



Professional Engineers
Ontario

**Examination of Procedures
for the Treatment of Complaints**

Final Report

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Section 1 Introduction

This report is the result of my examination conducted pursuant to the authority granted to me as the Complaints Review Councillor under the *Professional Engineers Act*¹

Let me start this report by saying that I did not find any fundamental problems with the way complaints are processed. My recommendations should be viewed as fine tuning of an otherwise well-functioning process.

During my term as Complaints Review Councillor, I have conducted numerous reviews of individual complaints. To date, generally speaking, I have found that complaints have been handled expeditiously and competently from the time the complainant signs the formal complaint until it is disposed of by the Complaints Committee.

However, in the course of these reviews, I have noted that there appeared to be lengthy periods between the time when the complaint first came to the attention of PEO and the time the formal complaint was signed. To be fair, however, there appears to have been a significant improvement in the last two years.

In this report, I will also address several specific unresolved issues surrounding the processing of complaints that have come to my attention during my tenure as Complaints Review Councillor (1999-2005) and during this review.

I have elected to take a normative approach in this report and suggest some standards that I believe are reasonably attainable for the processing of complaints.

If my recommendations are adopted, they will result in some procedural changes from the way complaints have been handled in the past. No legislative or regulatory changes are required to accomplish my recommendations. In my opinion, if these recommendations are accepted, the overall cost of implementation and the impact on the administration of the complaints system will be minimal.

I have consulted with staff in the preparation of this report and there will be no surprises for them. Moreover, the Chair of the Complaints Committee has provided me with the Committee's comments on my review and an earlier draft of this report. I have taken everyone's comments into consideration. In a few areas where I disagree with the comments I received, I have attempted to highlight the nature of the differences and the reasons why I reached my conclusions. By doing so, I hope that Councillors will be better able to understand the issues when they ultimately consider my recommendations.

Finally, I have kept in mind that PEO is moving towards the adoption of an alternative dispute resolution (ADR) mechanism. So far as I can ascertain, none of my recommendations conflict with this worthwhile initiative. In fact, I believe that my recommendations will facilitate the early introduction of ADR.

I wish to express my appreciation to all those who assisted me in the research and preparation of this report.

¹ *Professional Engineers Act*, R.S.O., Chapter P-28, as amended, s.26 (1), (12), (13) & (16)

Section 2 Recommendations

The following are my collected recommendations.

The numbering corresponds to the section of the report in which each, with accompanying commentary, is found.

Section 7 ACDE recommendations 5.1.8 and 5.1.9 should be implemented in full, as written, immediately.

Section 8 PEO should set internal standards for processing complaints. At the outset, I suggest the standard be set at six months from the point of intake until the registration of a formal complaint with the Registrar.

In the spirit of continuous improvement, this standard should be reviewed annually (probably by the Complaints Committee itself) with a view to being reduced even further until everyone is satisfied that the time limit cannot be reduced further.

The number of cases that exceed the standard and the causes therefor should be reported to Council as part of the Complaints Committee's annual report to Council.

Section 9 PEO should disclose experts' reports to both complainants and engineers who have been complained against, using precautions to minimize unintended uses of the report.

Section 10 The Complaints Committee should receive training on the writing of reasons in much the same manner as the Registration Committee and the Discipline Committee receive such training.

Section 11 PEO should explore the introduction of a quality assurance program, such as the ISO system or equivalent, to the complaints process, as a discrete unit of PEO's activities.

Section 3 ACDE Guiding Principles

The Task Force on Admissions, Complaints, Discipline and Enforcement (ACDE) set out the following guiding principles. These guiding principles are sound and they have guided my review.

