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

ORDER MO-2002

Appeal MA-030258-3

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 the following:

> Search: to perform a software search of the Region's email accounts, both past and present, including deleted and archived directories and file areas for all email containing the text [the requester's last name].
>
> Records #1: to provide the list of emails generated by the above search. The list is to be generated to identifying the sender, received, copied parties and (sic) well as the date and subject of each email. I would like this list to be exported as a digital file and emailed to [the requester's email address] or delivered on magnetic media, CD or Floppy disk.
>
> Records #2: the emails themselves are requested as records exported to magnetic media, CD or floppy disks.

The requester asked that the fee, if one is charged, be calculated on the two parts of the request separately. The Municipality issued a decision in which it took the position that the request was frivolous or vexatious under section 4(1)(b) of the *Act*.

The requester, now the appellant, appealed that decision, which was disposed of in Order MO-1841 where another related request involving the same parties was found to be frivolous or vexatious. As a result, the appellant's ability to make use of the access provisions of the *Act* was limited to one transaction at a time for a period of one year.

Order MO-1841 also required the Municipality to issue a decision regarding the present appeal. The Municipality issued a new decision, reiterating its position that the request was frivolous or vexatious in accordance with section 4(1)(b). The appellant again appealed this decision, and MA-030258-2 was opened. This appeal was resolved by Order MO-1894, in which the Registrar ordered the Municipality to issue a decision letter to the appellant regarding access to the records.

The Municipality issued a decision, as ordered and the appellant appealed that decision. The parties subsequently entered into discussions to reframe the request, which was amended to read:

> A software email search for the text "[the appellant's last name]" of the computers used by the individuals holding the following positions at the Region of Peel:
>
> 1. Director, Water & Wastewater Treatment
> 2. Manager, Capital Works
> 3. Commissioner, Public Works

4. Commissioner of Corporate Services and Regional Solicitor; and
5. Director, Engineering and Construction.

The Municipality then issued a further decision in response to this reframed request. The decision consisted of a fee estimate in the amount of $ 550, representing $ 10 for one CD, $ 300 for search time, and $ 240 for preparation time. The Municipality also indicated that some or all of the exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 10(1) (third party information), 11(valuable government information), 12 (solicitor-client privilege) and 14(1) (invasion of privacy) would apply to the records. The appellant submitted a request for the Municipality to waive the fee, but this was denied.

The appellant appealed the Municipality's decision with respect to the quantum of the fee and denial of fee waiver. This office then opened the current file, Appeal Number MA-030258-3. During the mediation stage of the appeal, the Municipality advised the appellant and the Commissioner's office that the decision on fees was a final decision, not an interim one. In addition, the appellant confirmed that he intended to appeal the application of the exemptions claimed for the responsive records, as well as the fee and denial of fee waiver. The appellant also advised that he was seeking access to the electronic versions of the records, in addition to the paper copies that were provided to this office during mediation. The matter was then moved to the adjudication stage of the process.

Because the records appear to contain the personal information of the appellant, I also sought the representations of the parties on the possible application of the discretionary exemption in section 38(a) of the *Act* to them. I initially provided a Notice of Inquiry setting out the facts and issues in the appeal to the Municipality, which provided representations in response. The Municipality withdrew its reliance on the mandatory exemption in section 10(1) at this stage with respect to Records 104, 105 and 106. I provided the appellant with the complete representations of the Municipality, along with a Notice of Inquiry but did not receive any submissions in response.

The Municipality has provided a number of different records which have been inadvertently incorrectly numbered. I have been provided with records numbered up to 138 and have addressed them in my decision below. I also received indices for different sets of records numbered 130 to 167, 131 to 142 and 132 to 133. In order to avoid confusion between these groups of records, I will refer to the first group of records as Records 1 to 138, the second group of records as Records 130B to 167B, the third group of records as Records 131C to 142C and the fourth group as Records 132D and 133D.

RECORDS:

The records at issue consist of the printed versions of some 200 emails. In addition, the email records have also been provided to this office in an electronic version in the "Outlook" format. The appellant indicates that he is also seeking access to this version of the records.

DISCUSSION:

WAS THE FEE CALCULATED IN ACCORDANCE WITH THE *ACT*?

