

MEMORANDUM

To: Core Area Liquid Waste Management Committee ("CALWMC")
From: Kim Cholette, Fairness & Transparency Advisor (FTA)
Date: September 4, 2015
Subject : Role of Fairness & Transparency Advisor

The purpose of this memorandum is twofold:

1. To provide information on how the role of the FTA will function (mostly through the inclusion of information items in Appendices); and
2. To seek guidance and decisions from the committee to clarify some aspects of the role and mandate of the FTA.

As a number of the questions presented are linked in some fashion, it is recommended that committee members read the entire memo through once before resolving individual issues.

ISSUE 1: Investigations

This is an information item only. Details on the **complaints-driven investigation** processes are provided in attached appendices (A-E). No discussion required.

"Own-initiative" Investigations - (Decision Required)

CALWMC has indicated the FTA is to have the ability to initiate investigations. In order to confirm the conditions under which the FTA would exercise that authority, a proposed approach to own-initiative investigations is outlined below.

Own-initiative investigations would be undertaken in relation to the following:

- A serious issue, (one which has the potential to undermine the decision) where there is sufficient evidence in support of a breach of process or legislated requirement;
- A systemic issue (e.g., a series of complaints that suggest a more fundamental or underlying problem that needs attention);
- Where an intervention has the potential to result in a stronger decision or fairer process or in an overall improvement in the standard of administrative conduct.

Notification of 'own initiative' investigations

- In initiating an own-initiative investigation, the FTA will advise the affected agency in advance and will take account of that agency's views before exercising the relevant functions and will seek to co-operate with the agency in so far as it is necessary for the effective exercise of those functions.

Information gathering

- The FTA may choose to monitor the media releases in relation to the project and may decide to investigate on an issue-by-issue basis. This would be facilitated through support by host jurisdictions (and/or CRD) agreeing to ensure that the FTA is aware of any process-related undertakings;
- The FTA may also choose to attend public meetings where issues associated with the Core Area Sewage Project are being discussed. In order to facilitate this, the FTA will receive regular updates from CRD staff on the undertakings of host jurisdictions as they relate to all phases of the project; and/or
- The FTA may choose to attend CALWMC meetings and will prioritize this as an action. This would require being provided with meeting details in advance.

Recommendation:

It is recommended that the committee support the approach to “own-initiative” investigations as described.

ISSUE 2: Advisory vs. Complaints Role of FTA - (Decision Required)

How will this **advisory** role (ex-ante advice vs. ex-post reviews) be structured?

Ex-Ante Advice

- The *ex-ante* perspective is forward looking. From the *ex-ante* point of view, we ask questions such as: What affect will this process have on the decision? Will a decision reached in this way produce good or bad consequences?
- The focus is on “corrective action”.
- Advice on process-related issues prior to finalizing a process can be discussed with the FTA in advance of the process being finalized. The draft process can be shared with the FTA who can review and provide comment as to the sufficiency of the process as outlined. This information will be made available to the public.
- The FTA cannot “craft” a process but can advise on sufficiency/adequacy of the process as drafted.

Ex-Post Reviews

- The *ex-post* perspective is backward looking. From the *ex-post* point of view, we ask questions such as: How was the process flawed? How was fairness compromised?
- There is an inherent challenge with a complaints-driven approach that is entirely “after the fact” as this FTA role relies entirely on providing recommendations and does not include the authority to require reconsideration or changes to decisions once they are made. Therefore, there may not be significant value in allowing complaints about a process that has terminated.
- This approach does not allow corrective action while the process is unfolding. If corrective action is the primary concern/objective, then complaints need to be able to affect the process.

Recommendation:

The committee is asked to support both an *ex-ante* an *ex-post* approach, **with priority placed on advice up-front**. Such an approach ensures that a priority will be placed on actions that inform a process either **before** it is actioned; or if a complaint is received as a process is unfolding, there would be a commitment to allow the FTA to provide advice in order to affect the process. Implicit in this approach is cooperation by all parties to work with the FTA up-front in the process design stage.

ISSUE 3: Scope and Application of role of FTA - (Decision Required)

There are three issues related to scope and application.

(1) How broad should the scope of fairness be?

What is the objective of the FTA role as it relates to the scope of what will be subject to review?

Is the objective of having a process in place that reviews fairness and transparency:

- a) To ensure that **all** processes related to the Core Area Sewage Treatment project (“the project”) are fair and transparent; or
- b) To ensure that all **CRD** processes related to the “the project” are fair and transparent?

