

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-4199

Appeals MA19-00513 and MA19-00514

The Regional Municipality of Durham

May 17, 2022

Summary: The appellant made two access requests under the *Municipal Freedom of Information and Protection of Privacy Act* to the Regional Municipality of Durham (the region) for records about environmental testing at a waste management facility. The region located responsive records and granted access to them, other than one email chain, which it denied access to pursuant to the discretionary advice or recommendations exemption in section 7(1). The appellant appealed the region's decisions on the appellant's two requests on the application of this exemption to the one record and also claimed that additional responsive records exist.

In this order, the adjudicator does not uphold the application of the section 7(1) exemption and orders the region to disclose the email chain at issue. She also upholds the region's search for responsive records in part, but orders it to conduct another search for responsive records in the record holdings of four specified individuals.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1), and 17.

OVERVIEW:

[1] The appellant sought access to records related to environmental testing at a waste management facility (the facility), which is an incinerator site, owned by the Regional Municipalities of Durham and York. This facility produces energy from the combustion of garbage.

[2] Specifically, the appellant submitted two access requests to the Regional Municipality of Durham (Durham or the region) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The first request (Appeal MA19-00513) was for the following:

I request the lab analysis reports showing the sampling results, from the AMESA [the Adsorption Method for Sampling Dioxins and Furans] cartridge samples collected in both boilers, for all sampling periods from start up to April 30, 2019.

I request all correspondence around the AMESA sampling system and results, between the Owners (i.e. – owners Durham and York Regions) and operator - [company operating the facility (the third party)] – with [named environmental consultant] and any other consultant/expert contacted by the Regions/[the third party]] around the AMESA Long Term Sampling System and/or results, including but not limited to the AMESA manufacturer, including any European regulators/experts, and with the Ministry of the Environment – the MOECC [Ministry of the Environment and Climate Change] (now MECP [Ministry of the Environment, Conservation and Parks]), from installation/implementation of the AMESA sampling system to April 30, 2019.

[3] The second request (Appeal MA19-00514) was for the following:

All AMESA Long Term Sampling System entire work plans from start-up to 2019 inclusive and any correspondence between the Owners (i.e. Regions of Durham and York and/or [the third party]) and the Ministry of the Environment (formerly MOECC and currently MECP) related to those work plans.

The presentation and/or submission and/or handout given by [the environmental consultant] and/or Works Department staff regarding the AMESA Long Term Sampling System referenced as being approximately four pages at or around the December 22, 2015 closed Regional Council meeting.

[4] The appellant attached a November 9, 2016 Interoffice Memorandum to her second request from the region's Commissioner of Corporate Services to the Members of the Durham Regional Council. She stated that this "confirmed the existence of the requested document [the four-page document]."

[5] The region responded to the appellant, advising that since the disclosure of the records responsive to her requests may affect the interests of third parties, the region would notify the third parties pursuant to section 21 of the *Act*.

[6] Following its receipt and consideration of the third parties' responses, the region

issued two separate decisions granting partial access to the records responsive to the appellant's two requests. For the decision responding to the first request, the region advised that access to the withheld information was denied pursuant to sections 7(1) (advice or recommendations), 10(1) (third party information) and 12 (solicitor-client privilege) of the *Act*. For the decision responding to the second request, the region advised that access to the withheld information was denied pursuant to section 10(1) of the *Act*.

[7] The appellant appealed the region's decisions to the Information and Privacy Commissioner of Ontario (the IPC). Appeal MA19-00513 was opened to address the region's decision with respect to the appellant's first request, and Appeal MA19-00514 was opened to address the region's decision with respect to the appellant's second request. A mediator was assigned to attempt to achieve a resolution of these appeals with the parties.

[8] During the mediation stage of the appeal process, the region issued a revised decision for the second request granting full access to the information withheld under section 10(1), therefore, this exemption was no longer at issue.

[9] The appellant advised the mediator that she believed further records existed that are responsive to both of her requests. The appellant provided the mediator with details about the additional records that she believed existed.

[10] The mediator conveyed that information to the region and requested that it conduct a further search for responsive records. The region conducted a further search and subsequently advised the appellant by letter that it had located no further responsive records. The region also provided the appellant with a description of its search process.

