Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

Reconsideration Order MO-2629-R

Appeal MA08-106

City of Toronto

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OVERVIEW:

This reconsideration order deals with two requests to reconsider Order MO-2439. That order dealt with an access request submitted to the City of Toronto (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a report which, according to the requester, would have been the product of an investigation by the City's Auditor General.

One request to reconsider was submitted by the City. The other was submitted by counsel representing the Auditor General, as well as the City's Integrity Commissioner, Lobbyist Registrar and Ombudsman (the "Independent Accountability Officials" or IAOs). Both reconsideration requests were accompanied by extensive representations. The IAOs also provided a number of affidavits with their reconsideration request.

Order MO-2439 only dealt with the Auditor General, and not the other IAOs. Although I have considered the joint submissions and materials provided by the IAOs, this order only addresses the Auditor General.

For the reasons set out in this order, I have decided to grant the reconsideration requests and rescind order provisions 1, 2 and 3 of Order MO-2439.

BACKGROUND:

The access request dealt with in Order MO-2439 was submitted by the requester's counsel, and stated as follows:

> … I have a client who has an interest in the outcome of the investigation commenced consequent to inquiries we believe made by Counsellor Ford respecting [a named City employee]'s purchase of a truck from [the City] at auction in the fall of 2006, and which truck was acquired by him for less than the cost of repairs authorized by the said [City employee] to the very vehicle prior to its disposition to [the City employee].
>
> My client and I are aware that the auditor has completed the investigation; however a report as yet has not been released, and my client and I seek a copy of such report.

In response to the request, the City advised that access to "the records that you have requested" was denied in full under section 53 of the *Act*. The City stated:

> It has been determined that, in accordance with section 53 of the [*Act*], the confidentiality provisions of the [*City of Toronto Act, 2006* (the *COTA*)] prevail. Section 181(4) of the [*COTA*] has been relied upon to deny access under the [*Act*] to records related to matters which came before the Auditor General during the performance of his duty.

The City also advised the requester that he could appeal this denial of access to this office, apparently acknowledging the Commissioner's authority to hear an appeal concerning the potential application of section 53 of the *Act* and, more significantly, section 181 of the *COTA*.

The City's decision did not indicate whether it had searched for responsive records, or whether any in fact existed.

Legislation

Section 53(1) of the *Act* provides that "[t]his Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise."

Section 181 of the *COTA* states:

> (1) The Auditor General and every person acting under the instructions of the Auditor General shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.
>
> (2) Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate information to another person in respect of any matter described in subsection (1) except as may be required,
>
> (a) in connection with the administration of this Part, including reports made by the Auditor General, or with any proceedings under this Part; or
>
> (b) under the Criminal Code (Canada).
>
> (3) A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 179 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege.
>
> (4) This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*.

The Inquiry process leading to Order MO-2439

In the inquiry I conducted prior to issuing Order MO-2439, I initially sent a Notice of Inquiry to the City setting out the background of the appeal and inviting it to provide representations. In the covering letter accompanying the Notice, I invited representations on any issue the City considered relevant. In particular, I stated:

> I am enclosing a Notice of Inquiry which summarizes the facts and issues in the appeal.

> *If you believe that there are additional factors which are relevant to this appeal, please refer to them. ...*
>
> *The representations you provide to this office should include all of the arguments, documents and other evidence you rely on to support your position in this appeal.*
>
> [Emphasis added.]

The Notice invited representations under the following broad heading: "What is the impact of section 181 of the [*COTA*]?" Under that heading, I set out the provisions of sections 53 and 181, and then asked the following specific question: "What is the impact of section 53(1) of the *Act* and section 181 of the [*COTA*] on the jurisdiction of the Information and Privacy Commissioner under the *Act*? Please explain." The City responded with representations on a number of subjects, and did not confine itself to the narrow question I have just quoted.

Under the heading of "Preliminary Issues," the City contradicted the statement in its decision letter, above, by submitting that this office lacks the jurisdiction to conduct an appeal relating to the Auditor General. The City also submitted that the burden of proof that an exemption applies (imposed by section 42 of the *Act*), which I had referred to in the Notice of Inquiry, is irrelevant in the circumstances of this case.

Under the heading, "Impact of Section 181 of *COTA*," the City submitted that:

- the section completely ousts the operation of *MFIPPA* in relation to the IAOs, including the Auditor General,
- the Auditor General is independent;
- the records of the Auditor General are not in the City's custody or under its control and are therefore not accessible under the *Act*;
- the section is designed to completely oust the jurisdiction of the IPC to conduct any hearing into documents which relate to the operation of the City's Auditor General; and
- a finding that the records are subject to the *Act* would create the absurdity that although the City has no control over such records, the Commissioner would be exercising such control.

The City's representations stated that its access to information staff had "not been provided with the relevant records held by the Auditor General," if any existed, but did not indicate whether the City had searched for responsive records that might exist in its other record holdings.

After receiving the City's representations, I sent them, in their entirety, to the appellant along with a Notice of Inquiry. The appellant did not provide representations.