If the objective is the first, then all processes undertaken by host jurisdictions in relation to “the project” would be subject to review. The *advantage* is that the focus of fairness and transparency in this approach is on “the project” and on ensuring that the public views **all aspects of the decision process in relation to the “the project”** as having been fair, thus potentially garnering increased public support for the final decision. The *disadvantage* is that this necessarily implies that host jurisdictions would cooperate fully once an investigation has been initiated which might require the CRD to seek municipal support to include them in the scope of the role. (If such approval is required it is suggested that we could proceed with implementation in a phased fashion.)

If the objective is limited to ensuring that CRD’s activities in relation to “the project” are fair and transparent, consultation undertakings of host jurisdictions in relation to, for instance, proposing sites, would not be subject to review. The *advantage* of this approach is that it does not involve municipal undertakings, thus simplifying the process. The *disadvantage* is that it is limited to the CRD’s actions alone, thus potentially undermining the efforts by hindering public support of a final decision.

Recommendation:

It is recommended that the committee support objective (a) which is that the primary objective is to ensure that “the project” overall, is fair and transparent, inclusive of site proposals from host jurisdictions.

(2) How will success at the end of the process be defined?

How is success being defined for the CRD as it relates to the FTA role? What do successful 'outcomes' look like?

Potential success 'outcomes':

- a) The public will feel that **all** processes related to "the project" were fair;
- b) The public will feel they had a reasonable opportunity to 'be heard' in all aspects of the decision process;
- c) The public will know that measures were in place to inform and improve the process as it unfolded; and
- d) The public will feel that processes undertaken by the CRD in relation to "the project" were fair.

Recommendation:

It is recommended that the committee approve outcome statements (a) through (c). (This implies that as it relates to Issue 3(1) –How Broad Should the Scope of Fairness be - , that the committee chose option (a) - To ensure that **all** processes related to the Core Area Sewage Treatment project ("the project") are fair and transparent).

(3) What is the objective of a fairness/transparency review by the FTA?

- a) To comment on a process **after** it has occurred with a view to affecting future similar processes;
or
- b) To attempt to affect/inform the process in its path; or
- c) Both a) and b).

Recommendation:

Issue 2 above, discussed the advantages and disadvantages of the timing associated with when the FTA would become involved – ex-post or ex-ante. Given these considerations as well as the considerations proposed under Issue 3 - Scope & Application of the role of the FTA, it is recommended that the committee support objective (c) – to comment on a process after it has occurred with a view to affecting future similar processes; AND to attempt to affect/inform the process in its path.

ISSUE 4: Exclusions

What exclusions, if any, should there be in the Terms of Reference?

The decision should be informed by the intent relative to the exclusions.

- Is the intent to exclude a group of people on the basis that they are public officials who have either made decisions on the matters at hand or work for the public institutions that have made the decision? (If this is the case, it is suggested that the grounds for review would capture any complaint that is not grounded in a breach of fairness); or
- Is the intent to avoid 'revisiting' political decisions that have been made? (If this is the case, it is suggested that the process as currently contemplated, in addition to requiring grounds for review, limit investigations to matters of administration initiated with respect to "the project". The FTA will not reconsider the merits of decisions of public bodies exercising legislative functions. (See Appendix B- Complaints Driven Investigations.)

Recommendation:

It is recommended that there be no exclusions.

