

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3663

Appeal MA16-633

Toronto Transit Commission

September 27, 2018

Summary: The TTC received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to a specified RFP. After conducting its search, the TTC granted full access to some records and partial access to others citing the exemption at sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege). The appellant appealed and raised the public interest override at section 16 of the *Act* during the adjudication stage. In this order, the adjudicator finds that some of the records withheld under section 7(1) do not contain advice or recommendations. In addition, he finds that one record is not properly exempt under section 12. The adjudicator orders disclosure of these records. The adjudicator also finds that the public interest override does not apply, in the circumstances of this appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1) (advice or recommendations), 12 (solicitor-client privilege), 16 (public interest override).

Orders and Investigation Reports Considered: Orders MO-3301-F.

Cases Considered: *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

BACKGROUND:

[1] A request was made to the Toronto Transit Commission (the TTC) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the

following information:

All documents, emails, notes, etc. including internal and external TTC correspondence and correspondence with [a specified firm] as fairness monitor, as well as legal counsel, concerning the decision to amend a specified RFP, supply of CAD/AVL system and implementation services (the "RFP") to remove the requirement that an "agreement to provide an irrevocable letter of credit" in the amount of \$5 million pursuant to subsection 6.7(C) of the RFP...

[2] After conducting its search, the TTC issued a decision granting full access to some records and partial access to eighty-two of the responsive records, redacting portions pursuant to the exemptions at section 7(1) (advice and recommendations), section 11 (economic and other interests), section 12 (solicitor-client privilege) and section 14 (personal privacy) of the *Act*.

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

[4] During mediation, the appellant advised that they were not interested in pursuing access to any information identified as personal information and as a result, section 14 of the *Act* is no longer at issue in this appeal.

[5] As mediation did not resolve the dispute, the appeal was transferred to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*. As the adjudicator in this appeal, I invited the parties to provide representations. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7, with some portions being withheld as they met the criteria for withholding set out in Practice Direction 7.

[6] In its representations, the TTC noted that it had decided to disclose additional information to the appellant. As a result, certain records were disclosed that are no longer at issue in this appeal. In addition, the TTC advised that it was no longer claiming section 11. As a result, section 11 is no longer an issue in this appeal.

[7] In this order, I uphold the section 7(1) exemption for all but two records for which that exemption was claimed. I also find that the section 12 exemption applies to all but one record for which that exemption was claimed. Finally, I find that the public interest override at section 16 of the *Act* does not apply in the circumstances of this appeal.

RECORDS:

[8] In this order, the "items" referred to by the TTC will be referred to as records. Some of the records were fully withheld while others were partially disclosed. There are 27 remaining records in dispute which are Records 1, 2, 3, 5, 6, 11-28, 30, 31, 36 and

37.

ISSUES:

- A. Does the discretionary exemption at section 7(1) apply to the records for which it was claimed?
- B. Does the discretionary exemption at section 12 apply to the records for which it was claimed?
- C. Did the institution exercise its discretion under sections 7(1) and 12? If so, should this office uphold the exercise of discretion?
- D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 7(1) exemption?

DISCUSSION:

Issue A: Does the discretionary exemption at section 7(1) apply to the records for which it was claimed?

[9] As the TTC has disclosed a number of records, the only remaining records in dispute, as confirmed by the TTC in its representations, are Records 23 (3 emails), 25 (1 email), 26 (2 emails) and 36 (3 emails).

[10] 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.

[11] 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

[12] "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.

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

[13] "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

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

[15] 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

[16] 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

[17] 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

[18] 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

² See above at paras. 26 and 47.

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.

- information prepared for public dissemination⁸

[19] 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. The appellant submits that the exception in section 7(2)(j) is relevant to the records for which section 7(1) is claimed.

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

- (j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

[20] 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.⁹ 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.

[21] 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).

[22] 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.¹⁰

[23] A body may be considered "attached" to an institution, even if it maintains some degree of independence from the institution.¹¹

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

⁹ *John Doe v. Ontario (Finance)*, cited above, at para. 30.

¹⁰ 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.).

¹¹ Order PO-2681; PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, cited above; and Order PO-1823.

