

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3505

Appeal MA16-177-2

Toronto Transit Commission

October 11, 2017

**Summary:** A request was submitted to the Toronto Transit Commission (the TTC) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to emails between named TTC staff and a company that created a specific TTC Wheel-Trans assessment report. The TTC granted partial access to the responsive records including severances pursuant to the discretionary exemption in section 7(1) (advice or recommendations) of the *Act*.

In this order, the adjudicator finds that the information at issue in the remaining record is not subject to section 7(1). She also finds that even if section 7(1) did apply to this information, that the exception in section 7(2)(k) to section 7(1) appears to apply. She orders disclosure of the information at issue in the record. The adjudicator also upholds the TTC's search for responsive records.

**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)(k), 17(1).

### OVERVIEW:

[1] A request was submitted to the Toronto Transit Commission (the TTC) under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) for access to the following information:

...all email correspondence between [two named individuals], and [named company], that concerned me or [named company] staff who made

[named company] Wheel Trans assessment report [number]. The request is for all correspondence regarding report [number] which includes any of the persons or organization named. \*

\*Including any [named company] staff involved in authoring or approving report [number], and including all correspondence in regard to events narrated in report [number].

[2] The TTC granted partial access to the responsive records with severances pursuant to sections 7(1) (advice or recommendations), 12 (solicitor-client privilege), and 14(1) (personal privacy) of the *Act*. The TTC issued three separate decision letters and included an index of records with each decision letter in which it listed the responsive records and exemptions relied upon to withhold parts of records.

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

[4] During the course of mediation, the appellant advised the mediator that he was pursuing access to some of the withheld information contained within the records and was of the view that additional responsive records should exist. The appellant also raised the public interest override in section 16 of the *Act*.

[5] The TTC subsequently issued two revised decision letters wherein it granted access to additional information contained within the records. As a result, the personal privacy exemption in section 14(1) is no longer at issue.

[6] The TTC advised the mediator that it had already retrieved all of the responsive records and would not conduct any further searches for records.

[7] The appellant confirmed that he was not pursuing access to any of the withheld information contained in Record 21 of the April 15, 2016 decision letter. The appellant then advised the mediator that he would like to pursue the appeal at the adjudication stage, where an adjudicator conducts an inquiry.

[8] I initially sought the representations of the TTC and an affected party whose information is contained in Record 1 of the April 18, 2016 decision letter.

[9] The TTC then decided to disclose all of the records, except one record, Record 1 of the April 18, 2016 decision letter, which is the record at issue in this appeal. The affected party did not provide representations on the information withheld from this record.

[10] I provided the appellant with a copy of the TTC's representations. The appellant provided representations in response. I provided the TTC with a copy of the appellant's representations, less the confidential portions. In response, the TTC stated that it relied on its initial representations.

[11] The appellant then provided unsolicited additional representations, which I did not share with the TTC as the additional representations did not address the issues in this appeal.

[12] In this order, I find that the information at issue in the record is not subject to section 7(1). In the alternative, I find that the exception in section 7(2)(k) appears to apply. I order disclosure of the information at issue in the record. I also uphold the TTC's search for responsive records.

## **RECORDS:**

[13] The following record remains at issue in this appeal:

- Record 1 – email from the affected party to the TTC's Assistant Manager – Customer Service, Wheel-Trans (the Manager).

## **ISSUES:**

- A. Does the discretionary advice or recommendations exemption at section 7(1) apply to the record?
- B. Did the institution conduct a reasonable search for records?

## **DISCUSSION:**

### **Additional Background**

[14] By way of background, the email at issue in this appeal relates to the TTC's Wheel-Trans eligibility assessment process. The TTC describes Wheel-Trans on its website as

...a safe and reliable transportation option for persons with disabilities to travel with freedom and dignity. Applicants may be eligible for Wheel-Trans service if their disability prevents them from using TTC's conventional transit for all or part of their trip. Disabilities may be permanent and/or temporary and are those identified in the Ontario Human Rights Code including, but not limited to physical, sensory, cognitive and mental health disabilities.<sup>1</sup>

[15] The appellant has provided documentation on this process, which is reflective of the information that the TTC has on its website about this process, as follows:

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<sup>1</sup> [http://www.ttc.ca/WheelTrans/FAQ-New\\_Customers.jsp](http://www.ttc.ca/WheelTrans/FAQ-New_Customers.jsp)

...Persons who believe they qualify for and are interested in becoming Wheel-Trans customers should complete and sign the [Wheel-Trans eligibility] application...

