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

ORDER MO-2439

Appeal MA08-106

City of Toronto

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester was represented by counsel, who set out the request 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 record at issue 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 *Municipal Freedom of Information and Protection of Privacy Act*, the confidentiality provisions of the *City of Toronto Act* prevail. Section 181 (4) of the *City of Toronto Act* has been relied upon to deny access under the *Municipal Freedom of Information and Protection of Privacy Act* to records related to matters which came before the Auditor General during the performance of his duty.

The requester, now the appellant, appealed that decision. This office determined that mediation would not be possible so this appeal was streamed directly to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*.

I began the inquiry by sending a Notice of Inquiry to the City, outlining the background and issues in the appeal, and inviting its representations. The City responded with representations. I then sent the Notice of Inquiry to the appellant along with a complete copy of the City's representations. Despite being provided with several extensions, the appellant did not provide representations.

DISCUSSION:

BURDEN OF PROOF

Early in its representations, the City refers to the fact that the Notice of Inquiry refers to the burden of proof established by section 42 of the *Act*. This section states:

> If a head refuses access to a record or part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in the Act lies upon the head.

The City states that it:

> … wishes to clearly establish its position that the burden of proof articulated in section 42 of the *Act* has no relevance to the issues in question within this appeal. The City is not refusing access to a record or part of a record on the basis of one or any of the "specified exemptions" in the *Act* and as such the City bears no "burden of proof" to satisfy that the records or the part therefore "falls within one of the specified exemptions in this Act." As a result, the City objects to the suggestion that section 42 has any application to the issues in this appeal.
>
> Furthermore, if the [Commissioner] were to have jurisdiction over this matter, which is not admitted, but actively denied, we suggest that as a result of the language of section 181 of the [*City of Toronto Act, 2006* (the *COTA*)], the burden of proof would of necessity lie on the parties attempting to gain access to the documents in question.

I agree with the City that section 181 of the *COTA* is not an exemption under the *Act*, and strictly speaking, section 42 therefore does not apply. However, for the reasons that follow, I do not agree that section 181 of the *COTA*, which is set out in full below, has the effect of creating an onus on requesters to prove that it does not apply.

Although section 42 is not strictly applicable as assigning an onus of proof where an institution relies on a confidentiality provision in another statute, rather than an exemption under the *Act*, I believe that this section still provides assistance in assessing the question of onus. In my view, section 42 indicates an intention on the part of the Legislature that, where a record is in the custody or under the control of an institution such as the City, the onus of proving non-accessibility under the *Act* rests with the institution. This is consistent with the purpose of the *Act* in section 1(a)(i) to "provide a right of access to information under the control of institutions in accordance with the principle[] that … information should be available to the public."

Even without relying on section 42, the City's argument that the burden of proof in this case falls on the appellant is without merit and unsustainable in law.

Section 4(1) of the *Act* stipulates that "[e]very person has a right of access to a record or part of a record under the custody or control of an institution unless …" the record is exempt under sections 6 to 15 or the request is frivolous or vexatious. This is the primary section establishing that the *Act* applies to the record holdings of institutions. There are several other sections setting out instances where the *Act* either does not apply (section 52), or records are not accessible because of a prevailing confidentiality provision (section 53). As noted above, the City relies on section 53 in conjunction with section 181 of the *COTA*.

Based on section 53 of the *Act* and section 181 of the *COTA*, the City seeks to prove that records which would otherwise be accessible under the *Act*, as stipulated by section 4(1), are in fact not accessible because of a prevailing confidentiality provision. The City thus seeks to oust the

accessibility of records under the *Act*, which would otherwise be subject to the access scheme established under the *Act* for records under the City's custody or control.

Seen in that light, it is clear that section 4(1) of the *Act* establishes a positive right of access on which members of the public are entitled to rely. The City wishes to remove the requested record from that positive right. In my view, the law of evidentiary burdens would place the onus of proof to accomplish that objective on the City. Failure by the City to establish the application of section 181(1) of the *COTA* will have the result that the City does not succeed on this point, and the *Act* would be found to apply. (See *The Law of Evidence in Canada* by John Sopinka, Sidney N. Lederman and Alan W. Bryant (Markham: Butterworths, 1992) at p. 57.)

It is also unfair, unreasonable, and contrary to the purpose of the *Act*, cited above, for the City to suggest that requesters have the onus of disproving that section 181 of the *COTA* applies to records they have requested. To discharge such an onus, a requester would need: (1) detailed knowledge of the City's record holdings; (2) knowledge of the precise nature of what records exist in the City's record holdings that may be responsive to his or her request, and (3) knowledge of where copies of such records would be located within the City's records. This information would rarely, if ever, be known to a requester. As noted in *Dow Chemical of Canada v. Pritchard*, [1970] O.J. No. 829 (H.C.J.), the onus of proving information that is peculiarly within the knowledge of a party rests with that party, in this case, the City.

