



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2207

Appeal MA-050062-2

Toronto Transit Commission



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NATURE OF THE APPEAL:

This appeal concerns the following request for information submitted to the Toronto Transit Commission (the TTC) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

1. Portion of training manual and general instruction[s] issued to the police officer (involved in this matter) regarding apprehending an accused/suspect. Specifically when and how to use handcuffs.
2. Policy/training manual for police officers as to how and where to take statement of an accused ([specially] underage/juvenile persons).
3. Training manual (used to train the ticket collectors) and general policy instructions about asking for I.D. from students/young commuters.
4. TTC policy/instructions to collectors regarding dealing with young customers in situation[s] when I.D. is not produced.
5. TTC policy/instructions about dealing with the young customers in the event of [a] disagreement and when to call police [into] the fray.
6. TTC [by-law] and regulation applicable to commuters regarding their conduct on the TTC premises.

The TTC granted partial access to records responsive to the request. Access was denied to some of the records pursuant to section 52(3)3 (labour relations and employment records) of the *Act*.

The requester (now the appellant) appealed the TTC's decision and appeal MA-050062-1 was opened. Order MO-1954 was issued as a result of this appeal, in which Adjudicator Donald Hale found that section 52(3) did not apply to exclude the application of the *Act* to the records at issue, and ordered the TTC to make an access decision and issue the appellant a decision letter in accordance with section 19 of the *Act*.

The TTC subsequently issued a second decision letter in response to Order MO-1954. In its decision, the TTC denied access to information in two records, one (Record 1) pursuant to section 8(1)(e) (life or physical safety) and the other (Record 2) pursuant to section 8(1)(c) (investigative techniques and procedures). With respect to the information sought "specific to juvenile/underage persons" under part 2 of the request, the TTC stated that no records exist, applying section 22(1)(a) of the *Act*.

The appellant appealed the TTC's second decision letter and this file was opened.

During the course of the mediation stage of the appeal process, and within the 35-day period for raising new discretionary exemptions, the TTC raised the application of the following additional discretionary exemptions under the *Act*:

- section 7(1) (advice or recommendations)

- section 9(1)(d) (relations with other governments)
- section 13 (danger to safety or health)

The TTC issued a supplementary decision letter confirming its reliance upon these additional discretionary exemptions.

During mediation discussions, the TTC maintained that one of the records at issue (Record 2) responds only in part to part 2 of the appellant's request, because information relating specifically to juvenile/underage persons does not exist. The appellant indicated that it does not dispute the TTC's position on this point. Accordingly, the application of section 22(1)(a) of the *Act* is not at issue. The appellant confirmed, however, that it wishes to pursue access to records 1 and 2.

I commenced my inquiry by issuing a Notice of Inquiry, which sets out the background facts and issues in a dispute, seeking representations from the TTC on the application of the exemptions in sections 7(1), 8(1)(c), 8(1)(e), 9(1)(d) and 13 to Records 1 and 2. The TTC submitted representations and agreed to share them, in their entirety, with the appellant. In its representations the TTC indicates that it is no longer relying on sections 9(1)(d) and 13 with respect to the records at issue. Accordingly, these exemptions are no longer at issue.

I then sought representations from the appellant on the application of sections 7(1), 8(1)(c) and 8(1)(e) and included with my Notice of Inquiry a complete copy of the TTC's representations. The appellant elected to not submit representations.

RECORDS:

The following two records are at issue in this appeal:

Record #	Description	Exemptions Claimed
1	Two TTC training documents that deal with empty hand control and handcuffing policy, procedure and technique	7(1) 8(1)(e),
2	One TTC training document that deals with taking statements and interviewing suspects	7(1) 8(1)(c)

DISCUSSION:

The TTC has claimed the application of section 7(1) to both records, in their entirety, section 8(1)(e) to all of Record 1 and section 8(1)(c) to portions of Record 2. I will first examine the application of the section 8(1) law enforcement exemptions to the records at issue.

LAW ENFORCEMENT

General principles

The relevant portions of section 8(1) state:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

...

- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

...

- (e) endanger the life or physical safety of a law enforcement officer or any other person;

The term “law enforcement”, which appears in sections 8(1)(c) and (e), is defined in section 2(1) as follows:

“law enforcement” means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b)

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 8(1)(e), where section 8 uses the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In the case of section 8(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

Because sections 8(1)(c) and (e) are discretionary exemptions, even if the information falls within the scope of these sections, the institution must nevertheless consider whether to disclose the information to the requester.

