Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3600

Appeal MA17-322

City of Windsor

April 27, 2018

Summary: The City of Windsor (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for records related to the decision-making that resulted in the denial of advertising space for a particular advertisement, including the records that identify the individuals involved in the decision and the input of these individuals. The city denied access to the responsive information in part, citing the discretionary advice or recommendations exemption in section 7(1).

In this order, the adjudicator partially upholds the application of section 7(1) to the records and finds that the section 23 public interest override does not apply to the exempted information.

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

OVERVIEW:

[1] The City of Windsor (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) from a media requester for the following records:

- Copy of Transit Windsor's policy relating to political advertisements on Windsor city buses.

- All email correspondence and memos between (a named individual) and the mayor's office and/or city hall AND (a named individual) and the mayor's office and/or city hall relating to (a named individual) and (a particular) ad proposal.

[2] The city issued a decision granting partial access to the records. The city withheld records pursuant to sections 7(1) (advice or recommendations), 10(1) (third party information) and 14 (personal privacy) of the *Act*.

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

[4] During the course of mediation, the city agreed to reconsider its decision. The city, however, requested that the appellant first clarify and/or narrow the request.

[5] The appellant advised that he wished to pursue access to records related to the decision-making that resulted in the decision to deny advertising space for a particular advertisement, including the records that identify the individuals involved in the decision-making and the input of these individuals. He advised that he would not pursue access to the correspondence that the city received from external parties or sent to external parties.

[6] The city subsequently issued a revised decision granting partial access to the records. The city withheld portions of records pursuant to sections 7(1) (advice or recommendations) and 8(1)(d) (confidential source of information) of the *Act*. The city also withheld records or portions of records deemed to be non-responsive or duplicated in other record pages at issue. The city later clarified that the record identified as document number 18 on the index of records attached to the revised decision was duplicated in other record pages at issue.

[7] The appellant advised that he wished to pursue access to the portions of the records that had been withheld pursuant to sections 7(1) and 8(1)(d) of the *Act*. The appellant submitted that if the city had properly applied the exemptions to withhold this information, then this information should be ordered disclosed pursuant to the public interest override found at section 16 of the *Act*.

[8] The appellant further requested that the city's late raising of section 8(1)(d) of the *Act* be included as an issue in the appeal.

[9] The appellant, however, agreed to the removal of the records or portions of records deemed to be non-responsive or duplicated in other record pages at issue from the scope of the appeal.

[10] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry.

[11] Representations were exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[12] In its representations, the city withdrew its reliance on the section 8(1)(d) exemption, therefore, this exemption is no longer at issue.

[13] In this order, I partially uphold the application of section 7(1) to the records and find that the section 16 public interest override does not apply to the exempted information.

RECORDS:

[14] The portions of the records identified as document numbers 2 and 4 on the index of records attached to the revised decision, which had been withheld pursuant to section 7(1) of the *Act*, remain at issue in this appeal.

ISSUES:

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

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 records that clearly outweighs the purpose of the section 7(1) exemption?

DISCUSSION:

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

[15] 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]

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

"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.

"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]

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

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 information[6]
- a supervisor's direction to staff on how to conduct an investigation[7]

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[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 dissemination[8]

[19] The city states that the records at issue are a straightforward example of information itself consisting of recommendations and relate to a suggested course of action made to a person being advised that will be accepted or rejected by that person. The city states that:

> Furthermore, the part of the record that identifies the public servant is also an integral part of the exemption from disclosure. In *John Doe v. Ontario (Finance)*,[9] ...in reference to the meaning of "advice" in the equivalent provision of the *Freedom of Information and Protection of Privacy Act*,[10] the Supreme Court of Canada stated at paragraph 26 that it would include "the public servant's identification"…
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> At paragraph 45, the Supreme Court unequivocally accepts that the rationale behind the exception is because "advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter."

[20] The appellant states that he is not interested in exposing the honest deliberations of bureaucrats, but rather the directives or suggestions of political officials, senior managers and leaders. He believes that any orders or instructions coming from these senior sources do not constitute advice under the *Act*.

[21] In reply, the city reiterates its position that the information at issue is advice or recommendations.

Analysis/Findings

[22] I will first deal with the city's claim that the identity of a public servant is subject to section 7(1). The city only severed one name from the records, in Record 4. It had claimed that the discretionary exemption in section 8(1)(d) applied to this name. It withdrew its section 8(1)(d) claim. It now appears that the city is attempting to raise the application of section 7(1) late to this name.

[23] Even if the city had raised the application of section 7(1) in a timely manner to

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[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),* 2014 SCC 36 (referred to as *John Doe* in this order).
[10] Section 13(1) of the provincial *Act*, the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), is the equivalent to section 7(1) of *MFIPPA*.

this name in Record 4, I would have found that this exemption does not apply to this name.