[11] The appellant confirmed receipt of the region's response. Regarding Appeal MA19-00513, the appellant advised the mediator that she wished to pursue access to one record, an email chain, which had been withheld under section 7(1) of the *Act*. Therefore, the information withheld under the remaining exemptions in sections 10(1) and 12 is no longer at issue.

[12] The appellant also advised that she continues to believe that further records exist that are responsive to both of her requests. Accordingly, reasonable search is at issue in both Appeals MA19-00513 and MA19-00514.

[13] As no further mediation was possible, both files moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. Given the overlapping facts and issues, the adjudicator formerly assigned to this appeal decided to conduct a joint inquiry into Appeals MA19-00513 and MA19-00514. She invited representations from the region and the appellant, which were shared between them in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[14] The appeal was then transferred to me to conclude the inquiry.¹

[15] In this order, I do not uphold the application of the section 7(1) exemption and I order the region to disclose the email chain at issue. I also order the region to conduct a search of the record holdings of the region's former Works Commissioner, the retired Chief Administrative Officer, the late Regional Chairman, and the current Commissioner of Works. I find that the remainder of the region's search for responsive records is reasonable and I uphold it.

RECORD:

[16] At issue is an email in record 9 in Appeal MA19-00513, which is an email between the environmental consultant and the external counsel that was forwarded to the region.

ISSUES:

- A. Did the region conduct a reasonable search for records responsive to both of the appellant's requests?
- B. Does the discretionary advice or recommendations exemption at section 7(1) apply to the record at issue in Appeal MA19-00513?

DISCUSSION

Issue A: Did the region conduct a reasonable search for records responsive to both of the appellant's requests?

[17] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.² If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[18] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.³ To

¹ Based on my review the complete file material for both appeals, including the representations received from the region and the appellant, I concluded that I did not need any further information before rendering a decision.

² Orders P-85, P-221 and PO-1954-I.

³ Orders P-624 and PO-2559.

be responsive, a record must be "reasonably related" to the request.⁴

[19] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁵

[20] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁶

[21] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁷

Representations

[22] The appellant sought access to records related to environmental testing at a waste management facility, which is an incinerator site, owned by the Regional Municipalities of Durham and York. The appellant believes that additional responsive records exist.

[23] The region was asked to provide details of the searches it undertook. In support, it was asked to provide a written summary of all steps taken in response to both of the appellant's requests. In particular, the region was asked to address the following questions in its representations:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
 - a. choose to respond literally to the request?
 - b. choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

⁴ Order PO-2554.

⁵ Orders M-909, PO-2469 and PO-2592.

⁶ Order MO-2185.

⁷ Order MO-2246.

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[24] The appellant was invited to respond to the institution's position on this issue and to explain why she believed that additional records responsive to her requests exist, which have not yet been located by the region.

[25] The region provided an affidavit from its Freedom of Information Coordinator (the FOIC), detailing the searches it undertook.

[26] The region states that it searched for records in the main project files for the AMESA Long Term Sampling System and the offices (including computers) of each employee known to be associated with this project.⁸ This included Works Department employees. The region provided copies of its correspondence to these employees that indicates who was asked to review records and what specifically they were asked to do.

[27] In response, the appellant provided representations. The former adjudicator summarized the appellant's representations and provided the region with a list of the records described by the appellant, asking the region to respond and address the searches it had undertaken to locate these records. In her letter to the region seeking representations in reply to the appellant's representations, the former adjudicator stated:

In particular, you are asked to respond to the following questions that were raised in the appellant's representations:

1. Is the region able to access [Environmental Compliance Approval (ECA)] lab results held at the incinerator site and/or by [the third party]? If so, have those records been searched in order to identify records responsive to the appellant's requests?
2. Are there any locations that have not yet been searched, which may contain records responsive to the appellant's requests? For example, the appellant suggests that [the Manager, Waste Services, Works Department] and [the Director, Waste Management, Works Department] may have records responsive to her requests. She also suggests that the files of former employees may contain responsive

⁸ The project is the AMESA Long Term Sampling System at the facility.

records. Have these locations been searched? If not, please explain the Region's decision not to search these files.