ISSUE 5: "Project " timelines

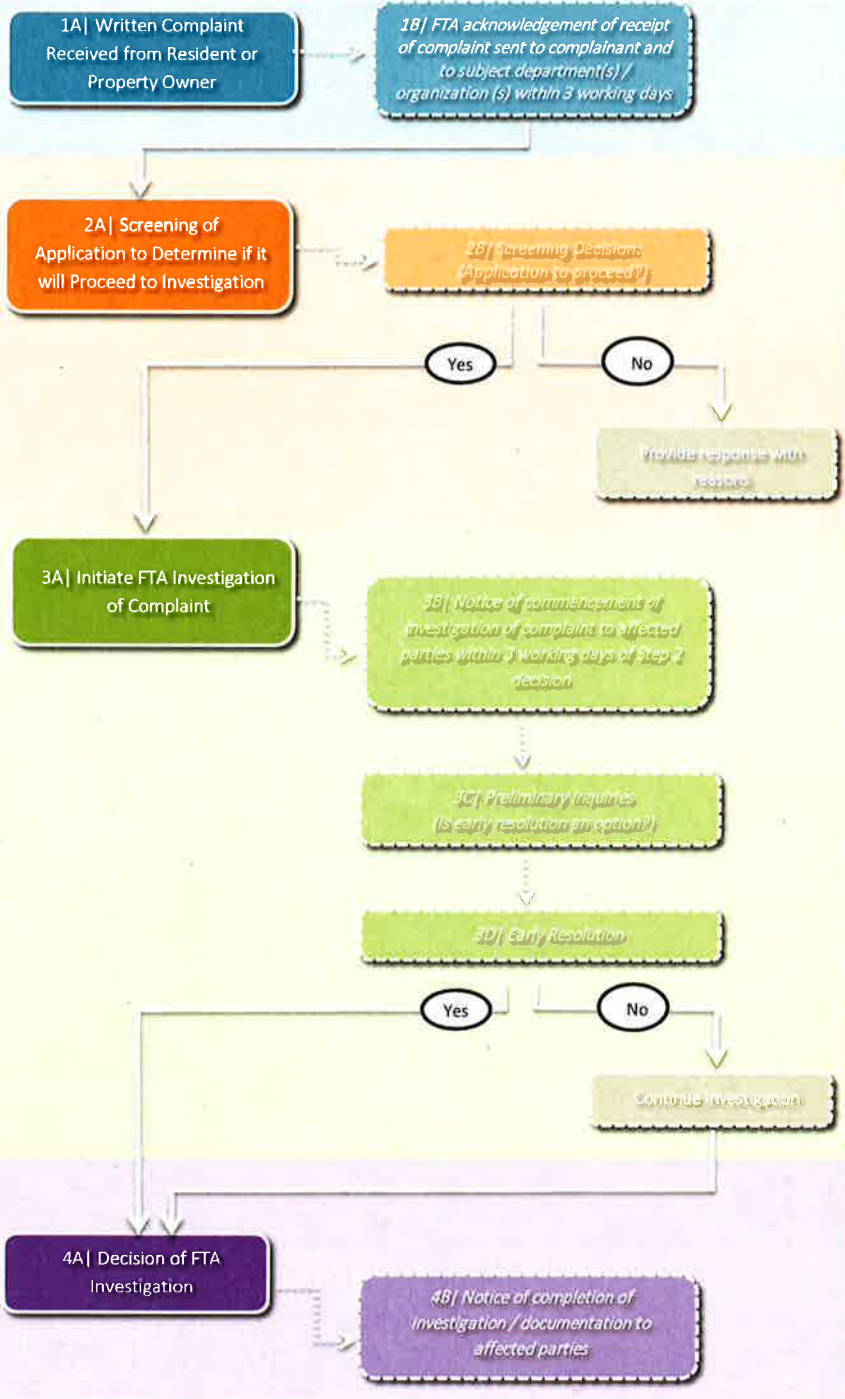
The timelines for the identification of a site (including costing, etc.), as imposed on the CRD by funders, are a constraint. While they do have the potential to affect processes related to public consultation and other related processes, these are not timelines that the CRD has self-imposed. This constraint is unchangeable (unless agreed to by third party funding agencies) and host jurisdictions and the CRD must work within this time constraint.

Recommendation:

All process-related complaints must relate to the individual processes within the existing timelines. FTA will not review the fairness of timelines imposed on the project by external parties (e.g., funders).

NOTES

- Is the complaint within FTA mandate;
 - Does the issue in question meet grounds for investigation (is there a breach of fairness)?
 - If appropriate, has complainant taken other steps to resolve their complaint prior to coming to FTA?
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- FTA examines all relevant documentation and undertakes key informant interviews
 - Preliminary document review and key informant interviews to gather further information from parties
 - FTA assess whether complaint can be resolved through a discussion with affected parties
 - Preliminary inquiries are intended to determine if early resolution is possible
 - Complaint resolved without full investigation
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- Written documentation of outcome of investigation provided to parties and posted to FTA webpage



PHASE 1: INITIATION

PHASE 2: SCREENING

PHASE 3: INVESTIGATION

PHASE 4: DOCUMENTATION

APPENDIX B COMPLAINT-DRIVEN INVESTIGATIONS

Focus/nature of investigations

Investigations will:

- Investigations would include any matter of administration initiated with respect to the project. A “matter of administration” encompasses everything done by governmental authorities in the **implementation** of government policy.
- Legislative decisions are based upon broad discretionary powers inherent in the legislative process. As such, the FTA will not reconsider the merits of decisions of public bodies exercising legislative functions. (The test for determining whether an action is legislative or administrative is whether the action taken was one making a law, or whether it involved executing or administering a law already in existence.)
- Focus on ensuring a detailed review of the substantive and procedural matters of administrative decisions, including a review of any specific documents considered, motions and all votes taken or direction given;
- Will consider whether the issue under consideration reflects all relevant guiding documentation;
- Will primarily be conducted through a review of key documents and include key informant interviews; they may also involve the review of videotaped proceedings,
- Investigations will be conducted by FTA in private (municipal solicitors/representatives or parties other than the witness cannot be present during interviews).

Notification of investigations

- If an investigation involves a municipal process, a letter will be sent to that council requesting full cooperation and requesting a contact person to assist with access to information; following that, the FTA will contact the affected municipality to explain the process and determine whom I should contact re: access to documents, etc.;
- The FTA will have the sole discretion to determine whether or not to allow affected parties to make representations; and,
- If at any time during the course of an investigation it appears to the FTA that there may be sufficient grounds to make any report or recommendation that may negatively reflect upon a party’s process, the FTA shall give him, her or it an opportunity to make representations respecting the adverse report or recommendations..

Reporting/documentation

- Names of individuals and/or firms involved will be withheld in any reporting unless consent is received.

WHAT IS “TRANSPARENCY”

One aspect of the role of the Fairness and Transparency advisor is to oversee the “transparency” of process related issues.

What is transparency?

There is no single definition of what constitutes transparency or method for measuring it. Below are some thoughts on what transparency is (or isn't).

“As a principle, public officials, civil servants...have a duty to act visibly, predictably and understandably to promote participation and accountability.

Simply making information available is not sufficient to achieve transparency. Large amounts of raw information in the public domain may breed opacity rather than transparency.

Information should be managed and published so that it is:

- ***Relevant and accessible:*** *Information should be presented in plain and readily comprehensible language and formats appropriate for different stakeholders. It should retain the detail and disaggregation necessary for analysis, evaluation and participation. Information should be made available in ways appropriate to different audiences.*
- ***Timely and accurate:*** *Information should be made available in sufficient time to permit analysis, evaluation and engagement by relevant stakeholders. This means that information needs to be provided while planning as well as during and after the implementation of policies and programmes. Information should be managed so that it is up-to-date, accurate, and complete.”*

Source: The Transparency and Accountability Initiative (T/A Initiative) is a donor collaborative working to expand the impact and scale of transparency and accountability interventions. The T/A Initiative is co-chaired by the Hewlett Foundation and Hivos.

Transparency has to do with disclosure. Providing information about an issue, event, project, policy, program etc. and then providing a way for people to find and view that information.

“(T)ransparency comprises not only the disclosure of government information, but also the access, comprehension, and use of this information by the public. Transparency, as such, requires a public that can acquire, understand, and use the information that it receives from the federal government. This concept of transparency, however, is not the only possible designation of the term.”

Source: Government Transparency and Secrecy: An Examination of Meaning and Its Use in the Executive Branch, Congressional Research Service, November 14, 2012.

Richard W. Oliver, in his book *What is Transparency?* wrote that transparency has come to mean “active disclosure.”¹

¹ Richard W. Oliver, *What is Transparency?* (New York: The McGraw-Hill Companies Inc., 2004), p. 2.

WHAT IS “TRANSPARENCY”

Other scholars have defined government transparency as “*the publicizing of incumbent policy choices,*”² and “*the availability and increased flow to the public of timely, comprehensive, relevant, high-quality and reliable information concerning government activities.*”³

In many ways, the duty of transparency relates to acting in ways that are visible, predictable and understandable.

Many of the hallmarks of “transparency” relate to how public consultations are undertaken. (See discussion on What Constitutes Adequate Public Consultation Process).

² Justin Fox, “Government Transparency and Policymaking,” p. 2.

³ David Ferranti et al., *How to Improve Governance: A New Framework for Analysis and Action* (Washington, DC: Brookings Institution, 2009), p. 7.

GROUNDS FOR REVIEW

What is the FTA's mandate regarding complaints?

The Fairness and Transparency Advisor 's (FTA's) mandate is to *"ensure that the process of costing options, working with the host jurisdiction(s) and preparing an amendment to the Liquid Waste Management Plan is fair, transparent, impartial and objective."* Part of this mandate includes receiving and investigating complaints from residents or property owners of the Core Area municipalities related to aspects of the Project that fall within the mandate.