[24] I disagree with the city that the findings in *John Doe* support its claim that the identity of a public servant who provides advice or recommendations is exempt under section 7(1).

[25] The city relies on paragraph 26 of the *John Doe* case, but fails to quote the entirety of the sentence at issue in that decision. Paragraph 26 states in full that:

> Policy options are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant's identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information. [Emphasis added by me].

[26] Therefore, *John Doe* determined that section 7(1) applies to the public servant's advice or recommendations, i.e. the public servant's identification of the alternative decisions, not their own identity.

[27] As well, in the context of this appeal, it is clear that the public servant's name is not personal information and the mandatory personal privacy exemption in section 14(1) cannot apply to it. This is because section 2(2.1) of *MFIPPA* provides that:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[28] The city submits that the remaining information at issue in Records 2 and 4 consists of recommendations. As noted above, 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

[29] The city submits that the records at issue relate only to the recommendations behind the decision of importance to a third party and not to the decision itself. It states that the ultimate decision arising from the recommendation has been revealed.

[30] The city was asked in the Notice of Inquiry to answer the following questions:

- What is the advice?
- What is the recommended course of action?
- Was the advice given by an officer or employee of an institution or a consultant retained by an institution? Please explain.

- If the advice or recommendation is not contained in the record, how could disclosure of the record reveal the advice or recommendation?

[31] The city did not provide representations on each severance, nevertheless, I have considered the information in each severance.

[32] Record 2 has two severances under section 7(1). I find that each severance is a recommendation of two different city employees and section 7(1) applies to this information.

Record 4 has four severances under section 7(1). I find that:

- The earliest severance at 11:56 a.m. does not reveal advice or recommendations but is factual or background information.

- The next severance in Record 4 at 2:25 p.m. is information that does reveal the recommendation in this record.

- The next severance at 2:31 pm is the recommendation in this record.

- The last severance at 2:33 p.m. does not reveal advice or recommendations and is also factual or background information.

[33] Therefore, I find that only the 2:25 p.m. and 2:31 p.m. severances in Record 4 contain advice or recommendations.

[34] As no other discretionary exemptions have been claimed and no mandatory exemptions apply, I will order the remaining two severances disclosed, along with the name of the public servant in Record 4.

[35] I find that none of the exceptions to section 7(1) in sections 7(2) or 7(3) apply to the information I have found subject to section 7(1). In particular, this information does not contain the reasons for a final decision, order or ruling of an officer or an employee of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution under section 7(2)(k).

[36] I will now consider whether the city exercised its discretion properly and whether the public interest override applies to the information I have found subject to section 7(1).

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

[37] 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.

[38] 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.

[39] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[11] This office may not, however, substitute its own discretion for that of the institution.[12]

[40] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[13]

- 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

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[11] Order MO-1573.
[12] Section 43(2).
[13] Orders P-344 and MO-1573.

- 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.

[41] The city submits that it exercised its discretion under section 7(1) keeping in mind the purpose of this section, and that the reasons for the decision upon which the recommendations were made have been communicated to the appellant.

[42] The appellant did not provide representations on this issue.

Analysis/Findings

[43] I agree with the city that it exercised its discretion in a proper manner concerning the information that I have found subject to section 7(1).

[44] I also agree with the city that it took into account the purpose of the section 7(1) exemption, namely, to allow people employed or retained by institutions to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.

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

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.

[45] 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.

[46] 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.[14]

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[14] Order P-244.

[47] 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.[15] 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.[16]

[48] A public interest does not exist where the interests being advanced are essentially private in nature.[17] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[18]

[49] A public interest is not automatically established where the requester is a member of the media.[19]

[50] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[20]

[51] Any public interest in *non*-disclosure that may exist also must be considered.[21] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[22]

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

- the records relate to the economic impact of Quebec separation[23]
- the integrity of the criminal justice system has been called into question[24]
- public safety issues relating to the operation of nuclear facilities have been raised[25]

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[15] Orders P-984 and PO-2607.
[16] Orders P-984 and PO-2556.
[17] Orders P-12, P-347 and P-1439.
[18] Order MO-1564.
[19] Orders M-773 and M-1074.
[20] Order P-984.
[21] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).
[22] Orders PO-2072-F, PO-2098-R and PO-3197.
[23] 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.).
[24] Order PO-1779.
[25] 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.

- disclosure would shed light on the safe operation of petrochemical facilities[26] or the province's ability to prepare for a nuclear emergency[27]

- the records contain information about contributions to municipal election campaigns[28]

[53] 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[29]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[30]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[31]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[32]

- the records do not respond to the applicable public interest raised by appellant[33]

- 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.

- 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.[34]

[54] 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.

