

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3347

Appeal MA15-214

Toronto Transit Commission

August 11, 2016

Summary: The Toronto Transit Commission (the TTC) received a request under *the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for access to a consultant's review of the Toronto-York Spadina Subway Extension Project. The TTC issued a decision granting partial access, citing sections 7(1) (advice or recommendations) and 11(d) (injury to financial interests) to deny access to portions of the record. In this order, the adjudicator does not uphold the section 7(1) exemption by reason of the exception in section 7(2)(e) (performance or efficiency report), but upholds the section 11(d) exemption for the information at issue in one section of the record.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1), 7(2)(e), and 11(d).

Orders Considered: Order PO-1884.

OVERVIEW:

[1] The Toronto Transit Commission (the TTC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* or the *Act* that was forwarded to it under the *Act* by the City of Toronto, for access to:

1. American Public Transit Association Peer Review of the project schedule for the Toronto York Spadina Subway Extension [TYSSE],

2. [Named consultant's (the consultant)] Review of Toronto-York Spadina Subway Extension Project status.

[2] The TTC issued a decision granting partial access to the records, citing sections 7(1) (advice or recommendations), 12 (solicitor-client privilege) and 15 (information soon to be published) of the *Act* to withhold the remaining records.

[3] The requester (now the appellant) appealed the TTC's decision.

[4] During mediation, the TTC issued a revised decision granting access to additional information. In addition, the TTC indicated that certain records would be available within 90 days.

[5] The TTC then granted access in full to the "Report of the American Public Transit Association".¹ It also issued a decision granting partial access to portions of the "Spadina Subway Extension, Project Assessment Report," dated February 5, 2015,² citing sections 7(1), 11 (economic and other interests) and 12 of the *Act* to withhold portions of this record.

[6] The appellant indicated that she continues to seek access to the withheld portions of the "Spadina Subway Extension, Project Assessment Report," dated February 5, 2015 but was no longer seeking any other records. As a result, section 15 of the *Act* was no longer at issue in this appeal.

[7] As mediation did not resolve all of the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. Representations were sought and exchanged between the TTC and the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[8] In its representations, the TTC withdrew its claim as to the application of section 12, therefore, this exemption is no longer at issue. It also clarified which paragraph of section 11 it was relying on, namely, section 11(d) (injury to financial interests) and that it was applying this exemption to only one section of the record, Section 5.

[9] In this order, I do not uphold the section 7(1) exemption by reason of the exception in section 7(2)(e) (performance or efficiency report), but I uphold the section 11(d) exemption for the information at issue in Section 5 of the record.

RECORD:

[10] The only record remaining at issue is the "Spadina Subway Extension, Project Assessment Report," dated February 5, 2015.

¹ Item 1 of the request.

² Item 2 of the request.

ISSUES:

- A. Does the discretionary advice or recommendations exemption at section 7(1) apply to the record?
- B. Does the discretionary exemption at section 11(d) (injury to financial interests) apply to the information at issue in Section 5 of the record?
- C. Did the institution exercise its discretion under section 11(d)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. DOES THE DISCRETIONARY ADVICE OR RECOMMENDATIONS EXEMPTION AT SECTION 7(1) APPLY TO THE RECORD?

[11] 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.

[12] 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.³

[13] "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.

[14] "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.⁴

[15] "Advice" involves an evaluative analysis of information. Neither of the terms

³ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

⁴ See above at paras. 26 and 47.

"advice" or "recommendations" extends to "objective information" or factual material.

[16] 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.⁵

[17] 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.⁶

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

- factual or background information⁷
- a supervisor's direction to staff on how to conduct an investigation⁸
- information prepared for public dissemination⁹

[19] The TTC submits that, through its Chief Executive Officer (CEO), it retained the consultant to undertake a detailed review of the Toronto-York Spadina Subway Extension Project (the project). It states that the deliverable under the consulting agreement was for the consultant to provide a "Recommendation Report" to the CEO. The TTC submits that the portions of the record at issue are advice and recommendation(s) as provided by a consultant retained for that specific purpose.

[20] The appellant states that although the report contains recommendations, an exception under section 7(2)(e), a report or study on the performance or efficiency of an institution, is applicable. The appellant refers to "Schedule A - Scope of Services" of the contract between the TTC and the consultant which she states is an assessment of the status of the project with a focus on the performance and efficiency of "TTC staff and contractors." The appellant states:

⁵ Order P-1054.

