

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2876-F

Appeal MA08-408

City of Windsor

April 25, 2013

Summary: This final order disposes of the remaining issue raised as a result of the City of Windsor's (the city) access decision in response to a request made for a draft audit report. In this order, the adjudicator finds that the draft audit report in the hands of the Auditor General is captured by the confidentiality provision in section 223.22 of the *Municipal Act, 2001*, which is a confidentiality provision that prevails over the *Municipal Freedom of Information and Protection of Privacy Act*. The city's decision to withhold the record is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 53(1); *Municipal Act, 2001*, section 223.22.

Orders Considered: MO-2629-R, PO-3017.

Cases Considered: *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271 (S.C.C.); *Niagara Escarpment Commission v. Paletta International Corp.*, 2007 CanLII 36641 (Div. Ct.); *R. v. Puskas*, [1998] 1 S.C.R. 1207 (S.C.C.).

OVERVIEW:

[1] This final order disposes of the remaining issue raised as a result of the City of Windsor's (the city) access decision in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for "the Audit Report

prepared by [named former city auditor] with respect to the 400 City Hall Square building," as well as other records relating to the Windsor-Detroit tunnel.¹

[2] The city issued a decision to the requester, denying access to the audit report, claiming the application of section 53(1) (confidentiality provision of another Act) of the *Act*. The city also advised the requester that City Council had established the Auditor General's Office as the audit function for the city, and that the record resided in the Auditor General's Office and was exempt from the provisions of the *Act*, by virtue of section 223.22 of the *Municipal Act, 2001*.

[3] The requester (now the appellant) appealed the city's decision to this office. During the mediation of the appeal, the appellant expressed the view that the Auditor General had not been appointed at the time the record at issue was prepared. The appellant also raised the possible application of the public interest override in section 16 of the *Act*. It was, therefore added as an issue in the appeal.

[4] The appeal moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the file sought and received representations from the city and the appellant. Representations were shared in accordance with this office's *Practice Direction 7*.

[5] The file was then transferred to me for final disposition. For the reasons that follow, I uphold the city's decision to withhold the information at issue, and dismiss the appeal. In the discussion that follows, I find that the record is not accessible under the *Act* by section 53(1) of the *Act*, as a result of the confidentiality provision in section 223.22 of the *Municipal Act, 2001* prevailing over the *Act*.

RECORD:

[6] The sole record remaining at issue is entitled "Post Construction Audit Report on the 400 City Hall Square Building – Draft Copy for Audit Committee Discussion – In-camera and Confidential."

ISSUE:

Is the record not accessible under the *Act* by virtue of section 53(1) of the *Act*, as a result of the confidentiality provision in section 223.22 of the *Municipal Act, 2001*?

¹ In Order MO-2617-I, Adjudicator Catherine Corbin dealt with the other records relating to the Windsor-Detroit tunnel, as well as a related fee estimate issue.

DISCUSSION:

Background

[7] The city's position is that Auditor General's records, including the record at issue, fall outside the scope of the *Act* by virtue of section 53(1) of the *Act*, as a result of the application of the "confidentiality provision" in section 223.22 of the *Municipal Act, 2001*. Section 53(1) of the *Act* states:

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

[8] Section 223.22 of the *Municipal Act, 2001* sets out the duty of confidentiality to which the Auditor General is bound, as follows:

(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 223.20 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*.

[9] The city states that the Office of the City Auditor was created on April 13, 2004 by a City Council resolution.² Prior to April 13, 2004, internal auditing at the city was

² Resolution 314/2004.

the responsibility of the city's Internal Audit and Performance Measurement Department. The resolution directed that the Office of the City Auditor shall be functionally and administratively independent from city administration, and required that the auditor conduct their work in accordance with certain professional practice standards.³ At the time City Council passed the resolution, an individual was the Acting Director of Internal Audit and Performance Measurement, and then became the City Auditor on April 13, 2004.

[10] The city goes on to explain that the work described in the record began in 2006 when the Office of the City Auditor undertook a post-construction review of the approval processes and management of the construction of 400 City Hall Square East. The City Auditor at that time was the lead auditor in charge of preparing the review. In April of 2007, the City Auditor brought the "draft of his future potential report" (the record at issue) before the Audit Committee for discussion purposes only. The city submits that it was not intended to be a final report and that prior to the draft document's completion, the City Auditor retired and another auditor became the lead auditor in charge of completing the review of the 400 City Hall Square building.