3. Is it possible that the [4-page undated record] responsive to the request at issue in Appeal MA19-00514 is two, two-page records, instead of one, four-page record, as suggested in the appellant's submissions? If so, have those records been located and addressed in an access decision?

4. Have any records relating to the "information exchanged between [the environmental consultant] and [the external lawyer], as mentioned in Document 14 (Index of Records relating to Appeal MA19-00513), been located and addressed in an access decision?

5. Did any responsive records exist that no longer exist? For example, have any potentially responsive records been destroyed in accordance with the Region's usual record retention practices?

[28] The parties provided reply and sur-reply representations to the appellant's representations on the records that she believes had not been located on each of these five items, which I will now describe individually.

1. The ECA lab results of the third party

[29] The appellant seeks access to the ECA (Environmental Compliance Approval) lab results held at the incinerator site and/or by the third party.

[30] The region states that the lab results are not in its possession, as the ECA testing results is a provincial requirement, not a regional requirement. It states that if any lab tests are run, the results of such flow from the third party (a separate corporate entity that holds a contract to build and run the facility) to the Province directly.

[31] The region states that it has no obligation to request the creation of those records and that any report it is obligated to make under the ECA is available on the "durhamyorkwaste.ca" website.

[32] In response, the appellant states:

[Concerning the ECA lab results], the incinerator is a publicly owned facility and Durham and York Region taxpayers are funding the required monitoring. [The third party] does not own the monitoring records... As a co-owner of the facility, Durham Region has a municipal duty of care to comply with permit requirements and to protect residents. Durham cannot offload its municipal responsibilities and duties to the corporate entity [the third party]...

In order for the owner (Durham, York and [the third party]) to prepare the Annual Report summaries, conclusions and results required in [the annual reporting requirements of the ECA], the ECA testing results, which are the underlying data upon which most of these documents are based, would have to flow to all three parties, not just [the third party], before they could responsibly prepare them...

[33] In reply to the appellant, the region states that it does not receive the lab results from the third party. Instead, it receives the lab certificate, which explains the process, how the samples and results were reviewed, and how the lab quality controlled their findings. It states that:

The results that we receive in the Annual Report from the certified consultant contain all the information we need. These are all third party independent consultants on whom we rely for their ability to create the Annual Report required to report to the public and to satisfy the Ministry.

The ... lab reports have to be onsite for Ministry visits and they are onsite at the facility. [The third party] as an owner ... has them and can produce them to the Ministry at any time. The region doesn't have them.

2. Are there locations that have not been searched?

[34] The appellant queries whether all relevant locations have been searched for responsive records, including that of the Manager, Waste Services, Works Department and the Director, Waste Management, Works Department (the director), as well as the records of the former Works Commissioner, the retired Chief Administrative Officer, the late Regional Chairman and the current Commissioner of Works.

[35] In response, the region states that all current Regional employees known to be associated with the project were contacted and requested to go through all of their records. This included Works Department employees. It states that it specifically searched the locations mentioned by the appellant in her representations that may contain responsive records, that of the Manager, Waste Services, Works Department and the Director, Waste Management, Works Department. It further states that the former employees' records were searched as part of the Works Department response.

[36] The FOIC in his affidavit states that all current Regional employees known to be associated with the project were contacted and requested to go through all of their records. This included Works Department employees.

[37] He refers to Exhibit "A" to this affidavit that he submits indicates who was asked to review records and what specifically they were asked to do. He states that the office (including computers) of each employee and the main project files were searched, as were all files relating to the project.

[38] Exhibit "A" contains two memorandums sent by the region's Privacy Analyst, Corporate Services Department, Legislative Services (the privacy analyst), to the region's Director of Business Services, Works Department, attaching the requests. The privacy analyst asks the director to send the following information about the requests to her:

1. All relevant documentation.
2. A completed Records Holding Statement.
3. A completed Index of Records for all records exempted in full, or part with the pages enumerated, the specified exemption that applies, and the reason the provision applies to the record.

I also require you to email me the total number of pages being released in full or part, minus the number of pages being exempted in full, and sent as an attachment to the email, the completed Index of Records.

[39] The region's affidavit included indices of records of the records located as a result of the searches undertaken by the Works Department.