General principles

Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

More specific provisions regarding fees are found in section 6 of Regulation 823. This section states:

> The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For floppy disks, $10 for each disk.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

Representations of the Municipality and my findings respecting the fee

As noted above, the appellant did not respond to the Notice of Inquiry provided to him.

In the present case, the Municipality indicates that it calculated the amount of the fee "based on the actual work completed", as reflected in its decision letters of January 31, 2005 and March 9, 2005 which set out in detail the fees charged for conducting a search of the electronic record-holdings of the five identified individuals. In the latter correspondence to the appellant, the Municipality indicates that it has calculated the fee as $550, consisting of $10 for the cost of a CD, $300 for search time (5 hours at $60 per hour) and $240 for preparation time (4 hours at $60 per hour).

The Municipality provided me with detailed representations describing the manner in which the search for responsive records was conducted by its Information Technology Division using the search capabilities in its server and the actual computers used by each of the five identified individuals. The Municipality has charged a fee for one hour of search time for each of the five computers that were searched. In my view, based on the representations of the Municipality, this is a reasonable cost for conducting searches for those records sought by the appellant. Accordingly, I uphold the fee of $300 for search time.

The Municipality indicates that it is prepared to allow the appellant access to all of the records, though some of them contain information that requires severing. For those records which cannot be disclosed in their entirety electronically, it proposes to deny access completely as it cannot practically sever an electronic record. However, the Municipality agrees to disclose severed versions of the paper copies of these same records, removing from the paper version those portions of the records that contain information that is subject to one of the exemptions in the *Act*. In order for it to do so, it will require time to prepare the records for disclosure. It claims that it will require four hours to do so, at a cost of $60 per hour, for a total of $240. This amount appears to have been calculated on the basis of paragraph 5 of section 6 of Regulation 823 as both the paper copies and the electronic versions of the records were produced from a machine-readable format.

In my view, the Municipality cannot charge for the cost of preparing the records in a paper format at the rate of $60 per hour as provided for in paragraph 5 of section 6. The records are not in a machine-readable format while undergoing preparation, but rather are in paper form. Accordingly, in my view, the correct fee must be calculated under paragraph 4, which provides for a fee of $30 per hour. I uphold the Municipality's fee for the preparation of the records for disclosure of $120, calculated at 4 hours at $30 per hour.

I also uphold the Municipality's decision to charge a fee of $10 for a CD. In conclusion, I uphold the Municipality's decision to charge a fee of $430.

FEE WAIVER

Again, it must be noted that the appellant has not provided this office with any submissions in support of his appeal of the Municipality's decision not to grant him a fee waiver. However, in an email to the Municipality dated March 9, 2005, the appellant set out lengthy reasons supporting his request for a fee waiver. I will refer to these submissions in my discussion below.

General principles

Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

> 45. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering:
>
> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed by the regulations.
>
> 8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> 1. Whether the person requesting access to the record is given access to it.
>
> 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in

part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F]. The institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

Representations of the parties

The appellant states that he ought to receive a fee waiver for the following reasons:

- the information he is seeking will form part of submissions he intends to make to the Municipality's Council "that can allow for better governing of our Region". He denies any personal interest in the information.
- he has expended enormous time and money pursuing this and other information in order to make submissions to Council and, in doing so, he is incurring a financial hardship.
- there is a benefit to public health and safety in the dissemination of these types of records "because the contents can help deliver water treatment upgrade services more efficiently, in less time and more competently".
- the amount of the fee is excessive to obtain 38 pages of records (in fact there are several hundred responsive records)

The Municipality points out that the appellant has not provided any basis for his statement that he is incurring a financial hardship by pursuing the records and having to pay a fee for them. It also submits that the actual cost of processing the request was significantly higher than that reflected in the fee charged because it required the involvement not only of the FOI Coordinator but also two representatives of the Municipality's Information Technology Division, the five individuals whose computers were searched and their respective Administrative Assistants. The Municipality notes that it is unable to recoup all of these costs under the fee provisions of the *Act*.

