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

ORDER MO-2308

Appeal MA07-157

City of Guelph

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The City of Guelph (the City) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> All/Any Peer Reviews done by [a named consulting company] (Air Management Consultants) [r]egarding the composting facility at the Guelph Waste/Recycling facility.

The City identified one five-page record as responsive to the request and issued a decision denying access to the record in its entirety. The City's decision letter states:

> The requested disclosure is denied pursuant to section 7(1)(2) [advice or recommendations] of the *Act* as this record is only a draft and as disclosure would reveal advice or recommendations of a consultant retained by the City of Guelph found in a record that is not an environmental impact statement or similar record or a feasibility or technical study relating to a project. This request is further refused pursuant to section [11(a)] of the *Act* [valuable government information] as any such document belongs to the City of Guelph and contains scientific or technical information and has monetary value or potential monetary value.

The requester, now the appellant, appealed the City's decision to this office. A mediator was appointed to try to resolve the issues between the parties. However, no resolution was possible and this appeal was transferred to the adjudication stage of the appeals process, where it was assigned to me to conduct an inquiry.

Initially, I sent a Notice of Inquiry setting out the facts and issues to the City seeking its representations. Upon receipt of the City's submissions, I noted that the City had raised an additional discretionary exemption to deny access to the record for the first time. Specifically, the City cited section 8(1)(a) (law enforcement) of the *Act* as a basis for withholding the record. I decided at that point to send a Supplementary Notice of Inquiry to the City seeking representations on two new issues: the justification of the late raising of a new discretionary exemption and the possible application of that exemption to the record in the event that I decided to allow the exemption claim. I also sought further clarification from the City on its position regarding the sharing of representations with the appellant.

Following a brief extension granted to the City, I received supplementary representations. It was necessary for me to address the sharing of both sets of the City's representations through a sharing decision.

I then sent a modified Notice of Inquiry, along with copies of the non-confidential representations of the City, to the appellant. The appellant chose not to provide submissions in response.

RECORD:

The sole record at issue in this appeal is a five-page report, dated August 8, 2006, titled "Peer Review Study Summary Report".

DISCUSSION:

PRELIMINARY ISSUE: LATE RAISING OF NEW DISCRETIONARY EXEMPTION

As previously noted, the City's first reference to the law enforcement exemption in section 8(1)(a) as a basis for denying access to the record appeared in its initial representations. This discretionary exemption permits an institution to refuse to disclose a record if the disclosure could reasonably be expected to interfere with a law enforcement matter.

However, it is unnecessary for me to consider the merits of the new exemption claim because I have concluded that the City should not be permitted to rely upon it in the circumstances of this appeal. My reasons for this decision appear below.

General Principles

Institutions are required to claim discretionary exemptions not later than 35 days after the Confirmation of Appeal notice is sent by this office. Section 11.01 of the *IPC Code of Procedure* states:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

Background

In the Supplementary Notice of Inquiry sent to the City to address the issue of the new discretionary exemption claim, I set out the background in the following manner:

> In this appeal, the Notice of Confirmation was sent May 25, 2007 and the deadline for claiming additional discretionary exemptions was June 29, 2007. The Confirmation of Appeal Notice sent to the City of Guelph stated the following (in bold):
>
> > Please be advised that if your institution wishes to claim discretionary exemptions in addition to those set out in your

> decision letter, you are permitted to do so by June 29, 2007. Should your institution wish to claim these exemptions, you will be required to issue a new decision letter to the appellant with a copy to [this office…].

In the Notice, I asked the City to clarify whether or not it had issued a revised decision letter regarding the new claim of section 8(1)(a) as an additional grounds for denying access to the record. I sought an explanation as to why the City was only then claiming the new discretionary exemption and why the City thought the exemption should apply. I also referred the City to several past orders of this office dealing with the late raising of discretionary exemptions by institutions [Orders P-1014, P-1137, PO-2113 and P-658].