Record 2 and the application of section 8(1)(c)

I note that in its decision letter, the TTC claimed the application of the section 8(1)(c) exemption to Record 2, in its entirety. The Mediator's Report also indicates that the TTC is claiming section 8(1)(c) for all of Record 2. However, in its representations the TTC claims the application of section 8(1)(c) for the following sections only:

- Preface (page 4)
- Rules 1 to 9 (pages 5 to 10)
- Voire Dire (pages 12 to 14)
- Admitted Statements (pages 15 to 16)
- Persons in Authority (pages 16 to 18)
- Charter Arguments (pages 18 to 20)
- Jeopardy (pages 21 to 23)
- Inducements (pages 23 to 24)
- Voluntary, State of Mind, Free Will, Operating Mind (pages 25 to 26)
- Interviewing an Accused Person (pages 27 to 30)
- Preparation (pages 30 to 31)
- Physical Barriers and Distractions (page 32)
- The Recording Officer (page 32)
- The Witness Officer (page 33)
- The Use of Silence (page 34)
- Questions That Commonly Arise (page 35)
- Structure of the Interview (page 36)

Subsequently, during the course of the inquiry, the TTC clarified that it had also intended to claim the application of section 8(1)(c) to the following sections of Record 2, which it had inadvertently omitted:

- Timing (page 31)
- Setting (page 31)
- The Use of Open Ended Questions When Interviewing (pages 39 to 42)

In the circumstances, I have decided to examine all of the above listed sections of Record 2, including the three additional sections that the TTC has raised during this inquiry, to determine whether they qualify for exemption under the section 8(1)(c) exemption.

Representations

The TTC submits that in accordance with section 53 of the *Police Services Act*, the TTC and the Toronto Police Services Board (the Police) have entered into an agreement for the appointment of certain TTC employees as Special Constables. The TTC states that section 30 of this agreement provides that the Police have conferred the powers of a police officer on TTC Transit Security Officers (now known as Special Constables) to enforce various pieces of legislation, including the *Criminal Code*, *Trespass to Property Act* and certain provisions of the *Provincial Offences Act*. The TTC states that the Special Constables have also been conferred the same powers by the Ministry of Community Safety and Correctional Services. The TTC submits that the function of its Special Constables is policing within the jurisdiction of TTC properties and vehicles. Accordingly, the TTC submits that its Special Constables, while performing their job duties, are engaged in “law enforcement” activities.

The TTC submits that the techniques set out in Record 2 are “investigative” in nature as the record “provides procedures for how a Special Constable, in the course of law enforcement activities, should take a statement from a suspect.” The TTC states that the procedures and techniques outlined in Record 2 are all currently in use by Special Constables and that their disclosure could “reasonably be expected to hinder or compromise” their effective utilization. The TTC further states that the non-disclosure of these techniques and procedures is not intended to conceal information from the public. Rather, the intent is to “protect TTC Special Constables and ensure that they are not constrained in their efforts to police TTC transit properties and enforce the law, arrest suspects and gather all relevant evidence.”

As indicated above, the appellant chose to not submit representations despite being invited to do so.

Analysis and findings

In order to meet the “investigative technique or procedure” test, the TTC must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487].

The techniques or procedures must be “investigative”. The exemption will not apply to “enforcement” techniques or procedures [Orders PO-2034, P-1340].

Having carefully reviewed Record 2 along with the TTC’s representations, I find that the following sections of the record qualify for exemption under section 8(1)(c):

- Interviewing an Accused Person (pages 27 to 30)
- Preparation (pages 30 to 31)
- Timing (page 31)
- Setting (page 31)
- Physical Barriers and Distractions (page 32)
- The Recording Officer (page 32)
- The Witness Officer (page 33)
- The Use of Silence (page 34)
- Questions That Commonly Arise (page 35)
- Structure of the Interview (page 36)
- The Use of Open Ended Questions When Interviewing (pages 39 to 42)

In my view, the aforementioned sections contain information that is “investigative” in nature, revealing investigative techniques and procedures that TTC Special Constables currently use to carry out their assigned duties. I am satisfied that these sections of the record contain information that, if disclosed to the public, could reasonably be expected to hinder or compromise the effective utilization of these techniques and procedures. Accordingly, I am satisfied that these sections of Record 2 qualify for exemption under section 8(1)(c).

On the other hand, I find the following information in Record 2 does not qualify for exemption under section 8(1)(c), because it is not investigative in nature:

- Preface (page 4)
- Rules 1 to 9 (pages 5 to 10)
- Voire Dire (pages 12 to 14)
- Admitted Statements (pages 15 to 16)
- Persons in Authority (pages 16 to 18)
- Charter Arguments (pages 18 to 20)
- Jeopardy (pages 21 to 23)
- Inducements (pages 23 to 24)
- Voluntary, State of Mind, Free Will, Operating Mind (pages 25 to 26)

None of this information, in contrast to the information I have found exempt under section 8(1)(c), reveals investigative techniques or procedures. In addition, much of this information is legal in scope and available in the public domain through various sources, such as, case law, legal dictionaries, legal texts and the *Canadian Charter of Rights and Freedoms*. Accordingly, I find that none of this information qualifies for exemption under section 8(1)(c).