[40] In sur-reply, the appellant states that the region's search seems to have produced no correspondence around the AMESA sampling and results which involved the Works Department Commissioner prior to his retirement and/or the former Durham Regional Chair despite:

- their positions of responsibility at the time,
- the issues and problems occurring with the AMESA sampling system during their tenure, and
- the fact that multiple parties were asking questions about AMESA data.

[41] In further reply, the region reiterates that a thorough search was done and refers to the affidavit it filed in support.

3. Question about a specific four-page record identified in the second request (Appeal MA19-00514)

[42] In the second request, the appellant is looking for an undated four-page record from the environmental consultant on the long-term sampling system that was discussed in a meeting in late 2015/early 2016. The appellant's second request refers to this document, as follows:

The presentation and/or submission and/or handout given by [the environmental consultant] and/or Works Department staff regarding the

AMESA Long Term Sampling System referenced as being approximately four pages at or around the December 22, 2015 closed Regional Council meeting.

[43] The region states that it has spent multiple hours searching for this record that the appellant seems to think a councillor at a meeting had in their possession. It states:

The region has not been able to determine what, if anything, related to this file, said councillor may have been referring to. The four-page record responsive to the request does not seem to be in the possession of the region. The two, two-page records are what were found in our record search.

[44] In response, the appellant refers to the November 9, 2016 memorandum (the memorandum) that was attached to her request in Appeal MA19-00514, in which the region's Commissioner of Corporate Services indicates, based on a review of documents by Corporate Services staff, that the undated four-page record was to be released to the public. She notes that the memorandum indicates that this record is not in the Master Legislative Services agenda file but it does not say whether inquiries to the Works Departments and other departments were made in order to locate this record.

[45] In reply, the region reiterates that it has searched for this undated four-page document and was not able to locate this record.

[46] In sur-reply, the appellant states that although the four-page undated document was not in the Master Legislative Services or the Clerks Department agenda file, it could be elsewhere.

[47] The appellant also refers to an email exchange between the region's Director of Legal Services and the external counsel where the external legal counsel searched for and could not locate the undated four-page document, only one or two two-page documents from the environmental consultant in that period.

[48] In response to the appellant's sur-reply representations, the region states that it consulted with the Director of Legal Services in the email chain and he explained that although he indicated in the email in question that the document "must exist", he said that because the Councillor had something in her hand that she was waving around Council.

[49] The region states that it also asked the environmental consultant specifically, and he indicated he does not know what the document is and, therefore, he could not provide it. The region states that it has not been able to identify or locate the document.

[50] The region states that it does not know what the Councillor was waving around when she made the comments she did at that meeting. The region did ask the

Councillor to provide the document and never received a response. The region noted that it is unable to speak to the Councillor again as she has since passed away. The region reiterates that it did a thorough search for the four-page record and cannot locate it.

4. Information exchanged between the environmental consultant and the external lawyer

[51] The appellant queries whether further responsive records exist that contain information exchanged between the environmental consultant and the external lawyer. She relies on document 14 that was disclosed to her with the decision letter of June 25, 2019 in Appeal MA19-00513.

[52] The appellant submits that the environmental consultant was a technical consultant hired by the region to advise it regarding AMESA issues. She states that there has been no explanation why his advice would have been provided to the region's staff through the external legal counsel, who is not a technical expert. She wonders whether the environmental consultant was requested by the region to relay technical information via the external legal counsel in order to make public access to such non-privileged non-legal advice more difficult.

[53] In reply, and sur-reply, both the region and the appellant made submissions on the discretionary solicitor-client privilege exemption in section 12 and about responsiveness regarding any additional records that may have been exchanged between the environmental consultant and the external counsel.

[54] However, these records are not before me, nor is section 12, nor the issue of responsiveness, and so I will not address this aspect of the parties' representations further.

5. Destruction of records

[55] The appellant is concerned that responsive records may have been destroyed.

[56] In response, the region states that to the best of its knowledge, responsive records have not been destroyed. The region refers to its records retention policies relating to destruction timelines which, depending on the types of records, are kept either permanently, or between 6 to 15 years. It states that it has:

...determined that any records would likely fall under the following [retention policies]:

- Environmental Planning (waste management studies, planning) – (current plus 10 years)

- Hazardous Materials/Waste (records on PCB material storage) – E+6 (event plus 6 years)
- Landfill Sites (information on active/inactive care sites/agreements/reports MOEE) – (permanent)
- Regulatory Approvals (waste disposal, waste management) – (event plus 10 years)
- Design Projects (waste treatment facilities) – (event plus 15 years)
- Waste Management Operations – (current plus 10 years)

[57] The appellant did not provide representations in response.

