

## DECISION

### Case Number: 394437

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 concern raised in the complaint centers around the terms of reference for the Technical Oversight Panel and whether recent actions taken by that Panel, exceeds their jurisdiction.

### Specific questions /proposed resolutions as put forward in the Complaint:

The complainant raises six questions. These are listed below.

- 1) Where in the Terms of Reference (TOR) for the TOP does it provide for public access by "Citizen Groups" to the TOP?
- 2) Where in the TOR for the TOP is any process laid out for "Citizen Groups" to gain access to the TOP?
- 3) In the absence of any apparent reference in the TOP's TOR to meeting with "Citizen Groups", did the TOR, by "arrang(ing) to meet" with such Groups go beyond its mandate, and if it did, what steps can or should be taken to correct this error in judgment?
- 4) How, if at all, did the Presentations of Citizen Groups influence the recommendations of the TOP vis a vis the consultants, CALWMC, and/or any other parties?
- 5) If the TOP erred in meeting Citizen Groups, how can it be ordered to desist from doing so in future?
- 6) Should not these and other Citizen Groups have approached the Fairness and Transparency Advisor with their concerns rather than the TOP, and should not the TOP have directed these Groups to address their concerns to the same Advisor instead of entertaining them itself?

## FINDINGS

The issues raised in this complaint mainly revolve around the role and jurisdiction of the panel.

### 1) Where in the Terms of Reference (TOR) for the TOP does it provide for public access by "Citizen Groups" to the TOP?

This first question relates to whether the panel is empowered through the enabling documents to engage with citizen groups. Thus, this first question is of a substantive nature.

The two key documents which will illuminate the panel's mandate are:

1. the Terms of Reference for the TOP; and
2. the Project Charter governing the overall project.

The Terms of Reference outlines the parameters under which the panel will undertake its work and set limits to the scope of their mandate with regard to a variety of issues. The Project Charter – drafted in September of 2015 and approved October 2, 2015 – as the overarching statement of the scope, objectives, and participants in the project, provides context to the interpretation of the various committees' terms of reference. As such, an interpretation of the mandate of any one committee must be undertaken within the context of the Project Charter (and the individual terms of reference).

## The Terms of Reference

Two items refer to public sessions and/or engaging with the public – items 4 and 5.

### Item Four

Item four of the terms of reference states that the TOP:

*4. “Will provide independent oversight to the work of the engineering, business case, lifecycle costing and other project analysis...”*

From the Terms of Reference it is fair to say that the intent in establishing the panel was to put in place an independent body of experts who could provide oversight of the options and costing process as well as objective advice to the CALWMC.

The TOR then go on to address the role of the TOP with regard to engaging with the public.

*“...The panel must be proactive, jointly preparing a work plan with the consultant to be proposed to the CALWMC, vetting the options in conjunction with the consultant, **identifying items that should be taken to the CALWMC and the public early in the process**” [emphasis added].*

The language in item four is slightly ambiguous as it relates to the actual role of the TOP with respect to engaging with the public. One view is that the TOR suggests that the TOP’s role is a narrow one focused primarily on working with the costing consultants. Their deliberations would then be taken as recommendations to the CALWMC, including making recommendations regarding the need for items to be taken to the public. This view does not support an active role for the TOP in terms of engaging with the public on such matters.

A second view would be that the item in fact does not exclude a role for the TOP in engaging with the public as it states that they are to identify items that should be taken to the public and does not constrain them by stating that they **cannot** engage themselves with the same public.

### Item Five

Item five then goes on to describe how the TOP will participate in public sessions:

*5. After the initial settling in period and approval of the consultant’s work plan, the TOP chair will report biweekly to the CALWMC until November 2015 to keep the CALWMC apprised of the project costing and solutions analysis. **The Chair of the Panel will have the primary responsibility for presenting updates and answering questions of the committee and speaking on behalf of the Panel at public sessions**”. [emphasis added]*

Again it is not entirely clear whether the TOR intends to limit the public sessions the TOP will be speaking at to those organized by CALWMC, or whether it simply requires that at any public session it will be the Chair of the Panel that would be authorized to speak on behalf of the Panel. (Although the latter seems unlikely as the item is in the context of the reporting relationship of the TOP to the CALWMC, and not part of a description of the responsibilities of the Chair of the TOP.)

While item 5 provides some further clarity on the role of the TOP with respect to public sessions, referring to the Terms of Reference alone does not provide the complete answer to the TOP’s role in relation to public engagement. In determining whether the TOP has a mandate to engage with members of the public, it is useful to examine the issue in the context of the totality of the guiding documents which structure interactions and provide guidance to the project and so we look to the Project Charter.

