Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3495

Appeal MA15-338-2

City of Toronto

September 15, 2017

Summary: The appellant submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* to the City of Toronto (the city) for information pertaining to the Scarborough Light Rail Transit and the Scarborough Subway extension. At issue in this appeal was two emails in an email chain which the city withheld under section 7(1) (advice or recommendations) and a third email in the email chain which the city withheld under section 9(1)(b) (relations with other governments).

In this order, the adjudicator upholds the city's decision that the record is exempt under sections 7(1) and 9(1)(b) and also finds that the public interest override in section 16 does not apply to override the application of these exemptions.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1), 9(1)(b), 16.

Orders and Investigation Reports Considered: Order MO-3353.

OVERVIEW:

[1] The appellant submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) to the City of Toronto

(the city) for specific information pertaining to the Scarborough LRT[1] and the Scarborough Subway extension (the SSE).

[2] The city issued a time extension and fee estimate, which the appellant appealed, resulting in Appeal MA15-388 and Order MO-3353 (August 30, 2016). Following a search by staff of the Deputy City Manager, the city issued an access decision on Oct. 12, 2016.

[3] The city's decision dated October 12, 2016 identified several responsive records and granted partial access, exempting information from disclosure pursuant to sections 7(1) (advice or recommendations), 9(1)(b) (relations with other governments) and 14(1) (personal privacy) of the *Act.*

[4] The appellant appealed the city's access decision. In the appeal letter, the appellant asserted that the city had erred in denying records under section 7(1) and that the records should be disclosed under section 7(2), on the basis that they contain factual information. The appellant also asserted that with respect to section 9(1)(b), that she was not satisfied that the information comes from another government or agency of government, and also did not believe that the government or agency would not consent. In addition, the appellant submitted that there is a compelling public interest in the exempted information and, therefore, the information should be disclosed pursuant to section 16.

[5] At the mediation stage, the appellant confirmed that she was not pursuing access to the information exempted under section 14(1). Therefore, the email chain of April 20, 2015 was no longer at issue.

[6] During mediation, the city advised that it was maintaining its sections 7(1) and 9(1)(b) claims and further advised that the other government/agency (Metrolinx)[2] had been consulted and did not consent to disclosure. The appellant advised that she wished to pursue access to the information, maintaining her objections to sections 7(1) and 9(1)(b) exemptions and asserting the application of section 16.

[7] As the appeal could not be resolved at the mediation stage, the appeal proceeded to the adjudication stage, where an adjudicator conducts an inquiry.

[8] Representations were sought and exchanged between the city, Metrolinx and the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[9] The city applied section 9(1)(b) to the third email in the three email chain that comprises the record. In her representations, the appellant conceded that section

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[1] Light Rail Transit.
[2] Metrolinx is an agency of the Government of Ontario under the *Metrolinx Act*.

9(1)(b) applied to the record at issue, but maintained that the public interest override in section 16 existed to override this exemption. On my review of this email and the representations of the parties, I am satisfied that the mandatory exemption in section 9(1)(b) applies to the third email in the record as it contains information received by the city from Metrolinx in confidence. Therefore, the only issue with respect to section 9(1)(b) is whether the public interest override in section 16 applies to the information for which it is claimed.

[10] In this order, I uphold the city's decision that the record is exempt under sections 7(1) and 9(1)(b) and also find that the public interest override in section 16 does not apply to override the application of these exemptions.

RECORD:

[11] At issue is one email chain of three emails dated May 19, 2015.

ISSUES:

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

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

C. Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the sections 7(1) and 9(1)(b) exemption?

DISCUSSION:

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

[12] 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.

[13] 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]

[14] "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.