- Overriding Guiding Principle
 - Protect and Serve the Public Interest: This is PEO's mandate.
- Primary Guiding Principles
 - Fairness of Process: A fair process is just and impartial.
 - Transparency of Process: The procedures should be open to public scrutiny.
- Secondary Guiding Principles (Used to interpret Primary Guiding Principles)
 - Clarity of Process: The process must be explicit.
 - Consistency of Process: The same process must be applied and accessible to all.
 - Elimination of Subjectivity or Discretion: The evaluation process should be as objective as possible.
 - Meet or Exceed Current Minimum Standards: This maintains or improves protection of public interest.
 - Non-discriminatory Process: This process should be independent of an applicant's² age, race, ethnic origin, sex, etc.
 - Predictability of Process: Applicants should be aware of the process at the outset.
- To Optimize the Guiding Principles
 - Clear Delineation of Roles: To ensure accountability in the process.
 - Economy of Process: The less expensive the process, the better.
 - Simplicity of Process: The simpler the process, the better.

² While the ACDE report uses the term "applicant", the term should be deemed to include both the complainant and the complained against engineer whenever and wherever it appears, as the context requires.

Section 4 Importance of the Complaints Process and the Complaints Committee

Every self-governing profession must maintain an exemplary complaints process if that profession hopes to enjoy public confidence and respect. The process must be transparent and accountable. If a profession fails to regulate the competence, ethics and professionalism of its members, there is little justification in granting the profession the privilege of self-regulation.

Self-regulation is built on the premise that members of the profession are best suited to judge the competence of its members. Failure to do so invites public cynicism and the charge that the profession is simply protecting its own.

A fine line must be walked between vigorously protecting the public interest on the one hand, and unwarranted harassment of members by disgruntled clients and members of the public on the other.

Section 5 Role of the Complaints Committee

The Complaints Committee is central in the complaints process under the *Professional Engineers Act* because no complaint goes to the Discipline Committee without first having gone through the Complaints Committee, with the exception of allegations sent directly to the Discipline Committee by Council or the Executive Committee.³

The Complaints Committee is charged with considering and investigating complaints made by members of the public or members of the association⁴. The Complaints Committee is assisted by PEO's investigators but, in the final analysis, it is the Committee's responsibility to ensure that the investigation is complete and that the Committee has examined or has made every reasonable effort to examine all records and other documents relating to the complaint⁵.

Where the Complaints Committee dismisses a complaint, there is no appeal from its decision apart from a request for a review by the Complaints Review Councillor. Of course, where a complaint is sent on to the Discipline Committee, the Discipline Committee considers the matter in an open formal hearing.

However, where the complaint is dismissed, the Complaints Review Councillor may only review the treatment of the complaint⁶. The Complaints Review Councillor is explicitly prohibited from inquiring into the merits of any specific complaint⁷. In other words, the Complaints Review Councillor is limited to reviewing the process, and not the substance, of the complaint.

The Complaints Committee is not required to hold a hearing or to afford any person an opportunity to make oral submissions before making its decision.⁸ In fact, I am not aware of any hearings conducted by the Complaints Committee since I was appointed Complaints Review Councillor in 1999. The Complaints Committee reaches its decision based upon the investigation file assembled by the staff investigator, which includes the Form of Complaint, the complaint response, and all other material obtained in the course of the investigation, including an independent expert report, if any.

The complaints process is well-documented in the public information guide entitled, *Making a Complaint*, which is posted on the PEO website; staff investigators go to great lengths to explain the process to both the complainant and the complained-against engineer. Nonetheless, from a complainant's perspective, the Complaints Committee's decision is shrouded in secrecy. This may not be important where complaints are forwarded to the Discipline Committee because, at that stage, the process becomes public.⁹ It is important that the Complaints Committee give comprehensive reasons

³ *ibid* s.27 (5). I understand that only one matter has been sent by Council or the Executive Committee directly to the Discipline Committee in the last six years.

