



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-2066**

**Appeal MA-050042-1**

**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 records containing the recommendations of a named consulting company provided to the Municipality regarding "... the validity of the claims put forward by [contractor X and subcontractor Y] for hard rock encountered in the Highway 410 tunnel."

The Municipality located one responsive record and denied access to it pursuant to section 7(1) (advice or recommendations), section 10(1) (third party information), sections 11(c) and (d) (economic and other interests), and section 12 (solicitor-client privilege) of the *Act*.

The requester, now the appellant, appealed the Municipality's decision.

During mediation, the mediator contacted the consulting company that prepared the record (the consultant) as it appeared to have an interest in the disclosure of the information at issue. The consultant advised that it was opposed to the release of the requested information.

Also during mediation, the appellant advised the mediator that he believed that additional records responsive to his request should exist. The Municipality agreed to conduct a further search for records and located an additional letter from the consultant. The Municipality denied access to the additional record pursuant to sections 7(1), 10(1), 11(c) and (d) and 12 of the *Act*.

At the end of the mediation process, the appellant indicated that, although he was satisfied with the Municipality's search efforts, he sought access to both of the responsive records.

As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeal process.

A Notice of Inquiry was sent to the Municipality initially, and it provided representations in response. A Notice of Inquiry was concurrently sent to the consultant, inviting representations on the application of section 10(1). The consultant also provided representations.

A Notice of Inquiry was subsequently sent to the appellant, along with a copy of the complete representations of the Municipality and a copy of the non-confidential portions of the consultant's representations. The appellant provided representations in response.

As the appellant's representations raised issues to which the Municipality and the consultant should be given an opportunity to reply, I sent a copy of the representations of the appellant to both the Municipality and the consultant. Both parties provided additional representations by way of reply.

## RECORDS:

There are two records at issue in this appeal:

- Record 1 is a two-page letter from the consultant to the Municipality dated June 14, 2004
- Record 2 consists of two pages, including a one-page letter from the consultant to the Municipality dated November 23, 2004 and an attached one-page chart.

## DISCUSSION:

### ADVICE TO GOVERNMENT

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 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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations, or
- 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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 563]

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

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order 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.); Order 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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564]

## **Representations**

The Municipality claims that section 7(1) applies to exempt the records at issue as they contain advice and recommendations within the meaning of that section. The Municipality submits:

[T]he documents in question entail advice and recommendations. Not just in a broad sense, but specifically in relation to a claim advanced by a contractor and subcontractor to the [Municipality]; that is litigation, or potential litigation. It is fundamental that such advice be privileged, for all parties, not just municipalities. Without the ability to advise and recommend under confidentially [sic], the public service will be effectively unable to obtain such advice, to proper effect, and unable to negotiate effectively, if their negotiation strategies, background information and advice would be available to the public – and particularly to the party with whom they are negotiating or continuing to do business.

### **What is the specific advice?**

The specific advice is with respect to various scenarios by which settlement of litigation or potential litigation might be achieved, as can be seen on the face of the documents.

**What is the recommended course of action?**

As appears from the documents, the recommendation was that the consultants be instructed to proceed to negotiate a settlement, under various suggested scenarios.

**Was the advice or recommendation communicated to the person being advised?**

Yes. The advice was communicated to the addressee of the correspondence and used, together with legal advice, to inform negotiations with the claimants.

**If the advice or recommendation is not contained in the record, how could disclosure reveal advice or recommendations?**

The advice and recommendations are contained in the record. Virtually every sentence is expressed in terms of advice and recommendations, as in “recommends ... negotiates a settlement ... we have calculated ... we believe [our opinion is] ... in our opinion...” The second page of the first document is entirely advice in the way of calculations and estimations forming the basis of [the consultant’s] advice and recommendations on different scenarios of settlement. The second paragraph of the June 14<sup>th</sup> letter is the heart of the consultant’s opinion, and the last paragraph explicitly sets out their opinion/advice.

**Could the disclosure of the advice or recommendation reasonably be expected to inhibit the free flow of advice or recommendation to the government?**

Absolutely, the disclosure of the advice and recommendations could inhibit the free flow of advice to the government. How could the government negotiate on a level playing field if their advice on the negotiations would be available to the public?

**Was the advice given by an officer or employee of an institution or a consultant retained by the institution?**

Yes, the advice was given by consultants providing construction management services to the [Municipality] on this very major construction.