[15] "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]

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

[17] 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]

[18] 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]

[19] 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).[7]

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

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[3] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[4] See above at paras. 26 and 47.
[5] Order P-1054.
[6] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[7] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

- factual or background information[8]
- a supervisor's direction to staff on how to conduct an investigation[9]
- information prepared for public dissemination[10]

[21] The city provided both confidential and non-confidential representations.[11] It has applied section 7(1) to the first two emails in the three email chain that comprises the record. It states that these emails contain exchanges between and amongst city staff comprising advice and recommendations in relation to matters related to the subject matter of the request. It states that this advice or these recommendations revolves around various options available to deal with issues arising from substantive and procedural issues related to the topic of discussion. The city states:

> In each of these discussions, the author provides a suggested course of action on substantive issues and suggestions on the procedural steps, as well as factors underlying the opinion on the substantive and procedural advice. In each case, the Advice Redactions outlined advice or recommendations made by city employees/officers to be considered and potentially implemented by other city employees/officers in a position to implement the advice on this matter…
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> [W]here section 7 has been applied to a portion of an Advice Redaction which does not specifically contain advice or recommendation, it has been applied where the disclosure of the withheld portion of the document would permit the inferring of advice by comparing suggestions as to actions with the publicly available information - including other disclosed records. Also, some of the Advice Redactions, indicate relevant considerations and conclusions which form the basis for the advice, which if released would allow a reasonable reader to infer the actual advice given…

[22] The appellant does not dispute that the information at issue may contain advice or recommendations, but submits that the record may be subject to the exception to section 7(1) in section 7(2)(a) in particular. This exception reads:

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

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[8] Order PO-3315.
[9] 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.).
[10] Order PO-2677.
[11] I will only be referring to the city's non-confidential representations in this order.

Analysis/Findings

[23] Based on my review of the two emails that the city has applied section 7(1) to, I agree with the city that the two emails at issue contain advice or recommendations of an employee of the city. I also find that the exceptions to section 7(1) in section 7(2) do not apply.

[24] In particular, I find that the factual information in the two emails at issue is so intertwined with the advice or recommendations, that disclosure would reveal the advice or recommendations.

[25] Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.[12] Where the factual information is inextricably intertwined with the advice or recommendations, section 7(2)(a) may not apply.[13]

[26] Therefore, I find that the exception to section 7(1) in section 7(2)(a) does not apply and, subject to my review of the city's exercise of discretion, the two emails at issue are exempt under section 7(1).

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

[27] The section 7(1) 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.

[28] 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.

[29] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[14] This office may not, however, substitute its own discretion for that of the institution.[15]

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[12] Order 24.
[13] Order PO-2097.
[14] Order MO-1573.
[15] Section 43(2).

[30] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[16]

- 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.

[31] The city states that it took into account all of the relevant considerations including the following:

a. The purposes and principles of *MFIPPA* including the principles that the information should be available to the public and exemptions to the right of access, should reflect the specific and limited circumstances where non-disclosure is necessary for the proper operation of municipal institutions;

[16] Orders P-344 and MO-1573.

b. The wording of the relevant exemption and the interests the exemption seeks to protect;

c. The fact that the requester has presented no sympathetic or compelling need to receive the information;

d. The fact that disclosure will not increase or decrease public confidence in the operation of city but it will have an adverse effect on the ability of city staff to properly consider the advice given in order to formulate decisions;

e. The nature of the information and the fact that the records are highly significant and sensitive to the city, and indirectly to another institution; and

f. The historic practice of the city in relation to the requested materials.

[32] The city states:

> There is a need to balance the interests intended to be protected by *MFIPPA*, and the public interest in disclosure of information concerning the operation of their municipal institutions. 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. The city has disclosed considerable amounts of information relating to the Scarborough Subway/LRT, including public reports and other documents that are readily available on the city's website and by way of the LRT/Subway Access Request. The city has disclosed thousands of pages in response to the current LRT/Subway-Access Request; however, the city has chosen to deny access to the specific and limited information contained in the few pages in question in this appeal to prevent exposing the city, and - as a result - the public, to the risk of harms which *MFIPPA* seeks to prevent…

[33] The appellant states that the city has previously shown to have arbitrarily applied section 7(1) of the *Act* and she believes that the city is acting in bad faith. She refers to another request to the city, where she requested a series of records also related to the Scarborough Subway, which were partially released with section 7 redactions. She states that during the appeal process for that appeal, the city released the records previously exempted with little explanation.

[34] In reply, the city states that although the appellant's previous request was also about transit initiatives, the responsive records were very different than the record at issue in this appeal.