Representations

[24] In its representations, the TTC notes that it disclosed a number of records for which it was claiming the section 7(1) exemption. It submits that the section 7(1) exemption continues to apply to Records 23, 25 and 36 in their entirety and to some parts of Record 26. It further submits that none of these records fall under any of the exceptions to the exemption listed in section 7(2) or 7(3).

[25] The appellant also provided representations in this appeal. The appellant submits that records containing only the fact that advice was sought by the TTC from a specified firm (the fairness monitor), should never have been subject to the exemption at section 7(1). They submit that the role of the fairness monitor is outside of the formal "advice" shield and clearly falls under section 7(2)(j) disclosure requirements. The appellant submits that the fairness monitor should be deemed as a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution as set out in section 7(2)(j). The appellant submits that given this clear exception to the exemption under section 7(2)(j), the TTC cannot shield this information from view.

[26] The appellant submits that the TTC, in its representations, maintains that the section 7(1) exemption should continue to apply even though some of the information in the records was communicated between TTC employees and the fairness monitor's staff. The appellant submits that this example, among others, is indicative that the TTC has not fairly and honestly applied the section 7(2) exception and this should therefore call into question its usage of the section 7(1) shield where it continues to be applied. The appellant submits that any and all areas where the TTC continues to attempt to use section 7(1) as a shield in an attempt to prevent the appellant from understanding the real purpose behind its decision to amend the RFP should be disregarded and the information associated with the requests be released immediately.

[27] The TTC provided reply representations in this appeal, after being provided with the non-confidential portions of the appellant's representations. In its reply representations, the TTC submits that the section 7(1) exemption is for advice or recommendations communicated between individuals employed by or in service of the institution discussing a course of action. It submits that the purpose of this exemption is to protect the advice and recommendations that were made before the final decision and that it is the final decision that stands and is what is communicated to involved parties. It continues to submit that these records fit the section 7(1) exemption and the exceptions under section 7(2) do not apply to these records.

[28] The TTC's reply was forwarded to the appellant for further comment, however, no further representations were received.

Analysis and finding

[29] I have reviewed the records for which the TTC is claiming the section 7(1) exemption and I find that Records 23 and 25 and the withheld part of Record 26 are exempt from disclosure by section 7(1) of the *Act*; however, I do not find that the withheld information in Record 36 is exempt under this section.

[30] First, I find that the fairness monitor is a consultant retained by the TTC. The appellant submits that the fairness monitor is a body "attached" to the TTC, for the purpose of section 7(2)(j), but, I find that the fairness monitor is considered a "consultant" for the purpose of section 7(1) as it was retained by the TTC in order to perform a function.

[31] After my review of the records, I find that the emails in records 23 and 25 were properly severed because there are inferences that can be drawn from the information in those records as to the nature of the fairness monitor's recommendation to the TTC. I also find that the withheld information in Record 26 constitutes an express recommendation as the information in the email suggests a course of action that will ultimately be accepted or rejected.

[32] However, as indicated, I do not find that the information in Record 36 meets the definition of recommendation or advice as set out in section 7(1). After a review, I do not agree that the withheld information in the three emails in this record constitutes advice or recommendations. I will order the TTC to disclose this information.

[33] In its representations, the appellant submits that the exception to section 7(1) at section 7(2)(j) is applicable in this appeal.

[34] Section 7(2)(j) has three essential requirements:

1. the record must be a "report" of a "committee, council or other body";
2. the committee, council or other body must be "attached to" an institution;
3. the committee, council or other body must have been established "for the purpose of undertaking inquiries and making reports or recommendations to the institution".¹²

[35] I must first consider whether the records to which section 7(1) applies constitute a report or reports. As noted in Order MO-3301-F the word "report" appears in several parts of section 7(2) and this office has defined "report" as "a formal statement or

¹² Order PO-2681.

account of the results of the collation and consideration of information.”

[36] Having reviewed the records to which section 7(1) applies, I agree with the TTC that they do not constitute “reports” within the meaning of this term as defined above. Therefore, I find that the withheld information in the emails does not constitute a report for the purpose of the *Act*. Given my conclusion, I do not need to consider the other requirements for section 7(2)(j). I find that this exception does not apply.

[37] I conclude that the exemption at section 7(1) applies to records 23, 25 and 26. The section 7(1) exemption does not apply to record 36. As no other exemption has been claimed for record 36, I will order its disclosure.