TTC is committed to providing a fair and objective eligibility process for all our applicants. To ensure we correctly match our transit services to your abilities, you may be requested to attend a functional assessment, in addition to submitting an application, to learn more about your abilities in performing activities related to travelling on transit. Your category of eligibility will be based on the information provided in your application and the results of a functional assessment (if required).

A functional assessment is a specific standardized evaluation that is administered by a registered occupational therapist. The functional assessment could be related to a physical, cognitive, sensory or mental health disability or a combination of disabilities. The results of the functional assessment will be sent to TTC staff and will determine whether you are eligible for service and the category of eligibility, i.e. conditional, unconditional or temporary...<sup>2</sup>

[16] If the decision is made to deny Wheel-Trans service by this process, the TTC advises applicants that they can appeal this decision, as follows:

1. Requesting an appeal by submitting an appeal form and any supporting documentation.
2. Attending an in-person functional assessment if you have not yet attended one prior to submitting your appeal.
3. Meeting with the TTC Wheel-Trans Eligibility Appeal Panel...

The TTC strives to ensure that your appeal results in a fair and equitable decision. Therefore, an appeal decision can only be made if the applicant/representative is present in-person for the appeal interview...

The panel represents an independent appeal process consistent with the Integrated Accessibility Standards Regulation (IASR O. Reg. 191/11) and the Accessibility for Ontarians with Disabilities Act (AODA) 2005. This means that your appeal will be heard by a panel that was not involved in your original Wheel-Trans eligibility determination. The panel consists of three (3) people: one (1) health care professional, one (1) conventional transit expert from the TTC and one (1) community member with a disability who is familiar with conventional transit.

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<sup>2</sup> [http://www.ttc.ca/WheelTrans/How\\_to\\_apply/index.jsp](http://www.ttc.ca/WheelTrans/How_to_apply/index.jsp)

The panel will make the following eligibility determination:

- Uphold the Wheel-Trans eligibility decision made by the TTC; or
- Change the Wheel-Trans eligibility decision made by the TTC.

The panel will make the eligibility determination based on:

- Your appeal form;
- Your Wheel-Trans application;
- The results of the functional assessment you attended;
- Any relevant supporting documentation provided by you and/or your representative at the appeal interview; and/or
- Any relevant observations made by the appeal panel.

...The appeal panel decision is final.<sup>3</sup>

[17] The TTC advises its customers that at the appeal hearing, the Wheel-Trans Eligibility Appeals Panel:

...will review all of your documentation, ask you specific questions and give you the opportunity to explain to them why you feel the original decision did not accurately capture your ability to use conventional TTC service. The panel will then make a decision that will support your position, uphold the original eligibility decision, or change your eligibility giving more or less access to Wheel-Trans...<sup>4</sup>

[18] The Wheel-Trans assessment process is administered by the affected party. The affected party is the company contracted by the TTC to conduct the Wheel-Trans eligibility process. The results of an appeal hearing are final and result in a determination of eligibility for Wheel-Trans.

[19] The appellant asked the TTC if he could videotape his appeal hearing. In response, the TTC sent the following email to the affected party:

One of our customers has made a request to video tape his appeal (it has not been scheduled). We do not have a good argument as to why we will not allow this.

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<sup>3</sup> [http://www.ttc.ca/PDF/Wheel-Trans/Wheel\\_Trans\\_Eligibility\\_Appeal.pdf](http://www.ttc.ca/PDF/Wheel-Trans/Wheel_Trans_Eligibility_Appeal.pdf)

<sup>4</sup> [http://www.ttc.ca/WheelTrans/FAQ-New\\_Customers.jsp](http://www.ttc.ca/WheelTrans/FAQ-New_Customers.jsp)

Please let us know if [the affected party] has a waiver that you would want signed (check with your legal), "I would suggest stating that the information is for the applicant's personal use only, and cannot be shared or posted on-line, etc."<sup>5</sup>

[20] The affected party then asked the TTC the reason for the appellant's request. In response, the TTC stated:

The individual has gone on record with the Ombudsman's office /TTC Chair office stating that he believes that the information captured at his appeal was not "truthful", and he wants to ensure that everything seen and captured at the next appeal is accurately documented. He doesn't need minutes, as he has a copy of his appeal results.