⁶ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

⁷ Order PO-3315.

⁸ 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.).

⁹ Order PO-2677.

Furthermore, this was not the only assessment the TTC requested for this purpose. The TTC retained the American Public Transit Association (APTA) to conduct a peer review of the project and to advise on whether "potential risks have been adequately considered". This peer review also examined the performance and efficiency of TTC staff and contractors and was eventually released in full, to the public.

[21] In reply, the TTC states that section 7(2)(e) does not apply since the record was developed in order to provide a "way-forward" with the project and does not examine the past performance or efficiency of the project. It states that the TTC's CEO retained the consultant to provide advice and recommendations on whether the project was capable of opening in 2017 (as was suggested in the APTA report) and if so, what needed to be implemented to achieve the date.

[22] The TTC states that the APTA Peer Review concluded that improving the effectiveness of the delivery of the project to the best possible completion date would depend largely on implementing a 'reset' of the management approach on the project. It states that the consultant provided advice and recommendations with respect to the reset steps, along with more detailed recommendations on how the TTC could achieve, in the most cost effective manner, an improved possible completion date.

[23] The TTC submits that the record is a "going forward" report and not a report or study on the performance or efficiency of the TTC. It further submits that the information at issue in the record is advice and recommendation(s) of the consultant.

[24] In sur-reply, the appellant states that the record examines past performance, which it uses to provide recommendations for a "way-forward". She submits that the "way-forward" could be considered a "plan or proposal to change or establish a program" (in this case a project reset including the replacement and addition of several new positions in project management).¹⁰

Analysis/Findings

[25] I agree with the TTC and the appellant that the information at issue in the record reveals advice or recommendations by a consultant retained by the TTC within the meaning of section 7(1). Therefore, the exemption in section 7(1) applies to this information.

[26] Section 7(2) creates 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. The appellant relies on the exception in section 7(2)(e), which reads:

¹⁰ The appellant is relying on the exception to section 7(1) in section 7(2)(h). As I have found that the exception in section 7(2)(e) applies, there is no need for me to consider the application of section 7(2)(h).

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

a report or study on the performance or efficiency of an institution.

[27] The word “report” appears in several parts of section 7(2). This office has defined “report” as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact.¹¹ It is clear that the record at issue is a report, as it is a formal statement or account of the results of the collation and consideration of information about the project by the consultant.

[28] Section 7(2)(e) is not restricted to reports or studies concerning institutions as a whole, but may also apply to reports or studies concerning one or more discrete program areas within an institution.

[29] I find that the exception in section 7(2)(e) applies to the record. The record is a review of a particular aspect of the TTC, specifically the TYSSE project. It was commissioned by the TTC in order to provide advice and recommendations to the TTC from the consultant to improve the project’s timeline in order to allow the project to open in 2017.

[30] The record in this appeal is similar to the record at issue in Order PO-1884. In that order, the Ontario Realty Corporation (the ORC) retained a consultant, PricewaterhouseCoopers (PWC), to “develop recommendations for how ORC can successfully achieve all of the required milestones between now and the final hand-over of (certain management contracts)”. The key items to be addressed by PWC included making recommendations for a transition plan which would cover tasks associated with contractual requirements, tasks required to accomplish appropriate staffing, and tasks related to development of a communications plan as well as other key items.

[31] In Order PO-1884, former Assistant Commissioner Tom Mitchinson stated that:

The reason why the PWC report was commissioned is not determinative of its characterization as a record under section 13(2)(f).¹² It is also necessary to examine the nature and content of the report in making this determination.

In undertaking its review, PWC examined a number of aspects of transition planning, identified gaps, interviewed key personnel and made

¹¹ Order PO-2681; Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).

¹² Section 13(2)(f) of the provincial *Act*, the *Freedom of Information and Protection of Privacy Act (FIPPA)* is the equivalent to section 7(2)(e) of *MFIPPA*.

recommendations that would help ensure a successful transition. In so doing, PWC examined the management structures as well as budgetary and planning systems in place at the time at the ORC, and pointed to areas of performance in need of improvement. In many cases, in order to identify recommendations for change, PWC needed to review and discuss deficiencies in current areas of operational and management performance, and these areas form important components of the report. Once the review was completed and the report prepared, in my view, it is not dissimilar in form and content to an audit report. It assesses past performance, identifies areas requiring improvement, and recommends ways in which these improvements can be made.