Issue B: Does the discretionary exemption at section 12 apply to the records for which it is claimed?

[38] In its representations, the TTC indicates that records 29 and 33 have now been provided to the appellant. As a result, the remaining records for which the TTC claims the application of section 12 are Records 1, 2, 3, 5, 6, 12, 13, 14, 15, 16, 17, 22, 23, 30, 31 and 37.

[39] Section 12 states as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[40] Section 12 contains two branches. Branch 1 (“subject to solicitor-client privilege”) is based on the common law. Branch 2 (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[41] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Here, the TTC claims the application of the common law solicitor-client communication privilege.

Solicitor-client communication privilege

[42] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made

for the purpose of obtaining or giving professional legal advice.¹³ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.¹⁴ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.¹⁵

[43] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.¹⁶

[44] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.¹⁷ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹⁸

[45] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹⁹ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.²⁰

Loss of privilege

Waiver

[46] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.²¹

[47] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.²²

¹³ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁴ Orders PO-2441, MO-2166 and MO-1925.

¹⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

¹⁶ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹⁸ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

¹⁹ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

²⁰ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

²¹ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

²² *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

[48] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.²³ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.²⁴

Branch 2: statutory privilege

[49] Branch 2 is a statutory privilege that applies where the records were “prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.” The statutory and common law privileges, although not identical, exist for similar reasons. Here, the TTC claims the application of the statutory solicitor-client communication privilege.

Statutory solicitor-client communication privilege

[50] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

[51] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.²⁵

Loss of Privilege

[52] Only the head of an institution may waive the statutory privilege in section 12. Disclosure by Crown counsel to defence counsel during a criminal proceeding, for example, does not result in waiver of the statutory privilege.²⁶

Representations

[53] The TTC claims that the records for which the section 12 exemption is claimed are subject to the common law solicitor-client communication privilege and the statutory solicitor-client communication privilege. It submits that all of the e-mails and documents in one group of records were prepared and sent to its in-house counsel from a TTC employee for use in seeking legal advice or from its in-house counsel to a TTC employee for use in giving legal advice. The TTC submits that another group of records, including emails and documents, were prepared and sent to outside counsel, a firm retained by the TTC, by a TTC employee for use in giving legal advice.

²³ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

²⁴ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

²⁵ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

²⁶ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

[54] The TTC submits that although it may not be expressly stated, it is implied that these communications were made in confidence given that it is a TTC employee asking for and receiving legal advice from either its own in-house counsel or outside counsel retained by the TTC.

[55] The TTC submits that the common law privilege has not been waived for any of the legal advice sought and received from in-house counsel or its outside counsel. It submits that although some e-mails were sent to other persons (i.e. the fairness monitor) they were either a TTC employee or an outside party with a common interest in the matter. The TTC also submits that the statutory privilege for this group of records has also not been lost as it was not waived by the head of the TTC.

[56] In its representations, the appellant stated that they recognize that attempts to breach solicitor-client privilege are difficult and that any traditional allowance to do so is narrow in scope and specifically "in its relation to information which was provided about a matter having legal implications, but where no legal opinion was expressed or where no course of action based on legal considerations was recommended."²⁷ The appellant submits that access should be granted to any and all communication between the TTC and their internal and external legal counsel that fits this definition.

[57] The appellant also submits that he should have access to any records that are communications to which the fairness monitor was involved. The appellant submits that the fairness monitor's primary role as characterized in their "Fairness Opinion" for the RFP was not to safeguard or validate the TTC's legal rights, but to act as an "independent and impartial third party whose role is to observe and monitor the procurement process to ensure the openness, fairness, consistency and transparency of the process." The fairness opinion also sets out that the procurement process includes communication, evaluation and decision-making associated with the project.

[58] The TTC did not provide further comment on section 12 in its reply representations.

Analysis and finding

[59] I have reviewed the records and conclude that all but one (Record 21) are exempt from disclosure under section 12 as records to which Branch 1, solicitor-client communication privilege applies. The records contain direct communications of a confidential nature between a solicitor and TTC staff.