The appellant argues that the Municipality is misrepresenting the role of the consultant to try to convince this office that the records at issue consist of confidential or privileged information. He submits that the Municipality’s “contract for the subject project is on [a] standard Peel form that incorporates the Ontario Provincial Standards for Roads and Public Works, September 1999 (OPS) into its contract documents.” He submits that in the contract documents, which are based on those standards, the “Contract Administrator is defined as the ‘entity designated by the owner to be the owner’s representative on the project.’” Therefore the appellant argues that in the context of the project the consultant was not acting as a consultant for the Municipality but as the

Contract Administrator. The appellant submits that the Contract Administrator's role is set out in those standards which specify that "the Contract Administrator will not show partiality to either party". Accordingly, the appellant submits that "the consultant is not solely an agent of [the Municipality] but is equally responsible to the contractor as well". The appellant points to section 3.14.03 of the Ontario Provincial Standards which appears under the heading "Claims Procedure" and details the steps that a contractor and Contract Administrator must take in resolving outstanding issues that may arise in the course of the project. Referring to that provision, the appellant submits:

In paragraph .05 on page 14 it states "Within 90 days of receipt of the detailed claim, the Contract Administrator shall advise the Contractor, in writing, of the Contract Administrator's opinion with regard to the validity of the claim".

[The consultant's] opinion of the claim is not to be made solely to [the Municipality] but is to be shared with the contractor. Therefore, it is clearly not confidential or privileged information.

The subject records of [the consultant] in the possession of [the Municipality] should be released to the contractor and should be available to the public on request.

In reply, the Municipality responds that it has not misrepresented the role of the consultant. It submits:

We acknowledge that [the consultant] provided Construction Management Services. By the Contract, [the consultant] was the "Owner's Representative", the [Municipality's] agent, a fiduciary, "to the extent provided in the Contract", which is to say, as set out in the Contract.

These are tripartite contractual arrangements, between the [Municipality]/Owner, [consultant]/Contract Administrator, and [named company]/Contractor. [The appellant], and [the appellant's company] acted as a consultant to [named company], on past projects, but he was not a party to and not involved with these contractual arrangements.

The Contract provides a means by which *the parties* may resolve disputes. It provides for the exchange of information *to each other* on a "*without prejudice*" basis per GC 3.14.04.01, among other things, highlighting the confidential nature of these exchanges. In accordance with paragraph .09 highlighted by [the appellant], the Contract Administrator is an adjudicator of sorts "*in the first instance*". The decision of the Contract Administrator is not binding. In accordance with GC 3.14.04, if the Contractor does not accept the opinion of the Contract Administrator on a claim, the process proceeds to the next level, where the Contract Administrator *enters into negotiations as the Owner's representative – to achieve a negotiated settlement*. At this point, in negotiating on behalf of the Owner/Region, the Contract Administrator is acting as advisory

and agent /fiduciary to the Owner/[Municipality]. It was that process that the documents in question were produced. They constituted advice given, and discussions had in the course of a negotiated settlement, and these are the first order of confidential, privileged communications.

The negotiations between *the parties* resulted in a settlement. The parties to the settlement signed a Release (copy attached, redacted as to settlement terms), which expressly provided that the terms of the settlement would remain confidential, and not to be used in any other litigation. None of the parties to the settlement would be legally permitted to obtain the confidential advice the other received in negotiating the settlement, nor to release or use any information related to the settlement. Neither have they asked.

Disclosure of this information to [the appellant] would constitute a breach of the settlement terms as to confidentiality by the [Municipality], and potentially through [the appellant] indirectly by [named company], where his former client would not be permitted to do so directly.

### **Analysis and finding**

As noted above, in order for information to qualify as “advice or recommendations”, it must suggest a course of action that will ultimately be accepted or rejected by the person being advised.

I have carefully reviewed the records at issue and find that in both cases, they reveal a suggested course of action that qualifies as advice or recommendation. The initial request for information was for the recommendations from the consultant on the validity of claims put forward by a contractor with respect to a specific project. As noted above, Record 1 is a two-page letter from the consultant to the Municipality. Record 1 outlines those claims and the consultant’s advice or recommendations on how the Municipality might respond to the claims. The advice is clearly stated as a recommendation, or suggested course of action, as to how the Municipality should proceed.