For all these reasons, I find that the burden of proving the application of section 181 of the *COTA*, in conjunction with section 53 of the *Act*, falls on the City in this appeal.

PREVAILING CONFIDENTIALITY PROVISION

Section 53(1) of the *Act* states as follows:

> This Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

In this case, the City relies on the "confidentiality provision" in section 181 of the *COTA*. This section 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*.

Looking at the words of section 181, it is apparent that the true "confidentiality" provision is section 181(1), since that section is the part of the provision that actually prohibits the disclosure of information. Sections 181(2) and (3) provide exceptions to the rule of secrecy, and section 181(4) states that section 181 prevails over the *Act*.

Section 181 appears in Part V of the *COTA*. Part V is entitled, "Transparency and Accountability" and contains provisions pertaining to the City's Integrity Commissioner and Ombudsman, as well as the Auditor General.

In discussing the scope of section 181 in its representations, the City states that:

> … the effect of this provision is two-fold:
>
> 1. this section is designed to completely oust the operation of [the *Act*] in relation to the City's Accountability Officers who [sic] includes the Auditor General; and,
>
> 2. this section is designed to completely oust the jurisdiction of the IPC to conduct any hearing in relation to documents which relate to the operation of the City's Auditor General.

Given that only the Auditor General is mentioned in section 181, I am puzzled by the City's bare assertion that this section applies across the board to all its "Accountability Officers," who, in addition to the Auditor General, also appear to include the City's Ombudsman and its Integrity Commissioner. Although this determination is not required for the purposes of this inquiry, I do not agree with this submission. Section 181 would only affect City officials to the extent that they fall under its express terms.

Based on this section, the City goes on to argue that the Commissioner is expressly prohibited from:

- including records of the City's Auditor General, if any exist, in the present appeal;
- having access to records of the Auditor General (if they exist) in relation to the request; and
- making any order in relation records of the Auditor General (if they exist).

The City further indicates that it is providing representations as a courtesy to this office, and nothing in the representations is to be construed as an acceptance of the Commissioner's jurisdiction.

As well, the City states that it:

> … recognizes the importance of open and transparent governance, and the important role that the [Commissioner] plays in maintaining such systems. However, the City is of the position, that section 181 of the [*COTA*] *excludes a narrow sub-set of documents* from the [Commissioner's] jurisdiction…. [Emphasis added.]

Although the City characterizes the records it seeks to include within section 181 of the *COTA* as a "narrow sub-set," its representations do not provide any detailed explanation of what the scope of this provision is, nor do they describe precisely which records would be affected. In its decision letter, the City refers to the exclusion covering records "which came before the Auditor General during the performance of his duty."

Notwithstanding the apparent focus of the City's representations on records "of the Auditor General," the City appears to be of the view that copies of any records that have any connection at all to the investigation, anywhere in the City's record holdings, fall under section 181 of the *COTA*. This is apparent from the City's blanket refusal to respond to the request, and its position that this office has no jurisdiction to conduct an inquiry in this appeal. The City does not indicate whether any responsive records exist at all. Nor does it indicate whether the Auditor General's investigation is complete, or whether a report has been issued. Although the City does not comment on this in its representations, it strains credulity to suggest that, if a report has been issued, no copies of that report would exist outside the possession of the Auditor General. As well, as discussed below, if a report has been issued, it would be caught by the exception to the confidentiality provision provided by section 181(2)(a).

Moreover, even if no report has been issued, it would be incumbent on the City to search for records under its custody or control that are "reasonably related" to the request (see Order P-881), and those would be responsive. Again, the City does not comment on the existence of such records, but it is quite likely that, at a minimum, copies of reasonably related records would exist

that are not records "of the City's Auditor General." The existence of responsive records other than any report that may have been issued is explored in more detail below.

If records exist outside the possession of the Auditor General, the City needs to explain why these are covered by the rather complex language of section 181. The City does not address this issue in its representations.

Instead, as is apparent from its reference to responsive records "if any exist" in its representations, the City appears to interpret section 181 as a right to refuse to confirm or deny the existence of *any* responsive records *anywhere* within the institution that have anything to do with an investigation by the Auditor General. I disagree that this characterization of the scope of the confidentiality provision in section 181 represents a "narrow sub-set" of records. Rather, this approach gives a very broad interpretation to section 181. If accepted the confidentiality provision would apply to a potentially very broad spectrum of records which, in my view, may include records that are *not*, in fact, covered by section 181.