Representations

The City confirmed in its representations that it did not send a new decision letter to the appellant advising her of the new discretionary exemption claim. The City explains its late claim as follows:

> The City has raised this ground when it did, as we had not previously directly put our mind to it in the context of this specific record, and as the statement in the IPC's May 25 Notice of Confirmation would not have been considered to be a binding legal requirement but only a policy direction.
>
> The *IPC Code of Procedure* is a guidance document or a policy, and not a statutory instrument. As the Ontario Court of Appeal has stated: "a non-statutory instrument cannot impose mandatory requirements enforceable by sanction" (*Ainsley Financial Corp. v. Ontario Securities Commission* (1995), 21 O.R. (3d) 104 at 109 (C.A.) … There also is no statutory equivalent in the [*Act*] to ss. 142(1)(2) [sic] of the *Environmental Protection Act* which provide that an appeal is limited to the grounds raised in the Notice of Appeal, or in matters of civil litigation wherein a defendant is limited to arguing the matters pleaded. As such, an adjudicator cannot fetter their discretion by refusing to consider any new ground for exemption raised in the July 24 [representations] on the basis of a mandatory time period set out in s. 11.01 of the *IPC Code of Procedure* or the Notice of Confirmation.
>
> If your office feels that there would be merit in issuing a new decision letter at this stage of the adjudication, please advise.

The City takes the position that the appellant was not prejudiced by the late raising of the exemption for the following reasons:

> … there would be no prejudice as the record does not relate to an operating facility, or to current or ongoing effects, but it only relates to what is now a shut

> down and decommissioned facility. In other words, the non-disclosure of the record would not prejudice the appellant, whereas it could prejudice the City by compromising its ability to make full answer and defence in defending the *Environmental Protection Act* charges brought against it.

The City contends that the integrity of the appeals process has not been compromised by the additional discretionary claim. The City submits that the "correct procedure" would be for this ground to proceed and for the appellant to be given the opportunity to make submissions on the exemption for the purposes of this inquiry.

Analysis and Findings

Having considered the City's representations on this issue, it appears that some clarification of this office's appeal procedures would provide a good foundation for my reasons refusing the City's late claim for reliance on section 8(1)(a) of the *Act*.

In seeking to bolster the argument that it should be permitted to rely on a discretionary exemption claim beyond the set time limit, the City refers to *Ainsley Financial Corp., supra,* provisions of the *Environmental Protection Act* and elements of civil litigation practice. As I understand the City's argument, the proffered principles justify the City's failure to comply with this office's procedure regarding new discretionary exemption claims. In my view, these references also suggest a challenge either to the validity or the enforceability of this office's inquiry processes.

While it is not necessary to refute each of the examples offered to justify the City's decision not to follow established inquiry procedures in this matter, I must respond to the argument that the 35 day deadline for additional discretionary exemption claims is not a "binding legal requirement". In conducting an inquiry under the *Act* into the access decision made by an institution, this office exerts a considerable degree of control over procedure and matters of process. This office's statutory inquiry powers are set out in section 41 of the municipal *Act* and section 52 of the provincial *Act* and these powers are expanded upon in the *Code of Procedure* and *Practice Directions*.

In addition, the Commissioner and her delegated decision–makers have an implied power to control the appeals process. This principle has been discussed in many previous orders of this office. In Order 164, former Commissioner Sidney Linden stated:

> … *the Statutory Powers Procedure Act* does not apply to an inquiry under the *Freedom of Information and Protection of Privacy Act, 1987*. Thus, the only statutory procedural guidelines that govern inquiries under the *Freedom of Information and Protection of Privacy Act, 1987* are those which appear in that *Act*. However, while the *Act* does contain certain specific procedural rules, it does not in fact address all of the circumstances which arise in the conduct of inquiries under the *Act*. By necessary implication, in order to develop a set of procedures

> for the conduct of inquiries, I must have the power to control the process. In my view, the authority to order the exchange of representations between the parties is included in the implied power to develop and implement rules and procedures for the parties to an appeal.