Record 2, a one page letter and attached one page chart, was also prepared by the consultant and addressed to the Municipality. The letter, written several months after Record 1, is premised upon the information available to the consultant at that later date. In the second letter, the consultant provides more precise advice to the Municipality on how to respond to the claim including a specific recommendation and a brief justification for that suggested course of action. The chart, which is attached to the letter, provides more precise details about the consultant’s recommendation, including the breakdown of its component parts and how it was reached, as well as additional information to explain why it is the best course of action for the Municipality.

I find that the advice or recommendations put forward by the consultant in Records 1 and 2 are clearly suggested courses of action which the Municipality was in the position to ultimately accept or reject. Given the way in which both records were drafted, in my view, disclosure of any part of them would reveal advice or recommendations. Severance of the records under

section 4(2) is therefore not possible in this circumstance. Accordingly, I find that all of the information contained in Records 1 and 2 falls squarely within the term “advice or recommendations” as contemplated by section 7(1).

Section 7(1) requires that the advice or recommendations be provided by either “an officer or an employee of an institution or a consultant retained by an institution”. Accordingly, it is important for me to determine whether the advice or recommendations was provided by a consultant within the meaning of section 7(1).

The appellant’s submissions focus on his position that the consultant’s role has been misrepresented by the Municipality and the consultant was in fact a “Contract Administrator” obliged not to show partiality to either party to the project.

I have reviewed the contents of the records, the circumstances of this appeal, as well as the representations of the parties. The records themselves demonstrate that the advice or recommendations contained within them were intended specifically for the Municipality and not for any of the other parties to the project. The contents of the records also lead one to the conclusion that the consultant was retained to act in the Municipality’s interest. I have received no convincing evidence to enable me to conclude that that the consultant was not retained by the Municipality and it is not within my jurisdiction to determine whether any of the terms of the contract governing the project related to the requested information have been breached. In my view, it is only within my jurisdiction to determine whether the records at issue are subject to any of the exemptions under the *Act*. Based on my review of the evidence, I am persuaded, on a balance of probabilities, that the consultant was, in fact, a “consultant retained by [the Municipality]” within the meaning of section 7(1).

Accordingly, I find that disclosure of the records at issue in these appeals would reveal advice or recommendations of a consultant retained by the Municipality and that section 7(1) applies to exempt the records from disclosure. As none of the exceptions to the section 7(1) exemption at sections 7(2) and (3) apply, I find that the records at issue are exempt from disclosure under section 7(1).

As I have found that section 7(1) applies to exempt the records from disclosure it is not necessary for me to determine whether or not the exemptions at sections 10(1), 11(c) and/or (d), and 12 have any application in the current appeal.

### **EXERCISE OF DISCRETION**

As indicated above, the section 7(1) exemption is discretionary and permits the Municipality to disclose information, despite the fact that they could withhold it. The Municipality must exercise its discretion. On appeal, this office may determine whether the Municipality erred in doing so [Orders PO-2129-F and MO-1629].

The office may find that the Municipality erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose



- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In any of these situations this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

In its representations the Municipality specifically addresses its exercise of discretion. It submits:

It is submitted that the [Municipality's] exercise of discretion was eminently reasonably exercised for the reasons indicated [in its representations]. The [Municipality] could not effectively conduct its business if confidential advice and recommendations on the settlement of claims against it, could be ordered disclosed, particularly to the opposing party.

The appellant does not specifically address the Municipality's exercise of discretion but submits generally that the information at issue should be disclosed, particularly given his position that the terms of the contract that governs the project provide that the consultant is not solely an agent of the Municipality, but is equally responsible to the contractor.

Despite the Municipality's rather brief representations on their exercise of discretion, taking into account the information contained in the records as well as the Municipality's representations on section 7(1), I find nothing in the manner in which the Municipality exercised their discretion that would warrant an order for them to re-exercise it. The Municipality took the position that section 7(1) applied to exempt the records from disclosure and found that no other relevant considerations weighed against the purpose of that section. I, therefore, find that the Municipality properly exercised their discretion under section 7(1) not to disclose the records to the appellant, in accordance with its obligations under the *Act*.

**ORDER:**

I uphold the decision of the Municipality.

Original signed by: \_\_\_\_\_  
Catherine Corban  
Adjudicator

\_\_\_\_\_ June 30, 2006