[35] The city states that in this current appeal, as in the appellant's previous appeal, the city also re-considered disclosure of the record during mediation, took into account

all relevant factors and determined that the information was properly withheld under section 7. It submits that the appellant cannot use the city's exercise of discretion for one appeal and apply it to other requests and appeals.

[36] The city states that the appellant was advised by the Manager, Strategic Communications of the city's Strategic Communications Division that the exempt emails do not discuss the operating costs of the Scarborough Subway extension. Furthermore, it refers to Metrolinx's representations that "… the information exempt is related to the methodology that would result in appropriate distribution of fare revenue and operating subsidies."

[37] The city submits that although it may be in the public interest to disclose the operating costs related to the $3 billion subway project, the record in this appeal does not contain this information.

[38] In sur-reply, the appellant states that as the record was captured as responsive to her request regarding the Scarborough Subway/LRT, it is reasonable for her to believe it has some relevance to that topic. Specifically, the responsive information may relate to the "operating costs" as her request indicated, which remains in her view a matter of public interest.

Analysis/Findings

[39] As stated by the city, the emails at issue contain advice or recommendations on information supplied to the city by Metrolinx in confidence. Although the emails at issue relate to operating costs, they don't reveal the actual operating costs as submitted by the appellant.

[40] Based on my review of the two emails at issue and the parties' representations, I find that the city exercised its discretion in a proper manner under section 7(1). The city has taken into account the purpose of the section 7(1) exemption to ensure 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.

[41] Therefore, I uphold the city's exercise of discretion under section 7(1) and find that the two emails at issue are exempt under this section, subject to my review of the application of the public interest override in section 16 to this information.

C. Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the sections 7(1) and 9(1)(b) exemption?

[42] Section 16 states:

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

[43] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[44] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[17]

[45] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[18] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[19]

[46] A public interest does not exist where the interests being advanced are essentially private in nature.[20] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[21]

[47] A public interest is not automatically established where the requester is a member of the media.[22]

[48] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[23]

[49] Any public interest in *non*-disclosure that may exist also must be considered.[24] A public interest in the non-disclosure of the record may bring the public interest in

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[17] Order P-244.
[18] Orders P-984 and PO-2607.
[19] Orders P-984 and PO-2556.
[20] Orders P-12, P-347 and P-1439.
[21] Order MO-1564.
[22] Orders M-773 and M-1074.
[23] Order P-984.
[24] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).

disclosure below the threshold of "compelling".[25]

[50] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[26]
- the integrity of the criminal justice system has been called into question[27]
- public safety issues relating to the operation of nuclear facilities have been raised[28]
- disclosure would shed light on the safe operation of petrochemical facilities[29] or the province's ability to prepare for a nuclear emergency[30]
- the records contain information about contributions to municipal election campaigns[31]

[51] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations[32]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[33]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[34]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[35]
- the records do not respond to the applicable public interest raised by appellant[36]

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[25] Orders PO-2072-F, PO-2098-R and PO-3197.
[26] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[27] Order PO-1779.
[28] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[29] Order P-1175.
[30] Order P-901.
[31] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[32] Orders P-123/124, P-391 and M-539.
[33] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[34] Orders M-249 and M-317.
[35] Order P-613.

[52] The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[53] The city's position is that the appellant has not raised a specific public interest in the current information requested, compelling or otherwise, nor established a basis as to how the information at issue would relate to this public interest.

[54] The city states that the topic of Scarborough Subway/LRT has been the subject of wide public coverage and debate and that it has hosted a number of public consultations on this, as well as public debates before Council and Committees of Council over several years.

[55] The city states that a significant amount of information has already been disclosed to the public through other public processes and to the appellant specifically and that withholding the small amount of information at issue would not shed further light on the matter as a whole.

[56] Metrolinx objects to disclosure of the information in the third email at issue in the record. It states that the record is part of a strategic policy and financial information provided by Metrolinx - an agency of the Government of Ontario - to another institution, in confidence, as part of options for consideration in formulating and determining a methodology that would result in an appropriate distribution of fare revenue and operating subsidies between the municipalities and Metrolinx.