In Order P-207, Assistant Commissioner Tom Wright (as he was then) expressed his agreement with Commissioner Linden's comments on the implied power to control inquiry processes, and continued by stating:

> In my view, the Commissioner or his/her delegate has the fundamental power to control the inquiry process. In *Re Cedarvale Tree Services Ltd. and Labourers' Int'l. Union of North America, Local 183*, [1971] 3 O.R. 832 (Ontario Court of Appeal), Mr. Justice Arnup, at page 841, stated as follows:
>
> > [T]he Board [Ontario Labour Relations Board] is a master of its own house not only as to all questions of fact and law falling within the ambit of the jurisdiction conferred upon it by the [*Ontario Labour Relations*] *Act*, but with respect to all questions of procedure when acting within that jurisdiction. In my view, the only rule which should be stated by the Court (if it be a rule at all) is that the Board should, when its jurisdiction is questioned, adopt such procedure as appears to it to be just and convenient in the particular circumstances of the case before it.
>
> In Practice and Procedure before Administrative Tribunals, The Carswell Company Limited, Toronto, 1988, Robert MaCaulay, Q.C. states that the above-noted observation of Mr. Justice Arnup with respect to the Ontario Labour Relations Board is of general application to administrative agencies.

I am in agreement with the comments of the former Commissioner and Assistant Commissioner. Accordingly, in considering the City's new discretionary exemption claim, I am obliged to do so within the framework described by Senior Adjudicator John Higgins in Order MO-2226:

> An institution's right to claim a discretionary exemption is governed by the *Act* and this office's *Code of Procedure* (the *Code*). The head of an institution is required to give notice under section 19 of the *Act* to the requester within thirty days as to whether or not access to a record or a part of it will be given (section 19). As mentioned above, the notice of refusal to give access to a record or part of a record (i.e. the decision letter) shall, among other things, state the specific provision of the *Act* under which access is refused and the reason the provision applies to the record (section 22).
>
> There have been circumstances when the institution decides to raise discretionary exemptions after the decision letter referred to in section 19 has been issued.

> Section 11 of the *Code* permits an institution to claim a new discretionary exemption within 35 days after it has been notified of the appeal. In an appeal before this office, the adjudicator may *decide not to consider a new discretionary exemption* where the claim is made after the 35 day period [emphasis in original].
>
> Section 11 of the *Code* and the provisions of the *Act* that set out the procedures an institution must follow in the event that it wishes to claim the application of discretionary exemptions have been considered by a number of previous orders. The principles established by these orders were recently reviewed in Order PO-2500. In that order, I stated:
>
> > The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113). **The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*** (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.) [emphasis added] …
>
> Order PO-2500 and the other decisions it cites underline the point that the procedures established by this office in relation to the late raising of discretionary exemptions are designed to protect the integrity of the process and the rights of the appellant. …

Section 8 is a discretionary exemption that falls within the scope of section 11 of the *Code*. In this case, the Confirmation of Appeal for this file is dated May 25, 2007. The City was advised in the Confirmation of Appeal that it had until June 29, 2007 to raise any new discretionary exemptions. The section 8 exemption was raised by the City for the first time in its initial representations, received at this office well after the deadline.

Moreover, the City did not send a revised decision letter to the appellant informing her of the new exemption claim. In its representations, the City suggests that it would send a revised decision letter "if [the IPC] feels that there would be merit." The obligation to send a revised decision letter regarding a new discretionary exemption claim is a requirement of the *Code*. The requirement exists because the Legislature has seen fit to give the institution that has custody or control of a record the responsibility to advise the individual seeking access to it of the basis for a denial of access, and the concomitant responsibility to prove that the exemption applies.

In the City's submission, the failure to claim section 8 of the *Act* in relation to the record was a matter of inadvertence. However, I note that there is no evidence that circumstances changed or that new information came to the City's attention which might have warranted the late claim of the law enforcement exemption. The charges under the *Environmental Protection Act* were known to the City throughout. In my view, the City had ample time to review the record, and to confirm the discretionary exemptions on which it wished to rely as the appeal proceeded through the mediation stage of the process.