[11] Effective January 1, 2007, by way of Bill 130,⁴ the *Municipal Act, 2001*, was amended to grant municipalities the discretion to create an Office of the Auditor General with internal audit powers. These amendments authorized municipalities to appoint an Auditor General who reports to Council and who is responsible for assisting Council in holding itself and its administrators accountable with respect to public funds.⁵ The legislation also sets out rules for access to corporate records by the Auditor General. The amendments did not require a municipality to appoint an Auditor General, but left the appointment of an Auditor General to the discretion of each municipality.⁶

[12] The city advises that on June 6, 2008, the city's Audit Committee met, and passed a motion that the establishment of an internally staffed Auditor General's Office pursuant to Bill 130 be approved. The city also advises that on June 26, 2008, the city's Audit Committee recommended the above to City Council.⁷

[13] Subsequently, on July 7, 2008, City Council adopted the recommendations of the Audit Committee and effective the same day, created the Office of the Auditor General, in which all staff of the City Auditor's Office became staff of the Auditor General's Office, with all of the powers and duties related to that Office as set out in the *Municipal Act, 2001*. The city began the process of recruiting a permanent Auditor

³ Standards for the Professional Practice of Internal Auditing and Code of Ethics promulgated by the Institute of Internal Auditors.

⁴ The *Municipal Statute Law Amendment Act, 2006*.

⁵ See section 223.19 of the *Municipal Act, 2001*.

⁶ With the exception of the City of Toronto, which is subject to the *City of Toronto Act*, which mandates the appointment of an Auditor General.

⁷ The Audit Committee also made further administrative recommendations to City Council in regard to the Office of the Auditor General.

General to lead the Office and, in the meanwhile, appointed the auditor in charge of completing the review of the 400 City Hall Square to the Office of the Auditor General on July 7, 2008.

[14] The appellant's request⁸ for the record at issue was made on July 3, 2008. The city issued its access decision with respect to the record on October 10, 2008.

[15] Finally, the city advises that the final audit report was completed and made public in two phases. The first phase was released in late 2009, and the second phase in 2010. In addition, the city states that City Council passed a resolution that accepted all 13 recommendations of the publicly available audit report.

The *Municipal Act, 2001*

[16] Under Part V.1 (Accountability and Transparency) of the *Municipal Act, 2001*, section 223.19 creates the office of the Auditor General. This section states, in part:

(1) Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an Auditor General who reports to council and is responsible for assisting the council in holding itself and its administrators accountable for the quality of stewardship over public funds and for achievement of value for money in municipal operations.

(2) Despite subsection (1), the responsibilities of the Auditor General shall not include the matters described in clauses 296(1)(a) and (b) for which the municipal auditor is responsible.⁹

(3) Subject to this Part, in carrying out his or her responsibilities, the Auditor General may exercise the powers and shall perform the duties as may be assigned to him or her by the municipality in respect of the municipality, its local boards and such municipally-controlled corporations and grant recipients as the municipality may specify.

[17] Sections 223.20 and 223.21 set out the powers of the Auditor General, which include authority to examine any person under oath and to obtain information regarding the "powers, duties, activities, organization, financial transactions and methods of business" of municipalities, local boards, and municipally-controlled corporations and

⁸ The appellant's original request was a multi-part request. The city issued a fee estimate and time extension to the appellant on September 2, 2008 with an option to narrow the request, as there were over 100,000 pages of records. On September 12, 2008, the appellant wrote to the city, splitting his original request into two parts. The record at issue was included in the first part. On September 15, 2008, the city sent a letter to the appellant stating that a decision on the first part of the request would be available by October, 15, 2008.

⁹ These clauses relate to auditing the accounts and transactions of the municipality and its local boards.

grant recipients "free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by the municipality, the local board, the municipally-controlled corporation or the grant recipient."

[18] As previously stated, section 223.22 of the *Municipal Act, 2001* sets out the duty of confidentiality to which the Auditor General is bound.

Representations

The city

[19] The city's argument is, essentially, that a proper interpretation of section 223.22 of the *Municipal Act, 2001* prohibits the disclosure of the "draft report" that is at issue in this appeal.

[20] The city submits that it has established that the Auditor General's Office and the staff within it have been operating as auditors under Part V.1 of the *Municipal Act, 2001* with all powers and duties under that part since July 7, 2008.