I find that the recommendations contained in the PWC report arise out of an assessment on the part of the ORC that improvements were needed in its transition planning process; a decision to hire PWC to review the situation and provide recommendations; and an evaluation of the performance of the ORC's transition planning function in the context of making these recommendations. As such, I find that the report falls within the scope of section 13(2)(f).

Therefore, despite my conclusion that the record meets the requirements for exemption under section 13(1),¹³ this exemption claim is not available to the ORC.

[32] In undertaking its review in this appeal, as in Order PO-1884, the consultant examined a number of aspects of the project. It collected and evaluated data, conducted site visits, interviews, and meetings with project staff and contractor site teams. In the report, the consultant provided a schedule to complete the work on the project. It also identified gaps, deficiencies and risks to the timely project completion. The consultant reviewed the project's budgetary, organizational, and planning systems, and made recommendations that would help ensure a successful completion of the project in a timely manner. As stated by the TTC, the record is "a detailed review of the TYSSE Project."

[33] As was the case in Order PO-1884, the record at issue in this appeal is not dissimilar in form and content to an audit report. It also assesses past performance, identifies areas requiring improvement, and recommends ways in which these improvements can be made.

[34] I find that the recommendations contained in the record arise out of an assessment on the part of the consultant about the improvements that were needed in the project to meet the timeline. It evaluates the performance of the TTC and project

¹³ Section 13(1) of *FIPPA* is the equivalent to section 7(1) of *MFIPPA*.

staff and the contractor site teams in making these recommendations and is a report on the performance or efficiency of a part of the TTC. As such, I find that the report falls within the scope of section 7(2)(e).

[35] As the report falls within the exception to section 7(1) in section 7(2)(e), the information at issue is not exempt under section 7(1).

[36] The TTC has claimed the application of section 11(d) to the information at issue in Section 5 of the record. As no other exemptions have been claimed for the remainder of the information at issue in the record, I will order it disclosed.

B. DOES THE DISCRETIONARY EXEMPTION AT SECTION 11(D) (INJURY TO FINANCIAL INTERESTS) APPLY TO THE INFORMATION AT ISSUE IN SECTION 5 OF THE RECORD?

[37] Section 11(d) states:

A head may refuse to disclose a record that contains,
information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution.

[38] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.¹⁴

[39] For sections 11(d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁵

[40] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹⁶

¹⁴ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

¹⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹⁶ Order MO-2363.

[41] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.¹⁷

[42] The TTC states that it has received a significant number of construction claims and civil lawsuits from contractors in relation to the project. It states that many of the lawsuits and contractor claims existed prior to retaining the consultant and was the main purpose of retaining it to examine the on-going issues and make recommendations on how the TTC could move forward in the most cost effective and timely manner. It states that the information at issue shall remain confidential until such time as all construction claims and litigation are settled in relation to the project.

[43] The appellant states that there is only one section of the record: "Section 5: Cost, Contracts, & Commercial," which appears to contain information relating to construction claims and civil lawsuits from contractors. She states, however, that the disclosed portion of this section is an assessment of the TTC's process and resources for handling changes and claims. She further states that limitations to the data available to the consultant are outlined in "Section 1.4 Limitations", which include Dispute Resolution Board information. She submits, therefore, that specific contractor claims or lawsuits, are not necessarily within the scope of the record.

[44] In reply, the TTC agrees with the appellant that section 11(d) can only apply to the redacted portions of Section 5 of the record. It states that the project is on-going with at least six large construction contracts and that each one of these contracts have had various claims made for additional money and time, which claims remain unresolved.

[45] The TTC further states that Section 5 addresses, in part, the unresolved claims for money and time and outlines potential costs exposures to the project based on a per contract basis. It submits that disclosure of such information would put the TTC at a severe economic and financial disadvantage in attempting to negotiate with each contractor in order to receive the best possible financial outcome. The TTC states that:

In some areas, pages 5-3, 5-7, 5-8, 5-9 and 5-10 specifically, confidential information relating to the claims and exposure, if any, are detailed. Disclosure of this information would be highly prejudicial to the TTC and would put the TTC in a competitive disadvantage in negotiating any possible resolution to the outstanding claims.