[57] Metrolinx states that the information that it wants withheld from disclosure underscores the importance the Government of Ontario places on the development of a fair revenue and subsidy model that meets the needs of municipalities. It also states that this information enhances the implementation of a Greater Toronto and Hamilton Area farecard system that saves costs, improves commuting experience for the public and improves access to all three types of transportation for commuters - surface rail, underground and buses.

[58] The appellant states that the emails at issue, which were sent by senior city officials, relate to the operating costs of the planned SSE, as noted in the disclosed subject line. She states:

> At a currently estimated cost of $3.35 billion, the Scarborough Subway extension (SSE) has been a controversial project since 2013 and the costs for the project have been a key factor in that controversy. Since 2014, the city has been collecting tax money through a levy from the public to pay for this project, which as of today has no approved alignment, and for which costs estimates continue to increase.

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[36] Orders MO-1994 and PO-2607.

> An originally-proposed light-rail line included plans to negotiate cost sharing of operating costs with the province and an agreement for the province to [fully] pay for capital maintenance costs. When council approved a subway, they also agreed to shoulder those costs fully, placing the burden entirely on the municipal taxpayer.
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> Since 2015, I have been requesting an estimate for operating costs of the SSE, which I was repeatedly told do not yet exist.
>
> It has become clear that the city's top officials do have some idea of operating costs estimates and that they were aware of them in 2015… I believe there is information contained in the public interest relating to operating costs and it is in the public's interest that those costs related to [the] more than $3-billion project to be disclosed immediately and in full. And as it is clear city officials knew something of operating costs in 2015, it is in the public's interest to know what their public officials knew in 2015 and why that information was not released when requested.
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> Secondly, Metrolinx claims that the information exempt under section 9(1)(b) is related to the "methodology that would result in an appropriate distribution of fare revenue and operating subsidies between the municipalities and Metrolinx."
>
> That distribution and fare revenue is critical not only to the success of this project but crucial [to] the transportation model this project has been advanced with and [also] used at council to argue the viability of this project – which remains today in question.

[59] In reply, the city re-iterates that the emails at issue do not contain the operating costs of the Scarborough Subway. It states that the appellant has not alleged any public interest in the actual content of the record at issue and restricted her submissions to alleging a public interest in specific information that is not included in this record. It submits, therefore, no compelling public interest has been even alleged with respect to the withheld information

[60] In sur-reply, the appellant states that it is reasonable to assume that the responsive email chain has some relevance to the Scarborough Subway/LRT, specifically as it relates to "operating costs" as the subject of the email chain indicates. Therefore, she submits that this is a matter of public interest as it relates to a more than $3-billion infrastructure project.

Analysis/Findings re: Compelling public interest

[61] The emails at issue are dated May 19, 2015 and do not reveal either the actual or estimated operating costs for the SSE, which is the information the appellant is seeking according to her representations. In addition, the record does not reveal the

distribution of fare revenue and operating subsidies between municipalities and Metrolinx.

[62] Instead, the emails that comprise the record reveal and discuss options provided by Metrolinx to the city about different models for the funding of the operating costs for transit systems. The record reviews and discusses these options and provides some advice on the options, but does not contain a recommended or an agreed upon course of action regarding which operating costs model should be adopted.

[63] As the record merely discusses and provides some advice on the various models for paying for operating costs without deciding on or recommending which model to implement, I find that there is not a compelling public interest under section 16 in disclosure of the information at issue in the record.

[64] In particular, I find that the record does not respond to the applicable public interest raised by appellant, which is the revelation of operating cost estimates, and the distribution of fare revenue and operating subsidies for the SSE.[37]

[65] Accordingly, as I have found that there is not a compelling public interest in disclosure of the record, there is no need for me to determine whether there is a public interest in non-disclosure, nor whether any compelling public interest in disclosure of the record clearly outweighs the purpose of the sections 7(1) and 9(1)(b) exemptions.

[66] As the public interest override in section 16 does not apply to override the sections 7(1) and 9(1)(b) exemptions in this case, I find that the record is exempt under these exemptions.

ORDER:

I uphold the city's decision and dismiss the appeal.

Original Signed by: September 15, 2017
Diane Smith
Adjudicator

[37] Orders MO-1994 and PO-2607.