The consequence of accepting this characterization would, moreover, go beyond simply denying access to records that may or may not be covered by section 181. Their very existence would remain secret without *any* outside scrutiny of whether section 181 even applies, based on an apparently unreviewable decision by City officials. This completely contradicts the legislative objective of "transparency and accountability," which is the title of Part V of the *COTA*, the part of the statute that includes section 181.

I also note that section 2 of the *COTA* sets out the purpose of the statute as a whole, which is to "… create a framework of broad powers for the City which balances the interests of the Province and the City and which recognizes that the City must be able …" to (among other things):

> *Ensure that the City is accountable to the public and that the process for making decisions is transparent*. [Emphasis added.]

The purposes of the *Act* are also important and are expressly set out in section 1. They include the important principles that information under the control of institutions "should be available to the public" and "decisions on the disclosure of information should be reviewed independently of the institution controlling this information."

The City relies on section 181 of the *COTA* in conjunction with section 53(1) of the *Act*. Both sections have an impact on whether the records requested by the appellant are available under an access-to-information regime. The purpose of both statutes is therefore significant in construing these provisions. In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 405, the Supreme Court of Canada has clearly recognized that the overarching purpose of access to information legislation is to facilitate democracy. Justice LaForest (dissenting on other grounds) stated:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens

> have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. (para. 61)
>
> …
>
> Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the *Access to Information Act* recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted. (para. 63)

In my view, the principle of coherence in statutory interpretation counsels the adoption of an interpretation that fulfils and accommodates the purposes inherent in both the *Act* and the *COTA*.

Rather than taking the blanket approach that it did, the precise meaning and effect of section 181 of the *COTA* ought to have been the focus of the City's response to the appellant's request, and this is the approach I intend to adopt in this inquiry. As well, this analysis must be conducted in the context of the important legislative purposes I have just outlined.

The City seeks to support its broad interpretation of section 181 of the *COTA* on two bases: (1) the Auditor General, and not the City, has custody and/or control of the Auditor General's records; and (2) section 181 is not limited to confidentiality of records, but provides a code regulating the disclosure of information. I will consider each of these arguments in turn.

In analyzing these arguments, it is also important to consider that the application of the *Act* is established by section 4(1). As already stated, this section indicates that "every person has a right of access to a record or part of a record in the custody or under the control of an institution unless …" the record is exempt under section 6 to 15, or the request is frivolous or vexatious.

Section 4(1) is the primary jurisdictional provision within the *Act*, and also sets primary boundaries for the Commissioner's jurisdiction in appeals under section 39, which confers authority on the Commissioner to determine an appeal of "any decision of a head under this Act". Based on that authority, the Commissioner clearly has the authority to determine the issue of custody or control under section 4(1) (see, for example, *Ontario (Criminal Code Review Board) v. Doe* (1999), 47 O.R. (3d) 201 (C.A.) and *David v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4351 (Div. Ct.)).

For these same reasons, I also conclude that while section 53(1) may limit the application of the *Act* based on a confidentiality provision in another statute, any record in the custody or under the control of an institution, whether or not it is covered by a confidentiality provision that prevails over the access and disclosure provisions of the *Act*, nevertheless remains subject to the processes established under the *Act* for determining these questions.

I now turn to detailed analysis of the two arguments advanced by the City to support its broad interpretation of section 181.

Independence of the Auditor General in relation to the custody and control of records

The City's arguments under this heading essentially state that section 4(1) of the *Act* does not extend to records in the custody or under the control of the Auditor General. The City argues that it has no more than bare possession of the Auditor General's records, and also argues that this view is supported by the provisions of the *COTA*, and in particular, section 181.

To the extent that section 181(1) of the *COTA* applies to records, they are subject to a confidentiality provision that prevails over the *Act*. Clearly, however, this result arises by operation of that section in combination with section 53(1) of the *Act*. This result does not arise from any loss of custody and/or control of the Auditor General's records under section 4(1) of the *Act* as the City suggests.

I also note that this argument only pertains to records in the possession of the Auditor General. As I have already indicated, it is quite possible that a report or other responsive record may well exist in other locations within the City's record holdings.

In any event, I conclude, for the reasons that follow, that the City's argument that it does not have custody or control of the Auditor General's records must be rejected. There is nothing in section 181 to suggest this outcome. Section 181 is a confidentiality provision which, if applicable, prevails over the *Act*, to the extent that the relevant statutory provisions are in conflict, and nothing more. Section 181 does *not* state that it ousts the City's custody or control of the Auditor General's records.