Order MO-2439

I then issued Order MO-2439, in which I made a number of determinations concerning section 181 of the *COTA*. Among other things, I found that:

- although section 181 of the *COTA* is a confidentiality provision that prevails over the *Act*, rather than an exemption from disclosure under the *Act*, and therefore section 42 of the *Act* does not place the burden of proof on the City, the law of evidentiary burdens still places the burden of proving the application of sections 53(1) of the *Act* and section 181 of the *COTA* on the City;

- if records exist outside the possession of the Auditor General, the City needs to explain why they are subject to section 181, and the City has not addressed this issue;

- rather than taking the blanket approach that it did to the application of section 181, the precise meaning and effect of section 181 ought to have been the focus of the City's response to the appellant's request;

- the Commissioner has the power to conduct an inquiry to determine the applicability of a prevailing confidentiality provision such as section 181 in an appeal under the *Act*, and may invoke the powers set out in section 41 of the *Act* when doing so; and

- the indicia of custody and control, including the fact that the Auditor General is an officer of the City and his/her records pertain to the functions of a City official, mean that the City has custody and/or control of the Auditor General's records.

The order concluded with the following provisions:

1. I order the City to search for a report by the Auditor General into the subject matter identified by the appellant.

2. In the event that no report exists, I order the City to search for other records in its custody or under its control that relate to the investigation and are not subject to the confidentiality provision found in section 181(1) or are subject to the section 181(2)(a) exception to section 181(1) of the *COTA*, and in making this assessment, to take into account the four questions set out on page 19 of this order.

3. I further order the City to issue an access decision to the appellant under the *Act* in accordance with sections 19, 21 and 22 of the *Act*, treating the date of this order as the date of the request, and to provide a copy of the decision to me when it is issued. This decision is to deal with all responsive records, including any that are discovered as the result of searches conducted under order provisions 1 or 2. If the City continues to take the position that the confidentiality provision in section 181(1) of the *COTA* applies to any of the records, the City is required to state this in its decision and to explain why this confidentiality provision applies.

GROUNDS FOR RECONSIDERATION:

Section 18 of the IPC's Code of Procedure (the *Code*) sets out the grounds upon which the Commissioner's office may reconsider an order. Section 18.01 of the Code states as follows:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.

THE RECONSIDERATION REQUESTS:

THE AUDITOR GENERAL AND THE IAOs

The IAOs, including the Auditor General, request that the order be reconsidered on the following grounds:

Defect in the Adjudication Process [*Code* section 18.01(a)]:

1) I did not notify the Auditor General or the other IAOs and invite their representations concerning the appeal;

Jurisdictional Defects: [*Code* section 18.01(b)]:

2) records belonging to the Auditor General and IAOs are not governed by the *Act*, and order provisions requiring the City to search the Auditor General's records or issue decision letters concerning them are made without jurisdiction;

3) the Auditor General is entitled to refuse to confirm or deny the existence of records concerning the request and for this reason also, any order provision requiring the City to issue a decision letter concerning the records is made without jurisdiction;

4) the request was for a "report" and the order provision requiring a search for records other than the report is made without jurisdiction;

In support of these grounds for reconsideration, the IAOs submit further as follows:

- the order needs to be clarified as it does not indicate whether, in using the term "City", the Auditor General's office is included;

- the IAOs, including the Auditor General, are independent and not part of the City for the purposes of the definition of "institution" under the *Act*, and cannot be the subject of an access request;

- records of the IAOs, including the Auditor General, concerning their investigative duties, are not in the City's custody or under its control.

THE CITY

In its separate reconsideration request, the City also relies on grounds 1, 2, 3 and 4, above, which pertain to grounds mentioned in both sections 18.01(a) and (b) of the *Code*.

In addition, the City submits that I did not permit it to provide representations concerning all of the issues I determined were relevant to the order, and that this is a fundamental defect in the adjudication process under section 18.0(a) of the *Code*.

In particular, the City submits that it was entitled to make submissions on the following issues:

- the "documents at issue" (i.e. the proper scope of the request);

- custody or control over records of the Auditor General;

- section 181 of the *COTA* as an "exclusion" to the *Act*; and

- whether the City may refuse to confirm or deny the existence of records to which section 181 of the *COTA* applies.

These issues relate to alleged defects in the adjudication process under section 18.01(a). For the reasons outlined below, it is not necessary to determine the question of custody or control in order to decide the outcome of this reconsideration order, but I note that the City did, in fact, make submissions on this subject in the representations it provided to me prior to Order MO-2439.

THE RECONSIDERATION PROCESS:

As noted above, the City and the IAOs provided detailed representations in support of their requests for reconsideration.

Following the receipt of these requests, I invited the appellant to provide representations on the following two issues:

- whether the scope of the request should be restricted to the "report" referred to in the original request; and

- the proper interpretation of section 181 of the *COTA*.

The appellant did not provide representations.

DISCUSSION:

NOTIFICATION/PROPER PARTIES TO THE APPEAL AND RECONSIDERATION

As noted above, the City and the IAOs, including the Auditor General, have made representations to the effect that the order should be reconsidered; that they were all entitled to notice of the appeal; and that this was an adjudicative defect within the meaning of section 18.01(a) of the *Code*.

