

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4131

Appeal MA19-00495

Toronto Transit Commission

November 30, 2021

Summary: This is an appeal from a decision of the Toronto Transit Commission (TTC) to deny access to a record containing medication cut-off and testing timeframe levels used in the administration of its “fitness for duty policy”. The TTC denied access to figures in the record pursuant to the discretionary exemption in section 7(1) (advice or recommendations) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant raised the possible application of the exception in section 7(2) (factual material). In this order, the adjudicator finds that the withheld figures qualify for exemption under section 7(1) and that the exception in section 7(2) (factual material) does not apply. On that basis, she upholds the TTC’s decision and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1) and 7(2).

OVERVIEW:

[1] The Toronto Transit Commission (TTC) received a request for access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), which enclosed a copy of the TTC’s notice entitled “Employee Obligations under the Fitness for Duty Policy” (the notice). The notice indicated that the “TTC has received updated medication guidelines from the [Chief] Medical Review Officer (MRO)” and referred to “guidance and/or recommendations provided by [Occupational Health and Employee

Well-being (OHEW)¹] regarding [TTC employees'] medication use" and to the OHEW's having issued "direction on taking... prescription/authorized medication."

[2] The appellant sought access to the following records:

1. The MRO guidelines referred to in the notice;
2. Any and all earlier versions of the MRO guidelines;
3. Any and all versions of the MRO guidelines that the TTC may have received after it issued the notice; and
4. Any record that OHEW staff refer to, consider or are otherwise guided by, when they develop and/or issue guidance, recommendations or directions to TTC employees about medication use.

[3] By way of background, the TTC engages with a company that employs fitness for duty experts (company). As an employee of the company, the Chief MRO (MRO), who is also a licenced physician, provided the TTC with updated medication guidelines, as a consultant to the TTC. The notice does not refer to MRO guidelines as indicated in the request; rather the notice refers to the updated medication guidelines (guidelines) received from the MRO.

[4] The TTC issued an access decision, in which it stated that no responsive records exist and provided an explanation of the obligations of an employee in relation to their use of medication. The appellant appealed the TTC's decision to the Office of the Information and Privacy Commissioner (the IPC), on the basis that records should exist.

[5] A mediator was assigned to explore the possibility of resolving the appeal. During mediation, the appellant reiterated that he is seeking the guidelines that were provided by the MRO to the TTC, as referenced in the notice. He also advised that he is not seeking individuals' medical information, but rather internal TTC memos, directives or guidance documents that OHEW staff refer to, consider or are guided by when issuing guidance, recommendations or directions to TTC employees about medication use.

[6] The TTC subsequently issued a revised access decision. With respect to request item 1, the TTC granted partial access to a record entitled "[Company name] Medical Testing and Assessments" and relied on the "advice or recommendations" exemption in section 7(1) to withhold portions of this record.

[7] Upon receipt of the revised decision, the appellant advised that he would not be pursuing items 2, 3 and 4 of his request but he was pursuing access to the figures withheld in the record because he believes the figures are factual and should be

¹ It appears that the OHEW is part of the TTC's human resources department.

disclosed pursuant to the exception to the exemption in section 7(2) of the *Act*.

[8] Further mediation was not possible and the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry.

[9] An adjudicator was assigned to this appeal and she decided to conduct an inquiry under the *Act*. She sought and received representations from the TTC and the appellant, as well as reply representations from the TTC and sur-reply representations from the appellant. The representations were shared in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[10] This appeal was then transferred to me to continue with the adjudication of the appeal.² In this order, I uphold the TTC's application of the exemption at section 7(1) of the *Act* to withhold portions of the record at issue and find that the exception in section 7(2) does not apply. On that basis, I uphold the TTC's decision and dismiss the appeal.

RECORD:

[11] The record at issue is entitled "[Company name] Medical Testing and Assessments" (the record), where figures in tables have been withheld (the figures).

ISSUES:

- A. Does the discretionary exemption at section 7(1) apply to the withheld information in the record?
- B. Did the TTC exercise its discretion under section 7(1)? If so, should I uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary exemption at section 7(1) apply to the withheld information in the record?

[12] The TTC relies on section 7(1) to withhold the figures from the record remaining at issue. 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.

² I have reviewed all the file materials and representations and have determined that I do not require further information before making my decision.

[13] The purpose of section 7(1) is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.³

[14] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[15] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.⁴

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

[17] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁵

[18] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply, as that intention is inherent to the job of policy development, whether by a public servant or consultant.⁶

[19] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 7(1).⁷

³ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43 (*John Doe*).

⁴ See above at paras. 26 and 47.