What Does the FTA Do?

- Assesses administrative fairness
- Conducts thorough, impartial and independent investigations of complaints
- Looks for fair resolutions and make recommendations to improve practices with respect to the Core Area Sewage Treatment Project
- May launch investigations stemming from the FTA's own initiative or from a referral by an interested party
- Makes recommendations to resolve issues of unfairness and improve administrative processes.

What does the FTA Not Do?

- Does not act as an advocate for complainants or represent government departments or professional organizations.
- Does not investigate complaints about decisions that are or may be before the courts.
- Does not investigate complaints about MLAs and individual elected officials, including government Ministers.
- The FTA does not have the authority to reconsider the merits of the decisions that have been made by elected officials.

How will the FTA ensure that processes and decision- making related the Core Area Sewage Treatment Project are fair?

The duty of fairness is flexible, depending on the statutes involved and the nature of the decision and the process. The degree of fairness depends on the effect of the decision on the rights of the individual, and whether legislation established an avenue of appeal. Not only does fairness depend on the circumstances, it may also mean different things to different people at different times. In short, fairness is a little difficult to firmly describe.

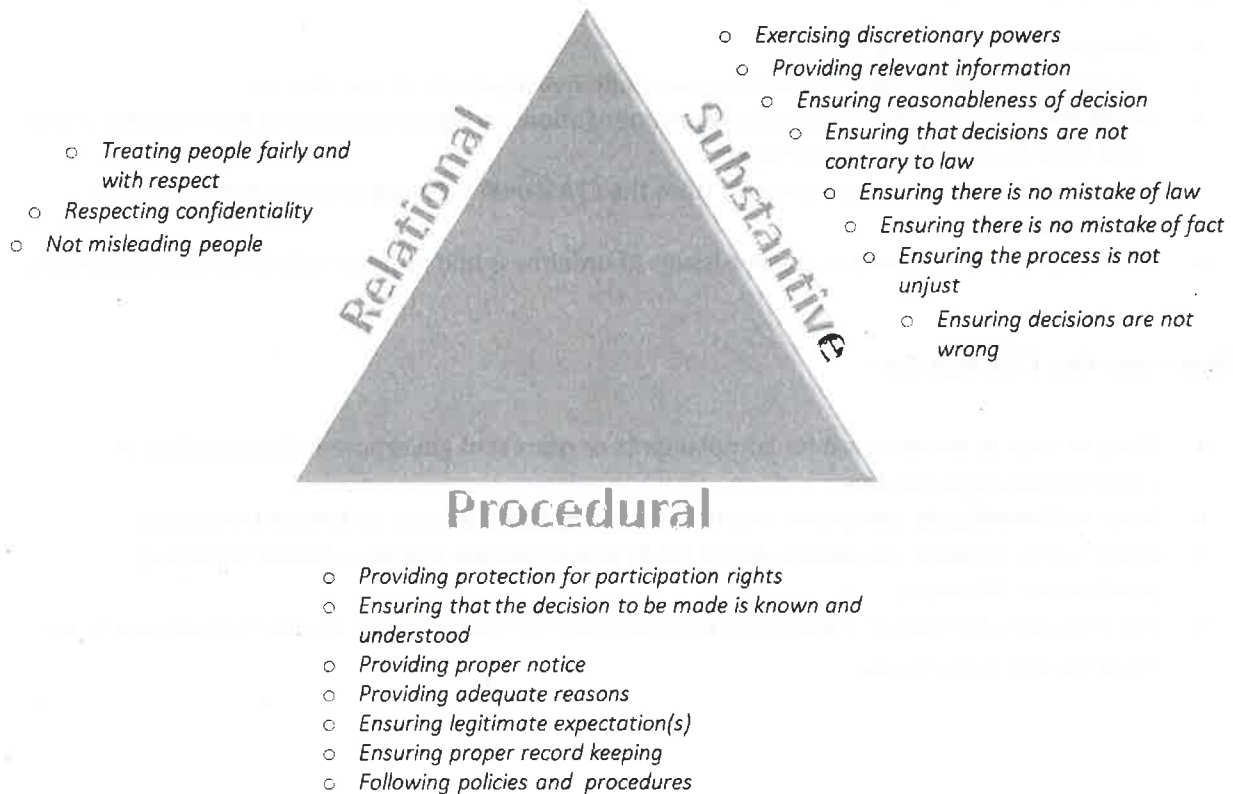
Fairness, in the context of the Core Area Sewage Treatment Project is about:

- ✓ Providing information that is easily found, accessed and understood;
- ✓ Treating the public with dignity and respect and providing an open, transparent process;

GROUNDS FOR REVIEW

- ✓ Providing well-reasoned decisions to the public;
- ✓ Providing individuals with an opportunity to be heard, as appropriate;
- ✓ A process free of bias and personal interest; and
- ✓ Acting on the basis of logical evidence.