The question of notice is addressed in section 40(3) of the *Act*, which states, in part:

> Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned of the notice of appeal, and *may also inform any other institution or person with an interest in the appeal* … of the notice of appeal. [Emphasis added.]

Based on the wording of section 40(3), notification of a "person with an interest in the appeal" is discretionary. This discretion must be exercised in accordance with applicable legal principles, which require the consideration of relevant factors and the exclusion of irrelevant ones.

In this case, the request was for a report which, if it exists, was prepared by the Auditor General. There is no suggestion that any of the other IAOs (the City's Integrity Commissioner, Lobbyist Registrar and Ombudsman) had prepared or might possess any responsive record. Section 181 of the *COTA*, claimed by the City as the basis for denying the request, is a confidentiality clause pertaining only to the Auditor General.

Part V of the *COTA* sets out separate provisions pertaining to each of the IAOs, summarized as follows:

- Integrity Commissioner: sections 158 through 164; a confidentiality provision is found at section 161;
- Lobbyist Registrar: sections 165 through 169; a confidentiality provision is found at section 169(3), and expressly refers back to section 161;
- Ombudsman: sections 170 through 176; 164; a confidentiality provision is found at section 173;
- Auditor General: sections 177 through 182.

The confidentiality clause at section 181 differs substantively from the other such clauses in Part V, particularly in its exception for the reporting function of the Auditor General. In Order MO-2439, I did not make any determination on the meaning of the sections in Part V that apply to IAOs other than the Auditor General.

Accordingly, I conclude that the IAOs other than the Auditor General were not necessary parties to this appeal under section 40(3) of the *Act*, and therefore find that it was reasonable not to notify them in view of this legislative scheme. In that situation, therefore, I find that the failure to notify the other IAOs is not an adjudicative defect under section 18.01(a) of the *Code*. In addition, I will not be making any specific findings in this order relating to the IAOs other than the Auditor General, as they are dealt with in specific sections of the *COTA* that are not under consideration here.

Both the City and counsel for the IAOs also submit that the Auditor General was entitled to notice of the appeal, and that failure to notify him was an adjudicative defect. However, the Auditor General has provided representations on this reconsideration, and as outlined below, I have taken these into account in deciding to reconsider Order MO-2439 on other grounds. Accordingly, it is not necessary to decide whether the lack of separate notification to the Auditor General was an adjudicative defect under section 18.01(a) of the *Code*.

Nevertheless, I would observe that, in the circumstances of this case, and given that the Auditor General is a City official appointed by City Council, pursuant to the *COTA*, it is not unreasonable to expect that the City would have notified him of the request and appeal. Alternatively, if the

City was of the view that the Auditor General was entitled to separate notification of the appeal, it could have advised me accordingly.

SCOPE OF THE REQUEST

Is this a Ground for Reconsideration?

Both the City and counsel for the IAOs take the position that the scope of the request should be restricted to a report, if one exists, and on this basis, they also submit that, to the extent the order requires a search for other records, this is a jurisdictional defect [*Code* section 18.01(b)].

The City also submits that it ought to have been invited to provide representations on this issue and that the failure to do so was a fundamental defect in the adjudication process [*Code* section 18.01(a)].

Although invited to provide representations on this question as part of the reconsideration process, the appellant did not do so.

This ground, as advanced both by the City and by counsel for the IAOs, arises from Order provision 2 in Order MO-2439 (reproduced here for convenience):

> In the event that no report exists, I order the City to search for other records in its custody or under its control that relate to the investigation and are not subject to the confidentiality provision found in section 181(1) or are subject to the section 181(2)(a) exception to section 181(1) of the *COTA*, and in making this assessment, to take into account the four questions set out on page 19 of this order.

As I noted in Order MO-2439, the City's approach to the request was a blanket application of section 181 of the *COTA*, without regard for where responsive records might be located, or whether their location or the surrounding circumstances might place them outside the purview of section 181.

Order Provision 2, which would only have come into play if no report of the Auditor General were found, was intended to provide redress for the City's blanket approach to the application of section 181, and its failure to even consider the possibility that there might be responsive records to which section 181 would not apply. A search for such records, and a more nuanced decision letter to the appellant, would have permitted him to submit a re-formulated request if he so desired.

Even if one accepts the City's position that investigative records of the Auditor General are clearly subject to section 181 of the *COTA*, the fact remains that neither the City's response to the request, nor its representations to me prior to Order MO-2439, even acknowledges the possibility that reports of the Auditor General, provided as part of that office's reporting

function, might be in the possession of a City official such as the Clerk, where they would not be covered by section 181 unless that individual was "acting under the instructions of the Auditor General." There was absolutely no indication in any of the material provided to me prior to Order MO-2439 that the City had searched what it considered to be its own record holdings. In my view, this approach was and is unreasonable, and was the result of an overbroad interpretation of section 181.

The City only reported the results of a search for a responsive record in the representations it provided as part of its reconsideration request, where it stated that it does not have the report mentioned in the request. This was apparently based on a search of the City's general administrative records, excluding the record holdings of the Auditor General. This is the first time in any communication by the City that it has addressed the question of whether it possesses a responsive record.

