

## DECISION

### Case Number: 397183

The mandate of the Fairness and Transparency Advisor (FTA) is to ensure that various processes associated with the Core Area Sewage Water Treatment project are fair, transparent, impartial and objective. In this capacity, the FTA is an observer of, and commentator on, process. The FTA has no power to impose remedies.

## BACKGROUND

### The Issues as Raised in the Complaint:

The main issue raised in this complaint relates to the suppression of information. It is alleged that important information which would inform the CALWMC's decision making, is being withheld from both the public and the committee.

Information suppression, it is argued by the complainant, is evidenced in the following:

- (a) Through **procedural aspects** of how the Technical Oversight Panel (TOP) operates which ultimately leads to the suppression of information;
- (b) Incomplete **disclosure in the minutes** of the full extent of deliberations at the TOP; and
- (c) Panel members being restricted in making **public comment** and/or sharing information on the details of Panel deliberations.

## FINDINGS

### (a) Procedural aspects of how TOP operates:

The complainant alleges to having "*witnessed ... as a regular occurrence that TOP members have their expert opinion...overruled by majority votes...I have witnessed several other key pieces of information that were suppressed by majority; non-experts, overruling experts.*"

At its core, the complaint raises procedural concerns with the way the TOP functions. The complaint indicates that the Panel is voting on issues that are brought forward to the CALWMC. It is the complainant's view that the expertise of Panel members should not be diluted or filtered through voting, and that the technical expertise of all of the members should be brought forward as it is presented by members of the Panel. And so the central question is one of procedure. How does the Panel function and what rules guide its deliberations?

In general, expert panels or advisory bodies are put in place when specialized input and opinion is required for an evaluation. Typically, a variety of experts are engaged based on various fields of expertise to debate and discuss sometimes divergent courses of action and to then make recommendations. Thus, once they are established they can be the main actors carrying out a review process throughout the exercise (as is the case with the TOP).

The Terms of Reference (ToR) for the TOP establish that the Panel is to be proactive in "*vetting the options in conjunction with the consultant, identifying items that should be taken to the CALWMC and the public early in the process*". The ToR further state that the Panel can

*“undertake a ‘rapid assessment’ to assess if a concept or configuration is feasible or not, and whether it should be taken to the next level of analysis or not”.* The ToR establishes no procedural requirements for how the panel is to conduct this assessment (discussed further below).

Panels can operate in a variety of ways. Some use consensus as a way of vetting issues and options in order to narrow the range of options brought forward, while others operate by way of majority vote. Although it is conceivable that a panel might operate with each member’s views being presented independently of other views at the table, it could be argued that this is less of a “panel” approach and more a case of independent experts providing insight. In the latter approach there would in fact be no need to operate as a panel.

Each model has advantages and disadvantages. An advantage of a consensus or majority vote process is that a narrowing of options is undertaken by the members and particular views/positions which have been “vetted” or “considered” are then presented to the decision-maker (who presumably does not possess the expertise of the panel members). This “vetting” allows the expert panel to exercise its expertise and to assist the decision making process. The disadvantage might be that some views may not be made known to the decision-maker.

The chair of the TOP explained that the Panel, as a general rule, does not conduct its business through voting. Their role is to review; deliberate; dissect and reflect upon issues and to provide the CALWMC (through Urban Systems and through its direct reporting to the CALWMC) with insight moving forward. This “insight” may at times be in the form of advice and/or suggestions, often reflecting different points of view from different Panel members, but they have no role in “ruling” or “voting” on matters. Urban Systems is entitled to take or leave the TOP’s views as they see fit. This has been the process of the TOP since the beginning. The Chair has confirmed to the FTA that the process to date, as it relates to the deliberations of the TOP (which are all public unless subject to the rules for closing a meeting) has not included “voting”. It was explained by the Chair that the Panel does attempt to arrive at a common view or perspective for clarity but the consultants are encouraged to consider all TOP opinions as they complete their reports. TOP reports to the CALWMC do not typically present individual TOP opinions on the many technical items discussed at each meeting. In reviewing the public record, the FTA found no evidence of dissenting views on any issues.

The FTA reviewed the various reports of the TOP to the CALWMC and can confirm that the language used in these reports is one of the TOP expressing “support” for an issue, as opposed to voting.

## **Conclusion**

Given that the TOP’s ToR make it clear the advice of the TOP is intended to guide decisions about whether or not concepts or configurations are feasible and should remain in the assessment process, it is reasonable to expect the TOP to operate in such a way as to provide advice or recommendations – either by consensus or majority vote – as opposed to a set of individual opinions. I can find no flaws in how the panel has operated as it relates to managing the various perspectives of panel members and moving those deliberations forward through to the CALWMC.