[21] The city further submits that the confidentiality provisions in the *Municipal Act, 2001* apply to all staff in the Auditor General's Office from the time of its creation regardless of whether a permanent "Auditor General" had yet been named.

[22] Turning to the record at issue, the city submits that it is misleading to refer to it as the "Post Construction Audit Report on the 400 City Hall Square Building." It submits that the record is more accurately described as "working papers" and is not an "audit," draft or otherwise, in the ordinary use of that word, for two reasons:

- Because an audit usually refers to a review of the financial books and records of the corporation by accountants, for the protection of shareholders in a private or public company, and of taxpayers in a municipal corporation. These working papers are not for an external audit of the type prepared by conventional auditors. They are for an internal review by a statutory creature known as the Auditor General, which is an entirely different internal function, which can be characterized as somewhat like efficiency experts examining the efficiency and effectiveness of internal municipal processes; and
- Under the rules and protocols of municipal internal auditing, a work in progress does not become an audit unless and until it has been sent in draft form to the municipal administration for comment, the comments have been received, and the work is then taken to completion.

[23] The city states that because the record is a draft of a future report, it is fundamentally different from an audit and there can be no such thing as a draft audit; only a draft report. It is only the final document, the city argues, that is an audit. The city further submits that the public has no right of access to the draft of what may or may not become a future report by the Auditor General by virtue of the proper interpretation of section 223.22 of the *Municipal Act, 2001*.

[24] Moreover, the city submits that the report, which was reviewed by the Audit Committee in April of 2007 for discussion purposes only, was clearly not intended to be a final report for several reasons, as follows:

- The project's financial reports had not been formalized, and, therefore, the Office of the City Auditor was unable to determine whether the city received value for its money, as it did not know yet how much money had been spent;
- A significant amount of critical documentation was yet to be received and reviewed, as the internal auditing profession required, prior to the completion of a report;
- The draft contained certain legal opinions and conclusions (which internal auditors, who are not lawyers, have no qualifications or authority to present) which had not been verified or substantiated by any lawyer for correctness, and which have subsequently, upon review, been found to be incorrect;
- Several suppositions or hypotheses as to what the facts might be had yet to be verified;
- Several of the draft conclusions based on supposition or hypotheses have since been found to be inaccurate and unreliable; and
- Parties alleged to have done something wrong have been incorrectly identified, and may have done nothing to justify the hypothetical and unverified criticisms.

[25] Furthermore, the city submits that the content of the draft prepared by the City Auditor is something that came to the knowledge of the internal audit staff in the course of their duties, because their duties included assisting the City Auditor in the preparation of the draft. It has not been made public and has only been made available under the control and direction of the lead auditor to a limited number of city managers on a "need to know basis" in order to receive their comments.

[26] There are two exceptions, the city states, to the duty of secrecy set out in section 223.22(2) of the *Municipal Act, 2001*. The first exception is something that is required to be communicated in the ordinary course of administration, such as reports to the public made by the Auditor General, and legal proceedings. The second exception is something that is required to be communicated in the course of a criminal prosecution. The only relevant exception, the city argues, is reports made to the public in the ordinary course of administration.

[27] The city submits that there is no legal requirement that reports made to the public must include earlier drafts of those reports.

[28] The city goes on to argue that the confidentiality provisions of the *Municipal Act, 2001*, as they relate to matters that come to the attention of the Auditor General and every person acting under the Auditor General's instructions, extends to draft reports for a particular reason. The reason, the city states, is that the legislature was of the view that the Auditor General and staff could function effectively only if they preserved secrecy with respect to all matters that come to their knowledge in the course of their duties under Part V. 1 of the *Municipal Act, 2001*. This duty of secrecy, the city argues, prevails over the *Act*.

[29] In addition to the city's main argument set out above, the city's secondary arguments are that the *Act* does not contemplate the disclosure of drafts of reports, or that even if the *Act* did apply, the "draft document" is not a "record" as contemplated by the *Act*, or that if it is a record, it is exempt under the discretionary exemption in section 11 of the *Act*.

The appellant

[30] The appellant states that City Council created the Office of the Auditor General by adopting the following resolution on July 7, 2010. It reads, in part:

I. That the establishment of an internally staffed Auditor General's Office BE APPROVED pursuant to the legislation as set out in Bill 130, and now included within the Ontario Municipal Act.