⁴ *ibid* s.24 (1)

⁵ *ibid* s.24 (2)

⁶ *ibid* s.24 (2) & (3)

⁷ *ibid* s.24 (4)

⁸ *ibid* s.24 (5)

⁹ *ibid* s.24 (4) as amended S.O. 2001, c. 9, Sched. B, ss. 11 (46), 14 (2)

where the Committee declines to refer the matter to the Discipline Committee. This is to dispel any suggestion that PEO is not simply protecting one of its own.¹⁰

Those involved in administering the *Professional Engineers Act* are required to preserve secrecy.¹¹ It is understandable that professional engineers should be entitled to have complaints against them treated confidentially so that they are not unnecessarily stigmatized, at least until the complaint has moved to the Discipline Committee.

I make these observations simply because they highlight the heavy responsibility placed on the shoulders of each member of the Complaints Committee to act with scrupulous objectivity and integrity in the handling of complaints, because the integrity and reputation of Professional Engineers Ontario hangs in the balance.

¹⁰ The need for adequate reasons is discussed more fully in Section 10 of this report

¹¹ *ibid* s.38 (1)

Section 6 Complaint Intake

Complaint intake is important for several reasons. One must be able to identify when a complaint has been lodged with Professional Engineers Ontario and thereafter to track the complaint from its initiation until its disposition. There must be a clear demarcation point from which time begins to run in the processing of a complaint.

At the outset, it is important to determine whether the complaint is a complaint against a specific engineer, or whether the complaint is more generic in nature and might more appropriately be characterized as a complaint about PEO policies. If the matter is considered a complaint against an engineer or engineers, the matter will go through the complaints process. Policy matters will go through PEO's Policy Development Process.

One issue related to the characterization of the complaint is confidentiality. If the matter is characterized as a "complaint" the normal confidentiality provisions apply. However, if it is a policy concern, confidentiality is not an issue, except to the extent that PEO's Privacy Policy is not contravened.

Finally, there are issues related to the utilization of alternative dispute resolution (ADR) mechanisms. Early intervention is one of the underlying success factors in ADR, which in most cases, is at the beginning stage of PEO's investigation. Since ADR is under active consideration, there is no need for me to comment further on this.

Section 7 Notification of Complaint

Disagreement surrounds the issue of when a licensed engineer should be notified that a complaint has been filed against him or her and what form that notice should take.

It is important to recognize the distinction between the complainant's initial contact with PEO and a formal complaint. A complaint does not become a formal complaint until it has been written on a form provided by PEO, signed by the complainant and filed with the Registrar. Section 24(1) of the *Professional Engineers Act* provides that "no action ... shall be taken by the Complaints Committee ... unless ... a written complaint in a form that shall be provided by the Association has been filed with the Registrar".

Staff investigates the allegations and reduces them to a formal complaint. The formal complaint is reviewed and ultimately accepted by the complainant as his or her own. Sometimes, the complaint goes through a number of iterations before it is finalized and this takes time, sometimes months.

Upon receipt of a complaint, which has not matured to a formal complaint, PEO's present practice is to advise the engineer that a complaint has been made and identify the project in question without further details. The engineer is not provided with the name of the complainant or the specifics of the complaint until the investigation has been completed and the complaint has moved to the formal complaint stage.

Needless to say, in many cases, the engineer would likely know the nature of the complaint and the identity of the complainant by virtue of prior dealings, but uncertainty exists until the formal complaint is filed with the Registrar. A cloud hangs over the engineer's head until the complaint is formalized, if it ever is. Professionally, this cannot help but be disconcerting.

The ACDE Task Force made a number of recommendations about providing the engineer with details of the complaint as soon as it is received, rather than waiting until the formal complaint. I address the ACDE recommendations now.

ACDE Recommendations 5.1.8 and 5.1.9:

Disagreement exists over the proper interpretation and application of ACDE recommendations 5.1.8 and 5.1.9. These recommendations read as follows:

5.1.8 The procedures for involving the Complaints Committee and staff in the investigation of complaints should include a direction that all complainants be requested to make a complaint in writing. Those procedures should also include a direction that a complaint in writing be copied, as soon as it is received, to the member against whom the complaint is made. Such a notice should inform the member that an investigation may be ongoing and that the member may be asked for an early response. The procedures should also provide that when a complaint is disposed of soon after it is received, and the member against whom the complaint

was made has not been notified, the member should be told in writing the nature of the complaint and the manner in which it was resolved.

