

# Manitoba Ombudsman

## **REPORT UNDER**

### ***THE OMBUDSMAN ACT***

#### **CASE 2012-0358**

#### **CITY OF WINNIPEG HANDI-TRANSIT SERVICE**

#### **REPORT ISSUED ON JANUARY 19, 2016**

### **CASE SUMMARY**

Manitoba Ombudsman received four unrelated written complaints from individuals who believed their eligibility for Handi-Transit service was unfairly assessed. While the individual complaints were ultimately resolved, Manitoba Ombudsman investigated broader issues raised by the complaints regarding the Handi-Transit application and appeal process.

As a result of our investigation, Handi-Transit (the department) has implemented administrative changes to improve the fairness of its decision-making process and its written communication with applicants. This includes the following:

- The department will provide written reasons in its decision letters to applicants deemed ineligible for Handi-Transit service;
- The department will advise unsuccessful applicants in writing that if an applicant wishes to provide new information related to eligibility, the department will accept the new information and then decide whether a reassessment, additional information, or a new application is required; and
- The department will proactively provide an appellant a copy of the functional assessment report the Handi-Transit Appeal Hearing Body considers at the hearing.

### **OMBUDSMAN JURISDICTION AND ROLE**

Under *The Ombudsman Act*, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, and municipalities, and their officers and employees.

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation or municipal by-law. On other occasions it is written policy or established procedures implemented to give effect to legislative purpose. In cases concerning an impact on individual rights or benefits we also examine the fairness of the action or decision. A complaint can raise questions of procedural fairness, substantive fairness or relational fairness.

The goal of administrative investigations is to determine the validity of complaints and to identify areas requiring improvement.

## THE INVESTIGATION

Between 2009 and 2012, our office received four written complaints from individuals who felt their eligibility for Handi-Transit service was unfairly assessed. The complaints related to how Handi-Transit assessed a person's ability to walk 175 metres outside in winter and in other months. One complainant was also concerned that the department did not provide her written reasons for why she was denied Handi-Transit service. While the individual complaints were ultimately resolved, broader issues regarding the Handi-Transit application and appeal process remained outstanding. To address these issues our office opened an investigation under subsection 15(b) of *The Ombudsman Act*, which states the following:

*15. The Ombudsman may, on a written complaint or on his own initiative, investigate [...]*

*(b) any decision or recommendation made, including any recommendation made to a council, or any act done or omitted, relating to a matter of administration in or by any municipality or by any officer or employee of a municipality, whereby any person is or may be aggrieved.*

## KEY ISSUES

- 1. Does Handi-Transit provide an unsuccessful applicant with written reasons explaining why he or she does not meet the Handi-Transit eligibility criteria?**
- 2. Does Handi-Transit advise an unsuccessful applicant that he or she may request reconsideration of a decision regarding eligibility?**
- 3. Does Handi-Transit provide an appellant a copy of the functional assessment report the Appeal Hearing Body considers during the appeal hearing?**

## **BACKGROUND INFORMATION**

### Handi-Transit Service and Eligibility Criteria

Handi-Transit is a service of the City of Winnipeg public transportation system. Vehicles used for this service are cars, retrofitted mini-vans that are low floor and wheelchair accessible, and mini-buses equipped with a wheelchair ramp. Passengers pre-book their rides with Handi-Transit and drivers assist passengers to and from Handi-Transit vehicles.

The City of Winnipeg council adopted the current Handi-Transit passenger eligibility criteria on December 15, 2010. An applicant must meet at least one of the criteria to be eligible for the service. The Handi-Transit website and application form describe the eligibility criteria as follows:

1. *Requires the use of a wheelchair or scooter:*
  - *On an ongoing basis – unlimited eligibility*
  - *Until a specific date – eligibility only until the date specified*
  - *As a result of dialysis treatment – eligibility only for trips to and from dialysis treatment.*
2. *Unable to walk 175 metres (575 feet) outside*
  - *At all times – unlimited eligibility, or*
  - *During winter months only – eligibility restricted to the period from October 15th to April 15, or*
  - *As a result of dialysis treatment – eligibility only for trips to and from dialysis treatment.*
3. *Has 20/200 vision or less, or a visual field of less than 20 degrees in both eyes (legally blind) not corrected by lenses – unlimited eligibility.*
4. *Has Alzheimer’s Disease or Related Dementia (ADRD) which interferes with ability to use the regular fixed route transit system with an equivalent level of independence and safety.*