Please ensure that any objections that you may have are valid and accurately documented then sent to me, as we may need to go forward with this with some compromises, i.e. camera just focused on him, with audio of the panel in the background, etc.

[Affected party contact's name] the TTC is a city of Toronto Public Entity, subject to audits and the scrutiny of the programs we administer. As I am sure you know, you don't just refuse to do something without very valid reasons that cannot be overcome.<sup>6</sup>

[21] In response, the affected party provided its position to the TTC on video recording appeal hearings for Wheel-Trans eligibility, which is the email at issue in this appeal.

[22] Following the email at issue in this appeal, the appellant was not allowed to video record his appeal hearing.

**A. Does the discretionary advice or recommendations exemption at section 7(1) apply to the record?**

[23] 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.

[24] 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

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<sup>5</sup> From disclosed portions of the record at issue in this appeal.

<sup>6</sup> Ibid.

advise and make recommendations within the deliberative process of government decision-making and policy-making.<sup>7</sup>

[25] “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.

[26] “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.<sup>8</sup> “Advice” involves an evaluative analysis of information. Neither of the terms “advice” or “recommendations” extends to “objective information” or factual material.

[27] 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.<sup>9</sup>

[28] 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.<sup>10</sup>

[29] 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 section 7(1).<sup>11</sup>

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

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<sup>7</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

<sup>8</sup> See above at paras. 26 and 47.

<sup>9</sup> Order P-1054

<sup>10</sup> *John Doe v. Ontario (Finance)*, cited above, at para. 51.

<sup>11</sup> *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

- factual or background information<sup>12</sup>
- a supervisor's direction to staff on how to conduct an investigation<sup>13</sup>
- information prepared for public dissemination<sup>14</sup>

[31] The TTC submits that the redacted information in the record contains advice or recommendations provided by a consultant of the TTC (the affected party) to an employee of the TTC. It states that the consultant sought their own legal advice prior to responding to the TTC.

[32] The appellant refers to the email noted above that was sent just prior to the email at issue in this appeal. Based on that email, the appellant submits that there was no reasonable expectation of confidentiality in regard to the record in question, as the TTC was not asking for "free and frank" advice or recommendations, and that the TTC was warning the author of the redacted portion of the record to prepare their response for public scrutiny.

[33] As a result, the appellant submits that, even supposing that the record did not relate to a final decision or new policy proposal (it appears to be both, in his view) the TTC's claimed exemption is not consistent with the purpose of section 7(1) of the *Act*, to protect "free and frank" discourse within government, and the full record should be disclosed.

[34] The appellant also submits that even if the record contains advice or recommendations, the exceptions to section 7(1) in section 7(2) apply.

### ***Analysis/Findings***

[35] Based on my review of the representations of the parties and the record at issue, I find that I have not been provided with sufficient evidence to support a finding that the record contains advice or recommendations for the purpose of the *Act*.

[36] The TTC's representations in support of its position that section 7(1) applies, as set out above, are brief. It provides little more than a recitation of the wording of the exemption, and its statement that the exemption applies.

[37] However, what is clear from the information contained in the records disclosed to the appellant and referenced above, is that the TTC was asked by the appellant to accommodate his request to have his appeal videotaped. The TTC had to make a decision on this issue, and asked its Wheel-Trans program consultant, the affected

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<sup>12</sup> Order PO-3315.

<sup>13</sup> 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.).

<sup>14</sup> Order PO-2677



party, to identify any objections it may have with respect to the appellant's request to videotape his appeal. It is in this context that the record at issue was created.

[38] In these circumstances, I am not satisfied that the disclosure of the record would reveal recommendations, as it is not clear that the record contains information that relates to a suggested course of action that will ultimately be accepted or rejected by the TTC.

[39] Based on my review of the information contained in the record, including the manner in which it is provided and characterized, I also find that disclosure of the record would not reveal advice. It does not contain a list 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. Nor does it contain the views or opinions of the affected party as to the range of policy options to be considered by the decision maker.

[40] Therefore, I find that section 7(1) does not apply to exempt the information at issue in the record, as it is not advice or recommendations but factual or objective information listing the affected party's objections.<sup>15</sup> In light of this finding, I need not address the appellant's position that the affected party in any event had no reasonable expectation of confidentiality in regard to the record in question.

[41] Even if I had found that disclosure of the information in the record would reveal advice or recommendations within the meaning of section 7(1), in the circumstances, it is possible that the exception in section 7(2)(k) may have applied to the record. Section 7(2) 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(1).

