

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3220

Appeals MA14-243, MA14-244 and MA14-247

City of Niagara Falls

July 9, 2015

Summary: This order disposes of three related appeals of a decision of the City of Niagara Falls (the city) to disclose, in full, records of correspondence relating to a named company. Although these appeals were brought by third-party appellants on the basis of their objection to disclosure of records relating to them, in this order the adjudicator finds that the decision underlying these appeals is invalid for lack of authority on the part of the city's decision-maker. In particular, the adjudicator finds that the delegation of authority made by a city officer to an outside individual is invalid. As the decision made by the unauthorized decision-maker is void, the city is ordered to issue a new decision on access in accordance with the *Municipal Freedom of Information and Protection of Privacy Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1), 3, 49(1).

Orders and Investigation Reports Considered: MO-1221, M-524, M-457.

OVERVIEW:

[1] This order disposes of three related appeals of a decision of the City of Niagara Falls (the city) to disclose, in full, a number of email records that are responsive to a request made to it under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). Although these third-party appeals were processed on the basis of the appellants' claim that a mandatory exemption in the *Act* applies to block disclosure, in this order I find that the underlying decision giving rise to these appeals is

invalid. To remedy this defect, I will order the city to issue a fresh decision on access in accordance with the requirements of the *Act*. Any appeals of a valid decision made by the city will be addressed in a separate inquiry process. The current appeal files are closed as a result.

[2] This matter arises from an access request made to the city for records about a named company. A requester sought records of correspondence between the city clerk (whom he identified by name), or the city clerk's staff, and the company. The requester also sought correspondence between the city clerk or staff and the Niagara Regional Police about a campaign being conducted against the company by an identified group. In addition, he asked for records of correspondence between the mayor's office and all city councillors' offices (or their staff) and the named company. The requester sought any such records from 2011 to the date of the request, made in February 2014.

[3] The city identified records responsive to the request and, before making a decision on access, notified a number of affected parties to whom the requested information relates, in accordance with section 21 of the *Act*. Some of these affected parties objected to disclosure of some of the records. After consideration of the affected parties' submissions, the city issued a decision on access. Among other things, the city decided to disclose, in full, the records relating to five affected parties. These five affected parties all appealed the city's decision to this office. Together, these five parties are the third-party appellants identified in these three appeals.¹ One representative made submissions in these appeals on behalf of them all.

[4] Among other claims, the appellants objected to disclosure of the records concerning their interests on the basis that the mandatory exemption at section 10 of the *Act* (third party information) applies. As mediation was unsuccessful, the three appeal files were transferred to the adjudication stage of the appeal process, where an adjudicator conducts a written inquiry under the *Act*.

[5] The adjudicator previously assigned to these appeals sought representations from the appellants and from the city on the application of section 10 to the records. The appellants' counsel made submissions on their behalf. The city declined to make representations, relying on the reasoning set out in its access decision to the parties. The appeal files were then transferred to me to complete the inquiry process.

[6] In reviewing these appeal files, I identified a potential defect in the city's decision on access. The decision was made by an individual to whom the city clerk purports to delegate the city clerk's powers and duties as head under the *Act* for the purposes of fulfilling the particular access request described above. I had concerns about the

¹ Two affected parties appealed the city's decision individually, and Appeals MA14-243 and MA14-247 were opened. Three other affected parties, whom the city addressed jointly in its notification and decision letters, appealed the city's decision together, and Appeal MA14-244 was opened.

propriety of this delegation on its face. In particular, as the decision letters to the appellants and the requester were issued on the letterhead of a lawyer who has no obvious connection to the city, it was not apparent to me that the lawyer (the named delegate) is an officer of the city or of another institution, as required by the *Act*. As the validity of the delegation could affect the validity of the decision on access that is the basis for the appeals, I identified this matter as a preliminary issue for determination prior to my consideration of the merits of the remaining issues.

[7] Given this, I sought supplementary representations from the city on the validity of the delegation of authority, made on the basis of section 49(1) of the *Act*, from the city clerk to the lawyer. I shared the city's representations, in full, with the third-party appellants and the requester, seeking their views on this issue. The third-party appellants responded through their counsel. The requester declined to make submissions on this issue.

[8] In this order, I find that the delegation of authority to the named decision-maker was not made in compliance with the requirements of the *Act*. Consequently, the delegation is invalid, as is the decision on access.

[9] The city is therefore in a deemed refusal situation, as contemplated by section 22(4) of the *Act*. I will, accordingly, order the city to issue a new decision on access that is in compliance with the requirements of the *Act*. Such a decision may then be subject to appeal by any of the parties, if they so choose.

DISCUSSION:

[10] Before setting out the reasons for my findings on the validity of the delegation, and consequently of the decision underlying these appeals, I want to acknowledge that I accept the city had no ill intentions in handling the request in the manner it did, and that none of the parties to the appeals has made any suggestion of bad faith by the city in acting as it did. In fact, I accept the city's evidence that the delegation of authority at issue here was made in an attempt to avoid the appearance of a conflict of interest on the part of the city clerk, who is named in the request that resulted in these appeals.

[11] These considerations cannot retroactively validate a decision made by an unauthorized decision-maker, however. I must begin by considering the validity of the delegation of authority pursuant to which the decision at issue in these appeals was made.

[12] Section 19 of the *Act* stipulates that it is the head of an institution who gives notice as to whether or not access is given in response to a request.

[13] Section 2(1) defines an "institution" for the purposes of the *Act* to include a municipality. Section 2(1) also provides that the "head" of an institution is the individual or body determined to be head under section 3 of the *Act*.