The Municipality refers to a related decision involving these same parties and similar records in Order MO-1809 in which former Assistant Commissioner Tom Mitchinson rejected the appellant's contention that the criteria for finding a public health or safety consideration was present. He stated:

- the subject matter of the records provided to the appellant do not relate to a public health or safety issue;

- their dissemination would not yield a public benefit by disclosing a public health or safety issue or contribute meaningfully to the development of understanding of an important public health or safety issue; and

The Municipality also points out that it assisted the appellant in substantially reducing an original fee of some $156,000 through encouraging him to narrow the focus of his request to include the record-holdings of only five individuals, rather than all of its employees.

Findings with respect to fee waiver

I agree with the findings of the former Assistant Commissioner in Order MO-1809 and find that they have equal application to the records at issue in this appeal. As a result, I find that the benefit to health and safety consideration favouring the granting of a fee waiver has no application in the current appeal.

I also agree with the Municipality's arguments that the appellant has failed to provide sufficient evidence of financial hardship to justify the granting of a fee waiver. Generally, a requester should provide details regarding his or her financial situation, including information about income, expenses, assets and liabilities [Orders M-914, P-591, P-700, P-1142, P-1365, P-1393]. In the present appeal, the appellant has not done so and I find that in the absence of such information, I am unable to give this consideration any weight whatsoever.

I also reject the appellant's contention that he intends to make public the information which he obtains as a result of this request and that he has no personal interest in the subject matter of the records. On the contrary, the appellant has been involved in extremely contentious litigation with the Municipality for a number of years over the subject matter of these records. His interest in their contents is of great personal interest to the appellant and for him to contend otherwise is not credible.

Based on the submissions of the parties, I find that the Municipality's decision not to grant the appellant a fee waiver was reasonable and I uphold that decision.

PERSONAL INFORMATION/INVASION OF PRIVACY

The Municipality submits that a portion of Record 123, a series of emails, contains information that qualifies as "personal information" within the meaning of section 2(1) of the *Act*. It argues that because the address, telephone number, email address and name of an individual appear on page 2 of this document, it is exempt from disclosure under section 14(1) of the *Act*.

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].

I have reviewed the information contained in this record and, particularly the context surrounding the provision of the information to the Municipality. In this case, the individual has contacted the Municipality and is proffering his professional services to it. In my view, the inclusion of his name, address, telephone number and email address was intended to make it possible for the Municipality to make use of his professional services. I find that this information relates to the individual in his professional capacity only, and does not relate to him

in a personal way. In addition, I find that the information does not reveal anything personal about the named individual.

Accordingly, I find that the information in Record 123 does not constitute "personal information" for the purposes of section 2(1). As only information that qualifies as "personal information" can be subject to the exemption in section 14(1), I find that it is not exempt under that section.

Similarly, although the appellant is referred to in many of the records, I find that they do not contain his personal information. Rather, the information that refers to the appellant relates to him only in his capacity as the owner of a company and lacks a personal element that would bring the information into the personal realm.

CLOSED MEETING

Section 6(1)(b) reads:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

For this exemption to apply, the Municipality must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

The Municipality has applied the discretionary exemption in section 6(1)(b) to a portion of Record 74. It submits that this record "contains the substance of a deliberation between the Regional Council and selected staff" and argues that the exemption can be applied because the in camera meeting was held pursuant to section 239(2)(e) of the *Municipal Act* to discuss litigation or potential litigation.

Part one of the test outlined above requires that the Municipality establish that a meeting of one of the bodies listed in the section took place. In the present case, the tone of the exchange of views in Record 74 indicates that the individuals writing the emails are simply canvassing the

idea of presenting an issue to the Regional Council in camera. The Municipality has not provided me with any evidence to demonstrate that such an in camera meeting ever took place. Accordingly, I find that section 6(1)(b) cannot apply to Record 74 as the first part of the test under that exemption has not been satisfied.

ADVICE OR RECOMMENDATIONS

The Municipality has claimed the application of section 7(1) of the *Act* to Records 3, 4, 8, 25, 49, 52 and 129. Section 7(1) states:

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

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

Advice 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

"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.); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.)].

Records 3 (which is entirely duplicated in Record 129) and 4 represent a series of email communications passing between various staff at the Municipality containing recommended courses of action to address certain construction deficiencies in a water works project undertaken by the appellant's construction company. I find that these records contain a suggested course of action given by staff of the Municipality or its consultants to more senior staff with the Municipality and that these communications consist of a recommended course of action to be taken in addressing some of the problems identified. Records 3 and 4 qualify for exemption under section 7(1).