### Initial assessment of eligibility

Pursuant to the City of Winnipeg council directive dated December 15, 2010, Handi-Transit applicants are generally required to attend a functional assessment review by an occupational therapist at the Handi-Transit office. According to the council directive, the purpose of the functional assessment is as follows:

- To assess an applicant’s mobility impairment (when applicable);
- To assess an applicant’s cognitive transit skills (when applicable);
- To determine eligibility; and
- To determine if a mandatory attendant is required for the applicant’s safe travel on Handi-Transit.

Handi-Transit states that the purpose of the functional assessment is also to assess the accessibility of an applicant's home and assess the safety of the applicant's mobility equipment for transport in Handi-Transit vehicles. Handi-Transit has three full-time occupational therapists on staff who conduct the functional assessment, which takes approximately 45 minutes to an hour to complete for an individual. The department states it may require an applicant to provide supplementary information related to their eligibility or safety if it is unable to determine the applicant's eligibility during the functional assessment.

A decision letter is sent to the applicant within ten business days of the functional assessment, advising the applicant as to whether he or she is eligible to receive service or if further information is required. The letter is signed by the registration and assessment services supervisor. An unsuccessful applicant has the right to re-apply at any time.

### The Appeal Hearing Body

On April 26, 2006, the City of Winnipeg council approved the creation of a body to hear appeals from applicants determined to be ineligible for Handi-Transit services. The hearing body is comprised of a medical doctor retained by the City of Winnipeg, the manager of Handi-Transit (or designate) and a third person designated by the director of Transit.

The Handi-Transit website provides the following information to the public regarding the Appeal Hearing Body:

*Applicants who are denied service are able to appeal the decision to the Appeal Hearing Body.*

*The request to appeal must be made within 30 days of the date of the letter advising the application has been denied. Confirmation of the date and time of the appeal will be provided by letter.*

*Decisions of the Appeal Hearing Body are final.*

Information regarding the appeal process is also provided to unsuccessful applicants in their denial letters from Registration and Assessment Services as follows:

*You have the right to appeal a decision regarding your eligibility for Handi-Transit. You can book an appeal to present the reasons you disagree with the decision. This information can be provided verbally and/or in writing to the appeal panel. You are welcome to have someone accompany you to the appeal.*

*[...]Please note, appeals typically take place on the second and fourth Wednesday of each month.*

*The appeal request must be made within **30 days** of the date of this letter. For more information, or to request an appeal appointment, please contact our office at 204-986-5722.*

If an applicant schedules an appeal hearing, a letter is sent to the applicant confirming the hearing date, time, and location and asking the applicant to confirm his or her attendance. The letter provides the following additional information:

*The appeal hearing body consists of a panel of three: the Manager of Handi-Transit, the Senior Instructor of Transit, and a Medical Doctor contracted to hear appeals.*

*Although this is a formal appeal, the atmosphere is informal. You may present the reasons you disagree with the denial verbally and/or in writing. You are welcome to have a family member or friend to accompany you.*

Handi-Transit states that the occupational therapist who assessed the applicant provides the functional assessment report and a verbal synopsis of the case to the panel at each appeal hearing. The occupational therapist also answers any questions the complainant or the appeal panel may have. The applicant then has an opportunity to present submissions verbally and/or in writing, or provide any additional information (such as a medical note) to the panel. At the end of the hearing, the panel informs the applicant that they can expect a decision in ten working days.

After the hearing, the panel completes a form in which it notes any direction for further follow-up or notes its decision and rationale. A decision letter, signed by the Handi-Transit manager of client services on behalf of the Appeal Hearing Body, is then sent to the applicant.

## **SCOPE OF THE INVESTIGATION**

Our investigation of this complaint included the following:

- Discussions with the Handi-Transit manager of client services and the Handi-Transit registration and assessment supervisor;
- Review of the Handi-Transit website;
- Review of City of Winnipeg council minutes regarding Handi-Transit eligibility and assessment (dated September 21, 1994; October 18, 2000; June 23, 2004; April 26, 2006; and December 15, 2010);
- Review of Handi-Transit form letters, including letters regarding the denial of service, the scheduling of an appeal hearing and the results of an appeal hearing;
- Review of reports that Handi-Transit occupational therapists prepare for sample appeal hearings; and
- Review of appeal panel notes regarding sample Handi-Transit appeal hearings.