Record 1 and the application of section 8(1)(e)

The TTC has claimed the application of section 8(1)(e) to Record 1 in its entirety. Record 1 is comprised of two documents that deal with the use of tactical handcuffing, empty hand control and tactical positioning all with regard to the safe handling of subject individuals. One is a

“Training Precis” prepared in April 1999 by the TTC’s Corporate Security Department on the use of force, empty hand control and tactical handcuffing and the other is an excerpt from a “Policy, Procedure and Rules Manual” issued by the TTC’s Corporate Security Department in February 1999 concerning the handcuffing of persons in custody.

Representations

The TTC states that the purpose of the record is to “train Special Constables on the proper use of tactical handcuffing, tactical positioning and empty hand control techniques to ensure that they can perform their law enforcement duties, while not endangering their own safety.” The TTC submits that the information contained in the record is very detailed with regard to the use of force in certain situations.

It is the view of the TTC that the release of the information contained in Record 1 would “endanger the physical safety of any TTC Special Constable who is engaging in law enforcement activities.” The TTC submits that the ability of a Special Constable to “contain a potentially serious and dangerous situation through the use of verbal communication or force is of paramount importance in performing any law enforcement activity.” The TTC states that a failure to contain a potentially dangerous situation or person would endanger a Special Constable’s physical safety. The TTC submits that if the information and techniques used to control suspects or situations becomes publicly known, the effectiveness of the use of these techniques is diminished. The TTC concludes that disclosure would, therefore, create a dangerous situation for every Special Constable and could reasonably be expected to endanger the life or physical safety of Special Constables.

Again, as stated above, the appellant chose to not submit representations.

Analysis and findings

I am satisfied that, for the most part, Record 1 contains information that if disclosed could reasonably be expected to endanger the life or physical safety of a TTC Special Constable. Specifically, significant portions of Record 1 contain detailed information about the appropriate use of force, the use of handcuffs and empty hand tactics for controlling dangerous individuals. In my view, disclosing this information could reasonably be expected to put a Special Constable at risk of physical harm in performing his or her law enforcement duties. Therefore, I find this information exempt under section 8(1)(e). This conclusion is consistent with other decisions of this office regarding the application of section 8(1)(e) [see, for example, Order MO-1779].

However, I find the following sections of the Training Precis portion of Record 1 not exempt under section 8(1)(e):

- Cover page
- Introduction
- Part II - Care and Maintenance of Handcuffs

- Portions of Part III – Policy and Procedure, including a drawing of handcuffs with parts labelled
- References to *Criminal Code* Sections 25 and 26
- Definition of Handcuffs

This information is either generic in nature or available in the public domain. Accordingly, I find that this information is not exempt under section 8(1)(e).

ADVICE TO GOVERNMENT

As noted above, the TTC has claimed the application of the discretionary exemption at section 7(1). I will address the application of this exemption to the information remaining at issue in the two records.

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.

The purpose of section 7(1) is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

In support of its reliance on this exemption, the TTC states that Records 1 and 2 were “prepared by an employee of the TTC for the specific purpose of providing advice to TTC Special Constables on how to deal with certain situations.” The TTC provides additional submissions regarding how the information in these records qualifies as advice or recommendations.

I have reviewed the information remaining at issue in Records 1 and 2 and the TTC's representations and I find that it does not qualify for exemption under section 7(1). As alluded to above, section 7(1) is intended to apply to advice or recommendations made within the

deliberative process of government decision-making and policy-making. It is not intended to apply to the contents of manuals, guidelines or policies and procedures created for the purpose of guiding employees in the performance of their job responsibilities [see, for example, Orders P-811, PO-1928 and MO-1729].

EXERCISE OF DISCRETION

The section 8(1)(c) and (e) 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.

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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- 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

With regard to the application of sections 8(1)(c) and (e), the TTC states that it considered the “potential harm that the release of the records may cause to those [TTC] employees [...] who rely on those records on a day to day basis.”

With respect to the application of section 8(1)(c) to Record 2, the TTC states that it considered the following factors in deciding to not release the information at issue:

- the general nature of the information
- the use of the information for conducting interviews with accused individuals
- the importance of the information to Special Constables in the performance of their jobs
- the impact that disclosure might have on the ability of Special Constables to perform their law enforcement functions balanced against the benefit of making the information public

With regard to the application of section 8(1)(e) to Record 1, the TTC states that it considered the potential harm to Special Constables that disclosure could cause. The TTC concluded that the “risk of potentially endangering the physical safety of its employees outweighed the benefit of making the information public.”

On my review of the records and the TTC’s representations, I am satisfied that the TTC has taken into account relevant considerations, and has not taken into account any irrelevant factors, in deciding not to disclose the information that I have found exempt under sections 8(1)(c) and (e).

ORDER:

1. I order the TTC to disclose Records 1 and 2 in part, in accordance with the highlighted versions of these records included with the TTC’s copy of this order, by **August 3, 2007** but not before **July 27, 2007**. To be clear, the TTC should not disclose the highlighted portions of these records.

2. In order to verify compliance, I order the TTC to provide me with copies of the records ordered disclosed in provision 1 of this order.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ June 29, 2007