⁵ Order P-1054

⁶ *John Doe* at para. 51.

⁷ *John Doe* at paras. 50-51.

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

- factual or background information⁸
- a supervisor's direction to staff on how to conduct an investigation⁹
- information prepared for public dissemination.¹⁰

[21] 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 exceptions in section 7(2) can be divided into two categories: objective information, and specific types of records that could contain advice or recommendations.¹¹ 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.

[22] The appellant has raised the application of section 7(2)(a), which states:

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

(a) factual material;

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

Representations of the parties¹⁴

[24] The TTC submits that the discretionary exemption at section 7(1) of the *Act* applies to the information at issue and none of the exceptions listed in sections 7(2) or (3) apply. The appellant submits that section 7(1) does not apply because disclosure of the redacted information would not reveal advice or recommendations and the

⁸ Order PO-3315.

⁹ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

¹⁰ Order PO-2677

¹¹ *John Doe* at para. 30.

¹² Order 24.

¹³ Order PO-2097.

¹⁴ While both parties made representations related to the appellant's motivation for making the request, I have not summarized them, as they are not relevant to my findings in this order.

exception in section 7(2) applies.

The section 7(1) exemption

[25] The TTC submits that the record contains the medical advice of the company's MRO on:

- the estimated minimum and maximum cut-off levels for testing/detecting the presence of certain medications in the human body; and
- the minimum and maximum timeframes where each medication could be detected, and could reasonably impair or impact an individual's ability to safely carry out their work functions.

[26] The TTC explains that its OHEW employees use the record as a guide to understand the cut-off levels for specific medications and determine what decisions, if any, need to be made to ensure the safety of the employee in the workplace, including whether it needs any additional advice from an employee's personal physician or the company's consultants.

[27] The appellant submits that the TTC's decision-making process shows that the guidelines do not contain advice or recommendations. He submits that, when the TTC's OHEW staff learn of an employee's use of drugs, they use the general information in the guidelines to determine whether they need to obtain advice about the specific individual from the employee's personal physician or the company's consultants. Despite the TTC's characterization of the guidelines as a "medical opinion", the appellant submits that:

[T]he TTC's description of how its OHEW staff use the documents tells a different story: they use it as general ("framework") information about drugs and drug testing to help them assess whether they need to obtain medical advice in individual cases. In the language of s. 7, the [guidelines] are "factual material"; it's the "additional medical review and evaluation that the TTC obtains from the MRO in individual cases that constitutes 'advice and recommendations'".

[28] Noting that the appellant acknowledges the figures are a guide, the TTC submits that this supports its position that the record contains the advice or recommendations of the MRO, while the TTC makes the ultimate decision, which may involve seeking additional medical advice when a situation falls outside of the scope of the guidelines, and/or is more complex.

Evaluative analysis

[29] The TTC refers to Order PO-4072-I, where the adjudicator stated that "advice" involves an evaluative analysis of information. In that order, the records were found to include both evaluative analysis and objective information that are interwoven and

cannot be separated, but were still exempt under the advice and recommendations exemption.

[30] The TTC submits that the information remaining at issue in the current appeal is an evaluative analysis of scientific information related to the minimum and maximum cut-off levels for testing urine and saliva for traces of specific drugs that was prepared for decision-making.

[31] The appellant challenges this by submitting that objective information does not become an “evaluative analysis” simply because it is expressed as a range or an estimate, because it is still “factual material” for the purposes of section 7(2)(a).

Exceptions to the section 7(1) exemption – factual material - section 7(2)(a)

[32] The appellant submits that the figures are objective information excepted from the section 7(1) exemption under section 7(2)(a) of the *Act* as “factual material”. He also submits that the figures constitute the “factual material” that forms part of later evaluative analysis – that is, the subsequent advice the company’s consultants give the TTC about whether a specific employee is safe in the workplace.

[33] According to the appellant:

the redacted information is objective rather than evaluative: it expresses, as a range of numerical values, the cut-off levels and time windows for testing/detecting the presence of certain medications in the human body that have been established on the basis of scientific evidence.