Moreover, this is not an appeal where there was a large volume of records. There was a single five-page record. While I accept that there may be instances involving numerous records where the 35-day policy should not apply, this is not one of those cases.

Furthermore, in my view, the assertion that "non-disclosure of the record would not prejudice the appellant, whereas it could prejudice the City by compromising its ability to make full answer and defence in defending the *Environmental Protection Act* charge," misses the mark. It is not actual disclosure or non-disclosure with which I am concerned at this point, but rather whether permitting the City to *claim and argue an additional basis* for refusing disclosure of the record would prejudice the appellant or compromise the process.

Although the appellant was provided access to the City's representations in which it made the section 8(1)(a) exemption claim, and was given the opportunity to reply, the introduction of a new exemption at a late stage only gives the appellant the time allowed for providing representations to consider it. Earlier identification of an exemption claim permits an appellant the time to consider and reflect on its application, consult on the issue if desired, and to address the exemption claim in mediation. In my view, there is something inherently unfair to an appellant in discovering the basis for an institution's denial of access through a Notice of Inquiry issued long after the appeal process has been initiated.

In the specific circumstances of this appeal, I find that the integrity of the process would be compromised and the interests of the appellant prejudiced if I were to allow the City to rely on section 8(1)(a) with respect to the record at issue. Accordingly, I will not permit the City to claim this exemption. Given this finding, I am not required to consider the application of section 8(1)(a) in this appeal.

ECONOMIC AND OTHER INTERESTS

The City claims that the discretionary exemption at section 11(a) applies to the record. This section states:

> A head may refuse to disclose a record that contains,
>
> > trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value.

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For section 11(a) to apply, the City must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;
2. belongs to an institution; and
3. has monetary value or potential monetary value.

Representations

The City's submissions on this exemption include reference to the qualifications of the consultant who authored the report:

> The consultant is a recognized expert in odor assessments, olfactometry evaluations, dispersion modeling, and in developing odor capture and control strategies and design of abatement systems. The record contains technical and scientific information relating to chemical analysis, ventilation, corrosion, etc.

The City takes the position that because the peer review was commissioned by the City, the contents of the record are the property of the City.

The City also submits that the information in the record has monetary value or potential monetary value,

> … in that the consultant was paid upon providing the record, and if the record is disclosed that could put the City to extra cost in defence of legal proceedings in rebutting the record. Also, disclosure of the record could reasonably be expected to have a financial impact to the City of Guelph with respect to any future use of the organic waste processing facility. Since information contained in the record is speculative… reliance on the record could have implications for any future use of this facility, and diversion of waste from landfill, and the City's ability to produce a revenue generating end product (compost).

Analysis and Findings

I will begin my analysis by highlighting the purpose of the exemption in section 11(a) of the *Act*. This exemption is intended to protect an institution from harms that may reasonably be expected to flow from the disclosure of its commercial information. Viewed in this light, and for the reasons that follow, I find that the record is not exempt under section 11(a) of the *Act*. Moreover, based on the conclusions I have drawn regarding parts two and three of the test for exemption under this section, it is unnecessary for me to make a finding on whether the record contains the requisite type of information for the purposes of part one.

To satisfy the second requirement for exemption under section 11(a), I must be satisfied that the information "belongs" to the City. There are many past orders of this office that have interpreted the word "belongs" for the purposes of this particular exemption. In Order PO-1763, Senior Adjudicator David Goodis found that the term refers to ownership by the institution, and that the mere right to possess, use or dispose of the information, does not amount to ownership. I agree. In this context, the fact that the City has paid a consultant to prepare the peer review does not mean that the information contained therein "belongs" to it [see also Order M-862].

Moreover, I note that in Order PO-1763, former Senior Adjudicator Goodis also concluded that the information itself must be such that the institution has a proprietary interest in the intellectual property sense, or in a sense that the law would recognize a substantial interest in protecting. Based on my consideration of the City's representations, I find that the City has failed to provide adequate evidence to establish any such proprietary or substantial interest in the record. Accordingly, I find that the record does not "belong" to the City within the meaning ascribed to that term in section 11(a).