## Project Charter

The Project Charter further illuminates the TOP's role with respect to public consultation.

The Project Charter states unequivocally that the role of the TOP does not include public consultation.

*“The role of the ToP **does not** include public consultation, media interaction, .... The ToP receives information from and liaises with the Engineering Team (Urban Systems and Carollo Associates), and provides feedback and recommendations to the CALWMC” [emphasis added].*

The Project Charter goes on to state that “[t]he TOP liaises with the Eastside and Westside Select Committee[s]”, presumably so that these committees can provide the TOP with feedback on treatment options and costing gathered through public consultation. This liaison function is a tool to ensure a coordinated, systematic approach to public consultations and to limit the number of bodies engaging with the public.

In addition, in Attachment 1 to the Project Charter - **Planning Process: Roles, Inputs and Relationships**- depicting the roles and inter-relationships of the various committees involved in the project, the TOP is shown to interface solely with the engineering team (refer to Figure 1 below):

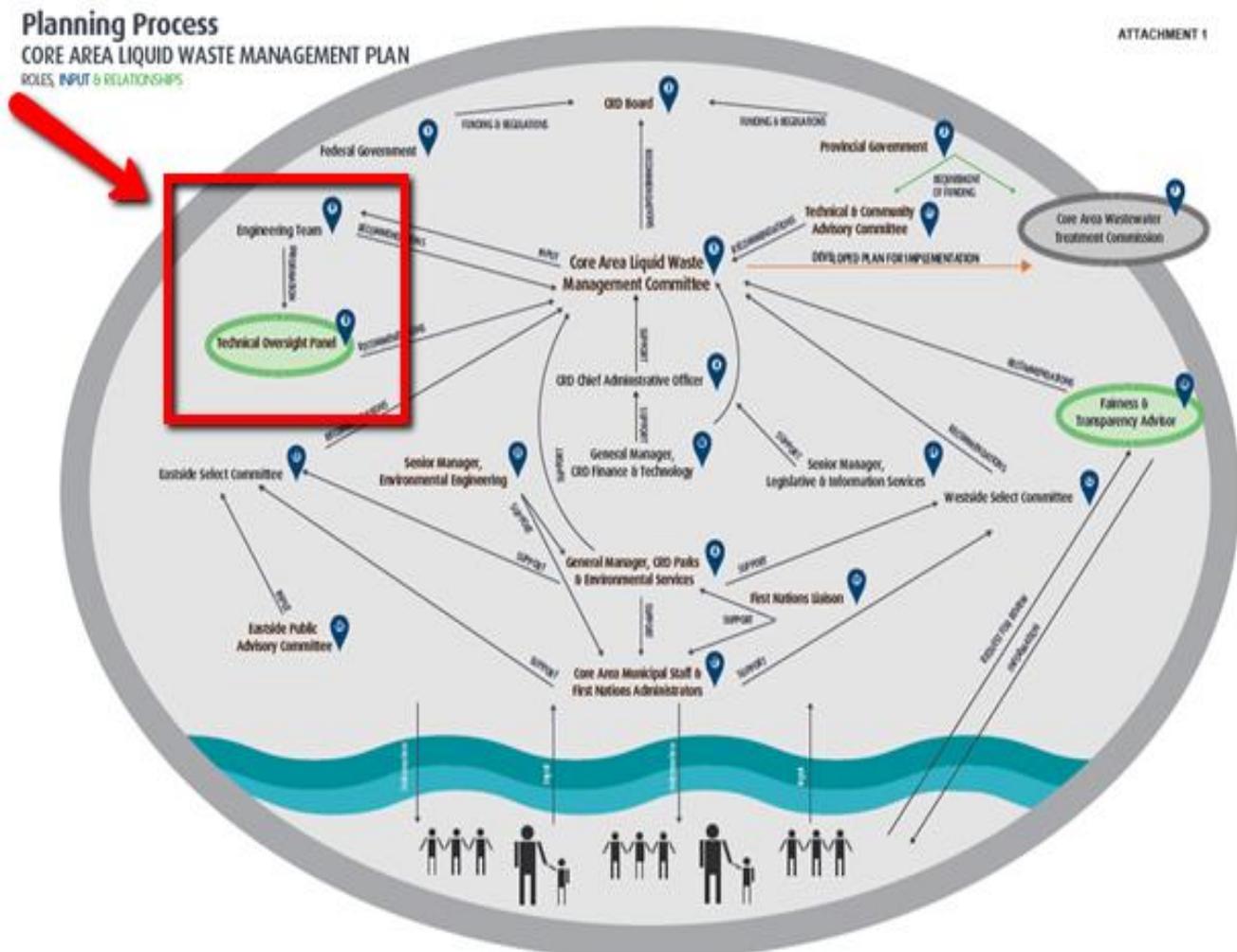


Figure 1: Planning Process - Roles, Inputs, and Relationships

## Terms of Reference for other Committees

A quick review of the Terms of Reference for other committees associated with the project reveal that the public consultation mandates of the various committees seem to be fairly clearly articulated. For instance, the TOR for the Westside Committee states, among other things:

*“The mandate of the committee is to: engage and consult with Westside residents”.*

A similar description is found in the Tor for the Eastside committee. No such statement related to a public consultation role is found in the Terms of Reference for the TOP.