Analysis/Findings

[58] In this order, I must determine whether the region has conducted a reasonable search for records. Although the *Act* does not require the region to prove with certainty that further records do not exist, it must provide enough evidence to show that it has made a reasonable effort to identify and locate records that are reasonably related to the request.

[59] The appellant, as the requester, must provide a reasonable basis for me to conclude that additional responsive records exist. I will consider specifically the five items that the appellant submits have not been searched for or located by the region.⁹

Findings re Item 1 - the ECA lab results of the third party

[60] I am satisfied that the region has conducted a reasonable search for the ECA lab results of the third party.

[61] As set out by the region in its representations, the ECA testing results are a provincial requirement, not a regional requirement. The province is the recipient of any ECA lab tests conducted by the third party. The region does not have a contractual obligation, nor a regulatory obligation under the ECA, to obtain a copy of these test results.

[62] I accept that these lab results flow from the third party (a separate corporate entity that holds a contract to build and run the facility) to the Province directly and the region is not a recipient of these lab results.

[63] I also accept the region's explanation that it was not necessary to obtain a copy of the lab results to prepare its annual reports, as any information in the annual reports related to the lab reports is provided to the region by an outside consultant.

⁹ Order MO-2246.

[64] Therefore, I am satisfied that the region's search for the ECA lab results of the third party was reasonable.

Findings re Item 2 - Locations that have not been searched

[65] The only searches for records in response to the appellant's requests are contained in the affidavit of the FOIC, where he states that:

To the best of my knowledge and belief, all current Regional employees known to be associated with the project were contacted and requested to go through all of their records. This included Works Department employees.

[66] In response, the appellant set out details supporting her contention that additional records likely exist. The region did not respond to this evidence and, instead, continued to rely on the affidavit it provided with its initial representations. The only specifics in this affidavit about the searches undertaken by the region is that it asked the Works Department to conduct searches and that the records of all current Works Department employees and files were searched.

[67] The appellant has indicated that specific past and current regional officials would be most familiar with the responsive records and that their records should have been searched. These officials are the former Works Commissioner, the retired Chief Administrative Officer, the late Regional Chairman and the current Commissioner of Works.

[68] Besides a general statement in reply that former employees' records were searched, which is not supported by the region's affidavit evidence on the searches undertaken, the region has not provided evidence that the records of the region's former Works Commissioner, the retired Chief Administrative Officer, the late Regional Chairman and the current Commissioner of Works were specifically searched.

[69] Although I accept that the records of current Works Department employees were searched, I do not accept that the records of former Works Department employees were searched nor those of the other regional officials named by the appellant in her representations. The affidavit evidence of the region does not make mention of these individuals' records being searched. The only instructions the region gave for searches to be undertaken was that to the Works Department where the privacy analyst asked that all relevant records be searched. Only indices of records were provided in response, not the actual details of the specific searches undertaken.

[70] The appellant has provided evidence that the region's former Works Commissioner, the retired Chief Administrative Officer, the late Regional Chairman, and the current Commissioner of Works may have or had responsive records because of the problems occurring with the AMESA sampling system.

[71] I find that the appellant has provided a reasonable basis for me to conclude that additional responsive records may exist in the record holdings of the region's former Works Commissioner, the retired Chief Administrative Officer, the late Regional Chairman, and the current Commissioner of Works. Accordingly, I will order the region to conduct another search of these individuals' record holdings.

Findings re Item 3 - the four-page record

[72] In her second request (Appeal MA19-00514), the appellant seeks access to:

...The presentation and/or submission and/or handout given by [the environmental consultant] and/or Works Department staff regarding the AMESA Long Term Sampling System referenced as being approximately four pages at or around the December 22, 2015 closed Regional Council meeting.