[46] In sur-reply, the appellant states that the TTC's CEO has already stated that there are up to \$400 million in claims for this project and this information has been used to question the ability of the TTC project management team, causing injury to the

¹⁷ Orders MO-2363 and PO-2758.

financial interests of the TTC. The appellant states that:

It has also placed the onus on the TTC to demonstrate a "culture change" in management that is more conciliatory toward the contractors which could result in higher claims against the TTC.

Analysis/Findings

[47] I agree with the TTC that disclosure of the information at issue in Section 5 of the record is information that could reasonably be expected to be injurious to the financial interests of the TTC, as it would cause severe economic and financial disadvantage in the TTC's attempt to negotiate with each contractor in order to receive the best possible financial outcome.

[48] The information at issue in the record details the TTC's financial exposure and risk with respect to these claims and includes information about suggested strategies to deal with them. This information includes recommendations for the TTC to consider in order to protect its financial interests in resolving the pending claims against it. Disclosure of this very specific information could reasonably be expected to significantly weaken the TTC's ability to protect itself financially and be injurious to its financial interests.

[49] Accordingly, subject to my review of the TTC's exercise of discretion, the information at issue in Section 5 of the record is exempt under section 11(d) of *MFIPPA*.

C. DID THE INSTITUTION EXERCISE ITS DISCRETION UNDER SECTION 11(D)? IF SO, SHOULD THIS OFFICE UPHOLD THE EXERCISE OF DISCRETION?

[50] The section 11 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.

[51] 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.

[52] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁸ This office may not, however, substitute its own discretion for that of the institution.¹⁹

[53] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁰

- 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.

[54] The TTC states that it has disclosed the record's factual material along with certain portions of the report that it determined properly fell within section 7(1), as the TTC elected not to claim this exemption to those portions of the report.

¹⁸ Order MO-1573.

¹⁹ Section 43(2).

²⁰ Orders P-344 and MO-1573.

[55] The TTC states that it is currently involved in a number of litigation and/or claims matters relating to the various contractors involved in the project and that it retained the consultant to assist it with a way-forward in attempting to complete the project in the most cost effective and timely manner. It submits that disclosure would be injurious to the TTC's handling of the various claims.

[56] The appellant states that withholding the information at issue does not necessarily protect the TTC's interest when handling claims, if the report itself does not deal with specific claims. She states that:

However, the [record], does recommend the TTC agree to "new milestones submitted by the Contractors" and "release of funds owed to Contractors to demonstrate the TTC is implementing a culture change." While, the APTA Peer Review Report concludes that no completion date can be predicted because of "lack of credible schedule information from contractors." Therefore, the approach recommended in the [record] could also be injurious to the TTC's handling of the various TYSSE claims and to protect the public interest, full disclosure should not be denied.

The [record (the report)] was submitted to the TTC over a year ago. Many of the recommendations in the report have been implemented. To prevent full disclosure of a report on the performance and efficiency of a project is unusual practice for the TTC.

[57] In reply and sur-reply, the parties rely on their original representations.

Analysis/Findings

[58] The record is from 2015 and, according to the TTC, the claims and lawsuits by contractors made against it are still pending. The portions of the record at issue in Section 5 contain information aimed at protecting the TTC's financial interests in the resolution of these claims and lawsuits. I find that in exercising its discretion under section 11(d), the TTC considered the relevant considerations set out above, including in particular, the nature of the information and the economic interests that the section 11(d) exemption seeks to protect.

[59] Based on my review of the information at issue and the parties' representations, I find that the TTC exercised its discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations. Accordingly, I uphold the TTC's exercise of discretion under section 11(d).

ORDER:

1. I order the TTC to disclose the information at issue in the record to the appellant, except for the information at issue in Section 5 of the record, by **September 1, 2016**.

2. In order to verify compliance with this order, I reserve the right to require the TTC to provide me with a copy of the information disclosed to the appellant.

Original Signed by: _____

Diane Smith
Adjudicator

August 11, 2016 _____