Record 8 is an email from the Municipality's Project Manager outlining a recommended course of action to its engineering staff. I find that section 7(1) applies to the information contained in this record as well.

Record 25 is an email received by the Municipality's engineers from its engineering consultant in which the consultant provided his professional opinion on a particular engineering option for the installation of a piece of equipment. I find that this record contains a number of recommended courses of action from the consulting engineer, as well as the Municipality's own Project Manager to its engineering staff and that this record qualifies for exemption under section 7(1).

Record 49 is an email confirming an agreement between the Ontario Clean Water Agency (the OCWA) and the Municipality regarding the correction of certain deficiencies in the work performed by the appellant's company. I cannot agree that this document represents a recommended course of action from an officer, employee or consultant retained by the Municipality. In fact, this document was prepared by an employee of the Municipality for the OCWA. It does not contain a recommended course of action for the Municipality to follow. Accordingly, I find that it is not exempt under section 7(1). As no other exemptions have been claimed and none of the mandatory exemptions in the *Act* apply to this document, I will order that it be disclosed to the appellant.

Record 52 contains a set of recommendations received by the Municipality's engineering staff from its consulting engineers with respect to certain issues relating to the construction project. I find that this document is exempt from disclosure under section 7(1).

I have reviewed each of the mandatory exceptions to the section 7(1) exemption that are referred to in sections 7(2) and (3) and find that none of them are applicable to the exempt information in Records 3, 4, 8, 25, 52 and 129.

By way of summary, I find that Records 3, 4, 8, 25, 52 and 129 qualify for exemption under section 7(1) while Record 49 does not.

SOLICITOR-CLIENT PRIVILEGE

The Municipality has applied the solicitor-client privilege exemption in section 12 to the majority of the records at issue in this appeal. It states that these records represent communications between its in-house solicitor and other staff with respect to the giving or obtaining of legal advice in the context of this particular construction project and its aftermath. It also states that litigation between the Municipality and the appellant's company was both threatened and existing at the time of the creation of these records. Accordingly, the Municipality argues that the records are exempt under both Branches of the section 12 exemption.

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. 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." 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

The records which the Municipality has claimed application of the section 12 exemption represent communications passing between the Municipality's in-house counsel and various engineering project management staff employed with the Municipality at the time of the identified water project. It is submitted by the Municipality that it became obvious by January 2002 that litigation between it, the appellant's company and various sub-contractors would be required to resolve at least some of the disputes that had arisen in the course of this project. There followed a lengthy series of email communications on a near-daily basis between Municipal staff and its consultants on the one hand, and its counsel on the other. The Municipality indicates that involvement of legal counsel was begun at this stage in order to ensure that its legal rights were properly protected, as the project had clearly encountered some serious problems, particularly with the appellant's company.

I have reviewed each of the records for which the Municipality has claimed the section 12 exemption and find as follows:

- Records 6, 10, 11, 14, 15, 18, 22, 23, 24, 30, 31, 32, 36, 37, 40, 41, 42, 43, 44, 45, 46, 47, 51, 56, 58, 59, 60, 63, 64, 65, 67, 68, 69, 70, 75, 76, 77, 78, 79, 80, 81, the first two pages of Record 84, 88, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 125, 127, 128, 131, 132, 133, 134, 136, 137, 138, 131B, 132B, 134B, 137B, 138B, 139B, 140B, 146B, 147B, 148B, 149B, 150B, 151B, 152B, 153B, 154B, 157B, 158B, 131C, 132C, 133C, 137C, 138C, 139C, 140C, 141C, 142C, 132D and 133D represent confidential communications about legal matters passing between a solicitor and client, in this case various officials with the Municipality. In my view, these records are exempt under the solicitor-client communication aspect of Branch 1 of section 12.

- Record 33 consists of a series of emails passing between the Municipality's Engineer and Project Manager and includes a letter and proposed Minutes of Settlement that were forwarded by the Municipality's Counsel to the appellant's solicitor. In my view, any privilege which may have existed this document was waived when it was shared with opposing counsel. Accordingly, I find that Record 33 is not exempt under section 12. As no other exemptions have been claimed and none apply, I will order that it be disclosed to the appellant.