Nevertheless, I must decide whether I should reconsider Order Provision 2 (and, by extension, Order Provisions 3 and 4) on the basis of the City's and IAOs' objections to my treatment of the scope of the request in those provisions.

With respect to section 18.01(b) of the *Code*, I found in Order PO-2879-R that an error as to the scope of a request is not "jurisdictional" in the sense intended by that section, or under the jurisprudence relating to reconsiderations. I stated:

> The question of whether a record or portions of a record are responsive to a request is one that affects the limits of an appeal, as non-responsive parts are excluded from consideration. In that sense, it could be said that an error regarding responsiveness is a "jurisdictional defect" under section 18.01(b) of the *Code*. However, this may be distinguished from the question of whether a record is excluded from the scope of the *Act*, either because it is not in an institution's custody or under its control (see section 10(2)), or because it falls within an excluded category under section 65. Clearly, the latter questions are "jurisdictional" because they circumscribe the authority of this office to order records disclosed. The question of responsiveness of records that are clearly subject to the *Act*, such as the ones at issue here, is a different matter. In my view, an error of that kind is made "within jurisdiction" and does not fit within section 18.01(b).

In my view, that conclusion is reinforced by the decision of the Divisional Court in *Ontario (Attorney-General) v. Fineberg* (1994), 19 O.R. (3d) 197, [1994] O.J. No. 1419, which refers to the "jurisdiction" of this office to rule on questions of responsiveness:

> In our opinion, the Officer must have the jurisdiction to consider the information and records at issue, in light of the wording of the request. Such jurisdiction necessarily entails the right to determine the scope of the request and the related relevance of the information at issue.

I have, however, concluded that, in the circumstances of this appeal, failing to invite the City to provide representations on this point is a proper ground for reconsideration under section 18.01(a) of the *Code*. Section 41(13) of the *Act* requires that parties to appeals be given an opportunity to provide representations to this office. In the *Fineberg* decision, which I have just cited, the Divisional Court expressly found an entitlement for parties to provide representations on the issue of whether records are responsive to a request where that was an issue that required determination:

> … section 52(13) [of the *Freedom of Information and Protection of Privacy Act*, the equivalent of section 41(13) of the *Act*] imposes a mandatory obligation on the Officer to provide the person making the request, and others as specified, with an opportunity to make representations. This was not done and it does not now lie in counsel's mouth to submit that [the appellant], or the Ministry could not have made meaningful representations. Subsection 52(1) contains no such qualification. In the result, this portion of the Inquiry Officer's order is set aside and the matter is remitted back for a re-determination of the issue of relevancy and, potentially, for a consideration of whether any of the exemptions apply, all with the benefit of representations from the parties to the request proceedings.

Should the findings in Order MO-2439 on the scope of the request be changed?

In Order MO-2439, I reached the following conclusion about the responsiveness of records other than a report:

> … to be considered responsive, records must "reasonably relate" to the request [Order P-880]. In this case, the appellant has specifically requested a report, but in the event that one does not exist, records reasonably related to the Auditor General's investigation into the alleged purchase of the truck at auction by the named City employee would be responsive.

The manner in which the scope of a request should be determined was extensively canvassed by Adjudicator Anita Fineberg in Order P-880. That order followed the Court's direction for re-determination in *Fineberg* (cited above), and sets out the results of Adjudicator Fineberg's re-determination. She stated:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. *The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request*. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise

> definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request. [Emphasis added.]

Counsel for the IAOs submits that where the request is unambiguous, the City is justified in relying on its wording and not expanding it to include "related" records. In making this submission, the IAOs refer to Order MO-2232, where Adjudicator Corban stated:

> I am satisfied on the evidence before me that the City adopted a reasonable interpretation of the appellant's request. *My conclusion is based on the wording of the request. While an institution is required to liberally interpret a request for information and to seek clarification where there is ambiguity in the wording of the request, in my view, the City conducted a search that covered the types of documents sought by the appellant in his request*. Therefore, under the circumstances, considering the wording of the appellant's request, I see no reasonable basis for concluding that the City should have sought clarification from the appellant regarding his request.

The IAOs also refer to section 17(1)(b) of the *Act*, which requires a requester to provide "sufficient detail to enable an experienced employee of the institution, upon reasonable effort, to identify the record." The IAOs submit further that:

> … to require institutions to consider 'related' records as relevant to every unambiguous request made would dramatically alter the legislative scheme and the practice that has been in place for processing requests since 1991, when [the *Act*] was passed. We submit further that to change the manner in which searches are conducted and requests processed under [the *Act*] in this manner would fundamentally alter the practices of institutions and rights of requesters.

The City provides similar arguments concerning this issue, and also states that this office "… has previously determined that a request for a specific document would not require the institution to include records containing information collected or compiled by the institution in relation to the requested document." In this regard, the City refers to Order MO-2132. In that order, in finding that a building permit was not responsive to a request for a building permit application, Adjudicator Corban stated:

> In my view, in the circumstances of this appeal, there is neither uncertainty nor ambiguity with respect to the records sought by the appellant. I find that the request does not include the relevant building permit within its scope.

