly 11 and nine and one-half years, I find that it would be unreasonable to make a finding that the disclosure of the information sought to be protected could give rise to the harms contemplated by the exemption. Specifically, I conclude that I have not been provided with sufficient evidence to

demonstrate that the harms set out in the section 10(1) exemption will flow from the disclosure of this information. Accordingly, I find that it has no application to the information in Records 3 and 5.

Record 9

I have reviewed the contents of Record 9, a letter dated June 10, 1999 from the engineering consultants to the Municipality's engineer, and find that it includes information that qualifies as "commercial information" for the purpose of part one of the test under section 10(1). As the information is contained in a letter to the Municipality, it appears on its fact to have been supplied to it by the affected party. Given the nature of the relationship between the consulting engineers and the Municipality, I am prepared to find that the information was submitted with some implicit expectation that it would be treated confidentially, thereby satisfying the second part of the test under section 10(1).

However, neither the Municipality nor the affected party provided me with any representations concerning the harms which may result from the disclosure of this information. I have reviewed the information contained in the record and it appears to be information that belongs not to a third party but rather to the Municipality, as it concerns certain engineering problems encountered in the construction of the project in question. Accordingly, I find that section 10(1) has no application to Record 9 and that it ought to be disclosed.

Records 14, 15 and 16

In my discussion of section 7(1) above, I found that much of the information contained in these records is exempt from disclosure under that section. In my view, the disclosure of the remaining information in Records 14, 15 and 16 could not reasonably be expected to result in the harms described in section 10(1). Neither the affected party nor the Municipality have provided me with the kind of detailed and convincing evidence required to uphold this exemption for these records.

Record 23

In my discussion of section 7(1) above, I found the "Recommendations" section on pages 8 and 9 of Record 23, a letter dated May 17, 2000 from the affected party to the Municipality's engineer, to be exempt from disclosure under section 7(1). The affected party argues that Record 23 is exempt under section 10(1) because:

This letter provides recommendations to the Region of Peel with respect to the award of a contract. In preparing the letter extensive reference is made to information contained in the 6 bids. This information is not made public as it could affect the business of the bidding companies.

The letter is written with the understanding that the recommendations, which may or may not be acted upon, and the bidding information contained therein is confidential.

In my view, the tender information described in the Table on page 3 of the letter contains commercial information that was provided to the Municipality by the bidders on the project with a reasonably-held expectation that it would be treated confidentially. In addition, I am prepared to accept that the disclosure of this information could reasonably be expected to give rise to significant prejudice to the competitive positions of the bidders, particularly considering the fact that the information may still be current. Accordingly, I find that the Table on page 3 of Record 23 qualifies for exemption under section 10(1). I cannot agree, however, that the remaining information, most of which relates to the appellant and its bid, falls within the ambit of the section 10(1) exemption.

Record 30

As noted above in my discussion of section 7(1), Record 30 is a report prepared by another consulting engineering firm for the affected party consultants respecting a portion of the work to be performed under the contract. I have not been provided with sufficient evidence to enable me to make a finding that this document was supplied to the Municipality with a reasonably-held expectation that it would be treated confidentially. In addition, neither the affected party nor the Municipality have provided me with evidence to support a finding that the disclosure of the remaining information in Record 30 could reasonably be expected to give rise to the harms contemplated by section 10(1). Accordingly, I find that the section 10(1) exemption has no application to those portions of Record 30 which are not exempt under section 7(1).

ORDER:

1. I uphold the Municipality's decision to deny access to:
 - (a) Records 19, 27, 37, 40 and 41, in their entirety; and
 - (b) the undisclosed portions of Records 34, 38 and those portions of Records 14, 15, 16, 23, 30 and 36 described above.

2. I order the Municipality to disclose the remaining records and parts of records to the appellant by providing him with copies by **November 21, 2005, but not before November 16, 2005.**

3. In order to verify compliance with Order Provision 2, I reserve the right to require the Municipality to provide me with copies of the records that are disclosed to the appellant.

Donald Hale
Adjudicator

October 17, 2005