



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-2224**

**Appeal MA06-309**

**Toronto Transit Commission**



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## **NATURE OF THE APPEAL:**

The Toronto Transit Commission (the TTC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for “any and all staff reports considered by [the TTC] in 2005/2006 relating to the purchase of new subway cars.”

In subsequent communications with the TTC, the requester clarified the request and confirmed that it related to the procurement of the subway cars, and also stated:

For clarification, we understand that, during the stated timeframe, the [TTC] considered a report from the Chief General Manager that dealt specifically with the procurement issue. We also understand that this report was originally accessible to the public but was removed from the TTC’s website following the [TTC’s] meeting.

The TTC responded to the request with a decision letter in which it provided the requester with an index of records, disclosed a number of records to the requester, and identified that it was denying access to certain records on the basis of the discretionary exemptions in sections 6(1)(b) (closed meeting), 9 (relations with other governments), 11(e) (economic and other interests), and 12 (solicitor-client privilege).

The requester, now the appellant, appealed the TTC’s decision.

During the mediation stage of this appeal, the TTC issued a supplementary decision letter in which it decided to release one of the records at issue (Record 10, which is the September 21, 2005 Committee of the Whole minute relating to the purchase of the new subway cars). After receiving that record, the appellant stated that the Committee of the Whole had before it a memorandum dated September 21, 2005 from the Chief General Manager of the TTC entitled “Subway Car Acquisition”. This memorandum was identified as Record 9 in the Index of Records, and included 7 appendices (Appendices A – H), some of which had been disclosed to the appellant.

The appellant confirmed that the sole record remaining at issue in this appeal was Record 9 and the attached Appendix H. The TTC confirmed that it was no longer relying on section 9 to deny access to this record, but maintained that sections 6(1)(b) and 12 applied to Record 9 and Appendix H.

Also during mediation, the TTC referred the mediator to the motion in which the decision to close the September 21, 2005 meeting was made, and referred the mediator to sections 239(e) and (f) of the *Municipal Act, 2001* (the *Municipal Act*) as authority for holding the closed meeting. In addition, the TTC advised the mediator that Record 9 was never posted on the TTC’s website.

Mediation did not resolve the remaining issues, and this file was transferred to the inquiry stage of the appeal process. I sent a Notice of Inquiry to the TTC, initially, inviting it to provide representations on the issues in this appeal. The TTC provided representations in response to the Notice of Inquiry, and indicated that portions of those representations were provided in confidence to me, and were not to be shared with the appellant. Upon my review of the

representations of the TTC, I determined that portions of their confidential representations ought to be shared with the appellant, and notified the TTC that I would be sharing portions of their representations. I subsequently sent the Notice of Inquiry, along with those portions of the TTC's representations which I determined to be non-confidential, to the appellant. The appellant provided representations in response.

## **RECORDS:**

The record remaining at issue is Record 9, which is a 3-page memorandum dated September 21, 2005 from the Chief General Manager to the Committee of the Whole; and the attached one-page Appendix H, consisting of proposed motions.

## **DISCUSSION:**

### **CLOSED MEETING**

The TTC relies on the exemption in section 6(1)(b), which reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

Previous orders have held that, for this exemption to apply, the TTC must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting;
2. a statute authorizes the holding of the meeting in the absence of the public; and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.

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

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

I will now review each part of this three-part test.

***Part 1- a council, board, commission or other body, or a committee of one of them, held a meeting***

In support of its position that the records qualify for exemption under section 6(1)(b) of the *Act*, the TTC states that the Committee of the Whole meeting was held on September 21, 2005. The appellant does not dispute that the meeting was held. In the circumstances, I am satisfied that the meeting did, in fact, take place, and that Part 1 of the three part test under section 6(1)(b) has been met.

***Part 2 - a statute authorizes the holding of the meeting in the absence of the public***

*The TTC's representations*

The TTC states that the meeting was held in the absence of the public under the authority of section 239(2)(f) of the *Municipal Act*. The TTC attached to its representations a copy of the relevant section of the *Municipal Act* and a copy of the resolution closing the September 21, 2005 meeting to the public. The TTC then states:

Section 289(2)(f) permits a meeting of the local board (for the purposes of the *Municipal Act* and section 239 the [TTC] is a "local board") to be closed to the public if the subject matter being considered is advice that is subject to solicitor-client privilege, including communications necessary for that purpose. [The] TTC submits that section 6(1)(b) applies to the records at issue as the record discloses deliberations of the Commission that was held in the absence of the public in accordance with section 239(2)(f) of the *Municipal Act*.

In the confidential portions of its representations, the TTC reviewed in some detail the specific information contained in the records, and identified those portions of the records which contain legal advice from counsel (both internal and external counsel).