[34] The TTC submits that the appellant has misunderstood its argument. Specifically, the TTC submits that the adjudicator in Order PO-4072-I found that:

factual material does not refer to occasional assertions of fact in a record, but to a coherent body of facts separate and distinct from the advice and recommendations the record contains. Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) [the provincial equivalent of section 7(2)(a) in the *Freedom of Information and Protection of Privacy Act*] will not apply.¹⁵

[35] Similar to Order PO-4072-I, the TTC submits that the figures in the record are based on factual scientific information and the MRO’s evaluation and interpretation of that information is a medical opinion that cannot be separated from the underlying factual scientific information, and as such, it does not meet the criteria of “factual material”. The TTC also refers to Orders 24 and PO-2097, which both found that the factual information exception could not be applied to the records because the factual

¹⁵ Order PO-4072-I at page 12.

material in the records could not be separated from the advice and recommendations in the records.¹⁶

Disclaimer in the record

[36] To support their respective positions, both parties refer to the following disclaimer on page one of the record, which states:

The below chart outlines estimated minimum and maximum time windows of detection for urine and oral fluid testing methods. This is for informative purposes only and should be used as such.

There are a number of factors that may change the timeframe of detection for some individuals. Some of these factors include but are not limited to:

...

The information contained below is based on reports from the laboratory as well as the most up to date information and research available at the time of publication of this document. It is possible, that based on new research available, this information could change. Please ensure that you are looking at the most up to date version and speaking with an expert before making any critical decisions based on this chart.

Please note that these take into consideration lab-based testing only (*i.e.* not Point of Care Testing devices). The detection windows can vary depending on many factors, including... As such, these are estimate only and are to be taken as such.

[37] The TTC submits that this disclaimer explains that the figures constitute a range of estimates based on the MRO's interpretation of the science of cut-off levels, which is highly subjective and influenced by other factors, and that these figures should be utilized for informative purposes only. The TTC provided me with a copy of an article¹⁷, which states that there are many different factors that can impact testing of medications in urine tests, in support of its position that the science of drug testing is not exact.

[38] In contrast, the appellant refers to the disclaimer to support his position that the redacted information in the record contains "factual material" because the disclaimer

¹⁶ PO-2097 at page 24 and Order 24 at page 7.

¹⁷ Moeller, K., et. Al. (2017). "Clinical Interpretation of Urine Drug Tests: What Clinicians Need to Know About Urine Drug Screens." *Mayo Foundation for Medication and Research*, 92(5), 774-796 (available online at [https://www.mayoclinicproceedings.org/article/S0025-6196\(16\)30825-4/pdf](https://www.mayoclinicproceedings.org/article/S0025-6196(16)30825-4/pdf)).

describes the data as “information”, rather than an “interpretation” of the laboratory reports and research. In addition, the appellant submits that the disclaimer does not say that the estimated timeframes, or the science behind them, are “highly subjective” and “speculative”.

Analysis and findings

[39] As explained below, I find that the section 7(1) exemption applies to the figures in the record and that the mandatory exception in section 7(2) does not apply.

[40] I find that the figures at issue consist of advice or recommendations of the MRO provided to the TTC. I accept that the figures in the record are the MRO’s evaluative analysis of scientific information related to the levels at which specific drugs can be detected and the timeframe in which they can be tested in urine and saliva. I also accept that the record was prepared for decision-making by OHEW staff about an employee’s use of specific medication and its impact on the employee’s work. Accordingly, I find that the section 7(1) exemption applies to the figures in the record.

[41] I also find that the figures in the record are not factual material. I am satisfied that the figures are based on factual scientific information and that the evaluation of that information by the MRO is a medical opinion that cannot be separated from the underlying factual scientific information. I agree that the figures are not a coherent body of fact separate and distinct from the advice or recommendations. I disagree with the appellant’s submission that the figures constitute the “factual material” that forms part of later evaluative analysis. As a result, I find that the mandatory exception in section 7(2)(a) does not apply to except the application of the section 7(1) exemption.

[42] While both parties argue that the disclaimer contained in the record supports their respective positions, I agree with the TTC’s interpretation of it. I accept that the disclaimer explains that the figures constitute estimates that should be used for informative purposes, meaning that many factors can influence cut-off levels in the human body. I also accept that the disclaimer explains that the science behind cut-off levels for drug testing is not exact and is subject to various factors. These factors lead me to find that the figures are not factual material – hence the reason why the TTC obtained a medical professional’s interpretation of the scientific study of cut-off levels for drug testing.

[43] Accordingly, subject to my review of the TTC’s exercise of discretion, I find the figures in the record are exempt from disclosure under section 7(1) of the *Act*.

Issue B: Did the TTC exercise its discretion under section 7(1) of the *Act*? If so, should the IPC uphold the exercise of discretion?

[44] 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 IPC may determine whether the institution failed to do so. In addition, the IPC 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.

[45] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁸ This office may not, however, substitute its own discretion for that of the institution.¹⁹

[46] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant and additional unlisted considerations may be relevant:²⁰

- 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;

¹⁸ Order MO-1573.

¹⁹ Section 43(2) of the *Act*.

²⁰ Orders P-344 and MO-1573.