- Records 54 and 55, as well as Record 135 are a series of emails passing between two Project Managers employed by the Municipality, to which are attached a number of letters, several of which were addressed to the appellant. In my view, this correspondence does not include information that qualifies for exemption

under section 12. I will address the application of section 11 to these records below.

- Record 84 consists of a two-page email communication from the Municipality's Project Manager to its Counsel, as well as a report to the Municipal Council from its Commissioner of Public Works. I cannot agree with the contention by the Municipality that the email portion of Record 84 contains information that qualifies for exemption under section 12. No other exemptions have been claimed for this record. As a result, I will order that this information be disclosed.

- Records 85, 86 and 87 are emails setting out the response from the Municipality's Freedom of Information Co-ordinator to a request and subsequent appeal by the appellant pursuant to the *Act*. I have examined these records and find that none of them contain information that qualifies for exemption under section 12. As no other exemptions have been applied to these records, I will order that they be disclosed to the appellant.

ECONOMIC INTERESTS OF THE MUNICIPALITY

It appears from its representations that the Municipality has claimed the application of the discretionary exemptions in sections 11(a), (c), (d) and (e) to Records 12, 20, 21, 34, 35, 48, 50, 53, 57, 71, 72, 73, 82, 83, 91, 102, 104, 122, 123, 124, 126, 130 and 134C. Sections 11(a), (c), (d) and (e) state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

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 sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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.)].

In support of its position, the Municipality states:

> The basis for the exemption is that the record contains valuable government information in the nature of financial, commercial and technical information that belongs to the Region of Peel. The subject matter of communications concerning the appellant is generally in relation to contract negotiations over disputed rights and obligations. Effective negotiations require that the Region have confidentiality in internal communications. The disclosure of this information could reasonably be expected to prejudice the economic interests of the Region of Peel in their contractual interests.

I have reviewed the contents of each of the records to which the Municipality has applied the section 11 exemptions. In my discussion above, I found that many of these records are exempt under sections 7(1) or 12. Accordingly, I will not consider whether they also qualify under section 11. My decision respecting the application of section 11 is limited, therefore, to Records 12, 20, 21, 34, 35, 48, 50, 53, 54, 55, 57, 71, 72, 73, 82, 83, 91, 102, 104, 122, 123 and 124.

Based on my review of the contents of these records and the somewhat limited representations of the Municipality on this issue, I find that the section 11 exemptions do not apply in the circumstances of this appeal. The representations of the Municipality do not provide the kind of "detailed and convincing" evidence required to establish the application of these exemptions to the records. In my view, the Municipality has failed to establish a reasonable expectation of harm resulting from the disclosure of these particular records to the appellant. Because the harms resulting from disclosure are referred to in the Municipality's representations in an oblique way which lacks detail or specificity, I am unable to make a finding that the disclosure of these records could reasonably be expected to result in the harms contemplated by section 11. Accordingly, I find that section 11 has no application to the records remaining at issue in this appeal. As no other exemptions have been found to apply to them, I will order that they be disclosed to the appellant.

ORDER:

1. I uphold the Municipality's decision to charge a fee of $430 and to deny the appellant a fee waiver under section 45(4) of the *Act*.

2. I uphold the Municipality's decision to deny access to the following records:

   - Records 3, 4, 8, 25, 52 and 129, which are exempt under section 7(1);

   - Records 6, 10, 11, 14, 15, 18, 22, 23, 24, 30, 31, 32, 36, 37, 40, 41, 42, 43, 44, 45, 46, 47, 51, 56, 58, 59, 60, 63, 64, 65, 67, 68, 69, 70, 75, 76, 77, 78, 79, 80, 81, the first two pages of Record 84, 88, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 125, 127, 128, 131, 132, 133, 134, 136, 137, 138, 131B, 132B, 134B, 137B, 138B, 139B, 140B, 146B, 147B, 148B, 149B, 150B, 151B, 152B, 153B, 154B, 157B, 158B, 131C, 132C, 133C, 137C, 138C, 139C, 140C, 141C, 142C, 132D and 133D, which are exempt under section 12.

3. I do not uphold the Municipality's decision to deny access to the remaining records and order it to disclose them to the appellant within 30 days of the payment of the fee described in Provision 1.

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

Original Signed by: December 8, 2005
Donald Hale
Adjudicator