II. That the Auditor General's Office BE APPROVED to report directly to the Audit Committee, both functionally and administratively.

III. That the internal staffing structure of the Auditor General's Office BE APPROVED to consist of an Auditor General position employed as a fixed term contract position, and to be staffed with City of Windsor employees reporting to that Auditor General position. This structure will assist in information retention when the Auditor General's contracted employed term is complete.

IV. That the Executive Director of Human Resources BE REQUESTED to provide a report to the Audit Committee relating to the recruitment process of the fixed term employment contract for the Auditor General position.

V. That the recruitment process, to be conducted by an external firm, for the Audit Committee's selection of the internally staff Auditor General contract position BE DEVELOPED with the assistance from the Executive Director of Human Resources.

[31] The appellant submits that the record was created by the city's internal auditor and was not initially intended to be used by the Auditor General and/or its office. In addition, the appellant submits that the Office of the Auditor General was not created until July 7, 2010¹⁰, which was after the date of his request.¹¹

[32] Further, the appellant argues that the record is not subject to the confidentiality provision in the *Municipal Act, 2001* for the following reasons:

- The Council resolution that was adopted, which created the Office of the Auditor General, improperly directs it to report to the Audit Committee, whereas the *Municipal Act, 2001*¹² directs the Office of the Auditor General to report to City Council;
- The Council resolution improperly¹³ delegates authority both "functionally and administratively" to the Auditor General's Office in the absence of an Auditor General;
- In the absence of an Auditor General, neither City Council nor the Audit Committee had the authority to delegate "powers and duties" to any individuals other than those permitted under the *Municipal Act, 2001*;
- The record was not prepared by the Auditor General and/or the Office of the Auditor General;
- The city's internal Audit Charter does not grant authority for an elected official to determine whether or not any record may be publicly disclosed. The Audit Charter only permits the Auditor with the authority to determine

¹⁰ The Office of the Auditor General was created on July 7, 2008. The appellant's representations may reflect a typing error.

¹¹ The appellant's request is dated July 3, 2008.

¹² Section 223.19.

¹³ The appellant specifically indicates that section 229.19(3) of the *Municipal Act, 2001* has been improperly interpreted. The appellant's representations may reflect a typing error.

whether or not information is made available to the public and/or to City Council. This process may include consultation between the city solicitor and the Auditor;

- According to a media report¹⁴ of July 2, 2008, the record at issue was reviewed by the city's Mayor (Head of Council) to determine whether it should be discussed by Council. Therefore, the record was an "audit" in a form Internal Audit believed satisfactory to be released to City Council;
- Given that the Mayor (Head of Council) reviewed much of the record and that he is not a member of the Audit Committee or the Auditor General's Office, nor operating under the direction of the Audit Committee/Internal Audit/Auditor General and/or the Office of the Auditor General, the record is not subject to the confidentiality section in the *Act*; and
- The record was in the control of the city at the time of the request.

[33] Further, the appellant argues that the record at issue was intentionally moved to the Office of the Auditor General after his request was filed, in an attempt to circumvent the access requirements of the *Act*.

[34] In response to the city's secondary arguments, the appellant submits that the record at issue, whether it be a draft or not, is a "record" as contemplated by the *Act*, and that the city should not be permitted to raise further exemptions without notice to him. In addition, the appellant submits that there is a compelling public interest in the release of the record as \$600,000 has been spent since 2006 conducting this audit and there have been allegations of political interference by Audit Committee members.

The city's reply

[35] In reply, the city submits that the appellant's argument that the Office of the Auditor General was not established at the time the record was created and that the record was not initially intended to be used by the Auditor General is chronologically correct, but legally irrelevant. The city reiterates that the confidentiality provisions in the *Municipal Act, 2001* apply to all staff in the Auditor General's Office from the time of its creation and are not limited to the selection or career of a particular incumbent of the head of that office carrying the title "Auditor General." The city rejects arguments that because the official "Auditor General" had not yet been appointed (at the time of the request), or because the person with the title was not yet there to issue instructions to their staff, that there was no requirement of secrecy. The city argues that such arguments are based on an overly literal interpretation of legislation, without regard to its purpose or context.

¹⁴ This office was not provided with a copy of the media report.

[36] The city also addresses the appellant's argument that City Council's resolution was improperly drafted because it directs the Auditor General to report to the Audit Committee rather than to City Council. The city submits that the *Act* says nothing about Council resolutions and the *Municipal Act, 2001* permits Council to delegate certain functions such as this one. The Auditor, the city states, initially presents draft reports to an expert Audit Committee, and then ultimately reports to City Council.