[42] The appellant raised the application of several exceptions, including the exception in section 7(2)(k), which reads:

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

the reasons for a final decision, order or ruling of an officer or an employee of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution.

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<sup>15</sup> I note that, if section 7(1) had applied, the TTC may have had to also consider the application of section 38(a) as the record appears to contain the personal information of the appellant. Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,  
if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information

[43] The exceptions in section 7(2) can be divided into two categories: objective information, and specific types of records that could contain advice or recommendations.<sup>16</sup> The first four paragraphs in section 7(2), paragraphs (a) to (d), are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature.

[44] The remaining exceptions in section 7(2), paragraphs (e) to (k), will not always contain advice or recommendations but when they do, section 7(2) ensures that they are not protected from disclosure by section 7(1).

[45] Concerning section 7(2)(k), the appellant submits that the record relates to a final decision to deny Wheel-Trans' appellants the ability to electronically record their own assessments. The appellant submits that this is because of the reasons contained in this email.

[46] In support, the appellant refers to an email from the TTC's Wheel-Trans Customer Service Manager, which is dated one day after the email that comprises the record, and in which the TTC advises the appellant that it was denying his request. He states that the TTC had previously indicated it would go forward with his request to videotape his appeal with a legal waiver. The appellant states that the TTC's Manager indicated that this decision of the TTC was because of the position taken by the affected party.

[47] As noted above, the TTC did not provide reply representations to this or any other submission made by the appellant.

[48] In these circumstances, there is certainly support for the argument that the email at issue in this appeal contains the reasons for a final decision of an employee of the TTC, which appears to be made pursuant to the exercise of a discretionary power conferred on the TTC under the Wheel-Trans scheme. However, because of my finding above that the record does not contain advice or recommendations, it is not necessary to make a determination on whether the exception to section 7(1) in section 7(2)(k) applies.

[49] Accordingly, the information at issue in the record is not exempt under section 7(1). As no mandatory exemptions apply to this email and no other discretionary exemptions have been claimed, I will order it disclosed.

[50] As I have found that the information does not qualify for exemption under section 7(1), it is not necessary to also review the TTC's exercise of discretion, or the appellant's significant representations relating to whether the public interest override in section 16 applies.

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<sup>16</sup> *John Doe v. Ontario (Finance)*, cited above, at para. 30.

**B. Did the institution conduct a reasonable search for records?**

[51] In the Notice of Inquiry, the TTC was asked to provide a written summary of all steps taken in response to the request. In particular, it was asked:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
  - (a) choose to respond literally to the request?
  - (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so, please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
5. Do responsive records exist which are not in the institution's possession? Did the institution search for those records? Please explain.

[52] The TTC states that:

The TTC department(s) affected by this access request searched their computer systems and their locked and secured cabinets for all records and/or information with respect to this access request. The TTC also contacted their Consultant [name], and had the consultant search their records and/or information to assist in processing this access request.

[53] The appellant states that TTC and/or its contractor has destroyed evidence and deliberately attempted to mislead him and the IPC with regard to the existence of requested documentation. He refers to earlier requests and what he perceives as

information missing from those requests.

***Analysis/Findings***

[54] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.<sup>17</sup> If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[55] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.<sup>18</sup> To be responsive, a record must be "reasonably related" to the request.<sup>19</sup>

[56] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.<sup>20</sup>

[57] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.<sup>21</sup>

[58] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>22</sup>

[59] I find that the TTC has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

[60] The appellant has not identified any responsive records in the TTC's custody or control that he does not already have copies of.

[61] Based on my review of the parties' representations, I find that the appellant has not provided a reasonable basis for me to conclude that additional responsive records exist within the TTC's record holdings.

[62] Accordingly, I uphold the TTCs search for responsive records as reasonable.

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<sup>17</sup> Orders P-85, P-221 and PO-1954-I.

<sup>18</sup> Orders P-624 and PO-2559.

<sup>19</sup> Order PO-2554.

<sup>20</sup> Orders M-909, PO-2469 and PO-2592.

<sup>21</sup> Order MO-2185.

<sup>22</sup> Order MO-2246.

**ORDER:**

1. I order the TTC to disclose the information at issue in the record to the appellant by **November 16, 2017** but not before **November 9, 2017**.
2. I uphold the TTC's search for responsive records.

Original Signed by: \_\_\_\_\_

Diane Smith  
Adjudicator

October 11, 2017 \_\_\_\_\_