5.1.9 The procedures referred to in 5.1.8 should give the investigating staff discretion to hold back early notice in those situations where it might prejudice the investigation. This should take place only with the consent of the Chair of the Complaints Committee, accompanied by written reasons for the basis upon which the consent was granted.

The issue is profoundly simple. It is whether a licensed member is entitled to receive a copy of a complaint as soon as it is received by PEO. At the moment, this is not the case. PEO's current practice (implemented during the work of the ACDE Task Force) is as follows.

- PEO requires all complaints to be in writing.
- Once PEO receives the complaint, PEO advises the complained-against engineer that a complaint has been received and describes the project involved, but does not provide the complaint itself.
- The complained-against member is offered the option of providing information in response but is not obligated to do so.
- If PEO closes an investigation before a complaint is filed with the Registrar, PEO advises the complained-against member of the resolution of the complaint.

Briefly then, the complaint process starts when a complainant contacts PEO about alleged unprofessional conduct by a licensed member. Nothing of consequence occurs until the complainant puts the complaint in writing. At that stage, PEO staff conducts a preliminary investigation designed to determine what evidence is required. Staff may also engage an independent engineer to review and comment on the work of the practitioner. Generally, depending on the evidence, staff prepares a formal complaint for signature by the complainant. The investigation and the preparation and signing of the formal complaint may take many months and can last upwards of years.

The key to understanding the disagreement is to recognize that complaints are not considered to be formal complaints until the initial complaint has been investigated by PEO staff and a formal complaint (usually prepared by PEO staff and signed by the complainant) is filed with the Registrar.

Some argue that the ACDE Task Force recommendations have not been acted upon, even though Council adopted them in December 1999. Others argue that PEO has complied with the spirit and intent, if not the letter, of the recommendations.

Arguments Against Implementation

Staff submits that PEO cannot comply with the letter of the ACDE recommendations for the following reasons.

- Often, the initial complaint is voluminous, numbering hundreds of pages;

- The initial complaint document may include drawings and reports from third parties who have been engaged by the complainant;
- The concept of “early notification” (which invites an “early response” from the member), as described in s 5.1.8, is contrary to the process contemplated in s. 24(1) of the *Professional Engineers Act*;
- The ACDE report is unclear as to the intended purpose of the early response;
- Initial complaint letters are often vague and contain facts and details that are not relevant to PEO’s authority and jurisdiction;
- The formal complaint may contain issues and allegations that were not addressed in the initial complaint letter, but came to light as a result of PEO’s investigation;
- Absent a complaint in the prescribed form (a formal complaint), the confidentiality provisions of s. 38 of the *Professional Engineers Act* prohibit staff from releasing details about the complainant’s concerns and information obtained in the course of the investigation.

Statutory Provisions

Before dealing with the specific reasons that have been advanced for less than full compliance with the ACDE recommendations, it is necessary to review the provisions of s. 24(1) and s. 38(1) of the *Professional Engineers Act*. The sections read as follows:

24(1) The Complaints Committee shall consider and investigate complaints made by members of the public or members of the Association regarding the conduct or actions of a member of the Association or holder of a certificate of authorization, a temporary licence, a provisional licence or a limited licence, but no action shall be taken by the Committee under subsection (2) unless,

(a) a written complaint in a form that shall be provided by the Association has been filed with the Registrar and the member or holder whose conduct or actions are being investigated has been notified of the complaint and given at least two weeks in which to submit in writing to the Committee any explanations or representations the member or holder may wish to make concerning the matter; and

(b) the Committee has examined or has made every reasonable effort to examine all records and other documents relating to the complaint.