[55] 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

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[26] Order P-1175.
[27] Order P-901.
[28] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[29] Orders P-123/124, P-391 and M-539.
[30] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[31] Orders M-249 and M-317.
[32] Order P-613.
[33] Orders MO-1994 and PO-2607.
[34] 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.).

information is consistent with the purpose of the exemption.[35]

[56] The city submits that the records at issue relate to recommendations about a decision of importance to a third party and that it released its ultimate decision to the third party including its reasons. It states that the records at issue relate only to the recommendations behind that decision and not to the decision itself.

[57] The city submits disclosure would not shed light on the operations of government and that the records merely corroborate what occurs at all levels of government - public servants are called upon to make recommendations, the recommendation is made and either acted upon or not. It states that the ultimate decision arising from the recommendation has been revealed and that the purpose of the section 7(1) exemption outweighs any public interest in disclosing the records at issue

[58] The appellant states that he is not interested in exposing the honest deliberations of bureaucrats, but rather the directives or suggestions of political officials, senior managers and leaders.

[59] The appellant states that he requested these emails because officials were evasive and inconsistent when asked to explain why an advertisement from a grassroots citizens' group concerned about the environment was rejected and who, specifically, rejected it. He states:

> At first, they said there was a policy against political ads. This didn't make sense to multiple media outlets because Transit Windsor had run political ads in the past. When this was pointed out to officials, they steadfastly refused to provide any further clarification. They said they wanted to move on.
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> When the director of Transit Windsor was asked for a copy of the advertising policy, he initially told [the appellant] that a written policy did not exist. When [he] obtained a copy of that written policy, via this FOI[36] request, officials then said the ad was rejected not because it was political but rather via a safety valve provision stipulating all ads were "subject to the discretion and consent of Transit Windsor."
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> Every resident of Windsor has a constitutional right to freedom of expression that includes the ability to advertise on publicly-funded infrastructure like a Transit Windsor bus. The onus is on the state to prove

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[35] 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.).
[36] Freedom of information.

> why that right should be denied, not on the citizen to prove why it must be upheld.
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> Denying a resident that basic right is not a decision that should be taken lightly and the decision to do so should be explained fully, frankly and transparently. It should be subject to a fair but rigorous examination by a free press. That examination cannot take place when officials offer varying accounts and refuse, point blank, to answer direct, relevant questions. That examination can only take place when all the facts are brought into the light.
>
> This advertisement did not violate Transit Windsor's advertising policy and [the appellant] does not understand how or why it was flagged as inappropriate in the first place. Why were senior political officials outside of Transit Windsor even alerted about this specific ad and what actions did they take after being notified? The advertisement advocated against a position endorsed by the city's mayor and council. Did that play any role in the decision to reject the ad?
>
> The public still does not know why this ad was rejected [by Transit Windsor]. But why? Who made the decision? And what recourse or remedy was offered to the group [the third party] denied that ad?
>
> The public has a right to know why the decision was made to deny this group their right to free expression and the public has a clear and enduring interest in ensuring that Transit Windsor's advertising policy is applied fairly, consistently and impartially to all residents of Windsor.

[60] In reply, the city states that the essence of the communication in the records remains "advice" or "recommendations" and that even if, as the appellant alleges in its representations, he received conflicting reasons for the ultimate decision to reject the advertisement on Transit Windsor's buses, the essence of the records as advice or recommendations remains unchanged.

Analysis/Findings

[61] Remaining at issue are four severances, consisting of two severances in each of Records 2 and 4.

[62] I find that the city has not directly addressed the application of the public interest override to the records. Instead it repeats its representations about the section 7(1) exemption.

[63] The appellant is seeking to ascertain from the records:

> … why this ad was rejected… Who made the decision? And what recourse or remedy was offered to the group [the third party] denied that ad?

[64] All the names of the individuals in the records at issue are or will be disclosed in this order. Therefore, the appellant's question as to "who made any decision?" has been or will be answered by disclosure of the records. As well, Record 2 discloses the decision made.

[65] The information at issue in the records also does not contain information as to any recourse or remedy offered to the third party group that sought to place the advertisement.

[66] As noted above, a compelling public interest has been found *not* to exist where:

- the records do not respond to the applicable public interest raised by appellant.[37]

[67] I find that the four remaining severances in the records at issue do not respond to the applicable public interest raised by appellant.

[68] As well, I find that a significant amount of information has already been disclosed, or will be disclosed by this order, and this is adequate to address any public interest considerations

[69] Therefore, I find that a compelling public interest does not exist in the circumstances of this appeal concerning the four withheld severances and I find these severances exempt under section 7(1).

ORDER:

1. I order the city to disclose the information in the records to the appellant by **May 18, 2018**, except for the information I have found subject to section 7(1). For ease of reference, I am providing the city with this order a copy of the records, highlighting the information not to be disclosed to the appellant.

Original Signed by: April 27, 2018
Diane Smith
Adjudicator

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