The FTA will examine three aspects of administrative fairness in any investigation in the context of the Core Area Sewage Treatment Project: (1) procedural; (2) substantive, and (3) relational.



Source: Adapted from Ombudsman Saskatchewan – Saskatchewan Ministry of Justice and Attorney General – Dispute Resolution Office. *Practice Essentials for Administrative Tribunals*.

GROUNDS FOR REVIEW

Below are general examples of the types of issues that can be examined in the context of the FTAs review of a complaint. Note that some of the bullets that may fall under one area might in some instances fall under more than one area. For instance, an aspect of procedural fairness may also be an aspect of substantive fairness. What is below is for illustrative purposes.

PROCEDURAL FAIRNESS

Participation Rights

- Did the process allow sufficient or reasonable time for the public and interested parties, to review and understand the information? "Sufficiency" will depend on the circumstances and the matters under consideration;
- Did the process ensure that all relevant information was made available?;
- Did the process offer an opportunity for discussion on the information?;
- Was the public given a meaningful opportunity to state or present their case?;
- Was there an opportunity to challenge or dispute any information?;
- Was the decision maker impartial (unbiased and without a personal interest in the outcome of the decision)?

That the Decision to be Made is Known and Understood

- A fair process requires that the public understand the issue at hand, as well as the decision that is to be made.

Proper Notice

The decision- maker should give adequate, proper and timely notice in plain language that states:

- A decision is going to be made;
- Why a decision is necessary;
- What information will be considered and the criteria to be used in making the decision;
- The current rules, procedures or requirements for receiving submissions and arriving at the decision; and
- How long the process is anticipated to take.

Adequate Reasons

- Did the decision- maker provide sufficient reasons for the decision; and/ or are the reasons sufficiently linked to the decision at question, that are understandable; and
- Was the decision based on relevant information?

Legitimate Expectation

- Did the decision- maker honour a commitment or follow regular procedures? (Failing to meet legitimate expectations may be as simple as an official failing to follow through after agreeing to take action).

Proper Records

- Is there a reliable and useable record of the process used and decisions reached?

GROUNDS FOR REVIEW

Policies & Procedures

- Were existing policies, guidelines, procedures and rules followed consistently?

SUBSTANTIVE FAIRNESS

Exercising discretionary powers

- Discretionary decision-making can sometimes be established in policies, legislation and/or by-laws and guidelines. An investigation might consider whether there was any discretion used as part of the decision process and whether that discretion was consistent with enabling legislation or policy;
- Discretionary decisions cannot be made in bad faith, for an improper purpose, or based on irrelevant considerations; therefore, investigation of a complaint may involve assessing whether a decision was made in bad faith, or based on improper or irrelevant considerations;
- Improper exercise of discretionary power can be applied when a decision, recommendation, act or omission is based on otherwise proper policies and procedures but is used to achieve an improper purpose. This can occur when the intent of the policy or procedure is ignored or disregarded in order to cause a particular outcome, or when there is an improper exercise of discretion. Such a finding will focus on the outcome, not the process; for example, an unauthorized purpose leading to personal gain, influence or bias. It may be necessary to establish intent to support a finding of improper purpose.

Information

- The decision should be made based on all relevant information (It is very important that only information relevant to the decision is collected and used; this includes legislation, policies and procedures).

Reasonableness of Decision

- A reasonable decision does not equate to whether the decision was wrong, or whether it might have been decided in a different way. A reasonable decision should indicate how the decision-makers considered and assessed the arguments and the facts;
- A decision, recommendation, act or omission can be defined as unreasonable if it:
 - Is inconsistent with other decisions that involve similar facts or circumstances;
 - Has been made without an obvious relationship to the facts or evidence;
 - Has a contrary effect to what was intended or permissible;
 - Cannot be rationally and fairly explained;
 - No reasons are given;
 - There is an unfair, irrational, illogical or untenable interpretation of criteria, standards or legislation;
 - There is delay in taking any required action; or
 - The decision creates an unnecessary obstacle for the person affected.