## ANALYSIS

### 1. Does Handi-Transit provide unsuccessful applicants with written reasons explaining why he or she does not meet the Handi-Transit eligibility criteria?

Handi-Transit provided our office with the form letters the supervisor of registration and assessment services and the Appeal Hearing Body send to applicants to advise them of their ineligibility. The letters set out the Handi-Transit eligibility criteria and indicate that based on the information provided, the applicant does not meet the criteria. Neither letter includes written reasons.

The department indicates that an unsuccessful applicant may call the department after receiving a denial letter and obtain verbal reasons from Registration and Assessment Services or the Appeal Hearing Body.

The decision letter that Registration and Assessment Services sends an applicant advising them of their ineligibility invites the applicant to contact Handi-Transit for more information and provides a phone number for the customer service section of Handi-Transit. The department indicates that if someone calls that number and requests reasons for the decision, customer service will direct their call to the occupational therapy office and it will provide verbal reasons to the applicant. The occupational therapy office will document the discussion in a handwritten note that is kept in the applicant's file.

The decision letter that the Appeal Hearing Body sends an unsuccessful appellant to advise them of the results of their appeal does not invite the applicant to request information about the panel's decision. However, the department indicates that if an applicant requests the panel's reasons for the decision, the panel will provide them to the applicant.

After reviewing the decision letters, our office provided the department with a draft report which suggested that Handi-Transit Registration and Assessment Services and the Appeal Hearing Body provide written reasons to unsuccessful applicants in its decision letters.

Giving reasons for decisions serves the values of fair and transparent decision making, reduces the chance of subjective or improper decisions, and cultivates the confidence of citizens in the decision-making process. Reasons can demonstrate that decision makers properly considered all relevant information provided and that they identified the relevant criteria. In the words of Justice Binnie of the Supreme Court of Canada, reasons "constitute the primary form of accountability of the decision-maker to the applicant, to the public and to a reviewing court" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), at para. 63).

Written reasons, in particular, can help an applicant understand why the application was denied and decide whether to ask for more information, a reconsideration and/or to appeal the decision. In the Supreme Court case of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC) [*Baker*], Justice Heureux-Dubé made the following points with respect to the benefits or providing written reasons:

- Written reasons foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out;
- Written reasons allow parties to see that the applicable issues have been carefully considered;
- Written reasons are invaluable if a decision is to be appealed or reviewed; and
- Those affected may be more likely to feel that they were treated fairly and appropriately.

The provision of such reasons takes on even greater significance at the appeal stage. The Supreme Court has held that the more important a decision is to the lives of those affected, the more stringent procedural protections will be required (*Baker* at para. 25). A decision by the Handi-Transit Appeal Hearing Body can have serious personal consequences. Many individuals cannot afford the cost of private transportation and rely on public transit to meet their basic needs, such as access to health care. When an applicant believes he or she should be entitled to access Handi-Transit services, an appeal panel's decision to restrict that person to the regular transit system can have a major impact on the person's life. The Supreme Court also states that no statutory right of appeal can result in higher procedural protections (*Baker* at para. 24). As there is no right to appeal a decision of the Appeal Hearing Body and a decision by this body can have serious consequences to an individual, written reasons are even more important at the appeal stage of the process.

Given the many important benefits of written reasons, our view is that they should be provided regardless of whether there is a legal requirement to do so. As Justice David Stratas of the Federal Court of Appeal stated in *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158 (CanLII):

[18] *In the above statement of purposes and principles [regarding reasons for decisions], nothing should be taken to encourage administrative decision-makers to aim only for the legal minimums, and no higher. Administrative decision-makers should strive to follow best practices so that the public gets the service it deserves, including providing exemplary reasons of high standard: for an example of one authority's helpful view of best practices, see Ombudsman Saskatchewan, Practice Essentials for Administrative Tribunals (2009), online: Ombudsman Saskatchewan <[http://www.ombudsman.sk.ca/uploads/document/files/omb-tribunal-guide\\_web-en-1.pdf](http://www.ombudsman.sk.ca/uploads/document/files/omb-tribunal-guide_web-en-1.pdf)>.*

Subsequent to our suggestion regarding reasons for decisions, the department decided it would change the denial of service template letters sent by Registration and Assessment Services and the Appeal Hearing Body. Both letters now include a section for explaining why the applicant did not meet the criteria under which he or she applied.