## **(b) Incomplete disclosure in the minutes**

The complaint alleges that the TOP minutes do not reflect the full breadth of the deliberations (and likely debates) at the TOP table.

The FTA began by examining the *Rules of Procedure Bylaw* governing the CRD and its committees. While I recognize that the panel is not a “committee” under the Bylaw, I was looking for guidance on the production of minutes more generally. The Bylaw did not provide much insight other than stating that minutes must “*be kept by the Corporate Officer; such minutes to be concise and to detail proceedings of the Board. The minutes shall be legibly recorded, certified as correct by the Corporate Officer, and signed by the Chair, Vice Chair, or the person presiding at such meeting or at the next meeting at which they are adopted*”.

I would offer that in many organizations, meeting minutes are not used to capture the full nature of deliberations; minutes are typically used to capture decisions and action items.

The minutes for the TOP meetings were prepared by CRD staff, reviewed and approved by the TOP Chair, and adopted at the following TOP meeting.

The FTA reviewed minutes of TOP meetings since mid-November where the above issues would have been discussed. The minutes summarize agreements and identify action items, and do not capture all the discussion that occurred in relation to the agenda items.

The central issue in this complaint is whether the limited minute contents amounts to a suppression of information which ultimately results in an impairment of procedural fairness. One could argue that if the TOP minutes reflected the full breadth of all discussions, the CALWMC and the public would be able to hear the full range of views on an issue and to decide where they land on a particular topic. However, this view somewhat changes the role of the TOP as it does not require them to use their expertise to “decipher” and narrow options. It sees their expert opinions being made available to the community as individual experts (not as a panel). In this view the Panel does not provide any kind of “validation” process as a group. Each expert reviews information and offers their view, independent of the views of others on the Panel, with respect to a matter.

Another view might be preferred which sees the TOP’s role as a sieve of highly complex technical information, one which necessitates an elimination process of information so as not to overburden the CALWMC with having to sort through, and make sense out of highly technical information. Such a view would be troubled by the prospect of an “outlier” view (a point of view that is not shared by the majority of members; one which has been debated and upon which no agreement is reached) being presented without adequate supporting information to explain the reasons for the differences of opinion. This view would tend to want to avoid placing the CALWMC in a role which sees them involved in a vetting of technical information.

I prefer the latter view of the role of the Panel; a role which sees the TOP as a sieve of information, sorting through data and analysis, and undertaking a technically-based evaluation of options. I believe that the CRD intended the TOP to vet and eliminate on behalf of the CALWMC specifically because of the dangers that can accrue from having individuals who do not have the technical knowledge required, engage in such a process.

## Conclusion

I believe that I have previously stated (in other decisions) that fairness and transparency demands that all relevant information be made known to the public and that nothing be purposefully withheld. I still believe this to be true.

While a panel approach characterized by a vetting and summarizing of information may mean that the CALWMC may not hear from the TOP itself what the full views are, these views would still be aired through existing public processes. These views are not hidden or suppressed. They may not be formally documented in the form of minutes (nor in the reports) but the public interested in the matter was able to hear the full debate at the TOP meeting. Both the TOP meetings as well as all CALWMC meetings are public and open to public scrutiny. The public has in fact, on several occasions, raised a variety of issues through the petitions and delegations process – including issues raised directly to the TOP.

The lack of certain content on deliberations in the minutes does not mean that the process is procedurally flawed (unfair or lacking transparency). It should also be remembered that the minutes are not the sole vehicle for the TOP to provide input to the CALWMC. The TOP provides comment on technical documents directly and submits additional reports which are presented in person by the Chair of the TOP, presumably so that the CALWMC may ask questions.

Therefore, I find that the brevity of the minutes does not constitute a suppression of information or result in a diminishing of procedural fairness or transparency.

## Imposition of an informal “gag order” on panel members

The complainant raises an issue with the restrictions imposed on Panel members as it pertains to their ability to comment in public on matters under consideration by the Panel. The complainant suggests that *“individual members are not permitted to comment to the general public...the members are bound by a confidentiality agreement.”*

The FTA began by assessing any formal agreements signed by Panel members which might restrict such interactions with the public.