[37] Further, the city submits that the legislative intent was to make the secrecy requirement applicable to the Office of the Auditor General, and that equally restrictive secrecy requirements were applicable prior to the creation of the Office.

[38] With respect to the appellant's argument that the city's Internal Audit Charter does not grant authority to an elected official to determine whether a record should be disclosed, the city submits that the decision to have the draft audit reviewed prior to release was not the decision to refuse to release it. The city goes on to state that the decision not to release the record at issue was made by the Lead Auditor, who is not elected, and that the draft record was shared with city management for the purpose of seeking comments only.

[39] In addition, the city submits that draft audit reports are an integral part of the auditing process and forcing the release of drafts would inhibit the necessary candour required in making internal audit reports.

[40] The city reiterates that the *Act* does not contemplate the release of draft reports, "control" of a draft document does not change the nature of its substance and is irrelevant in this appeal, and the record at issue is not a "record" for purposes of the *Act*.

Analysis and Findings

[41] The central issue in this appeal is whether the record at issue is captured by the wording of section 223.22 of the *Municipal Act, 2001* and the application of section 53(1) of the *Act*. If that is the case, then the confidentiality provision of the *Municipal Act, 2001* prevails over the access rights provided to the appellant under the *Act*.

[42] As set out in the city's representations, the record is a draft audit report which was initially written by the City Auditor of the Office of the City Auditor¹⁵ and its staff in 2006.

[43] The Municipal Act, 2001 was amended, effective January 1, 2007 to, among other things, give the city authority to appoint an Auditor General. On June 6, 2008,

¹⁵ This office was created in 2004 by City Council resolution.

the city's Audit Committee met and carried a motion to establish such an Office. In the Audit Committee's minutes, there is reference to a discussion about a report of the General Manager of Corporate Services and Executive Assistant to the General Manager of Corporate Services dated April 28, 2008. The report discusses implementations options for the Auditor General's Office and the Internal Audit Office.

[44] The Audit Committee's motion was approved by City Council on July 7, 2008 and effective immediately, all staff of the Office of the City Auditor became staff of the Auditor General's Office with all of the powers and duties as set out in the applicable provisions of the *Municipal Act, 2001*. The appellant's access request was made on July 3, 2008.

[45] While the appellant is of the view that the record at issue was moved to the Office of the Auditor General after his access request was made in order to thwart his access rights under the *Act*, I respectfully disagree.

[46] The above evidence demonstrates that the Audit Committee made recommendations that the Office of the Auditor General be established prior to the appellant's access request, and that it was the city's intention to establish the Office of the Auditor General well before the access request was made. The appellant has not provided any evidence that the Office of the Auditor General was created for the purpose of interfering with his access request.

[47] Turning to the timing of the access request, as previously noted, the appellant's access request was made four days prior to the establishment of the Office of the Auditor General. The significance of the timing of the request is that at the time of the request, section 223.22 of the *Municipal Act, 2001* did not apply, as the Office of the Auditor General had not been established. Four days after the access request, the Office of the Auditor General was established and section 223.22 of the *Municipal Act, 2001* did apply.

[48] In framing the issue, I have rejected the appellant's submission that section 223.22 did not even apply as of July 7, 2008, because no individual had been appointed as the permanent Auditor General. I agree with the city's submissions that the confidentiality requirement is intended to and does apply to the Office of the Auditor General and not particular individuals filling that or other positions in the Office. The applicability of the confidentiality provision is not dependent on the presence or absence of an incumbent, once the Office was established.

[49] As of July 7, 2008, therefore, section 223.22 of the *Municipal Act, 2001* excludes the appellant's rights to access the Auditor General's draft report.

[50] However, this does not end the matter. I must also determine whether the appellant's rights under the *Act* had "vested" at the time the office of the Auditor General was created and the confidentiality provision therefore came into effect.