Based on the totality of the documentation in support of the project, I am of the view that the TOP has no mandate to engage with the public.

I now move on to determine whether the TOP actually engaged in public consultation.

## The CRD's Approach to Public Consultation

In order to determine whether the TOP engaged in “public consultation”, we first need to define public consultation.

A review of the CRD website does not reveal a definition of “public consultation” per se but rather a detailed framework for what they describe as “public participation”.

According to the CRDs public participation framework, public participation<sup>1</sup> is:

*“when an organization reaches outside of itself to seek the involvement of others in its decision-making process... It is more than giving information and receiving feedback — it is a deliberate commitment that government makes to its public and stakeholder groups **to listen and to be influenced** within expressed limits.”[emphasis added]*

The CRD's public participation framework envisions participation on a spectrum - from low participation to high. At the low end are those activities characterized by the provision of information, (*inform & educate; gather information*) while at the high end of the spectrum we find more extensive levels of participation including *partnering* with the public. In the middle are “discussing” and “engaging”.

Based on the CRD's public participation framework, I am of the view that public consultation is the same as public participation. I am also of the view that the TOP did engage in public consultation by “discussing” and “engaging” with citizen groups at a November 23<sup>rd</sup> meeting of the TOP.

## Conclusion

From the combination of guiding documents (the TOR; the Project Charter) it is fair to say that there is relative clarity with respect to the TOP and public consultation; that is that the TOP has no mandate to actively engage with the public and doing so is inconsistent with their mandate and is ultimately beyond their jurisdiction.

## 2) Where in the TOR for the TOP is any process laid out for "Citizen Groups" to gain access to the TOP?

The FTA finds no provision in the TOR for citizen groups to have access to the Technical Oversight Panel (TOP). In fact, the Project Charter clearly constrains the TOPS's interactions with the public and does not include a role for them to engage citizen groups.

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<sup>1</sup> Capital Regional District Public Participation Framework (undated) CRD Website

**3) In the absence of any apparent reference in the TOP's TOR to meeting with "Citizen Groups", did the TOP, by "arrang(ing) to meet" with such groups go beyond its mandate, and if it did, what steps can or should be taken to correct this error in judgment?**

Taken together, the current terms of reference and the Project Charter do not contemplate a public engagement role for the TOP. In fact, the Project Charter clearly states that they are not to engage with the public.

Correspondence with the Chair of the TOP with respect of this matter suggests that the TOP believed that they were acting in a manner consistent with their mandate under item 7 in the terms of reference, which provides for them to "*consider additional sites*":

*"The team will begin its work with the option set sites provided. But it may consider additional sites that will ensure the best business case scenario that maximizes benefit to the best value for taxpayers..."*

While it is clear that the TOP has a mandate to explore additional sites and that the panel is entitled to exercise discretion and professional judgment in carrying out their duties, they do not in my opinion, enjoy unfettered discretion in determining how to do that, and are not immune to the constraints placed upon them by other enabling documents (e.g., the Project Charter). If the TOP were solely guided by the Terms of Reference, then the discretion exercised by the panel in initiating public engagement would likely be reasonable. However, in light of the totality of the guiding documents associated with the project, I find that arranging meetings with citizen groups exceeds the current mandate of the Panel as set out in the Terms of Reference and the Project Charter (taken together).

**4) How, if at all, did the presentations of citizen groups influence the recommendations of the TOP vis a vis the consultants, CALWMC, and/or any other parties?**

In order to answer this question, a detailed review of the public record of meetings would be required to determine whether there was a link between what the TOP heard through their meetings with citizen groups and subsequent advice provided to the CALWMC. The public record would need to clearly show how public input shaped recommendations coming from the TOP. The record of TOP meetings with respect to how the TOP's views were shaped (if at all) by interactions with citizen groups is inconclusive.<sup>2</sup> The minutes do not permit the FTA to definitely dispose of this matter or to comment on how any interactions with citizen groups would have affected their recommendations to the CALWMC and any other conclusion would be speculative.