[73] In support of her submission that the four-page record exists, the appellant provided a November 9, 2016 interoffice memorandum to members of Durham Regional Council from the region's Commissioner of Corporate Services regarding the "... Release of Documents from the December 22, 2015 and January 27, 2016 Committee of the Whole Meetings."¹⁰

[74] In this memorandum, the Commissioner of Corporate Services states that:

At the November 2, 2016 meeting of the Committee of the Whole, the following motion was approved.

...That staff be directed to release the following documents to the public...

5. The undated four-page document related to the long-term sampling system and the AMESA cartridges...

[75] However, regarding this four-page record, the memorandum also states that:

There is no record of this document in the master Legislative Services agenda file. It is not clear where this document originates from.

[76] The appellant also refers to emails exchanged in November 2016 between the region's Director of Legal Services and the region's external legal counsel.

[77] In this email exchange, the Director of Legal Services advises the external counsel that:

We are trying to run down a document that would have been produced by [the environmental consultant] (if it exists, which is not certain). Can you

¹⁰ This memorandum was also attached to the appellant's request in Appeal MA19-00514.

check if you have something matching this in your files and/or get in touch with [the environmental consultant]?

"The undated four-page document related to the long term sampling system and the AMESA cartridges"

It would have been produced either for the Dec 22 meeting or the Jan 27th meeting. I think [the environmental consultant] was only at the Jan 27 meeting.

[78] In response, the external counsel emails back to the Director of Legal Services that:

I do not have any 4 page documents from [the environmental consultant] between November 2015 and March 2016. If you want me to adjust the search criteria I will. There are one or two 2 page documents from him in that period.

[79] Based on my review of the parties' representations, including the November 2016 memorandum and emails, I find that the region has conducted a reasonable search for the undated four-page record. Both the memorandum and the emails indicate that this record was searched for in or around November 2016 and could not be located at that time. As well, the region has recently conducted a search for this record and could not locate it.

[80] The appellant questions whether this four-page record, which would be dated prior to January 27, 2016, is actually the "one or two two-page records" referred to by the external counsel in his email to the Director of Legal Services as being in his possession when they corresponded in November 2016.

[81] From my review of the emails of November 2016, I understand that these "one or two two-page records" were not located in the record holdings of the region but that of its external counsel. The memorandum and the appellant's request refer to a four-page undated document, not a two-page document. Therefore, I do not have sufficient evidence to determine that these one or two two-page records are the same as the undated four-page record that the appellant is seeking.

[82] In the circumstances, I am satisfied that the region has conducted a reasonable search for the undated four-page record sought by the appellant.

Findings re Item 4 - records exchanged between the environmental consultant and the external lawyer

[83] As noted above, the appellant is seeking access to records relating to the "information exchanged between the environmental consultant and the external lawyer" as mentioned in a record (document 14) that was disclosed to her in response to the

request in Appeal MA19-00513. Document 14 is an email chain and contains an email dated June 8, 2016 from the environmental consultant to the region's Manager, Waste Services, Works Department. The external counsel was copied on this email.

[84] In this June 8, 2016 email, the environmental consultant says that he had sent a summary of the AMESA results evaluation to the external counsel. The appellant is seeking copies of this information. I find that the region has conducted a reasonable search for the records that contained this summary of the AMESA test results exchanged between the environmental consultant and the external lawyer.

[85] In particular, the region reviewed the chain of emails between the environmental consultant and the external lawyer and provided the appellant with an index of records for both appeals listing the records it identified as responsive to each request. These records included emails and other correspondence exchanged between the external counsel and the environmental consultant. These records were either disclosed to the appellant, withheld as being subject to the discretionary solicitor-client privilege exemption in section 12, or identified as being not responsive to the appellant's requests.

[86] At mediation, the appellant did not pursue the region's decision to withhold certain information in the records exchanged between the external counsel and the environmental consultant on the basis of either section 12 or non-responsiveness. Therefore, this information is not at issue at adjudication.

[87] I find that the appellant has not provided a reasonable basis for me to conclude that the region has not located all responsive communications between the external counsel and the environmental consultant.

[88] Accordingly, I am satisfied that the region's search for a summary of the AMESA test results exchanged between the environmental consultant and the external lawyer was reasonable.