In this case, expanding the scope of the request to include "related" information was a remedy specifically tailored to the circumstances, and designed to respond to the City's approach to the request, as described above. Nevertheless, I agree with both the City and the IAOs that the request unambiguously seeks access to the Auditor General's report concerning the subject matter referred to in the request.

As already noted, the appellant did not provide representations on this issue although invited to do so. Absent any argument from the appellant as to why the scope should include related records, I find that this aspect of the order was in error. Based on section 17(1)(b) of the *Act* and the jurisprudence cited, institutions are normally entitled to rely on the request as stated and need not include "related" records where a specific document has been requested, and this analysis applies here.

Accordingly, Order Provision 2 will be rescinded in its entirety. In addition, and subject to the further discussion of the remaining issues, below, Order Provision 3 will be rescinded to the extent that it refers to an access decision relating to the outcome of searches required by Order Provision 2.

IS THE AUDITOR GENERAL "PART OF" THE CITY?

Is this a Ground for Reconsideration?

Order MO-2439 did not expressly consider this question, or the impact of section 2(3) of the *Act*, now relied on by the City and the IAOs in their reconsideration submissions. Nevertheless, the order proceeded on the basis that the Auditor General is "part of the City." In my view, it is clear that if the Auditor General is not "part of" the City, this is a jurisdictional issue in the true sense of the word. Accordingly, an express error, or even an erroneous assumption in this respect, would warrant reconsideration under section 18.01(b) of the *Code*. The jurisdictional nature of this issue is evident from the Court of Appeal's decision in *City of Toronto Economic Development Corporation v. Ontario (Information and Privacy Commissioner)*, 2008 ONCA 366 (C.A.) ("TEDCO"), which applied the correctness standard because this question is "jurisdiction-limiting" and "defines the scope of access to records."

Is the Auditor General "Part of" the City?

The primary arguments of the IAOs in this regard are to the following effect:

- the Auditor General and the other IAOs are not included in the definition of "institution" under the *Act*;

- the Auditor General and the other IAOs are not deemed to be part of the City under section 2(3).

Like the IAOs, the City also submits that the Auditor General is not part of the City for the purposes of the *Act*.

Both the City and the IAOs also provide extensive argument to the effect that the IAOs require operational independence in order to fulfil their mandates. This is reflected in the affidavits provided to me by the IAOs. As I have already noted, the issues in this order and Order MO-2439 only relate to the Auditor General and not to the other IAOs.

The definition of "institution" in section 2 of the *Act* states unequivocally that this term includes "a municipality" [paragraph (a) of the definition]. No one disputes that the City is an institution within the meaning of this definition.

Section 2(3) sets out criteria for determining when external bodies are "part of" an institution. It states:

> Every agency, board, commission, corporation or other body not mentioned in clause (b) of the definition of "institution" in subsection (1) or designated under clause (c) of the definition of "institution" in subsection (1) is deemed to be a part of the municipality for the purposes of this Act if all of its members or officers are appointed or chosen by or under the authority of the council of the municipality.

In my view, employees and officials of an institution are implicitly recognized as being part of that institution and it is not necessary to qualify them as being "part of" the municipality by applying section 2(3). The Auditor General is not an "agency, board, commission, corporation or other body"; for the reasons that follow, I find that he is clearly a City official appointed by the City to a statutory mandate and therefore "part of" the City for the purposes of the *Act* in the same manner as any other City official.

To begin with, the Auditor General's statutory mandate implicitly recognizes that he is part of the City for the purposes of the *Act*. If the Legislature considered the Auditor General (whose appointment is mandated by the *COTA*) not to be part of the City, then section 181(4) of the *COTA*, which provides that section 181 prevails over the *Act*, would be redundant. It is axiomatic that the Legislature does not pass redundant enactments, and this analysis draws more force from the fact that section 181(4) appears in the same statute that created the office of Auditor General in the first place. Accordingly, the existence of section 181(4) is a powerful basis for concluding that, in the Legislature's mind, the Auditor General, whose office came into being under Part V of the *COTA*, was intended to be "part of" the City.

There are numerous other provisions of the *COTA*, and other City enactments and policies, that support the view that the Auditor General is "part of" the City.

For example, and significantly in my view, the Auditor General is appointed by, and reports to, City Council [*COTA* sections 177(1) and (2)]. Although he is not required to be a City employee, the *COTA* does not prohibit this [section 177(3)]. The Auditor General "is responsible for assisting city council in holding itself and city administrators accountable for the quality of stewardship over public funds and for achievement of value in city operations" [*COTA* section 178(1)]. The Auditor General "… shall perform the duties as may be assigned to him or her by city council…" [*COTA* section 178(3)].

Reports of the Auditor General to City Council, provided as exhibits to the Auditor General's affidavit, describe the office as "City of Toronto Auditor General's Office" and bear the City's logo. The Auditor General's own Policies and Procedures Manual describes him as a "City

official." Under City of Toronto By-Law No. 1076-2002, Article 169-30.4A, the Auditor General's powers to appoint and deal with his staff are "subject to the provisions of any personnel regulations adopted by Council or collective agreements applicable to all employees of the City" and his annual budget is approved by City Council.