[60] After my review of the records, I find that they consist of direct communications by way of email exchanges between TTC staff and a solicitor, made for the purpose of

²⁷ Freedom of Information and Privacy Manual, Government of Ontario.

obtaining or giving professional legal advice. As noted, the rationale for this type of privilege is to ensure that a client may freely confide in their lawyer on a legal matter. Confidentiality is an essential component of the privilege, and I am satisfied by reviewing the records and the TTC's representations, that the communications were made in confidence.

[61] The appellant submits that any communications protected by this privilege but that were also shared with the fairness monitor should not be exempt under section 12 and refers to the fairness monitor's "fairness opinion for the TTC" where it refers to itself as "an independent and impartial third-party." However, in their representations concerning the application of section 7(2)(j), the appellant submitted that the fairness monitor was "attached" to the TTC but submits that for the purposes of section 12 that the fairness monitor's role was not to safeguard or validate the TTC's legal rights.

[62] The TTC submits that the fairness monitor has a common interest so that any privileged information that was shared with it was not waived and therefore continues to be privileged.

[63] In the Court of Appeal's *General Accident Assurance Co. v. Chrusz*, referenced above, Justice Doherty, writing for the majority, addressed communications between a client and a third party or between a solicitor and a third party by noting that the authorities establish two principles:

1. not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by solicitor-client privilege; and
2. where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as they meet the criteria for the existence of the privilege.

[64] Justice Doherty noted that:

the applicability of client-solicitor privilege to third party communications in circumstances where the third party cannot be described as a channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.

Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act

on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.

[65] In this instance, I find that the function of the fairness monitor, as mentioned in the "fairness opinion" was "to monitor the RFP procurement process," and this function is essential to the existence or operation of the solicitor-client relationship in connection with the RFP process. Therefore, the privilege covers any communications which are in furtherance of that function and which meets the criteria for the privilege.

[66] In my review of the records, I note that the information in records 27, 28, 30, 31 and 37 was shared with the fairness monitor. However, I do not accept that the solicitor-client privilege was waived for any of the communications that were also shared with the fairness monitor because the fairness monitor's function was to monitor the RFP process which is the subject of the privileged information. In this circumstance, I find that the fairness monitor was performing a function which was central to the solicitor-client relationship between the TTC and its counsel for the purpose of communications referable to monitoring the RFP process.

[67] Therefore, I do not find that by including the fairness monitor in the communications set out in records 27, 28, 30, 31 and 31, the TTC waived privilege in these records.

[68] With regard to Record 21, which consists of one email and an attachment (most of the attachment was disclosed), I have reviewed this record and do not accept that the various severances are exempt from disclosure under section 12. The severances in this email, including the severance on the attached document are not direct communications made for the purpose of obtaining or giving professional legal advice. The TTC will be ordered to disclose the withheld information in this record.

[69] Subject to my finding on the TTC's exercise of discretion, therefore, I find that the records for which the TTC claims the section 12 exemption, except for the withheld information in Record 21, are exempt from disclosure pursuant to section 12 of the *Act*. As no other exemption was claimed for the information in Record 21, I will order that it be disclosed.

Issue C: Did the institution exercise its discretion under sections 7(1) and 12? If so, should this office uphold the exercise of discretion?

[70] The section 7 and 12 exemptions are discretionary, and permit 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.

[71] 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.

[72] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁸ This office may not, however, substitute its own discretion for that of the institution.²⁹

Relevant considerations

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

- 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

²⁸ Order MO-1573.

²⁹ Section 43(2).

³⁰ Orders P-344 and MO-1573.

- 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.

[74] Taking into account all the circumstances present in this appeal, including my review of the withheld information in the records, the parties' representations on the exemptions and the fact that I have upheld most of the severances claimed under section 7 and 12, I am satisfied that the TTC has appropriately exercised its discretion under sections 7 and 12 the *Act*, taking into account relevant considerations and not taking into account irrelevant ones. I therefore uphold the TTC's exercise of discretion.

Issue D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 7(1) exemption?

[75] 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.

[76] 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.

[77] 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.³¹

[78] 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.³² Previous orders

³¹ Order P-244.

³² Orders P-984 and PO-2607.