In support of its argument that it does not have custody and/or control of the Auditor General's records, the City submits that it is entitled to "structure its operations in such a fashion as to limit the City's control or custody over records of" an accountability officer such as the Auditor General. The City argues that the Auditor General's records are not under the control of the Clerk, but rather under the Auditor General's independent control.

The City states that "information controlled by the Auditor General is only disclosed to the City in accordance with [the Auditor General's] duties under section 181; to provide access under other circumstances would be a conflict with the duty of confidentiality." The City further states that there is little or no support for finding that it has control over the records of the Auditor General, and in that regard, the City specifically refers to Order P-120.

In my view, the following questions summarize the indicia that may support or contradict a finding of custody and/or control:

- Was the record created by an officer or employee of the institution? [Order P-120]

- What use did the creator intend to make of the record? [Orders P-120, P-239]

- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above]

- Is the activity in question a "core", "central" or "basic" function of the institution? [Order P-912]

- Does the content of the record relate to the institution's mandate and functions? [Orders P-120, P-239]

- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120, P-239]

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? [Orders P-120, P-239]

- Does the institution have a right to possession of the record? [Orders P-120, P-239]

- Does the institution have the authority to regulate the record's use and disposal? [Orders P-120, P-239]

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?

- To what extent has the institution relied upon the record? [Orders P-120, P-239]

- How closely is the record integrated with other records held by the institution? [Orders P-120, P-239]

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

As the City notes in its representations, it appoints the Auditor General pursuant to a statutory duty under section 177 of the *COTA*. This section states:

> (1) The City shall appoint an Auditor General.

(2) The Auditor General reports to city council.

(3) The Auditor General is not required to be a city employee.

Accordingly, it is clear that the Auditor General is an officer of the City, whether or not he or she is an employee. This fact alone would support a conclusion that the Auditor General's records are under the custody and/or control of the City, because they pertain to the functions of a City official.

I also note that the Auditor General's "responsibilities" are set out in section 178(1) of the *COTA*:

> 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 for money in city operations.

In my view, these duties represent a basic aspect of the City's functions and responsibilities, and relate closely to its mandate and operations.

I also consider it significant, in relation to custody and control, that the Auditor General reports to City council, as noted in section 177 of the *COTA*. This is a significant indicator that the City has control over the Auditor General's activities and records.

As well, the distinction between the facts in this case and those relied on by the Court in *David v. Ontario (Information and Privacy Commissioner)* (cited above), is instructive. In *David*, the Court upheld a decision of this office that the investigation notes of The Hon. Coulter Osborne, appointed by the City on an *ad hoc* basis to inquire into the process adopted by the City in relation to the redevelopment of Union Station, were not within the City's custody or control. Mr. Osborne reported his findings to City council, and his report was published on the City's website. But in upholding the decision of this office that Mr. Osborne's notes were not within the City's custody or control, the Court cited the following as "more important" factors:

> … Mr. Osborne was *neither an employee nor officer of the City*. He was an independent person appointed to conduct an inquiry into, and to report on the selection process. *He was to conduct the inquiry and make his report independently of, and at arms-length from the City*. In my view, he was not an agent of the City in the traditional sense of one who has the authority to bind his principal; Mr. Osborne had no such power or authority. His recommendations were not to be binding on anyone. Nothing in the record before us leads to the conclusion that the documents were ever actually controlled by the City. Although they were in some cases stored in a computer owned by the City, it is clear that the computer was allocated to the inquiry and not accessible to persons not associated with the actual inquiry. [Emphases added.]

In my view, the role of Mr. Osborne is distinguishable from that of the Auditor General, who as noted, need not be a City employee but is certainly a City official, and one who holds an ongoing position with responsibility for important matters central to the City's proper discharge of its municipal functions and responsibilities. This is a strong indication that the Auditor General's records are within the custody and control of the City.

Before leaving this aspect of the City's representations, I must address a further submission made by the City under that heading. This submission focuses on the role of the Commissioner. The City submits that if the Commissioner has jurisdiction to hear an appeal in relation to records of the Auditor General, this would have "… the absurd result that the City, its staff and councillors could not exert *any* control over the confidential records of its Accountability Officers – even to the limited extent of having the City Clerk review the document – except by making a request for access under the *Act*, even though these sections are to prevail over the *Act*."

I do not agree that the ability of the Commissioner to hear appeals concerning the applicability or non-applicability of section 181(1) of the *COTA* has any of these effects. The Commissioner's jurisdiction does not oust the authority of the City over the records of one of its officers; such a suggestion is itself absurd. If section 181(1) applies and requires that a record remain secret, and not be disclosed to a member of the City's staff who wants to see it, the same result would occur regardless of whether or not a request is made under the *Act*.