In addition, I find that the City has failed to demonstrate that it will be deprived of any monetary value in the information as a result of its disclosure. The City's representations on the third part of the test for exemption under section 11(a) refer to the likelihood of harms of a financial nature flowing from the disclosure of the record. The City argues that these harms relate, in part, to the anticipated costs of "rebutting the record" in unspecified legal proceedings. Furthermore, as I understand the City's argument, disclosure of the information in the record could reasonably be expected to adversely affect the income-generating prospects of the City or its ability to administer its environmental program. I reject these arguments. First and foremost, I find that the City has not persuaded me that the information itself has any monetary value in the requisite sense. Next, apart from the intrinsic quality of the information in the record, the City has not provided sufficient evidence to demonstrate a link between the information and the very serious harms it alleges will result from its disclosure.

For these reasons, I find section 11(a) does not apply to the record.

ADVICE TO GOVERNMENT

The City also claims that the record is exempt under section 7(1) and that none of the exceptions to the exemption found in section 7(2) apply.

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. Furthermore, 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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] 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 [2005] 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

[Orders P-434, 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), supra*].

Sections 7(2) and 7(3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7. Based on the analysis and my findings on section 7(1), however, it will not be necessary to review the exceptions.

Representations

In its representations, the City sets out the information that it believes to constitute the advice or recommendations of the consultant retained to provide a peer review study of the City's organic waste processing facility. This information is drawn directly from the final page of the record, and it appears under a heading titled "Conclusions & Recommendations."

In response to the question "Was the advice or recommendation communicated to the person being advised?" the City answered: "Yes." No additional detail following this answer is provided. However, it appears from notes taken by the mediator during the mediation stage of the appeal that City staff advised this office that the record was not sent to City Council and no action was taken with regard to it.

In its representations regarding its exercise of discretion, the City elaborates further on the use to which the record was put. It must be noted that portions of these representations were not shared with the appellant. However, I have concluded that some reference to their content is necessary for the purposes of this order. Specifically, the City suggests that the record exceeded the scope of its mandate as a technical peer review study. The City's representations also confirm that no further action was taken with respect to what was only a draft version of the peer review.

The City submits that the disclosure of the consultant's findings, advice or recommendations could result in consulting firms being unwilling to conduct engineering studies for the City in the future. In response to the question in the Notice of Inquiry asking if the record contains a coherent body of facts separate and distinct from the advice or recommendations, the City does not provide a "yes" or "no" answer. Instead, the City describes the components of the different sections of the record, namely Background, Approach, Findings, and Conclusions & Recommendations. With respect to the latter two sections of the record, the City submits that the consultant's conclusions are speculative and cannot, therefore, be considered factual material. The City maintains that no severance is possible and that the entire record should not be disclosed.

The remainder of the City's representations consist of brief, point-by-point, statements regarding the non-application of the exceptions contained in section 7(2).

Analysis and Findings

The City has taken the position that the entire record must be withheld because it contains advice or recommendations. In my view, however, the circumstances surrounding this appeal are such that none of the information contained in the record qualifies for protection as advice or recommendations under section 7(1) of the *Act*.

I will first consider the argument that the draft nature of the record brings it within the ambit of section 7(1) of the *Act*. In Order P-872, Inquiry Officer Anita Fineberg considered the claim of the Ministry of Community and Social Services (the Ministry) that a draft report which reviewed the operations of a sexual assault crisis centre was exempt under section 13(1), which is the provincial equivalent of section 7(1):

> Both the Ministry and counsel for the Centre submit that, because the report is a draft, the entire document satisfies the section 13(1) exemption. Counsel states that "... it is specifically noted to be a provisional document, requiring further assessment and input before final, reliable or accurate conclusions could be reached". I do not agree that the exemption applies merely because a document is a draft. In my view, the determination of the application of the exemption depends on whether it contains a suggested course of action made within the deliberative processes of government. This approach is consistent with the purpose of the *Act* set out in section 1(a)(ii) that necessary exemptions from the right of access should be limited and specific.