38.(1) Every person engaged in the administration of this Act, including any person making an examination or review under section 26 or an investigation under section 33, shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties, employment, examination, review or investigation and shall not communicate any such matters to any other person except,

- (a) *as may be required in connection with the administration of,*
 - (i) *this Act and the regulations and by-laws, or*
 - (ii) *the Architects Act, and the regulations and by-laws under that Act, or any proceedings under,*
 - (iii) *this Act or the regulations, or*
 - (iv) *the Architects Act, or the regulations under that Act;*
- (b) *to his or her counsel; or*
- (c) *with the consent of the person to whom the information relates.*

Analysis

The strongest argument advanced as to why an initial complaint cannot be forwarded to an engineer against whom the complaint has been made is said to be the provisions of s. 24(1) of the *Professional Engineers Act*, which provides that no action shall be taken by the Complaints Committee unless “a written complaint in a form that shall be provided has been filed with the Registrar” (emphasis added).

I make a number of observations about this argument. First, I suggest that if the argument is accepted, it is a triumph of formalism over substance.

A close reading of the section refers to the time when the Complaints Committee has authority to act, not when PEO staff swings into action. In fact, I believe that a fair and more sensible reading of s. 24(1) is that the Complaints Committee and PEO staff are directed to “consider and investigate” complaints made by members of the public, etc. The Act goes on to say that “no action shall be taken” by the Committee until the complaint is signed by the complainant and filed with the Registrar. The Act does not say anything about the handling of the original complaint and, specifically, whether a copy can be sent to the engineer. Therefore, one must return to first principles.

One of the primary guiding principles of the ACDE Task Force recommendations is that PEO’s admissions, complaints, discipline and enforcement processes be just and impartial and that the procedures be open to public scrutiny. Moreover, there should be clarity of process. In my view, the present process of withholding the original complaint from the engineer complained against does not meet these criteria. I do not see how giving a copy of the actual complaint will offend any of the guiding principles enunciated by the ACDE Task Force.

I observe that the ACDE’s recommendations and the accompanying commentary, as well as subsequent communications with the Hon. Douglas Carruthers, Q.C., leave little doubt that the Committee intended that the original complaint would be given to the engineer as soon as it is received by PEO, except in the narrow circumstances outlined in ACDE recommendation 5.1.9.

I also note that virtually all other self-regulating professions send a copy of complaints to the professional as soon as they are received, with the professional being given the opportunity to respond as he or she sees fit.

I do not accept the proposition that the complained-against professional engineer is not entitled to see the original complaint until the formal complaint is filed with the Registrar. If anything, I believe that the Act is directory and not mandatory in this regard and, as noted earlier, the Act does not prohibit release of the original complaint.

With respect, arguments that some complaints are too voluminous and may contain drawings from third parties, etc. are disingenuous. First, we are not talking about all the material that supports the complaint, but the complaint itself. Surely, if the engineer wants to see the supporting material, arrangements can be made to duplicate it or, at least, allow the engineer to see it under appropriate conditions. Issues can be resolved by the Complaints Committee, or by the Chair, on a case-by-case basis, or in accordance with criteria yet to be developed.

There are practical reasons why the person should see the original complaint itself. First, it is only fair that the professional should have the right to see the specific allegations at the earliest possible time; a description of the project is no substitute for the original complaint. Second, although not obliged to do so, the professional engineer may see fit to respond to the allegations, which may shed considerable light on the complaint and focus and shorten the subsequent investigation.

Finally, and most important, early disclosure of the allegations leads to the possibility of early resolution, whether by alternative dispute resolution or otherwise. ADR is under active consideration by PEO, and disclosure is an essential element of ADR. I, for one, welcome the early introduction of ADR, because many of the complaints I was asked to review over the years would have lent themselves to early informal resolution.

The confidentiality provisions of s. 38(1) of the Act do not provide a satisfactory reason not to disclose the original complaint to the member against whom a complaint has been made. In this regard, I note that the Act specifically provides an exception for disclosures as may be required in connection with “the administration of this Act and the regulations and bylaws”. If disclosure to the subject member is not administration of the Act, then I don’t know what is. After all, the complaint and all supporting material must be made available once a formal complaint is filed with the Registrar. What is qualitatively different with providing the original complaint as soon as it is received? Nothing.