GROUNDS FOR REVIEW

Ensuring that Decisions are Not Contrary to Law

- The most obvious manner of acting 'contrary to law' is to contravene legislation or the common law. One can act contrary to law, however, without directly contravening legislation. For example, a government agency may do something that is not legislatively authorized. Or, an agency may use its lawful powers in a manner that the legislation granting those powers did not intend.
- Administrative conduct may be considered contrary to law if it appears to be inconsistent with relevant legislation, or a violation of administrative fairness or other legal principles developed by the courts.

Mistake of Law

- 'Mistake of law' applies to situations where an organization has full and correct knowledge of the facts, but incorrectly applies or interprets a statutory provision, regulation, or common law rule or principle, resulting in an improper decision or action. This term overlaps with "contrary to law", but is used where the law has been misinterpreted.

Mistake of Fact

'Mistake of fact' occurs when a decision or recommendation is based on information that is factually in error or has been misinterpreted, leading to a decision that is inappropriate or wrong. It can also happen when important facts have been omitted or ignored.

The Process is Unjust

A decision or action will be unjust if it is:

- Inappropriately punitive or has consequences beyond what is appropriate to the circumstances;
- Is arbitrary; or
- Violates well established, known and accepted policies or procedures.

Wrong

An act, omission, decision or recommendation can be found to be wrong if:

- It clearly departs from a policy, process, or procedure;
- The investigation turns out new facts that were unavailable or unknown previously and that casts doubt on the correctness of the original act, omission, decision or recommendation;
- It is based on an erroneous interpretation of the facts; or
- It is the result of carelessness on the part of an employee or the organization.

RELATIONAL FAIRNESS

Several considerations can be taken into account when assessing relational fairness:

- People are not treated fairly and with respect;
- Confidentiality was not respected; or
- People were misled.

GROUNDS FOR REVIEW

What will the FTA actually investigate in the context of a complaint?

Considerable attention and emphasis in all investigations of complaints undertaken by the FTA will be placed on the process through which a decision was reached and/or if there was no decision involved, the FTA will focus on the processes surrounding the matter at issue.

No matter what the merits of a particular action or decision are, if the process followed was improper, the parties have acted unfairly.

An investigation will include reviewing the public record; documents used to arrive at a decision; interviews with relevant parties, as well as review of any relevant policy or legislation (e.g. by-laws).

Can the FTA's decline to investigate a complaint?

The FTA can refuse to investigate a complaint, or to continue an investigation of a complaint, when it is believed on reasonable grounds that:

- The complaint is not within the mandate of the FTA;
- The complainant has not availed him or herself of other adequate remedies under the law or existing administrative practices;
- The subject matter of the complaint is trivial;
- The complaint is frivolous, vexatious or was not made in good faith;
- Having regard to all of the circumstances of the complaint, no further investigation is necessary; or
- The complaint does not relate to a breach of procedural, substantive, or relational fairness.

Who may initiate a complaint?

A person seeking to make a complaint shall not have to demonstrate a formal interest; nor shall they have to prove that they are principally and directly concerned by the breach or non-application complained of.

WHAT IS ADEQUATE PUBLIC CONSULTATION?

How will the FTA assess the adequacy of a public consultation undertaking?

Whether or not there is a legal obligation to consult, when consultation occurs, it must be carried out *fairly*. What is 'fair' will depend on the circumstances and the nature of the proposals under consideration.

The rather open-ended doctrine of fairness means that different people could reach different views on the fairness of the consultation process, even given the same facts. Sensible guidance for decision-makers is to approach consultation with more care and seriousness when the subject-matter is likely to prove particularly controversial.

Unless there are legally required procedures, and subject to the overall requirement of fairness, the decision-maker will usually have a broad discretion as to *how* a consultation exercise should be carried out; and *what* should be consulted upon.

The decision-maker's discretion is not without limits, however, as it is commonly accepted that certain fundamental principles of fairness must be adhered to. These are explored below.

Ensuring adequate time for consideration and response

Unless there are prescribed statutory timeframes, what constitutes "adequate" time is case-specific. However, where existing policy will be departed from, there should be a good reason for doing so. Otherwise, the decision-maker may be guilty of a breach of a legitimate expectation that the policy will be followed.

