

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3158

Appeal MA13-458

Toronto Transit Commission

February 4, 2015

Summary: The requester sought access to all communications relating to the Presto/Farecard Project during a two-year period and between specified Toronto Transit Commission (TTC) staff and identified individuals and organizations. The TTC granted access to some of the records and denied access to others, in whole or in part, relying on the discretionary exemption in section 7(1) (advice and recommendations) of the *Municipal Freedom of Information and Protection of Privacy Act*. The adjudicator partly upholds the decision to deny access and orders disclosure of some of the information.

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

OVERVIEW:

[1] The appellant submitted a request to the Toronto Transit Commission (the TTC) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for all communications regarding the Presto/Farecard Project during a two-year period and between specified TTC staff and identified individuals and organizations.

[2] The TTC issued a decision in which it granted partial access to the requested records, claiming the exemptions in sections 7(1) (advice or recommendations), 10(1) (third party information) and 14(1) (personal privacy) of the *Act* to deny access to the records, in whole or in part.

[3] The appellant appealed the TTC's decision.

[4] During mediation, the parties narrowed the issues on appeal. As the appellant did not take issue with the TTC's reliance on section 14(1) and the withholding of personal information, it was accordingly removed from the scope of the appeal. Upon provision and subsequent review of the records at issue during mediation, a party whose rights may be affected by the disclosure of the records (the affected party) consented to the release of certain records to the appellant, resulting in a revised decision from the TTC that granted access to specific portions originally withheld pursuant to section 10(1) of the *Act*. In its revised decision, the TTC reiterated its position with respect to the application of section 7 of the *Act* to the remaining severed records. The appellant still took issue with this exemption claim and as mediation did not resolve the appeal, it was forwarded to the adjudication stage of the appeal process.

[5] The adjudicator previously assigned to this appeal sent a Notice of Inquiry to the TTC initially, asking it to address the issue of whether section 7(1) applies to the records at issue. The TTC submitted representations in response, as well as exercising its discretion to disclose an additional page of the records, in its entirety. The TTC maintained, however, that section 7 applies to the remaining records at issue. The adjudicator then shared these representations, in their entirety, with the appellant and invited him to address the application of the section 7 exemption and respond to the TTC's submissions. The appellant subsequently provided representations.

[6] This appeal was then re-assigned to me. The issue before me is whether to uphold the TTC's application of the exemption at section 7(1) to the records that remain at issue. For the reasons below, I find that some of the information does not qualify for exemption. I uphold the TTC's exercise of discretion under section 7(1) to those records, or portions of records, for which I have found the exemption applies.

RECORDS:

[7] The records remaining at issue are those withheld by the TTC under section 7(1) of the *Act* and consist of severed emails and their attachments found on pages 416, 417, 458, 482, 483, 496, 514, 530, 530b, 533, 533b, 536, 540, 544, 545 and 550. These records relate to 2010 and 2011 Presto/Farecard communications and consist of thirteen pages of emails, a draft response and one chart, portions of which remain at issue.

ISSUES:

- A. Does the discretionary exemption at section 7(1) apply to the records?
- B. Did the TTC exercise its discretion under section 7(1)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the discretionary exemption at section 7(1) apply to the records?

General principles

[8] Section 7(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[9] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹

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

[11] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.²

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

¹ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

² See above at paras. 26 and 47.

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

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.³

[14] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.⁴

[15] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 7(1).⁵

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

- factual or background information⁶
- a supervisor's direction to staff on how to conduct an investigation⁷
- information prepared for public dissemination⁸

[17] Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7.

Representations

[18] The TTC describes the information at issue in this appeal as various emails and attachments regarding the Presto project. In its representations, the TTC provides a description of the redactions on each page at issue and a justification for its finding that the discretionary exemption at section 7(1) applies to the information. For those redactions described as portions of emails, the TTC submits that the exemption applies

³ Order P-1054.

⁴ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

⁵ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

⁶ Order PO-3315.

⁷ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

⁸ Order PO-2677.

to the information on the basis that it contains a suggested course of action. The TTC further asserts that a number of these internal emails contain advice between the Project Manager, Chief General Manager and other TTC staff regarding the best approach for dealing with the Presto project. The TTC states that redacted information from these emails includes recommendations, summary of options, and drafts of responses to external parties. One email record at page 550 was specifically identified by the TTC in its representations as legal advice to the Chief General Manager (CGM) of the project and TTC Chair regarding a recommended course of action. The TTC asserts that this particular record is exempt as "advice" and also subject to solicitor-client privilege. I note that the discretionary exemption in section 12 of the *Act* has not been raised by the TTC in this appeal and is not at issue.

[19] The TTC argues that a chart on pages 482 and 483 qualifies as advice as it was created to provide advice to the project's Chief General Manager on the Presto response on various issues, and their relationship to the Commission's principles and objectives. The TTC also seeks to exempt the entire record on page 514, stating it is a "draft response" prepared for the CGM, in preparation for an in-camera meeting with a Commissioner.