Therefore, I conclude that sections 24(1) and 38(1) of the *Professional Engineers Act* do not prevent the full implementation of recommendations 5.1.8 and 5.1.9 of the ACDE Task Force Report.

I recommend that ACDE recommendations 5.1.8 and 5.1.9 be implemented in full, as written, immediately.

Section 8 Time to Process Complaints

The *Professional Engineers Act* only inferentially suggests a time limit for the processing of complaints. The Act provides that the Complaints Review Councillor may review the treatment of a complaint if the Complaints Committee has not disposed of it within 90 days after the complaint has been registered with the Registrar. This time limit is not very meaningful because, in my experience, the Complaints Committee invariably disposes of matters within that time. Moreover, the Complaints Review Councillor has no power to direct an earlier disposition of a complaint, except that a Complaints Councillor's review may hasten the disposition of a complaint without more.

As noted earlier, the real issue is the time between a complainant's first contact with PEO and the registration of his or her formal complaint with the Registrar. This is the investigation stage. To be fair, I have observed a noticeable improvement in the last couple of years. I know that staff is conscientiously attempting to shorten the turnaround time.

I recommend that PEO set internal standards for processing complaints. At the outset, I suggest the standard be set at six months from the point of intake until the registration of a formal complaint with the Registrar.

In the spirit of continuous improvement, I further recommend that this standard be reviewed annually (probably by the Complaints Committee itself) with a view to being reduced even further until everyone is satisfied that the time limit cannot be reduced further.

The Deputy Registrar, Regulatory Compliance, and the Complaints Committee both argue that there are too many aspects of the complaints investigation process outside the investigator's control to permit the establishment of a "firm standard". For example, requests to third parties, such as building officials, can take days or even months and the investigator is powerless to compel prompt delivery of the needed materials. It is said that the Complaints Committee cannot dispose of the complaint without violating s. 24(1) of the *Professional Engineers Act*.

I am the first to acknowledge that occasionally difficulties assembling information may delay an investigation beyond the six month standard, but these situations can be treated by exception, and it does not mean that there should be no standard at all.

It must be understood that these guidelines are internal guidelines only and directory in nature. Non-compliance will not vitiate a complaint, but the guidelines will be of invaluable assistance to Council in monitoring the effectiveness of the complaints process. Moreover, a standard would allow staff and the Complaints Committee to look at the exceptions critically with a view to determining whether recurring problems can be identified and rectified, even if they lie outside PEO's control.

I welcome that Regulatory Staff are moving to establishing timing benchmarks for various elements of the investigation process (e.g. time between initial intake and PEO's acknowledgement/response, time between a signed complaint and its filing with the

Registrar). However, I see these as elements, albeit important elements, to the success of the larger objective, namely to improve the turnaround time between the first contact and the filing of a formal complaint.

The real question becomes what to do if the standard is not been met.

The first step is to develop appropriate monitoring and accountability mechanisms, the details of which can be developed by staff in conjunction with the Complaints Committee. Whether staff report the status of all open files with special attention to those files open for more than six months (or whatever the standard may be), or only focus on the exceptions is irrelevant to me. However, I simply note that monitoring systems that focus on the exceptions direct attention to problem areas, which in turn lead to their solution. The important thing is that some effective monitoring system be put in place.

The second step is to identify the cause for the exceptions and attempt to rectify them. It may be that the cause of delay is one or more external agencies, in which case discussions should ensue between PEO and that agency to remove the roadblocks to the timely processing of complaints. The point is that once problems are identified, invariably they can be solved.

I also recommend that the number of cases that exceed the standard and the causes be reported to Council as part of the Complaints Committee's annual report to Council.