The fact that the application of section 181(1) of the *COTA* is within the Commissioner's power to determine, in the context of an access appeal, simply adds a necessary layer of review and accountability where a member of the public seeks access to a record for which the City relies on that section.

Where records are in the custody or control of the City, and are not otherwise excluded from the application of the *Act* (see, for example, section 52), they are within the Commissioner's jurisdiction. This includes the determination, on appeal, of whether a prevailing confidentiality provision as contemplated in section 53(1) of the *Act*, such as section 181(1) of the *COTA*, applies. If they are not, the Commissioner would have the authority to order disclosure.

In fact, as discussed below, even where records are claimed to be excluded from the scope of the *Act* under section 52, the Commissioner retains the authority to conduct an inquiry and to determine whether the *Act* applies, or does not apply, to such records.

To conclude, based on the indicia of custody and/or control listed above, the statutory mandate of the Auditor General, the Court's reasons in *David*, and the evidence before me, I do not accept the City's argument that it lacks custody and/or control over the Auditor General's records.

Section 181 provides a complete code in relation to the disclosure of information

Although the City characterizes this part of its submissions as an argument that section 181 is a "complete code," the essence of the City's position is that section 181 is sufficiently broad to oust even the Commissioner's power to conduct an inquiry to consider whether section 181(1) applies to a record. I have already alluded to this in my observations about the Commissioner's powers in relation to records under the custody or control of the City.

Turning specifically to the "complete code" issue, I consider it highly significant that the *COTA* does not provide any mechanism that would serve as an alternative to an appeal to the Commissioner to review the issue of whether section 181 applies as a basis for denying access to records. This would appear to be a significant omission from a regime that the City claims to be a "complete code," particularly where the provision appears in a statute intended to "[e]nsure that the City is accountable to the public and that the process for making decisions is transparent" (section 2 of the *COTA*, as quoted above), and in a portion of that same statute (Part V) that is entitled, "Transparency and Accountability." For this reason, and for the additional reasons that follow, I reject the City's "complete code" argument.

In this part of its representations, the City goes on to argue that section 182 of the *COTA* prevents the Auditor General or any person acting under his or her instructions from being called as a witness in a civil proceedings in relation to anything done under the authority of the Auditor General's office, and that if courts have no power of compulsion, neither should the Commissioner. I would observe that the enabling statute of many other institutions subject to the Commissioner's authority also contain testimonial immunity provisions (see, for example, section 32 of the *Ontario Municipal Board Act* and section 10 of the *Ontario Energy Board Act*). These provisions do not mean that the Commissioner has no power to conduct an inquiry, compel testimony or require the production of records with respect to appeals in which they are involved as institutions.

To the contrary, the Commissioner does have these powers, even where there is a claim that the records are excluded from the scope of the *Act*. In *Ontario (Minister of Health) v. Big Canoe*, [1995] O.J. No. 1277, the Ontario Court of Appeal considered the impact of a claimed exclusion under section 65 of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*) on the Commissioner's inquiry powers. The power to compel production of a record in section 52(4) of the provincial *Act* (the equivalent of section 41(4) of the *Act*) was at issue. The Ministry had claimed that the records were excluded from the scope of the *Act* under section 65(2), a provision (now repealed) that applied to certain clinical records as defined under the *Mental Health Act*. The Court found that the Commissioner had the power to conduct an inquiry and require that records be produced as part of the inquiry powers granted under section 52 of the provincial *Act* (section 41 of the *Act*).

In upholding the Commissioner's power to exercise her inquiry powers in that situation, the Court stated:

> It is our opinion also that s. 52(4) must be construed as being applicable to all inquiries conducted pursuant to the Act. Having regard to the purposes of the Act and the manner in which the section is framed, *the procedures available to the Commissioner under s. 52 in conducting an inquiry to review a head's decision are applicable to inquiries relating to a head's decision that records sought by a requester are excluded* by s. 65(2). [Emphasis added]

The impact of an excluding provision under section 65 of the provincial *Act* (section 52 of the *Act*) is arguably stronger than that of a prevailing confidentiality provision such as section 181(1) of the *COTA*, read in conjunction with section 53(1) of the *Act*. Accordingly, it is clear that the Commissioner's power to conduct an inquiry, and all the powers in section 41 of the *Act* (the equivalent of section 52 of the provincial *Act*), are available even where an institution seeks to rely on a provision which, if applicable, means that records are not subject to the *Act*.