Basic considerations should include:

- Decision-makers will have to form a judgment as to what period of time is appropriate for the consultation. Where there has been prior discussion about the issue, then it may reasonably decide to limit the time for formal consultation. On the other hand, where the information to be consulted on is complex, or not well known to participants, it may consider that a longer period of consultation is called for.
- Timeframes for consultation should be realistic to allow participants sufficient time to provide a considered response.
- Engagement should begin early in the process when the option is still under consideration and feedback can genuinely be taken into account in making decisions. There are several stages of site selection, and it may be appropriate to engage in different ways at different stages. As part of this, there can be different reasons for, and types of consultation, some radically different from simply inviting response to a document. Every effort should be made to make available the evidence at an early stage to as enable contestability and challenge.

Making information useful and accessible

Materials

Consideration should be given to the types of material used in consultation and the level of technical expertise required to understand it. Allowances must be made to adapt materials in order to ensure that the public has an opportunity to understand technical aspects of information presented.

WHAT IS ADEQUATE PUBLIC CONSULTATION?

The level of detail of the information that needs to be provided will vary by audience. Where the groups to be consulted are particularly expert, then greater detail may be required.

Where the decision-maker has access to important documents which are “material” to the determination whose contents the public would have a legitimate interest in knowing, then those documents should be disclosed in the consultation process.

Assessment Criteria

It is important that the public be aware of the basis upon which a proposal will be considered as otherwise they will be unable to give meaningful consideration or make an intelligent response to it. This requirement means that the public is entitled to be informed of the criteria to be adopted by the decision maker and the factors to be considered decisive or of substantial importance, in making the decision at the end of the consultation process.

Accuracy of Information

Information that is made available during consultations should be as accurate as possible at the time. Inaccurate or incomplete information may have the effect of precluding an informed response to the disadvantage of participants that may be affected by the decision.

Consultation on a single option or alternatives

A public body can consult on a single, preferred, option but that is unlikely to be considered fair unless other options are identified and the preferred option explained in a way which allows participants properly to argue in favour of other alternatives. Options should not be prematurely removed from consideration.

Keeping an open mind

If the decision-maker does not properly consider the feedback provided in the consultation, it can be accused of having “made up its mind”, or of failing to take into account a relevant consideration.

If a decision-maker has arrived at a “preferred option” or “recommended outcome” prior to initiating consultation, this should be clear to participants so that their feedback can be focussed accordingly.

The feedback received during consultation must be meaningfully taken into account by decision-makers. The consultation findings – which may reflect multiple and conflicting values and perspectives – must be considered along with technical information when making decisions.

Offering a variety of forms of consultation

Consideration should be given to offering a mix of consultation methods: from formal public hearings; to less formal forms techniques ,– for example, e-mail or web-based forums, open houses, public meetings, and surveys.

The methods used must be appropriate to the nature of the issue, the participating audiences, and the staff and resources available for consultation.

WHAT IS ADEQUATE PUBLIC CONSULTATION?

Adhering to existing legislative requirements

Ensure that public participation processes adhere to the relevant legislation, regulations, policies or guidelines.

Other Issues Relative to Consultation

When is 'fresh' consultation required?

A decision-maker is faced with an issue where it has genuinely considered consultation feedback and wants to adjust its original proposal(s), or where circumstances have changed since consultation began. In such an instance, is the decision-maker required to consult again?

Fresh consultation should only be required where there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt. A fundamental difference is a change of such nature that it would be unfair for the decision-maker to proceed without having given participants a further opportunity to be consulted about the changes to the proposal. Where the amended proposal has emerged from the consultation process and reflects the feedback from the process itself, there will likely be no further obligation to consult.

Challenging the consultation

An interesting question arises as to when a challenge should be made if consultation is thought to be defective. Should the challenge be made as soon as the consultation commences, before its conclusion, or should the challenge await the outcome of the decision being consulted upon?

The answer is – "it depends".

If the basis of the challenge is that the decision-maker had already made its mind up at the outset of the consultation process, then it would be difficult to assess this challenge during the course of the consultation process.

If the challenge relates to the adequacy of the overall consultation process and there is an opportunity to positively affect the program, this would have to be considered.

Final Considerations

The FTA cannot stray from its proper focus of reviewing the fairness of the decision-making process, into evaluating the substantial merits of a decision. That is beyond the jurisdiction of the FTA, whose focus is on process.

WHAT IS ADEQUATE PUBLIC CONSULTATION?

Source: Adapted in part from a paper written by Clive Sheldon, QC: CONSULTATION AND LEGITIMATE EXPECTATIONS, January 2012