We are of the view that the addition of written reasons to the decision letters is a procedural improvement to the department's written communication with unsuccessful applicants.

## **2. Does Handi-Transit advise an unsuccessful applicant that he or she may request reconsideration of a decision regarding eligibility?**

At any stage of the process, an applicant may request that the department reconsider a decision if he or she provides the department with new or supplementary information regarding eligibility. The applicant does not need to file an appeal to obtain this reconsideration. However, the department notes that if an applicant provides new information several months after being denied service, the department would likely ask the person to re-apply so that all relevant information in the department's file is current.

While the department advises applicants verbally of their right to submit new information at any time, our office was concerned that the department did not appear to advise unsuccessful applicants in writing of their right to request reconsideration of an application if they provide new or supplementary information. We suggested that the department inform applicants of their right to submit new information at any time in the denial letters the department provides to unsuccessful applicants.

The department subsequently changed both the denial of service letter sent by the supervisor of registration and assessment services and the letter the Appeal Hearing Body sends to an unsuccessful appellant. Both letters now indicate the following with respect to Handi-Transit accepting new information without always requiring that the unsuccessful applicant re-apply or undergo another assessment:

*If you have new information or should your condition change, please inform us by calling the Handi-Transit office at 204-986-5722. A new application, additional information or a reassessment may be required.*

These are positive administrative improvements to the department's written communication with unsuccessful applicants and will ensure that applicants are aware of the opportunity to request that the department reconsider eligibility decisions.

## **3. Does Handi-Transit provide an appellant a copy of the functional assessment report the Appeal Hearing Body considers during the appeal hearing?**

Pursuant to a 2010 City of Winnipeg council directive, Handi-Transit applicants are generally required to attend a functional assessment performed by Handi-Transit occupational therapists. As noted earlier in the report, the purpose of the functional assessments are as follows:

- To assess an applicant's mobility impairment (when applicable);
- To assess an applicant's cognitive transit skills (when applicable);
- To determine eligibility; and
- To determine if a mandatory attendant is required for the applicant's safe travel on Handi-Transit.

The Appeal Hearing Body considers the functional assessment report at the appeal hearing. The department indicates that the information in the report is shared with an appellant at the appeal hearing and the hearing body also invites appellants to provide any additional relevant information for its consideration. The department advises that under its current process, an appellant is not provided with a copy of his or her functional assessment report unless the appellant makes a written request under *The Freedom of Information and Protection of Privacy Act* (FIPPA). When a FIPPA request is made, the department provides a copy to the applicant and the supervisor of the area reviews it with him or her.

Under its current process, the department does not advise an applicant in writing that he or she has a right to obtain a copy of the functional assessment report that the appeal panel will consider. In our view, an appellant should have access to the information the Appeal Hearing Body will be considering in order to both verify the accuracy of the report and to help prepare his or her submissions and evidence in advance of the hearing.

We note that when offering a service like Handi-Transit, the City of Winnipeg, like any public body, owes a duty of procedural fairness when it makes an administrative decision affecting individual rights or privileges (the Supreme Court noted this municipal duty in *Congrégation des témoins de Jéhovah de St Jérôme-Lafontaine v. Lafontaine (Village)* (2004), 241 D.L.R. (4th) 83, 2004 SCC 48 (CanLII) at para. 3).

Procedural fairness is concerned with the procedures used by a decision maker, rather than the actual outcome reached. It generally requires that an individual affected by an administrative tribunal's decision knows the case he or she has to meet. As stated by the Supreme Court in *May v. Ferndale Institution*, [2005] 3 SCR 809, 2005 SCC 82 (CanLII):

*[92] In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet. If the decision-maker fails to provide sufficient information, his or her decision is void for lack of jurisdiction. As Arbour J. held in Ruby, at para. 40:*

*As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position . . . .*

Given these principles of procedural fairness, our draft report to the department suggested that the department inform individuals who have filed an appeal that they may request a copy of the report the Appeal Hearing Body will consider prior to making its decision. We also expressed concern that the department currently requires an appellant to file a FIPPA request if he or she wishes to obtain a copy of the functional assessment report, and noted that it appears that the report is comprised of personal health information within the scope of *The Personal Health Information Act*, rather than FIPPA.