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.³³

[79] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.³⁴

[80] Any public interest in *non*-disclosure that may exist also must be considered.³⁵ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling”.³⁶

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

- public safety issues relating to the operation of nuclear facilities have been raised;³⁷ or
- disclosure would shed light on the safe operation of petrochemical facilities³⁸ or the province’s ability to prepare for a nuclear emergency³⁹

[82] 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;⁴⁰
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;⁴¹
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;⁴² or

³³ Orders P-984 and PO-2556.

³⁴ Order P-984.

³⁵ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

³⁶ Orders PO-2072-F, PO-2098-R and PO-3197.

³⁷ 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.

³⁸ Order P-1175.

³⁹ Order P-901.

⁴⁰ Orders P-123/124, P-391 and M-539.

⁴¹ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

⁴² Order P-613.

- the records do not respond to the applicable public interest raised by appellant.⁴³

[83] 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.

[84] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.⁴⁴

Representations

[85] The appellant submits that for the good of the taxpaying public the requested information should be made available to the public in full. They submit that the vast majority of the TTC's operating funds are made available directly or indirectly through taxpayer funded revenues and as such there is a fiduciary responsibility to spend those resources in a fiscally responsible way. The appellant refers to occasions of financial impropriety at the City of Toronto, including the recent discovery by the City of Toronto's Auditor General of potential bid rigging related to the 2010-2015 audit conducted on the city's tendering process around road resurfacing contracts. The appellant indicates that one of the best defenses for the public against these occurrences is full transparency when alterations of changes occur in the midst of multi-million dollar procurements.

[86] The appellant submits that the RFP at issue took a very sudden and disturbing turn when four business days before the RFP's close an addendum was issued that significantly altered a mandatory bid requirement. This related to the provision requiring a binding commitment from all proponents to submit a \$5 million "Letter of Credit." The appellant submits that this mandatory requirement, to which all vendors were required to comply with in order to have their bid considered, was no small burden for a company to secure and commit to at the time of providing their respective bids.

[87] The appellant submits that this requirement, which was previously listed as part of the "Evaluation Criteria and Weighting" section 6.7c of the RFP, stipulated that "mandatory requirements will be assessed on a pass/fail basis." The appellant submits that section 6.7c. made specific reference to the letter of credit, indicating that the proponent shall submit the completed agreement to provide an irrevocable letter of credit letter of credit form which was subsequently deleted in addendum 6 that was issued on September 3", 2015.

⁴³ Orders MO-1994 and PO-2607.

⁴⁴ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

[88] The appellant submits that the decision to amend the treatment of the letter of credit and remove this requirement from the mandatory requirement checklist was no minor amendment for any public institution to initiate. The appellant provided a portion of the RFP that previously listed this section, along with addendum 6 that removed the letter of credit requirement. They also provided an email exchange between the TTC and the IPC where they submit that the TTC mischaracterizes the change to the RFP as being immaterial to the overall process instead of recognizing that it did in actual fact change the process from a pre-bid commitment to provide a letter of credit, to a requirement to the successful proponent following contract award.

[89] The appellant submits that disclosure of the information in the records relating to the TTC's last minute decision to amend their RFP would allow the public to be provided with a complete and full view of the interactions between TTC staff, the fairness monitor and the advice from internal and external legal counsel which was used as the basis by the TTC and the fairness monitor to reject the appellant's formal letter of protest. In addition, the appellant submits that full disclosure of this information will allow their company to understand why this mandatory bid condition was altered at the last minute.

[90] The appellant submits that their continued requests for clarity from both the TTC and the fairness monitor went unanswered. The appellant submits that the TTC may have had the entitlement to make an amendment but what the appellant has yet to understand is the genesis of the decision to issue the amendment.

[91] The appellant submits that the fairness monitor's mischaracterization of the letter of credit requirement should not be ignored. The appellant submits that the fairness monitor relied upon the TTC's continued blatant mischaracterization of the letter of credit requirement. The appellant submits that by only relying upon the TTC's staff and legal advice in reviewing the matter, the fairness monitor failed to perform the duties required by an independent monitor of a procurement process.

[92] The appellant submits that fairness monitor's final position on the treatment of the letter of credit issue appears to directly contradict a comment from the TTC which was disclosed in Record 26, an email in which a TTC employee specifically makes reference to amendment 6 "lessening the requirements burden on the proponent going this route." The appellant submits that they do not know what "route" the TTC is referring to as it continues to be shielded under a section 7(1) exemption, but suggests that it appears to be the only direct reference that the appellant could find as to a rationalization regarding an "issue" that a party to this bid was facing; and the need to issue the addendum as expeditiously as possible because the deadline to submit was fast approaching.