[20] The appellant did not provide any specific representations as to the application of section 7(1) and the merits of the advice and recommendations exemption claimed by the TTC in this appeal, except to question the TTC's motivation for its exercise of discretion under section 7(1).

Analysis and findings

[21] On my review of the records and the parties' submissions, I am satisfied that most of the information at issue contains the advice and recommendations of TTC employees regarding the PRESTO project and, thereby qualifies for exemption under 7(1). I find that portions of the emails at issue, the draft responses and most of the information contained in the chart contains a suggested course of action regarding the farecard project that will ultimately be accepted or rejected by the decision-makers to whom the advice and recommendations was directed. The undisclosed information contains advice and recommendations relating to an on-going inter-governmental project and its implementation.

[22] I do not, however, uphold the application of the exemption for part of the withheld portion on page 417 and part of the chart on pages 482 and 483. I find that some of the information in these pages does not contain any advice and recommendations. Specifically, I find that part of the withheld portion of the email on page 417 contains factual information about potential services offered by Presto to the TTC. This part of the text amounts to background information about the farecard project. It does not contain any advice and recommendations, and is therefore not exempt.

[23] With regard to the information contained on pages 482 and 483, I do not uphold the application of the section 7(1) exemption to a portion of the chart. The chart on pages 482 and 483 consists of three columns, the first of which lists the TTC's principles and objectives related to the farecard project. I find this portion of the chart contains a summary of overall direction given to TTC staff involved in the Presto project, and is therefore more in the nature of factual or background information framing advice being given, rather than advice or recommendations in itself. This column is severable from the remainder of the information. The two other columns contain advice and recommendations in that they describe responses from the other main participant in the project and assesses them against the TTC's concerns and issues.

[24] To summarize, subject to my findings on the ministry's exercise of discretion, I uphold the TTC's application of section 7(1) to most of the information at issue. I do not uphold the TTC's application of section 7(1) to a portion of the email at issue on page 417 and the first column of the chart contained on pages 482 and 483. I will order these portions of the records disclosed.

B. Did the TTC exercise its discretion under section 7(1)? If so, should this office uphold the exercise of discretion?

General principles

[25] The section 7 exemption is discretionary, and permits an institution 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.

[26] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[27] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁹ This office may not, however, substitute its own discretion for that of the institution.¹⁰

⁹ Order MO-1573.

¹⁰ Section 43(2).

[28] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹¹

- 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.

Representations

[29] The TTC states in its representations that it exercised its discretion under section 7(1) with respect to the disclosure of the records in question. It characterized these

¹¹ Orders P-344 and MO-1573.

records by the institution as relating to “detailed project delivery options and issues involving the TTC and PRESTO.” According to the TTC, the information in the documents that was not disclosed pursuant to its exercise of discretion contained advice and/or recommendations relating to an on-going inter-governmental project and its implementation, within the meaning of the exemption in section 7(1).

[30] As noted above, the appellant did not provide any specific representations as to the application of section 7(1), except to question the TTC’s motivation for its exercise of discretion. The appellant asserts that the TTC failed to take into account relevant considerations, like the relevance of the records to determining if other institutions related to the farecard project made an “irrational policy decision.” In addition, the appellant alleged the TTC exercised its discretion based on irrelevant considerations such as a desire to avoid embarrassing these other institutions. The appellant argues that the records at issue were withheld for being the “most embarrassing pages.”

Analysis and findings

[31] Upon consideration of the contents of the records and the parties’ submissions, I am satisfied that the TTC exercised its discretion under section 7(1) in a proper manner. I am satisfied the ministry considered relevant factors, including the nature of the withheld information in exercising its discretion.

[32] I note that the TTC has already disclosed a significant portion of records to the appellant in response to his request, both in the initial response to the request and then at the adjudication stage of the appeal process, when it decided to exercise its discretion in accordance with section 7(1) to disclose a further record. In so doing, the TTC distinguished information withheld as advice and/or recommendations relating to the on-going inter-governmental project and that disclosed, which was communications or portions of emails more factual and observational in nature.

[33] I am also satisfied the ministry did not consider irrelevant factors such as those raised by the appellant. Although the appellant has alleged improper bases for the ministry’s decision to withhold certain records, the evidence does not support any inference of the kinds of motives he describes. I do not agree that the ministry’s failure to disclose the records at issue signals a flawed exercise of discretion motivated by irrelevant considerations or disregarding relevant ones.

ORDER:

1. I order the TTC to disclose the following portions of records to the appellant by providing him with a copy of them **on or before March 11, 2015** :
 - Part of the withheld portion on page 417
 - Part of the chart on pages 482, 482b and 483

For greater certainty I have enclosed a copy of the records at issue, highlighting the information that is to be **disclosed**.

2. I uphold the TTC's decision to withhold the remaining records or portions of records from disclosure.
3. In order to verify compliance with this order, I reserve the right to require the TTC to provide me with proof of disclosure to the appellant in accordance with order provision 1.

Original signed by: _____
Sherry Liang
Assistant Commissioner

_____ February 4, 2015