The department reviewed our draft report and decided to change its process for providing a copy of the functional assessment report to an appellant. The department created a new form for the

functional assessment report (see Appendix 1) and going forward, it will proactively share a copy of the functional assessment report with an appellant by enclosing a copy with the letter the department sends an appellant regarding the date, time and location of his or her appeal hearing.

We believe that the proactive disclosure of the functional assessment report to an appellant will help ensure that the principles of procedural fairness are reflected in the Appeal Hearing Body's decision-making process.

## **FINDINGS AND RECOMENDATIONS**

We are pleased that the department has implemented the following administrative changes to improve the fairness of its decision-making process and its written communication with applicants:

- The department will provide written reasons in its decision letters to applicants deemed ineligible for Handi-Transit service;
- The department will advise unsuccessful applicants in writing that if an applicant wishes to provide new information related to eligibility, the department will accept the new information and then decide whether a reassessment, additional information, or a new application is required; and
- The department will proactively provide an appellant a copy of the functional assessment report the Handi-Transit Appeal Hearing Body considers at the hearing.

The department indicates that it will distribute internal memoranda to staff to advise them of these procedural changes.

In light of the administrative changes made by the department, we consider this matter concluded.

## **MANITOBA OMBUDSMAN**

***NOTE:** Subsequent to the release of this report, the department updated the form for the functional assessment report that is provided to an appellant and the Handi-Transit Appeal Body. The updated form is enclosed as Appendix 2.*



**Decision Rationale:**

Applicant: _____ Reg#: _____ Assessment date: _____ In attendance _____ Criteria applied: _____ Reason for applying: _____
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Previous HT assessments / eligibility/IRide incidents *(if applicable)*:

\_\_\_\_\_

\_\_\_\_\_

**Functional Abilities**

Applicant reports the following condition(s) related to criteria:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Applicant reports the following impacts related to condition(s):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Applicant reports the following medication (s) related to criteria:

\_\_\_\_\_  
\_\_\_\_\_

Applicant reports the following medication (s) related to criteria:

Taken

\_\_\_\_\_  
\_\_\_\_\_

Applicant reports the following aides/strategies used related to criteria:

N/A  cane I O D A  crutches I O D A  \_\_\_\_\_ walker I O D A  manual w/c I O D A  
 power w/c I O D A  scooter I O D A

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**Decision Rationale:**

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Applicant reports the following bus usage or navigo related to criteria:  
 Never  Occasionally  Frequently  Past  Summer  Other

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Applicant reports the following abilities with ADL's related to criteria:

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Applicant reports on their mobility as it relates to criteria:

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Objective information related to criteria:

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Range of Motion on date of assessment:

	Hip Flex	Knee Flex	Knee Ext	Ankle Rot	Dorsi flex	Plantar Flex
Right						
Left						

TUG: \_\_\_\_\_

Walking assessment: \_\_\_\_\_

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## Decision Rationale:

Balance & Transfers:

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Supplementary information: (if applicable)

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Decision rationale:

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### OT Processing:

Travel Training       Send attached letter       Return file to OT

A or D	Unlimited Eligibility	2017 or NA
E	Seasonal –Winter Only	2017
B or F	Until a specific date	_____
C or G	For Dialysis Only	2017
H	Legally Blind	NA
I	ARD	2017 or NA

Mobility Code \_\_\_\_\_ Equipment: \_\_\_\_\_

Attendant Required: Y / N       Make new equipment primary aid

Assessor: \_\_\_\_\_ Date: \_\_\_\_\_

**To be completed by administrative staff:** (Please check and initial when completed)

Phone call with outcome      Letter with outcome

Other: \_\_\_\_\_



## Assessment Summary

Applicant:	Age:
Registration number:	Date of Appeal:
Assessment date:	Requested appeal on:
In attendance:	

**Criteria applied under:**

**Reason for applying:**

Applicant reports:

**HT information:**

**Reported Impact (s) Related to Criteria**

Applicant reports:

**Treatment/Follow Up**

Applicant reports:

**Bus Use**

Applicant reports:

**Mobility/Function**

Applicant reports:



## Assessment Summary

Presentation

Supplementary Information

Decision Rationale