In addition, one of the exhibits to the Auditor General's affidavit, "A Policy Framework for Toronto's Accountability Officers" (which was adopted by City Council's Executive Committee) sets out the following "guiding principles":

- The Offices will be established by by-law in Toronto's Municipal Code.
- The officers are appointed by and have direct accountability to City Council.
- The appointment, renewal and removal processes will be defined and transparent.
- The officers will have fixed terms of office.
- The officers will have budgetary, operational and staffing independence.

Significantly, the policy framework also provides that the accountability officers, including the Auditor General, "… must be held to account for the management of their offices, the administration of the services they provide, for their performance in fulfilling their mandates and for their use of public funds." In addition, it affirms that their staff are City employees.

The representations of the IAOs also refer to the fact that the City "appears to be in the process of amending the *Municipal Code* to adopt the Policy Framework." Chapter 3, Article I, section 3.2 of the *Municipal Code* in fact provides as follows:

> A. An accountability officer carries out in an independent manner the duties and responsibilities of his or her office as set out in Part V of the [*COTA* and] this chapter….
>
> B. An accountability officer is accountable to council.

In my view, while these various provisions provide a form of operational independence to the Auditor General, they also provide overwhelming support for concluding that he is a City official and part of the City for the purposes of the *Act*. He is appointed by City Council, reports to City Council, must perform the tasks assigned by City Council, and is accountable to City Council. In this regard, it is also significant that, under section 3 of the *Act*, City Council is also the "head" for the purposes of the *Act*. Moreover, the Auditor General describes himself as a City official in his own Policy and Procedures manual, uses the city's logo on his reports, has his office staffed by City employees and must follow City rules in respect of their employment. His office is created by the *COTA* and provided for in the City's *Municipal Code*.

Accordingly, there is no need to consider section 2(3); the Auditor General is clearly an integral part of the City's governance structure and, ultimately, of the City itself.

Even if section 2(3) were applicable, it is also clear that its terms are met. That section provides that an external body is part of a municipality "… if all of its members *or* officers are appointed or chosen by or under the authority of the council of the municipality [emphasis added]."

The Auditor General's office consists of a number of employees, headed by the Auditor General himself. If the Auditor General's office is to be considered as an external body subject to analysis under section 2(3), the Auditor General, who occupies a statutory office under the *COTA* and bears the statutory responsibility for the work of his office, is its sole officer. This conclusion is consistent with the direction provided by the Ontario Court of Appeal in TEDCO (cited above), which counselled against technical interpretations that would defeat the transparency purposes of the *Act*. TEDCO is a corporation of which the City is sole shareholder. In concluding that its officers, appointed by a board of directors elected by the City, were appointed "under the authority" of City Council, the Court stated:

> When one considers that the object or purpose of the Act is to provide a right of public access to information under the control of municipalities and related municipal institutions, it would appear reasonable to conclude that TEDCO should be subject to the Act.
>
> …
>
> … a formal and technical interpretation of s. 2(3) runs contrary to the purpose of the Act. We are dealing with a corporation whose sole shareholder is the City of Toronto, whose sole purpose is to advance the economic development of the City, and whose board of directors – at the time of the proceedings before the adjudicator – was populated by persons directly appointed by City Council.… …[I]t seems to me that TEDCO is just another example of a complex bureaucratic structure of public administration. In my view, it is contrary to the purpose of the Act and access to information legislation in general to permit the City to evade its statutory duty to provide its residents with access to its information simply by delegating its powers to a board of directors over which it holds ultimate authority.

Unlike the situation in TEDCO, moreover, and therefore even more clearly meeting the requirements of section 2(3), the Auditor General is not appointed by delegates of City Council. Instead, he is *directly* appointed by City Council. Section 177(1) of the *COTA* states that "[t]he City shall appoint an Auditor General." Although the term "City" is not defined in the *COTA*, other provisions of that statute [e.g. section 8(2), which confers the power to pass by-laws] make it clear that this term is a reference to City Council. In addition, as acknowledged by the IAOs in their representations, the Auditor General and the other IAOs are, in fact, appointed by City Council. Accordingly, I conclude that, as the sole "officer" of his office, the Auditor General was appointed by City Council, meeting the requirements of section 2(3).

The IAOs and the City cite two decisions intended to support their argument that the Auditor General is not part of the City under section 2(3). The first of these is *David v. Information and Privacy Commissioner*, 2001 CanLII 36618 (Div. Ct.). That decision upheld Order MO-1892, in which Adjudicator Donald Hale had found that records held by the Hon. Coulter A. Osborne, appointed by the City on an *ad hoc* basis to investigate the awarding of a contract in the Union Station redevelopment, were not in the City's custody or control. As part of its control analysis, the Court observed that section 2(3) is not intended to make individuals "part of" the City.

In my view, the situation addressed in *David* is entirely distinguishable from the facts of this case. Mr. Osborne was retained on an individual *ad hoc* basis by the City. By contrast, the Auditor General's appointment is not *ad hoc*; he was appointed to that office pursuant to the express provisions of *COTA*. For the purposes of section 2(3) of the *Act*, I also note that the Auditor General's office is not comprised of a single individual; his affidavit indicates that he has 29 staff.