Similarly, in Order PO-1690, Adjudicator Holly Big Canoe considered whether a draft environmental report could be considered exempt under section 13(1). She stated:

> A draft document is not, simply by its nature, advice or recommendations [Order P-434]. In order to qualify for exemption under section 13, the record must recommend a suggested course of action that will ultimately be accepted or rejected during the deliberative process of government policy-making and decision-making. Although I am satisfied that the final version of this report is intended to be used during the deliberative process, it simply does not contain advice or recommendations, nor does it reveal advice or recommendations by inference. Accordingly, I find that section 13(1) does not apply.

I agree with the reasoning in these orders, and I will follow the same approach to the record in the present appeal.

Based on my review of the information in the record, I find that it mainly consists of background, factual and evaluative material which does not relate to a suggested course of

action. In the first two sections, "Background" and "Approach" (pages 1 - 3), the consultant reviews the history of the odour problem at the facility, conveys his understanding of the scope of the peer review and describes the method by which the review is to be conducted, including the sourcing of the information. I find that this information does not qualify as advice or recommendations for the purposes of section 7(1).

The information contained under the heading "Findings" (pages 3-5) relates to the solution proposed by another consultant to combat the odour problem at the facility. In my view, this section is purely evaluative in nature. Based on my reading of the information, taken with the City's representations, I am not persuaded that it is to be construed as offering advice to the City in making its decision. Rather, the consultant's outline of the merits and deficiencies of the other consultant's proposed solution, and the alternatives available, appears instead to comprise an effort to draw matters of potential relevance to the City's attention. Accordingly, I find that the consultant's comments in this section about the other consultant's work and proposed options does not constitute "advice" or "recommendations" in the sense contemplated by section 7(1).

I acknowledge that the final section of the record is titled "Conclusions and Recommendations" (page 5). On its face, it might seem that this heading and the following four point list would be sufficient to satisfy the requirements of section 7(1). However, in my view, this portion, consisting of three conclusions and a suggested approach, does not qualify in the circumstances of this appeal, for the following reasons.

First, I note that previous orders of this office have found that the mere use of the word "recommendations" is not determinative of the issue of whether or not the information that follows is shielded from exemption [see, for example, Order P-442]. Moreover, past orders have also emphasized that beyond matters of format, and word choice in headings, it is the content of a record said to be subject to section 7(1) that must be assessed in light of the context in which the record was created and communicated to the decision-maker (see Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines), supra*).

Implicit in the City's decision to claim section 7(1), and in its representations regarding the exemption, is that the record formed part of a deliberative process. However, on my review, it is not clear that the record itself was ever used in the City's deliberative processes. Indeed, the representations provided by the City are not sufficient to establish a connection between the record and any City Council deliberations on the organic waste processing facility. There is no evidence that what the City's claims is the consultant's advice and recommendations in the final section of the record was ever presented to the City's decision-making body, that is, City Council. I also note that the City did not, by its own account, either pursue a finalized version of the draft peer review or make any use of it.

Furthermore, taking a purposive approach to this exemption demands consideration of whether disclosure of the information at issue could *reasonably* be expected to hinder the provision of expert or professional assistance within the deliberative process (Orders PO-2028 and 94). Based on the City's representations, and the content of the "Conclusions & Recommendations" section,

I find that disclosing this information would not, as former Commissioner Linden established in Order 94, interfere with "the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making", or inhibit the free and frank exchange of views. Implicit in this finding is the rejection of the City's submission that disclosure of the record could reasonably be expected to result in engineering consulting firms no longer providing professional assistance to the City.

For all of these reasons, I find that none of the portions of the record qualify for exemption under section 7(1) of the *Act*, and I will order that it be disclosed in its entirety to the appellant.

ORDER:

1. I order the City to disclose the record to the appellant by sending her a copy of the record no later than **June 13, 2008**.

2. In order to verify compliance with Order Provision 1, I reserve the right to require the City to provide me with a copy of the record disclosed to the appellant.

Original signed by: May 23, 2008
Daphne Loukidelis
Adjudicator