*The appellant's representations*

The appellant submits that the records do not qualify for exemption under section 6(1)(b), and also refers to the wording of section 239(1) and (2)(f). However, the appellant takes the position that the meeting of September 21, 2005 was improperly held in the absence of the public. He states:

The memorandum from the Chief General Manager to TTC Committee of the Whole is put forward by [the TTC] as the sole purpose for holding the September 21, 2005 meeting in the absence of the public. It follows, therefore, that not only would Record 9 have had to be advice subject to solicitor-client privilege, but also, the only subject matter discussed at the meeting.

It appears that a decision was recommended at the closed session of the September 21, 2005 meeting, but then immediately adopted and staff given direction in an open session. It appears that the subject matter being considered by the TTC was ... not ... advice from TTC and external solicitors. The memorandum was from the Chief General Manager and not the TTC solicitor.

...

The explanation provided by [the TTC] that access to Record 9 should be denied is based on invoking section 239(2)(f) of the *Municipal Act*. Further, the TTC has relied on the closed meetings provisions of the *Act* to deliberate and render a decision. It is my understanding that the TTC, by definition, a local board, is required to deliberate and render decisions in open meetings. I put forward that the meeting of September 21, 2005 was improperly held in the absence of the public and that the discretionary exemption of section 6(1)(b) does not apply to Record 9.

The appellant also states that the fact that Record 9 contains the word “confidential” does not automatically render the document legal advice or confidential. He submits that the TTC must provide evidence in support of its position that the information in a particular document is confidential.

### *Findings*

The relevant portions of section 239 of the *Municipal Act*, R.S.O. 2001, c. 25, state:

- (1) Except as provided in this section, all meetings shall be open to the public.
- (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
  - (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

Upon my review of the record and evidence provided by the parties, I am satisfied that the TTC was authorized by section 239(2)(f) of the *Municipal Act* to hold a closed meeting to consider the contents of Record 9 and Appendix H thereto. Although Record 9 is a memorandum from the Chief General Manager to the Committee of the Whole, I am satisfied that the TTC has provided me with sufficient evidence to demonstrate that much of this memorandum contains specific legal advice from internal and external counsel.

As identified above, the TTC has identified in some detail the specific information contained in those portions of Record 9 and Appendix H which contain legal advice. Based on my review of the records and the TTC’s submissions, I am satisfied that Record 9 and Appendix H contain

advice that is subject to solicitor-client privilege, including communications necessary for that purpose, sufficient to satisfy the requirement in section 239(2)(f), which allows for a meeting to be closed to the public. In the circumstances, I find that the TTC was authorized by statute to hold the meeting in the absence of the public, thereby satisfying Part 2 of the test under section 6(1)(b) of the *Act*.

***Part 3 - disclosure of the record would reveal the actual substance of the deliberations of the meeting***

Under Part 3 of the test set out above, previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision [Order M-184]
- “substance” generally means more than just the subject of the meeting [Orders M-703, MO-1344]

In addition, previous orders of this office have established that it is not sufficient that the record itself was the subject of deliberations at the meeting in question [see Order M-98, M-208], where the record does not reveal the actual substance of the deliberations or discussions that took place leading up to the decisions that were made.

In this appeal, the TTC states that the confidential legal advice contained in Record 9 and Appendix H was received and deliberated upon in the September 21, 2005 Committee of the Whole meeting. Based on the information provided to me, I find that disclosure of Record 9 and Appendix H would reveal the substance of the deliberations at the closed meeting. Accordingly, I conclude that the third part of the test has also been met.

In conclusion, I find that all three parts of the test under section 6(1)(b) have been satisfied to exempt Record 9 and Appendix H from disclosure.

**Section 6(2)(b): Exception to the Exemption**

Section 6(2)(b) sets out an exception to the exemption in section 6(1)(b). It reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

in the case of a record under clause (1)(b), the subject matter of the deliberations has been considered in a meeting open to the public;

The appellant takes the position that the exception in section 6(2)(b) applies.

The TTC addresses this issue by stating:

Following deliberations at the Committee of the Whole meeting of September 21, 2005, the [TTC] provided direction to staff on how to proceed with the procurement of the new subway cars. The minute from the subject meeting which documents the approved motions was previously provided to the requester because the record identifies the [TTC's] final decision in the matter, not the substance of the broader deliberations and legal advice that it received on the issue ...

The TTC then identifies that the procurement of the new subway cars was subsequently addressed at public TTC meetings held on two identified dates, and that the information in the reports relating to these meetings (which are public) relate to the business of the procurement that took place after the September 21, 2005 Committee of the Whole meeting. The TTC states that the information in those public reports is consistent with the publicly available information about the procurement process, and does not provide information about the legal advice received and deliberated by the Committee of the Whole on September 21, 2005. The TTC states "As such, ... the substance of the deliberations stemming from [Record 9 and Appendix H] have not been considered in a public meeting".