In those rare cases where staff investigators cannot get requested documents, I note that s. 24(1) of the *Professional Engineers Act* only requires the Complaints Committee to examine or make *every reasonable effort* to examine all records related to the complaint. This simply means that, in those rare cases where investigators have been unsuccessful in assembling all material, the Complaints Committee may simply be required to make its decision based on the material that is available to them. Some finality must be brought to investigations. If the allegation is serious enough, it probably should go to the Discipline Committee barring any unusual circumstances. The Discipline Committee has the power to summons evidence and documents, which powers are not available to the Complaints Committee.¹²

¹² Statutory Powers Procedure Act, R.S.O. 1990, c. S 22, s.12

Section 9 Experts

From time to time, PEO's investigators consider it necessary to retain the services of an expert as part of their investigation.

Expert reports are commissioned when the investigator (or in some cases, the Complaints Committee itself) is of the opinion that the issues raised are sufficiently technical or of a specialist nature that a third-party opinion is required to properly assess possible errors, omissions, deficiencies or inappropriate standards of practice on the part of the engineer.

The disclosure of the expert's report is not universally accepted. I favour disclosure of the report to both the complainant and the engineer, but this has not been PEO's practice to date.

The following reasons have been advanced for not releasing the expert's report to the complainant:

- The release of the report would offend the confidentiality provision of s. 38 of the *Professional Engineers Act*
- Often, civil litigation exists between the complainant and the engineer and the release of the report increases the likelihood that PEO and the independent engineer's report will be "used" in the litigation.
- The report might be circulated or used inappropriately.
- The independent expert's report is not released to the engineer unless the matter proceeds to a disciplinary hearing, at which time the normal disclosure rules come into play.
- Even if the complaint goes to the Discipline Committee, the expert's report is not released to the complainant because PEO takes on the prosecution of the case and the complainant is not a party to the proceedings (although undoubtedly a witness).

The real problem in not releasing the report lies in the fact that the complainant is likely to jump to the conclusion that PEO's refusal to release the report is designed to protect one of its members. Whether this is true is not the issue; the damage is done because the impression, once conveyed, is almost impossible to dispel. This view erodes public confidence in the objectivity of PEO's complaints process.

The problem is greatly exacerbated when the Complaints Committee relies upon an expert's report not to refer a complaint to the Discipline Committee because the complainant has no effective recourse from that decision¹³. and the decision terminates the complaints and disciplinary proceedings.

¹³ Referrals to the Complaints Review Council are appeals on matters of process rather than an appeal on the merits. This point is amplified in section 5 of this report.

I have real difficulty with the proposition that the confidentiality provisions of s. 38 of the *Professional Engineers Act* prohibit the release of the independent expert's opinion to both the complainant and the engineer. It simply makes no sense to me that a report can be prepared at the request of PEO staff and subsequently relied upon by the Complaints Committee to arrive at its decision without the parties having an opportunity to comment on it. It defeats the objective of openness and transparency and brings the complaints process into disrepute.

The objective of s. 38 is to ensure that the engineer's name is kept private until at least a determination is made whether the complaint should go to a disciplinary hearing. This avoids stigmatization of the engineer. It does not mean that people involved in the investigation of the complaint, including the parties and the independent expert, should not have full access to the material that will be considered by the Complaints Committee. All the Act requires is that they keep the matter confidential.

The object is not to protect the expert. If it were, the simple solution would be to require the expert to agree, in advance, to the release of the report to the parties. I suspect that most experts already assume that their report will be released. Moreover, if the matter goes to a disciplinary hearing, the report will be disclosed.

Respectfully, the present application of s. 38 is too restrictive. In my opinion, the disclosure of this material falls clearly within the exempting words "*...as may be required in connection with the administration of this Act ...or any proceedings under this Act.*"¹⁴

With respect, I do not agree with the conclusion that the expert's report cannot be released to the complainant or the engineer because the report might be used in civil litigation or because PEO loses control of how the report might be used or circulated. If that is true, the same can be said of much of the other material that is routinely made available to complainants and complained-against engineers alike.