- the age of the information; and
- the historic practice of the institution with respect to similar information.

Representations of the parties

[47] The TTC submits that it exercised its discretion in applying the section 7(1) exemption in an appropriate manner. It submits that it has remained consistent in its approach regarding information of this nature and has been limited and specific in the redactions applied to the record. It also submits that it has done so in good faith and with the sole intention of protecting the advice and recommendations contained in the record.

[48] It also submits that in making its decision, it considered that the record contains advice and not factual information, with the intention of simply protecting the advice provided by the MRO to the TTC.

[49] The TTC submits that it has not taken into account any irrelevant factors, and that it took into account the following relevant factors in making its decision:

- The information contained in the record is utilized for internal business purposes and to maintain the safety of employees in relation to the consumption of medications that may impair their ability to perform their jobs.
- The TTC has been limited and specific about which portions of the record are considered exempt under section 7(1) of the *Act*.
- The TTC has considered the purpose of the section 7(1) exemption, which is to protect advice and recommendations provided to it by the MRO.
- The information contained in the record is sensitive to the TTC as the figures could be used by employees who believe it to be fact and try to circumvent the drug testing process.
- The TTC has maintained a consistent practice when dealing with the record and other similar records, which is to not share the type of figures presented in the record, as it has always recognized such information as the advice and recommendations of the MRO or other medical consultant.
- There is no personal information of the appellant contained in the record.
- The appellant has never brought forth any sympathetic or compelling reason why he requires the information in the record.
- The record is not old.

[50] The appellant submits that I cannot reasonably conclude, based on the record before me, that the TTC properly exercised its discretion because the TTC did not

provide him with reasons that contain a “meaningful justification” of its decision to withhold the figures under section 7(1) of the *Act* and therefore, it is impossible to know whether the TTC considered relevant factors, or irrelevant factors, when it decided to withhold the figures. He submits that when refusing to disclose a record under the section 7(1) exemption, the TTC is making an administrative decision to do so and under administrative law, it is required to give reasons that provide a meaningful justification for its decision. He also submits that I must be able to evaluate the administrative decision-maker’s reasons for the decision in order to conduct a meaningful review of that decision.²¹

[51] He further submits that the TTC’s representations in this appeal do not cure this defect because they do not provide a meaningful explanation of its exercise of discretion and they are a *postfacto* rationalization of the TTC’s decision, rather than the reasons for the decision itself, which is not permitted as per *Vavilov*. In addition, he submits that the TTC has done little more than run through the thirteen factors listed in the Notice of Inquiry in a superficial way.

Analysis and findings

[52] As explained below, I find that the TTC properly exercised its discretion in making its decision to withhold the figures in the record under section 7(1).

[53] The appellant submits that the TTC did not exercise its discretion properly because at the time of making its decision, the TTC did not provide reasons that contain a “meaningful justification”, and therefore, it is impossible to determine whether the TTC considered all of the relevant factors, or considered irrelevant factors, when it decided to withhold the figures in the record.

[54] Based on my review of the parties’ representations, I am satisfied that the TCC properly exercised its discretion under section 7(1) in deciding to withhold the figures in the record. I find the TTC considered the nature of the information in the record and the purpose of the section 7(1) exemption as well as the purposes of the *Act*. In addition, I find the TTC considered the need to protect the flow of advice and recommendations between the TTC and its consultants. I am also satisfied the TTC acted in good faith and did not take into account irrelevant considerations.

[55] I acknowledge the appellant’s concerns regarding whether the TTC provided a “meaningful justification” of its exercise of discretion. However, upon review of the record and the evidence provided by the TTC, I find the TTC has now provided sufficient evidence to demonstrate that it did not act in bad faith, that it considered relevant considerations and that it did not consider irrelevant considerations in

²¹ The appellant refers to *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*), which he submits explains the importance of reasons in the review of administrative decisions.

exercising its discretion to withhold the figures in the record. While the TTC may not have fully explained its reasons in its access decision, it has now done so as part of this appeal process and the appellant has had the opportunity to respond to the TTC's reasons.

[56] I note that even if I were to find that the TTC did not fully consider all factors when making its decision to withhold the record at issue, I am not able to substitute my decision for its exercise of discretion. At most, I would only be able to order that the TTC re-exercise its discretion. However, in this case, the TTC has satisfied me that it did not exercise its discretion in bad faith nor did it fail to take in to account the valid considerations set out above.

[57] Accordingly, I find that the TTC properly exercised its discretion in making its decision to withhold the figures in the record and I uphold it

ORDER:

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

Original signed by _____
Valerie Silva
Adjudicator

November 30, 2021