The Panel members were asked by the CRD to sign an agreement which speaks to issues associated with confidentiality and conflict of interest. As it pertains to confidentiality, the agreement outlines circumstances or information that would be subject to the agreement. Review of this agreement reveals that the restrictions imposed on Panel members as it relates to interacting with the public relate to a set of specific circumstances:

- ✓ *matters which have been received in the course of a closed meeting;*
- ✓ *information received which is subject to another confidentiality or non-disclosure agreement;*
- ✓ *information which is protected under the Freedom of Information and Protection of Privacy, Act (British Columbia);*
- ✓ *any information that is subject to solicitor-client privilege; and*

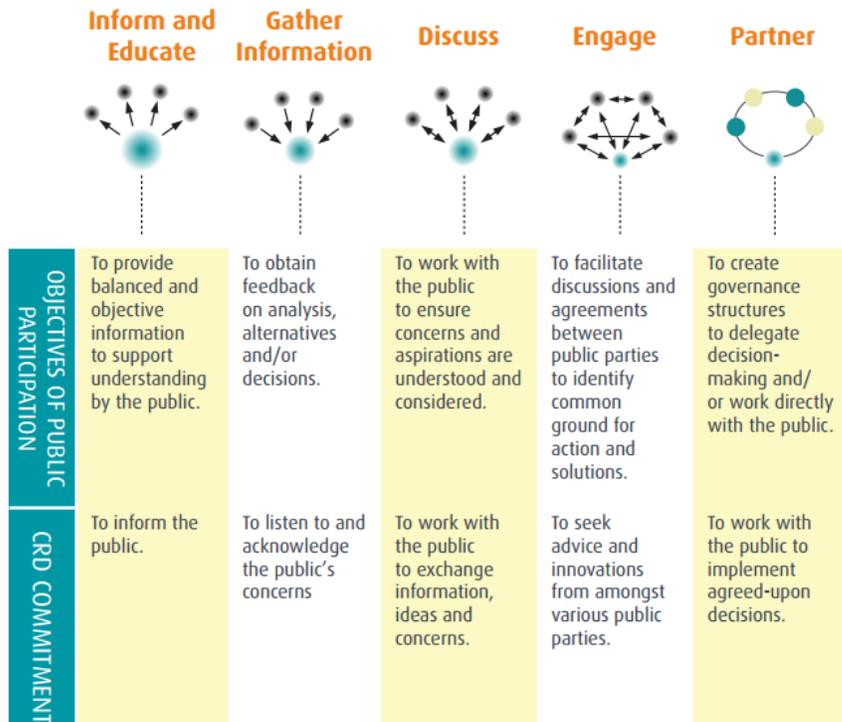
- ✓ any other information held in confidence by the CRD except to the extent that the information is released to the public as lawfully authorized or required by an enactment.

The CRD is a public body and is itself subject to privacy and confidentiality constraints, having responsibilities to protect both the public interest as well as private proprietary interests. As such, I find no fault in imposing these restrictions which I determine to be reasonable.

The Project Charter states that “[t]he role of the ToP does not include public consultation, media interaction...” While the Project Charter prohibits the Panel from engaging in “public consultation”, it is silent on whether they can actually comment publically on any deliberations of the Panel. The question then becomes, is “public comment” the same as public consultation?

The CRD’s public participation framework (Diagram 1 below) recognizes a spectrum of activities that may be considered part of public consultation. At the low end is providing information; at the high end is a robust model which sees CRD staff or committees actively engaging with the public in a back and forth of information sharing and analysis.

**Diagram 1**



I consider the TOP’s role to fall within this low end of the engagement spectrum: to inform and educate. Such a role is in keeping with their ToR and the Project Charter.

## Conclusion

All TOP meetings are public (unless subject to confidentiality restrictions) and therefore the Panel's deliberations are intended to be publicly accessible and in essence are part of the "inform and educate" part of the spectrum. Because the Project Charter states that they are not to engage in public consultation or media interaction, it would be fair to say that it was never intended that they would have a "to and fro" (interactive) role with the public. What then of making public statements? I am of the view that Panel members do that as a regular part of their role on the Panel. They make statements while at meetings. The agreement that they signed does not preclude them from sharing information unless it meets the exclusions described in the agreement and making comment is at the low end of the engagement spectrum.

In short, Panel members are not restricted from sharing information with the public, unless it meets one of the grounds in the agreement. Such unfettered sharing of information is permitted, provided they do not undertake a more robust public engagement exercise. The discussions of the Panel, as previously stated, are all public (unless otherwise subject to confidentiality provisions). I see no reason why a Panel member would be prohibited from commenting to the public on deliberations which are already public.