The more central issue to resolve moving forward may be whether the TOP was meant to interact with the public at all. If it was always intended for them to engage as they have, or if it has become apparent that such a role would be beneficial, there is still an opportunity for the CALWMC to revise the Project Charter and/or the Terms of Reference in order for the public to more clearly see whether their mandate includes public engagement.

**5) If the TOP erred in meeting citizen groups, how can it be ordered to desist from doing so in future?**

In answering this question, we must first determine who is responsible for managing the TOP. The terms of reference for the TOP do not specifically state that the TOP will report to the CALWMC or that the CALWMC would have responsibility for overseeing the work of the TOP; however the TOR do specify that the TOP chair will report to the CALWMC ("*the TOP chair will report biweekly to the CALWMC*").

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<sup>2</sup> Minutes reviewed were those available on CRD website: TOP last posted minutes was December 1; CALWMC was November 4.

While the Terms of Reference for the TOP is not clear on who the TOP reports to, the *Scope of Work for the Request for Proposals*<sup>3</sup> for the costing consultants speaks to the reporting relationship between the TOP and the CALWMC:

*“In order to ensure transparency and achieve public confidence in the analysis, the CRD will retain a Technical Oversight Panel of up to five individuals with relevant technical expertise to provide oversight of this work. This Panel will report directly to the Core Area Liquid Waste Management Committee.”*

As such, it is my view that it is within the powers of the CALWMC to direct the TOP. It would be entirely within the purview of the CALWMC (and in fact, it would be consistent with the Project Charter) to direct the TOP to refrain from future public engagement.

**6) Should not these and other citizen groups have approached the Fairness and Transparency Advisor with their concerns rather than the TOP, and should not the TOP have directed these groups to address their concerns to the same Advisor instead of entertaining them itself?**

Whether the concerns raised by citizen groups, were actual “complaints” seeking resolution with respect to the planning process cannot easily be ascertained through the public record. As such, it is difficult for the FTA to comment on whether the citizen group’s issues amounted to “complaints” and thus falling more squarely within the mandate of the Fairness & Transparency Advisor.

While I am unable to comment on whether the issues explored were more in the nature of a “complaint”, I do believe that the TOP having engaged with the public in the manner they have, gives rise to a procedural concern.

Presumably on such a highly visible project - one in which it was deemed necessary to put in place a *Fairness & Transparency Advisor* - the processes used in consulting with the public should engage high levels of transparency and accountability. This might be characterized by clear and deliberate notification periods of any public sessions and/or invitations to the public to engage with the panel, and detailed minutes being made available to the public in a timely manner. The absence of this might subject the process to criticism. The public record related to how the TOP established procedures for the public to engage with them is lacking. There does not appear to have been any systematic solicitation process by the TOP for the public to make representations to the panel and/or to have equal access to the panel, nor does there appear to have been any vetting procedures in place to review such requests. What can be gleaned from the public record is that the committee responded to requests by individual members of the public, for opportunities for citizen groups to interact with the TOP.

## **Conclusion**

In the end, it appears that the TOP, in agreeing to engage with the public in the manner in which they have, exceeded their mandate and as such, exceeded their jurisdiction.

The complainant asks whether these concerned citizen groups should have instead approached the FTA with their concerns. I am of the view that the burden for re-directing such inquiries should not rest with members of the public. The public should not be held to the same standard as formally established vehicles such as panels and committees established under various public sector processes.

In deciding how to deal with requests from citizen groups, there were many options available, including the ones outlined below.

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<sup>3</sup> CRD Request for Proposals for Costing consultant as posted on CRD website

One option is to place the responsibility squarely on the Chair of the TOP to re-direct such inquiries to existing channels (if the issues were related to fairness and transparency, then to the FTA; otherwise to the CALWMC).

A second option might have been for the CRD staff person responsible for managing the TOP to have intervened to remind the panel of the Project Charter's constraint with respect to them engaging in public consultations. This view sees the TOP body as a truly external body of technical experts, unburdened by procedural constraints imposed through various instruments such as terms of reference and/ or project charters. This option places the burden for providing advice and support on process-related matters on operational staff, thus freeing up the panel to focus on providing technical advice.

A third option might have been for the TOP to discuss the issues with the Technical and Community Advisory Committee (TCAC) whose mandate it is to provide technical and community consultation advice to the CALWMC. This choice may have resulted in a more balanced approach for engagement by ensuring that public input is structured using a systematic approach (characterized by equitable access of the public to processes that will inform decision-making).

Finally, the substance of the issues presented to the TOP by the various citizen groups varied from issues of a *procedural nature* to those related to project *treatment options and costs*. As it relates to procedural matters, one might ask whether such issues would be better directed to the CALWMC or other committees established with a mandate to provide advice on process related matters.