Findings re Item 5 – destruction of records

[89] The appellant did not provide representations on this item. Based on my consideration of the region's representations, including its records retention policies, I find that there is insufficient evidence to support a conclusion that responsive records have been destroyed by the region, as any responsive records would not have been destroyed according to the region's records retention policies.

Conclusion

[90] Based on my review of the parties' representations, I find that the region has conducted a reasonable search for responsive records, other than for those of the region's former Works Commissioner, the retired Chief Administrative Officer, the late Regional Chairman, and the current Commissioner of Works. Therefore, I will order the

region to conduct a search for records responsive to the appellant's two requests in the record holdings of these four individuals.

Issue B: Does the discretionary advice or recommendations exemption at section 7(1) apply to the record at issue in Appeal MA19-00513?

[91] The region has claimed the exemption at section 7(1) to an email chain that contains two emails, an email from the region's environmental consultant to the region's external counsel, and second email forwarding the first email to the region's Manager, Waste Services, Works Department with a copy to the region's Director of Legal Services.

[92] The "advice or recommendations" exemption at 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.

[93] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹¹

[94] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[95] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.¹²

[96] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[97] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

¹¹ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

¹² See above at paras. 26 and 47.

- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.¹³

[98] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.¹⁴

[99] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 7(1).¹⁵

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

- factual or background information¹⁶
- a supervisor's direction to staff on how to conduct an investigation¹⁷
- information prepared for public dissemination.¹⁸

Representations

[101] The region submits that the email chain at issue contains advice and recommendations to help senior management and legal counsel determine the appropriate course of action to recommend to Regional Council as required.

[102] The region further states that:

The consultants and employees have expertise in the service/delivery of the project [the AMESA Long Term Sampling System] that Regional Council would not have. They use their expertise to evaluate any course of action for the business purpose of the Region based on that expertise.

This email document contains information regarding a course of action that may or may not be required. It speaks to previous advice and results

¹³ Order P-1054.

¹⁴ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

¹⁵ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

¹⁶ Order PO-3315.

¹⁷ 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.).

¹⁸ Order PO-2677.

and how the consultants and employees were continuing to work to provide advice and recommendations to the appropriate Committee.

[103] The appellant submits that any technical information and observations from the consultant regarding the AMESA sampling would be factual or background information, not advice or recommendations, and should be disclosed.

Findings

[104] Section 7(1) applies if disclosure would “reveal” advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.¹⁹

[105] The region was asked in the Notice of Inquiry to provide representations on what advice or recommended course of action is revealed in record 9. Other than stating that the record contains advice to help senior management and legal counsel determine the appropriate course of action to recommend to the Regional Council or some unknown Committee, the region did not indicate or explain what this advice or recommendation is or where it is located in the record.

[106] This email chain at issue, record 9, consists of an email from the region’s environmental consultant to its external counsel (the earlier email), which was forwarded by the external counsel to the region’s Manager, Waste Services, Works Department with a copy to the region’s Director of Legal Services. The external counsel replies that he is forwarding the earlier email to another external party.

[107] In my view, this email chain does not reveal advice or recommendations to recommend to Regional Council or a Committee as submitted by the region. The information in this record is a direction by the environmental consultant for an action to be undertaken by another external third party.²⁰

[108] Based on my review of the record and the region’s representations, I find that section 7(1) does not apply to it, as record 9 does not reveal advice or recommendations of an officer or employee of the region or a consultant retained by the region within the meaning of section 7(1).

[109] Therefore, I find that record 9 is not exempt under section 7(1). As no other

¹⁹ Orders PO-2084, 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; see also Order PO-1993, upheld on judicial review in *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.

²⁰ See 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.), referred to above.

discretionary exemptions have been claimed for this record and no mandatory exemptions apply, I will order it disclosed.

ORDER:

1. I order the region to disclose record 9 to the appellant by June 16, 2022.
2. I order the region to conduct a search of the record holdings of the region's former Works Commissioner, the retired Chief Administrative Officer, the late Regional Chairman, and the current Commissioner of Works, treating the date of this order as the date of the request. I order the region to issue an access decision to the appellant in accordance with the *Act* with respect to any further responsive records located as a result of these searches.
3. I uphold the remainder of the region's search for responsive records as reasonable.

Original Signed by: _____
Diane Smith
Adjudicator

_____ May 17, 2022