The Commissioner's ability to invoke her inquiry powers even where an institution claims that a record is excluded from the scope of the *Act*, or as in this case, is subject to a prevailing confidentiality provision (either of which, if applicable, would mean that the Commissioner lacks the jurisdiction to order disclosure), is also consistent with the principle that tribunals are required to address matters involving their jurisdiction, as affirmed in *Re Morgan et al. and Windsor R.C.S.S. Board* (1979), 112 D.L.R. (3rd) 163 (Div. Ct.). In that case, the Court stated (at page 168):

> Finally, I wish to turn to *Re Ontario Labour Relations Board; Bradley et al. v. Canadian General Electric Co. Ltd.*, [1957] O.R. 316, 8 D.L.R. (2d) 65, and particularly at pp. 334-5 O.R., p. 81 D.L.R., where in dealing with the jurisdiction of an inferior tribunal, Roach, J.A., for the Court says:
>
> > When the jurisdiction of an inferior tribunal to decide what I will call the main question before it, depends upon a collateral matter it must, of course, decide that preliminary or collateral matter. It can decide it only on evidence. … If there is evidence then the tribunal weighs it and concludes that the facts on which its further jurisdiction depends either have or have not been proven to exist.
>
> *This passage makes it clear that an inferior tribunal must, as a preliminary to deciding the main question before it, make a decision upon a collateral or preliminary matter affecting its jurisdiction*. [Emphasis added]

The City concludes its representations on this point by referring to *Ontario (Solicitor General) v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 2218 (Div. Ct.) in which an order for production for records alleged to be subject to the *Young Offenders Act* was quashed by the Divisional Court. The order had been made under section 52(4) of the provincial *Act*.

As the City notes, Order P-804 was quashed on the basis of the doctrine of federal legislative paramountcy. Such questions depend on a finding of conflict, that is, a finding that obedience of one statute involves contravention of another (see *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1). In the present appeal, the question is how far section 181(1) of the *COTA* extends. Both it and the *Act* are provincial statutes so there is no question of federal paramountcy. As well, there is no question of compliance with one statute entailing defiance of the other; the only question to decide is the extent or reach of section 181(1) of the *COTA*. If section 181(1) applies, then the affected records are subject to a confidentiality provision that prevails over the *Act*. This is not a question of conflict between statutes.

On the contrary: the solution is a matter of statutory interpretation, and as evidenced by the decision in *Morgan*, above, it is a decision the Commissioner and her delegates must make in appeals under the *Act*. I therefore conclude that, where section 181(1) of the *COTA* is the basis for a denial of access in a request made under the *Act*, the Commissioner has the authority to determine whether section 181(1) applies. I therefore turn to consider the substantive impact of section 181 in the context of this appeal.

Scope of Section 181(1) of the *COTA*

Assessment of this issue requires detailed analysis of the relevant statutory provisions and their constituent wording. I will begin with section 181(1) of the *COTA*.

This section sets out the basic confidentiality provision relied on by the City, which I reproduce again here:

> 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.

Thus this section applies to:

- the Auditor General; and
- every person acting under the Auditor General's *instructions*.

Other than the Auditor General, the only other City staff members affected by this provision are those acting under the Auditor General's "*instructions*." A further limit on the reach of this section arises from the stipulation that a person who is required to preserve secrecy must do so in relation to "*matters*" that come to his or her knowledge "*in the course of his or her duties under this Part*".

These are significant limitations on the reach of this provision, and the meaning of each must be considered.

"Instructions"

In order for a person to be found to act under the Auditor General's "instructions," the Auditor General would be required to possess the authority to "instruct" that person. In my view, this would apply to the Auditor General's staff, or any other person to whom, by statutory authority or the terms of reference of an investigation, the Auditor General would have the power to issue binding directives. For persons other than the Auditor General's own staff, I conclude that the most relevant authority to "instruct" for the purposes of section 181(1) would entail the power to compel the individual to provide information.

Section 179(1) provides assistance in determining the "persons" who, in addition to the Auditor General's own staff, may be considered to act under the Auditor General's "instructions." This section states:

> The City, its local boards and the city-controlled corporations and grant recipients referred to in subsection 178(3) shall give the Auditor General such information regarding their powers, duties, activities, organization, financial transactions and methods of business as the Auditor General believes to be necessary to perform his or her duties under this Part.

Given the reference in section 179(1) to "the City", I conclude that in this case, in addition to the Auditor General's own staff, other City staff who are required to give information to the Auditor General in relation to the information listed in that section act under the Auditor General's "instructions" for the purposes of section 181. This would also be the case for local boards and city-controlled corporations, but no such entities are involved here. Information in the hands of City grant recipients would likely not have the potential to be accessible under the *Act* unless the grant recipient is an institution in its own right.