[93] The appellant submits that the fairness monitor's final report to the TTC, entitled "Fairness Opinion for the Toronto Transit Commission," to support the TTC's procurement process, and ultimately its vendor selection, makes no reference to their

letters of appeal or the internal TTC and fairness monitor's processes that deemed their request to be without merit.

[94] The TTC was provided with a severed copy of the appellant's representations and in reply representations, the TTC addressed the public interest override provision. The TTC submits that since the records for which it was claiming the section 11 exemption are no longer in dispute, the public interest override at section 16 of the *Act* can only apply to records withheld under section 7(1) and cannot apply to the records withheld under section 12.

[95] The TTC submits that with regard to the records that were withheld under section 7(1), there is no compelling public interest in the disclosure of these records as they do not, in any way, offer insight into the operations of the TTC or inform the citizenry about the activities of the TTC in any meaningful way.

[96] Further, the TTC submits that it has been transparent throughout the entire RFP process. It submits that not only did it hire a fairness monitor to oversee the procurement, but the purchasing of this system was discussed in public board meetings where any member of the public could attend and was given the opportunity to speak on the topic. The TTC submits that it takes the threat of corruption and bid-rigging very seriously and has taken steps to ensure that the process was fair and equal.

[97] The TTC also submitted that it has many internal players that are responsible for catching instances of wrong-doing or fraud and each department has special controls put in place to prevent corruption within their business unit. In addition to their internal controls, the TTC submits that it has a special investigation unit that will investigate accusations of wrong doing that are reported on the integrity line.

[98] The TTC refers to Order P-123, where Commissioner Linden held that the public interest override could not be used if there are other processes to address public interest considerations. The TTC submits that by hiring a fairness monitor, by discussing this contract in a public forum, by providing the public the opportunity to speak on the contract, by implementing controls within departments to prevent fraud, by providing training to employees to detect and prevent fraud and by the activities of TTC's Special Investigation Unit as well as the Audit department to identify and rectify instances of wrong doing, it has clearly established processes to address this public interest consideration.

[99] As noted, the TTC's reply representations were sent to the appellant who was invited to provide further representations in response, however, none were received.

Finding

[100] As noted by the TTC, the public interest override at section 16 of the *Act*, in this appeal, can only apply to the records to which section 7(1) applies since the solicitor-client privilege exemption at section 12 is not included under section 16. Therefore, I

will assess whether the public interest override can apply to Records 23, 25 and 26 which I have found are exempt from disclosure under section 7(1).

[101] In my review of these records, I do not agree that there is a public interest in disclosing the information that is exempt under section 7. I do not agree with the appellant's assertion that disclosure of this information relating to the TTC's last minute decision to amend the RFP, would allow the public to be provided with a complete and full view of the interactions between TTC, the fairness monitor and the advice from internal and external legal counsel. It seems that the appellant is addressing records that have been withheld under section 12 which are not records where the public interest override may apply.

[102] However, with regard to the records that were withheld under section 7(1), after my review, I agree with the TTC that disclosure of this information would not offer insight into the operations of the TTC or inform the citizenry about the activities of the TTC in any meaningful way.

[103] In addition, the appellant submits that disclosure of this information will allow their company to understand why the TTC amended a bid condition at the last minute. However, the public interest can only apply where there is "a compelling public interest in the disclosure of the record" and I find this argument serves a private not a public interest.

[104] Therefore, I find that there is no compelling public interest in disclosure of the records that would clearly outweigh the purpose of the section 7(1) exemption.

ORDER:

1. I order the TTC to provide the non-exempt portions of Records 21 and 36 to the appellant by October 26, 2018 but not before October 22, 2018. With the TTC's copy of this order, I am enclosing a copy of Records 21 and 36 with the information to be disclosed highlighted.
2. In order to verify compliance with provision 1 of this order, I reserve the right to require the TTC to provide me with a copy of the records disclosed to the appellant.
3. The remainder of this appeal is dismissed.

Original Signed by: _____
Alec Fadel
Adjudicator

September 27, 2018 _____