[51] In Order PO-3017, former Senior Adjudicator John Higgins conducted a thorough analysis of the impact of a legislative or regulatory change on a pre-existing access request. He noted that it is presumed that the Legislature does not intend legislation to be applied in circumstances where its application would interfere with vested rights.¹⁶

[52] Former Senior Adjudicator Higgins noted that:

- There are no vested rights in matters that are purely procedural. Legislation is purely procedural if it affects only the means of exercising a right;
- If the application of the legislation makes exercising a right practically impossible, it is not purely procedural;¹⁷
- Where an amendment, or change in legislation is not merely procedural, two further requirements must be met with to establish that it interferes with vested rights:
 - the legal situation of the requester must be tangible and concrete, meaning that the individual must have taken steps towards availing themselves of that right, such as making an access request; and
 - it must also be sufficiently constituted at the time of the commencement of the amendment.¹⁸

[53] With respect to the second requirement that the legal situation of the appellant was sufficiently constituted or crystallized at the time of the coming into force of the amendment,¹⁹ former Senior Adjudicator Higgins stated:

In order to have a vested right, the legal situation must have inevitability and certainty.²⁰

¹⁶ R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008).

¹⁷ Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Quebec: Les Éditions Yvon Blais, Inc. 1991 at 118-120.

¹⁸ *Niagara Escarpment Commission v. Paletta International Corp.*, 2007 CanLII 36641 (Div. Ct.) at paras. 42-43.

¹⁹ In Order PO-3017, the amendment in question was the addition of section 65(5.2) of the *Act*, which excludes the application of the *Act* to certain types of records.

²⁰ *Niagara Escarpment Commission* (see citation at footnote 18, above) at para. 42.

The Supreme Court of Canada's decision in *R. v. Puskas*²¹ ("*Puskas*") provides guidance in this situation. This case related to *Criminal Code* amendments that eliminated the right of two criminal accused to appeal to the Supreme Court of Canada as of right. Under the former law, that right accrued if their acquittals or a stay of proceedings were overturned by a Court of Appeal and new trials were ordered. The Supreme Court ruled that the right to appeal did not vest until the judgment appealed from was rendered by the court below. In particular, it held that:

. . . a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled.

Under the former s. 691(2) of the *Code*, there were a number of conditions precedent to the acquisition of the right to appeal to this Court without leave. The first is that the accused is charged with an indictable offence. The second is that he is acquitted of that offence at trial. The third is that the acquittal must be reversed by the Court of Appeal, and the fourth is that the Court of Appeal order a new trial. Until those events occur, the accused does not acquire the right to appeal to this Court without leave, nor does it accrue, nor is it accruing to him or her.²²

Therefore, before a right can be said to have vested, all the conditions precedent required for the right to be exercised must have been completed before the amendment came into force.

As in *Puskas*, there are a number of conditions precedent that must be satisfied in order to receive access to records that have been requested under the *Act*. The requester must have made a written request for access to an institution [section 24(1)(a) and (b) of the *Act*]; the requester must have paid the prescribed fees [sections 24(1)(c) and 57, as applicable]; and a decision must have been made by the head of an institution or, on appeal, by this office, to grant access to the record [section 50(1)]. Until all of these conditions precedent are satisfied, the right to obtain a record requested under the *Act* does not vest. Because the OLG denied access to the record, and no decision reversing that decision had been made, the appellant did not have an existing right of access on the date of the amendment, and its legal situation was therefore not sufficiently constituted at the time when section 65(5.2) came into force as to form a vested right of access.

²¹ [1998] 1 S.C.R. 1207.

²² *Puskas* at paras. 14-15.

[54] It has also been noted elsewhere that the presumption against interference with vested rights is variable and often easily rebutted.²³ This is because most legislation affects rights that would have been in existence but for the legislation. As the Supreme Court of Canada noted in *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, "most statutes in some way or other interfere with or encroach upon antecedent rights."²⁴

[55] I adopt the approach taken by former Senior Adjudicator Higgins for dealing with legislative changes post request, and apply it to the circumstances of this appeal. I find that the application of section 223.22 is not purely procedural, as it may make exercising an access right practically impossible. I also find that the appellant's legal situation was tangible and concrete, as he had taken the step of making an access request.

[56] However, I find that the appellant's access rights under the *Act* were not sufficiently constituted at the time of the establishment of the Office of the Auditor General and, consequently, the applicability of the coming into force of section 223.22 of the *Municipal Act, 2001*, so as to vest his rights to access under the *Act*. As stated above, in order to have a vested right, the legal situation must have "inevitability and certainty," which I find absent in the circumstances before me.