To summarize, the following individuals may, depending on the facts, be seen as "acting under the Auditor General's instructions":

- the Auditor General's own staff;
- a local board, or a city-controlled corporation, or a grant recipient, who comply with instructions from the Auditor General to provide information regarding their powers, duties, activities, organization, financial transactions and methods of business.

However, it is also significant that section 181(1) limits its secrecy requirement to all "matters" that come to a person's knowledge "in the course of his or her duties" under Part V of the *COTA*. As discussed in more detail below, the mere fact that a City staff member acts under the Auditor General's instructions when providing information would not require that individual to preserve secrecy with respect to information that came to their attention during the course of their ordinary work, which for most City staff would *not* involve duties under Part V. Also, secrecy is required in relation to "matters", a term which, in my view, has a more specific connotation than "information," as explored in more detail in the discussion below.

Accordingly, I now turn to a detailed examination of these other terms found in section 181(1).

"Matters"

In *Black's Law Dictionary*, 8th ed., by Bryan A. Garner (St. Paul, Minn.: West, 2004), "matter" is defined as follows:

> 1. A subject under consideration, esp. involving a dispute or litigation; … 2. Something that is to be tried or proved; an allegation forming the basis of a claim or defense…. (p. 999)

The following entries from the definition in the *Oxford Concise Dictionary*, 6th ed., by J.B. Sykes (Oxford University Press, 1976) may also be helpful in understanding its meaning:

> 3. (Logic) Particular content of proposition, distinguished from its form. 4. Material for thought or expression" subject of a book speech, etc. … 7. Affair, thing to be done or considered, esp. of a specified kind….

From these definitions, I conclude that "matters" appears to include a reference to person's knowledge of the fact that a particular issue or complaint is under consideration by the Auditor General, and/or the particulars of that complaint, and to ancillary information derived solely in that context. It is a more specific term than "information." In my view, it does not include information that came to a person's attention during the course of their everyday work, whether or not that information was later provided to the Auditor General.

"In the Course of Duties under Part V"

The requirement that a "matter" must have come to the knowledge of the Auditor General or the person acting under his or her instruction "in the course of his or her duties under" Part V of the *COTA* provides a further limitation on the reach of this section.

As already discussed, information provided pursuant to section 179(1), above, is subject to the confidentiality requirement in section 181(1) where this information is in the hands of the Auditor General or a person acting under his or her "instructions." But this is to be distinguished, in my view, from information in the hands of a staff member of the City that such a person receives in the course of his or her normal duties, which later becomes the subject of a request for information by the Auditor General. In my view, such information (as opposed to knowledge of the "matter" of the investigation or complaint) would *not* be caught by section 181(1) because it did not come to the staff member's knowledge "in the course of duties under" Part V of the *COTA* as the section requires.

Moreover, imposing the non-disclosure obligation on original information in the hands of such staff members would, in many instances, render them unable to perform their day-to-day functions to which the original information relates. Where applicable, this analysis would also

apply to staff of another institution under the *Act* that is compelled to provide information to the Auditor General under section 179(1), such as a local board or city-owned corporation.

Accordingly, I conclude that, in the hands of City staff (or staff of another institution under the *Act* compelled to provide information to the Auditor General under section 179(1), such as a local board or city-owned corporation), and who are not staff of the Auditor General, original information that remains in the hands of the staff member for the purposes of his or her ordinary tasks would not be subject to section 181(1), even if a copy has been given to the Auditor General. Only information about the complaint or investigation being conducted by the Auditor General would be caught.

With respect to the nature of "duties" under Part V, I conclude that providing information when "instructed" to do so by the Auditor General would be a duty under Part V, but as already noted, if the information came to the knowledge of the staff member as part of his or her everyday work, and not in connection with Part V of the *COTA*, the information itself would not be caught by section 181(1) in the hands of the staff member. Only information about the Auditor General's investigation that was acquired by the staff member as a consequence of being instructed or asked to provide information to the Auditor General would be covered.

Further information about the meaning of "duties under Part V" is provided by section 178(3) of the *COTA*. This section describes the duties of the Auditor General, indicating that "… in carrying out his or her *responsibilities*, the Auditor General may exercise the powers and perform the duties *as may be assigned to him or her by city council*…."

Section 178(5) may also be pertinent. It allows the Auditor General to "… delegate in writing to any person, other than a member of city council, any of the Auditor General's powers and duties under this Part."

Where sections 178(3) or 178(5) are pertinent to the scope of a person's duties, they must be taken into account in the application of section 181(1). I am not aware of any circumstances in the present appeal that would bring them into play, but if they are relevant, they must be considered in responding to question 4 in the test for the application of section 181(1) that is set out below.