The second case cited by the City and the IAOs is *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611, [1997] O.J. No. 2485 (C.A.). That case dealt with whether the Ministry of the Attorney General had custody or control of records held by members of the Judicial Appointments Advisory Committee, an arms-length lay body set up to provide the Attorney General with advice about proposed judicial appointments. In Order P-704, former Assistant Commissioner Irwin Glasberg had found that the Ministry had control of the records, on the basis that the Committee was "part of" the Ministry. The Court disagreed, finding that the Committee was not part of the Ministry, and on that basis, it concluded that the records were not under the Ministry's custody or control.

Walmsley was decided under the provincial *Freedom of Information and Protection of Privacy Act* ("*FIPPA*"), rather than the *Act*. There is no equivalent to section 2(3) in *FIPPA*, so this analysis was not conducted on the basis of section 2(3).

In my view, like *David*, *Walmsley* is distinguishable. Unlike the office of the City's Auditor General, the creation of the Judicial Appointments Advisory Committee was not statutorily mandated, and as the Court observed, its members were neither employees of the Ministry nor were they appointed by Order-in-Council. By contrast, the Auditor General's appointment is mandated by *COTA*, the same statute that gives City Council its powers. The Auditor General describes himself as a "City official," and the statute does not preclude him from being a City employee. He was appointed by City Council. His staff are City employees. As noted in his affidavit, his office is at Metro Hall, and even his records are stored on City premises, although access is strictly controlled. None of these factors were present in *Walmsley*. The advisory council under consideration in *Walmsley* is a demonstrably external body, and is not comparable to the Auditor General for the reasons given above. I therefore find that the *Walmsley* case is distinguishable on the facts.

The IAOs also make extensive submissions about the effect of the requirement that the Auditor General operate independently. In my view, this is precisely why the Legislature enacted section

181 of *COTA*, and the necessary independence contemplated by the Legislature is achieved as a result of that section, as discussed in more detail below.

In particular, the IAOs submit that the issue of whether the City is required to "search through" their investigation files is important, and that if City staff tried to do so, they would tell them to "get lost." As I have already noted, only the Auditor General's records are at issue in this case, and Order MO-2439 and this order do not address records of the other IAOs.

As regards City staff "searching through" the Auditor General's records, it is significant that the confidentiality clause in section 181 prevails over the *Act*. For that reason, both the Auditor General and the City would have to respect the obligation imposed on the Auditor General to preserve secrecy with respect to records described in section 181 when responding to an access request. Given the strictly controlled access to the records of the Auditor General outlined in the IAOs' representations, it is apparent that the current arrangements, in concert with section 181, would be sufficient to preclude City staff not employed in the Auditor General's office from "searching through" the investigation files.

To conclude, based on the evidence and the relevant statutes and enactments of the City, I find that the Auditor General is part of the City for the purposes of the *Act*.

SECTION 181 OF THE *COTA*

Is this a ground for reconsideration?

Section 181 of the *COTA* states that if applicable, it "prevails over" the *Act* with the result that records falling within its terms are not accessible through an access request. This section uses different language than an exclusion under section 52 of the *Act*, ("this Act does not apply …). The latter is a clear example of a jurisdiction-limiting provision, and an error in that regard would be a "jurisdictional defect" for the purposes of section 18.01(b) of the *Code*.

As already noted, however, section 181 requires the Auditor General and anyone acting under his instructions to "preserve secrecy" with respect to "matters that come to his or her knowledge in the course of his or her duties" under Part V of the *COTA*. Accomplishing that objective could significantly circumscribe the extent to which provisions of the *Act*, other than the right to make a request and to file an appeal, might apply. In other words, the provisions of the *COTA*, an external statute, could significantly impact the extent to which records are accessible under the *Act*.

Given that the *COTA* is an external statute, and not part of the scheme of exemptions within the *Act* for records that are otherwise accessible, I conclude that the question of whether section 181 applies is of a sufficiently "jurisdictional" character to bring it within section 18.01(b) of the *Code*. For that reason, an error in interpreting or applying section 181 would give rise to reconsideration under that section of the *Code*.

Interpretation and application of section 181 of the *COTA*

I have already concluded that the only record that should be considered responsive to the appellant's request is the report that is expressly mentioned in the appellant's request. In addition, the City indicates that it has searched its record holdings (which I assume did not include the records of the Auditor General) and has not located such a report. In doing so, the City has complied with Order Provision 1, as far as its own record holdings, excluding records of the Auditor General, are concerned. However, the City has apparently not searched the records of the Auditor General, which Order Provision 1 would also have required.

In these circumstances, the focus of this order shifts to a report in the hands of the Auditor General or anyone acting under his instructions.

With respect to the impact of section 181 of the *COTA* on the Auditor General's records and those of his staff, the City submits that:

- it is not possible for the City to conduct searches of the Auditor General's records without violating section 181;
- it could not provide an access decision concerning any such record, if it existed, without violating section 181; and
- if a record is in the custody of the Auditor General or his staff, and relates to his duties under Part V of the *COTA*, section 181 requires secrecy to be preserved with respect to this record, regardless of the content.