[57] There are several factors that lead me to this conclusion. While the appellant had made the access request, the city's fee estimate and access decision, denying access, was not made until after the Office of the Auditor General had been established. Arguably, in accordance with the reasoning in Order PO-3017, the conditions precedent to the appellant's exercise of his right of access had not been fulfilled as of the date, July 7, 2008, when section 223.22 came into force. It is also significant in this case that as of July 7, 2008, the city had not had the opportunity to consider the application of the discretionary exemption in section 11 of the *Act*, which it was entitled to consider. Although the city's discretion is not unfettered, the availability of this exemption claim, which is not on its face far-fetched, lends support to the conclusion that as of July 7, 2008, the appellant's rights to access did not have "inevitability and certainty."

[58] Consequently, I find that the application of section 223.22 of the *Municipal Act, 2001* in these circumstances would not offend the presumption against interference with vested rights.

[59] Having found that section 223.22 of the *Municipal Act, 2001* applies to the appellant's request, I will now turn to consider the nature of the record itself to

²³ R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis Canada Inc., 2008) at 670; P-A Cote, *The Interpretation of Legislation in Canada*, 2nd ed (Quebec: Les Editions Yvon Blais, Inc., 1991) ("Cote") at 151.

²⁴ [1977] 1 S.C.R. 271 (S.C.C.) at 282, cited in Cote at 151.

determine whether section 223.22 prevails over access rights under the *Act*. The record was authored by the then City Auditor and his staff and was reviewed by the Audit Committee in April of 2007 for discussion purposes. Subsequently, when the then City Auditor retired, his replacement assumed carriage of the audit and the record. According to the city's representations, the content of the draft prepared by the City Auditor is something that came to the knowledge of the internal audit staff in the course of their duties, because their duties including assisting the City Auditor in the preparation of the draft. The record was not made public and was only made available under the control and direction of the lead auditor to a limited number of city managers on a "need to know basis" in order to receive their comments.

[60] In Order MO-2439, former Senior Adjudicator Higgins dealt with an access request for a report which, according to the requester, would have been the product of an investigation by a municipality's Auditor General. The order was reconsidered in Order MO-2629-R. In that reconsideration order, former Senior Adjudicator Higgins found that the record was subject to the confidentiality provision of the *City of Toronto Act (COTA)*,²⁵ which, in combination with section 53(1) of the *Act*, meant that it was not accessible under the *Act*. In coming to this conclusion he stated:

. . . Section 181(2)(a) [of *COTA*] 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 [Independent Accountability Officials]. An access request under the *Act* is *not* an activity conducted under Part V²⁶ 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* . . .

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*.

²⁵ *COTA* has confidentiality provisions in regard to the Auditor General equivalent to the *Municipal Act, 2001*.

²⁶ The equivalent of Part V.1 of the *Municipal Act, 2001*.

[61] In the circumstances of this appeal, I adopt the approach taken by former Senior Adjudicator Higgins and find that the draft audit report is a record that falls within the ambit of the confidentiality provision of section 223.22 of the *Municipal Act, 2001*. In doing so, I note that the confidentiality provisions in *COTA* that former Senior Adjudicator Higgins analyzed are equivalent to those found in the *Municipal Act, 2001*. Section 223.22(2) of the *Municipal Act, 2001* sets out an exception to the confidentiality clause for reports made by the Auditor General. As was the case in Order MO-2629-R, the exception is limited to the administration of the part of the *Municipal Act, 2001*²⁷ that outlines the functions of accountability officials. The appellant's access request is not an activity conducted under Part V.1 of the *Municipal Act, 2001*, and consequently, the exception in section 223.22(2) does not apply in these circumstances.

[62] This outcome also respects the important purpose behind the confidentiality provisions of the *Municipal Act, 2001*, which is that the Auditor General must be able to perform his or her functions in an independent manner.

[63] In conclusion, I find that the record at issue is captured by the wording of section 223.22 of the *Municipal Act, 2001* and that section 53(1) of the *Act* applies. Therefore, the confidentiality provision of the *Municipal Act, 2001* prevails over the access rights provided to the appellant under the *Act*.

[64] Having found that the confidentiality provision of the *Municipal Act, 2001* prevails over the access rights under the *Act*, the public interest override in section 16 raised by the appellant cannot apply.

ORDER:

I uphold the city's decision to withhold the record, and dismiss the appeal.

Original signed by: _____
Cathy Hamilton
Adjudicator

_____ April 25, 2013

²⁷ Part V.1.