Effect of Section 181(2)(a)

Even if information meets the requirements outlined above under section 181(1), it may still be disclosed if one of the exceptions in section 181(2) applies. Section 181(2)(b) refers to disclosures mandated by the *Criminal Code*, and as that is unlikely to impact a request under the *Act*, I will not discuss it here.

Section 181(2)(a) refers to the Auditor General's reporting function and has potential relevance in this case and, likely, in many others. Repeated here for ease of reference, this section states:

> … 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,
>
> > in connection with the administration of this Part, *including reports made by the Auditor General*, or with any proceedings under this Part; …

References to "administration of this Part" and "proceedings under this Part" would relate to the process adopted by the Auditor General in performing his or her duties. For example, evidence may be gathered and proceedings (e.g. akin to those under the *Public Inquiries Act* – see section 180(2)) may be conducted as needed.

The reference to the reporting function represents a clear legislative signal that reports of the Auditor General are not caught by this confidentiality provision.

Determining whether section 181(1) applies

The City does not address the application of section 181 beyond taking the position that if a record has anything to do with an investigation by the Auditor General, it is automatically excluded from the application of the *Act* and the jurisdiction of the Commissioner.

For the reasons already outlined, I do not accept this position. As I have noted, section 181(1) contains significant limiting language which must be considered. As well, in my view, section 181(2)(a) makes it clear that reports of the Auditor General are not subject to the confidentiality provision at section 181(1).

Moreover, any reading of the two statutes that takes their purposes into account provides additional support for this interpretation, as set out earlier in this order. Both the *COTA* and the *Act* are concerned with government accountability, which would appear to be a particularly important function of the Auditor General, especially in his or her reporting function. In that context, and given the wording of the exception provided by section 181(2)(a) of the *COTA*, an interpretation excluding reports of the Auditor General from the application of the *Act* is not tenable.

In this case, the appellant is plainly asking for a specified report of the Auditor General. Rather than stating whether such a record exists, the City has chosen to attempt to exclude that category of records from the scope of the *Act* and the jurisdiction of this office. I reject this approach, and conclude that reports of the Auditor General would not be subject to the confidentiality provision at section 181(1) of the *COTA* because they are caught by the section 181(2)(a) exception. Such records would therefore be accessible under the *Act* unless an exclusion or exemption applies.

As well, 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.

From the forgoing analysis, I have developed the following test for determining whether section 181(1) applies. This test applies to requests made to the City. It would also apply, with any necessary changes, in the event that such a request is made to another institution mentioned in section 179(1), such as a local board or city-owned corporation.

1. Is the requested information found in a report of the Auditor General? If so, the information is subject to the *Act* and an access decision must be made.

If responsive records that are not reports of the Auditor General contain responsive information, the following further questions must be addressed. In order for the exclusion at section 181(1) to apply, the answer to each of these questions must be "yes".

2. Is every person who has a copy of the record containing the requested information in his or her possession either the Auditor General or a member of the Auditor General's own staff? Alternatively, where a record containing the requested information is in the possession of a person who is not a member of the Auditor General's own staff, but is a City staff member or official whose records are otherwise subject to the *Act*, does that person act "under the instructions" of the Auditor General?

3. Does the record reveal the existence of, or nature of, a "matter" that is, has been or is about to be investigated by the Auditor General?

4. Where the record containing the requested information is in the possession of a person who is not a member of the Auditor General's own staff, but is a City staff member or official whose records are otherwise subject to the *Act*, did information about the investigation, complaint or proceedings being conducted by the Auditor General come to the person's knowledge in the course of his or her duties under Part V of the *COTA*?

If the answer to any of questions 2, 3 or 4 is "no," then the record or portion to which that negative answer pertains is *not* subject to the confidentiality provision at section 181(1) of the *COTA*, and is therefore subject to the *Act*.

Based on these conclusions, I will order the City to conduct a search of its records to determine whether it has a copy of the relevant report, or other records "reasonably related" to the request that are not subject to the confidentiality provision in section 181(1), or are subject to the exception in section 181(2)(a) of the *COTA*, and therefore subject to the *Act*. In so doing, the City must consider the questions outlined above. If the appellant disagrees with the City's determinations in relation to any of these issues, he may file an appeal with this office.

ORDER:

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.

4. The City is currently involved in a strike by many of its employees, which may impair its ability to respond to this order. In the event that this is the case, the City may contact me for further directions and/or ask that I vary the time within which it is required to comply with this order.

Original Signed by: July 21, 2009
John Higgins
Senior Adjudicator