As regards information in the hands of other City staff, the City submits that:

- with respect to City staff who do not work for the Auditor General, the primary purpose of section 181 is to exclude from disclosure any information the City staff member obtained or created as a consequence of acting under the Auditor General's instructions;
- section 181 would also apply to prevent the disclosure of "everyday information" held by a City staff member when its disclosure would indirectly disclose information received by a City staff member while acting under the instructions of the Auditor General, or would reveal that information with respect to a "matter" came to the attention of the Auditor General in the course of his duties under Part V of the *COTA*.

The IAOs submit that the Auditor General's records are not "governed by" the *Act*. In support of this submission, they argue that the Auditor General is not part of the City or deemed to be an institution, and his records are not under the City's custody or control. They also submit that the Auditor General operates independently of the City administration. In addition, they state that

there is a right to refuse to confirm or deny the existence of records to which section 181 applies because that section "prevails over" the *Act*. Many of these arguments are significantly focused on the other grounds for reconsideration such as custody or control and whether the Auditor General is "part of" the City.

As already noted, the appellant did not make submissions on this issue, although he was invited to do so.

Having considered all of these arguments and the provisions of section 181, I conclude that an examination of its meaning and effect completely resolves the remaining issues that must be decided in this order.

For convenience, the relevant portions of section 181 are repeated here. They state:

> (1) The Auditor General and every person acting under the instructions of the Auditor General shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.
>
> (2) Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate information to another person in respect of any matter described in subsection (1) *except as may be required,*
>
> (a) *in connection with the administration of this Part*, including reports made by the Auditor General, or with any proceedings under this Part; or
>
> (b) under the Criminal Code (Canada).
>
> . . .
>
> (4) This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*.
>
> [Emphasis added.]

I have already noted that the City has apparently complied with Order Provision 1, in respect of its record holdings, not including records of the Auditor General. Order Provision 2 has been rescinded, above, in my findings concerning the scope of the request. Order Provision 3 has been rescinded to the extent that it requires a decision letter for records other than a report.

The only order provisions remaining at issue, therefore, are Order Provision 1 to the extent that it requires a search of the Auditor General's records for a report; and Order Provision 3 to the extent that it requires a decision letter to be issued in respect of the results of that search.

Significantly, the analysis that underpins these order provisions, to the extent that they remain at issue, assumes that if the record is a report, the section 181(2)(a) exception to the confidentiality clause applies, and further assumes that, as a consequence, such a report could be the subject of an access request under the *Act* in the normal manner.

In my view, the second of these assumptions is faulty. Section 181(2)(a) provides an exception to the confidentiality clause for reports made by the Auditor General, but the exception is limited to "the administration of this Part" – a reference to Part V of *COTA*. That part outlines the functions of the IAOs. An access request under the *Act* is *not* an activity conducted under Part V of *COTA* and there is no sound basis for arguing that it is. Accordingly, in my view, even if the record is a report, the exception at section 181(2)(a) does not have the effect of making the report, in the hands of the Auditor General or those acting under his instructions, accessible under the *Act*. On the contrary, I conclude that section 181 would apply, and as a consequence, such a report could not be disclosed in response to a request under the *Act*.

Moreover, in preparing a response to a request under the *Act*, it would be necessary for the Auditor General, and those acting under his instructions, to preserve secrecy with respect to matters coming to their attention in the course of their duties under Part V of *COTA*. For the purposes of this order, it is not necessary for me to determine whether this includes the right to refuse to confirm or deny the existence of records, or the mechanisms by which the City should respond to access requests concerning records of the Auditor General; those are matters for the City and the Auditor General to determine at first instance.

On the other hand, if a report has been provided to a City staff member who does not act under the Auditor General's instructions in that regard, it would be subject to an access request under the *Act*. As already noted, no such record has been found in this case.

For the foregoing reasons, the remaining portions of Order Provisions 1 and 3 are rescinded. The combined effect of this conclusion and with my previous findings in this order is that all of the order provisions of Order MO-2439 are rescinded.

This conclusion resolves the remaining issues in this case. Accordingly, I need not determine the question of custody or control over records that are subject to section 181 of the *COTA*.

Before leaving this subject, it is important to point out that, for the reasons outlined in Order MO-2439, this office retains the power to determine appeals where access to records requested under the *Act* has been denied based on a claim under section 53 of the *Act* that a confidentiality clause, such as section 181 of the *COTA*, applies.

CONCLUSIONS:

The scope of the request is limited to the report it mentions. In the hands of the Auditor General or anyone acting under his instructions, such a report, if it existed, would be subject to the confidentiality provision in section 181 of the *COTA*, which in combination with section 53(1) of

the *Act* means that it would not be accessible under the *Act*. The City has searched for a responsive record and did not locate one. Because the City did not advise the appellant of this in a decision letter, the appellant may appeal the reasonableness of the City's search within 30 days after the date of this order. With respect to the scope of such an appeal, if one is filed, it is clear that the City was not required to search the Auditor General's records because, as noted, section 181 of the *COTA* would apply to a responsive record found there, if one exists.

ORDER:

Order Provisions 1, 2 and 3 of Order MO-2439 are rescinded.

Original signed by: June 9, 2011
John Higgins
Senior Adjudicator