Based on the information provided to me by the TTC, I am satisfied that the subject matter of the deliberations of the in-camera meeting of September 21, 2005 has not been considered in a meeting open to the public. Therefore, I find that the exception in section 6(2)(b) is inapplicable to the circumstances in this appeal.

Having found that the records are exempt under section 6(1)(b), it is not necessary for me to review the possible application of section 12 to them.

### **EXERCISE OF DISCRETION**

As the section 6(1)(b) exemption is discretionary, I will now consider whether the TTC exercised its discretion properly in not disclosing Record 9 and Appendix H to the appellant.

Section 6(1)(b) permits the TTC to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The appellant submits that the TTC did not exercise its discretion in applying the exemptions to deny access to Record 9. The appellant refers to the following particular considerations that he states the TTC ought to have taken into account:

- that information should be available to the public,
- that exemptions from the right of access should be limited and specific,
- the wording of the exemption and the interests it seeks to protect, and
- whether disclosure will increase public confidence in the operation of the institution.

The appellant also refers to statements by this office recognizing the importance of building a “culture of openness” in government. He also refers to the following excerpt from the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* [1997], 2 S.C.R. 403, where Mr.



Justice La Forest of the Supreme Court of Canada considered the purpose of the federal *Access to Information Act* and commented:

The overarching purpose of access to information legislation... is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process and secondly, that politicians and bureaucrats remain accountable to the citizenry...

The appellant also states:

The TTC is public institution of significance in Toronto. The budget of the TTC comes from the approved budget of the City of Toronto. Clearly, the public has a right to the information that shapes the decision-making of the public institutions.

...

In applying [the discretionary exemptions claimed], the TTC did not take into consideration the purposes of the *Act*. The application of [the *Act*] is not intended to be a legal exercise, but rather the exercise of the right of the public to participate in the democratic process, understand decisions made about them and for their City and hold the elected officials and bureaucrats accountable for the decisions made on their behalf.

To reverse the decision of adopting a competitive bidding process and decide to adopt a sole source process to purchase subway cars in a decision that requires transparency. The TTC has decided to turn this access request into a legal exercise and apply an exemption because it is available and not because it is warranted. The public has a right to know how decisions were made, the effect of those decisions and the ability to participate in the deliberation of the same.

The TTC has obfuscated the decision-making process and taken away transparency in government decision-making. This risk [undermines] the public trust in how the City of Toronto and its agencies, boards and commissions, manage the finances entrusted by the citizens.

I submit that the TTC did not exercise its discretion in applying the exemptions to deny access to Record 9. I submit that there was no consideration of the principles of [the *Act*], the limited and specific nature of exemptions, if applicable and whether the disclosure will increase the public trust. The public does not require information to be candy-coated. The public requires respect and transparency and in return government institutions receive their trust.

In support of its decision to exercise its discretion to apply section 6(1)(b) to the record, the TTC states:

... the TTC undertook a thorough and detailed analysis of all documents related to the procurement of the new subway cars to ensure that [the *Act*'s] mandatory and discretionary exemptions were properly applied. The TTC fully supports the principles set out in the legislation as they relate to the public's right of access to records. This effort resulted in both the release and denial of documents covered by discretionary exemptions, including the withholding of Document 9 and Attachment H. The following are the primary considerations applied to [those records]:

- the context of the legal advice contained in the documents,
- if any compelling reasons are present to justify waiving solicitor-client privilege or to reveal the substance of the deliberations from an in-camera meeting,
- are these limited exemptions, and
- the intent and purpose of the discretionary exemptions being applied.

### ***Finding***

As set out above, an institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so, or did so based on proper considerations, and may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

On my review of the representations of the parties on the issue of the proper exercise of discretion, I find that in denying access to Record 9 and Appendix H, the TTC exercised its discretion under section 6(1)(b) for a proper purpose, not taking into account irrelevant considerations and taking into account only those that are relevant. I also note that, as identified by the TTC, its exercise of discretion resulted in the denial and release of documents for which discretionary exemptions could have been claimed.

Finally, the appellant takes the position that the public ought to have access to this information, and implicitly raises the possibility that section 16 of the *Act* (the public interest override) may apply. Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

I have found that the records are exempt from disclosure under section 6(1)(b), which is not one of the sections listed in the public interest override in section 16. Accordingly, section 16 cannot apply to records found to be exempt under section 6(1).

As a result, the records are exempt from disclosure under section 6(1)(b).

**ORDER:**

I uphold the decision of the TTC.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_ September 11, 2007