The fact that an expert's report may be used for collateral purposes is a risk inherent in the complaints process, but in my view, there are simple precautions to minimize this risk. Simple precautions include:

- advising the parties that the expert's report has been prepared solely for the complaints process and may not be used for any other use;
- having the expert limit the use of his or her report to the complaints process (or, alternatively, PEO could stamp the report with words to that effect);
- reminding the parties that the report is governed by the confidentiality provisions of the *Professional Engineers Act*,¹⁵ or
- in the most egregious cases, applying for an injunction to prevent the misuse of the report.

¹⁴ The ACDE Report (s. 5.4) obliquely commented on this issue.

¹⁵ *Professional Engineers Act*, s. 38

I believe that the interests of transparency and the very integrity of the complaints process itself far outweigh the risks involved. If anything, PEO should always err on the side of disclosure.

Therefore, **I recommend that PEO disclose experts' reports to both complainants and engineers who have been complained against, using precautions to minimize unintended uses of the report.**

Section 10 Complaints Committee's Reasons

As pointed out earlier in this report, the Complaints Committee is responsible for carrying out its duties thoroughly and with complete objectivity and integrity¹⁶. This responsibility is particularly onerous where the Committee declines to send a complaint to the Discipline Committee for hearing. The Complaints Committee is required to give its decision in writing, and where it directs that the complaint not be referred to the Discipline Committee, its reasons therefor.¹⁷

In my opinion, it is vitally important that the Committee's reasons be complete and answer each of the specific allegations of misconduct so that the complainant may know and understand why the complaint will not be processed further by PEO. Adequate reasons are the means through which transparency is maintained.

I acknowledge that writing reasons is onerous, especially for Committee members who already volunteer their time and conscientiously review the material, but good thorough reasons are vital to the transparency and, ultimately, the integrity of the complaints process itself.¹⁸

The complainant has no effective avenue of appeal from the decision, except to request a review by the Complaints Review Councillor. However, as has been noted earlier, the Complaints Review Councillor's jurisdiction is limited to a review of the process and not the substance of the complaint. Invariably, in my experience, the complainant wants a review of the substance of his or her complaint and not the process.

I recommend that the Complaints Committee receive training on the writing of reasons in much the same manner as the Registration Committee and the Discipline Committee receive such training.

There will be some costs associated with such training, but I am convinced that Committee members will derive great benefit from such training and such training will enhance public confidence in PEO's complaints process.

¹⁶ See section 5 of this report

¹⁷ *ibid* s. 24 (3)

¹⁸ See *R. v. M. (T.)* (2004) 71 O.R. (3d) 388 (Ont. C.A.) at 393 per Laskin J.A. "... giving reasoned reasons is an important self-discipline for a judge."

Section 11 Quality Assurance

Quality assurance systems can be applied to virtually any process-based system, not just manufacturing. PEO's complaint system is process-oriented, and it is clearly amenable to the introduction of a quality assurance system.

It is beyond the scope of this report to design such a system. However, if, for example, the six-month timeline is accepted as a reasonable standard for investigation of complaints, then it and all intermediate steps can be included in the quality assurance evaluation system.

A good quality assurance system allows those responsible to identify and rectify trouble spots. More important, a good quality assurance system, rigorously applied serves as a platform for continuous improvement.

I recommend that PEO explore the introduction of a quality assurance program, such as the ISO system or equivalent, to the complaints process, as a discrete unit of PEO's activities.

There will be costs associated with the introduction of a quality assurance system but these costs will be offset, in large part, by efficiencies discovered through the process. Above all, added credibility would more than justify the expenditure.

Section 12 Conclusion

All in all, I am satisfied that PEO's complaints process works well and that the public interest is well served. I am also convinced that PEO's complaints staff and the members of the Complaints Committee are conscientious, objective and fair. As with any system, there is always room for improvement.

The recommendations in this report are offered with a view to improving the complaints process. No legislative or regulation changes are required to implement the recommendations in this report.

Respectfully Submitted

David J.D. Sims, Q.C.