[14] Section 3 states, in part:

(1) The members of the council of a municipality may by by-law designate from among themselves an individual or a committee of the council to act as head of the municipality for the purposes of this Act.

...

(3) If no person is designated as head under this section, the head shall be,

(a) the council, in the case of a municipality.

[15] Section 49(1) of the *Act* concerns the delegation of a head's powers. It reads as follows:

A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution or another institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

The city's response to the request

[16] Upon receipt of the request by the city, the city clerk wrote to the requester to acknowledge receipt and to provide notice, under section 20 of the *Act*, of an extension of time to respond to the request. In his letter to the requester, the city clerk provided this explanation for needing an extension of time:

I am the "Head" for the Corporation of the City of Niagara Falls for FOI requests, which means that I review and respond to FOI requests on behalf of the City. I take my responsibilities seriously and any responses would be in compliance with the Act and IPC (Information & Privacy Commission of Ontario) decisions, however, in light of the fact that the records requested relate to me, the City will be delegating the responsibility of dealing with this request to a third party, as per s. 49(1) of the Act. Our City Solicitor will make arrangements for the third party.

[17] Soon afterward, the city appointed an outside lawyer to act in place of the city clerk for the purposes of responding to the request. The lawyer is named in a March 6, 2014 document entitled "Delegation of Authority – Head Functions under s. 49(1) –

Municipal Freedom of Information and Protection of Privacy Act." This document, signed by the city clerk, identifies the city clerk as head of the city for the purposes of the *Act*, and delegates "all powers and duties under the *Act*" for the particular request to the named lawyer.

[18] The lawyer, as named delegate, then responded to the request in the manner of a head. He wrote to the requester to provide notice of the delegation, enclosing a copy of the March 6, 2014 document. He identified a number of parties whose interests may be affected by a decision to grant access to records responsive to the request, and provided notice of the request, along with a copy of the March 6, 2014 document, to these affected parties. He considered submissions received from affected parties before making his decision on access. Finally, he wrote to all the parties to convey his decision on access, and to notify them of the right to appeal his decision to this office.

[19] All his correspondence with the parties appears on the letterhead of the eponymous professional corporation through which the lawyer provides legal services.

[20] None of the parties with whom the lawyer dealt in responding to the request raised issues concerning the lawyer's authority to respond to the request on behalf of the city. In addition, none of the parties to these appeals raised this issue during the earlier stages of the appeals.

Inquiry into the validity of the delegation

[21] Although the parties to the appeals did not raise it as an issue, the validity of the delegation of authority to the decision-maker may affect the validity of the decision that gave rise to these appeals. As the delegation, on its face, did not appear to comply with the requirements of the *Act*, I asked the city to provide supplementary representations in response to a number of questions. These included the following:

- What is the authority for the March 6, 2014 delegation of powers from the city clerk to the lawyer named as delegate? Is the lawyer an officer or employee of the city?
- If the delegation to the lawyer is not authorized, what is the remedy?
- How would an improper delegation of authority affect the three appeals before me?

[22] I also invited the third-party appellants and the requester to provide their views on the city's response to this issue.

The city's representations

[23] The city states that when the city clerk, acting as the head of the city, received the request that resulted in these appeals, he recognized that by being named in the request there was a risk of a perceived conflict of interest on his part given his role, by custom, as decision-maker under the *Act*. This was particularly so given that some of his own correspondence is responsive to the request.

[24] To avoid the appearance of conflict of interest, the city elected to appoint another individual as "temporary head for the purposes of these particular applications." The city explains that it selected the lawyer for this role because of the lawyer's familiarity with municipal and administrative law and because the city "believed that he could demonstrate to any applicant the independence of his actions and decision making process," among other qualities recommending him to the role.

[25] The city reiterates that the lawyer was retained to act as head for the purposes of fulfilling the particular request at the basis of these appeals only, and that it gave him no other instruction. It submits that its actions were in keeping with the policy and spirit of the reasoning set out in two orders of this office addressing situations of conflict of interest, M-524 and M-457.

[26] While the city acknowledges it is "unusual" for outside counsel to be considered an officer of an institution, and now recognizes that the delegation under review is "subject to technical challenge," the city proposes that the delegation achieved the purpose of the *Act* by ensuring that the decisions concerning the application of the *Act* "were the result of independent and authoritative consideration."

Other parties' representations

[27] Through their counsel, the third-party appellants state they were unaware of the "technical legal aspects" of the delegation of authority, and take no position on whether it is permissible or not permissible as a matter of law. They neither consent to nor oppose the delegation of authority made by the city clerk.

[28] They also reassert their objection to the disclosure of records affecting their interests, for the various reasons set out in their representations submitted to the previous adjudicator during an earlier stage of the inquiry.

[29] The requester declined to make representations on this issue.

Analysis and findings

[30] Although I accept the city's evidence that the delegation of authority at issue here was made by the city in an effort to avoid the appearance of conflict of interest, I

find the delegation is invalid. Moreover, the delegation cannot be saved on the basis it was made in good faith, or, were it given, on consent of the other parties.

[31] The primary reason for my finding arises from the attempt by the city clerk to delegate an authority to an outside party who is not a party to whom a delegation may be made under the *Act*.²

[32] I asked the city to explain the authority for the delegation to the individual named in the March 6, 2014 document signed by the city clerk. In acknowledging the delegation is "subject to technical challenge," the city appears to concede that outside counsel is not a person to whom a delegation may be made under section 49(1).³ The city recognizes there are technical defects in the course of action taken by the city and the city clerk to address the request, but explains that it was done to avoid a conflict-of-interest finding like those made by this office in previous orders.

[33] The orders cited by the city, M-457 and M-524, involved situations where the institutional decision-makers had personal interests in the records being sought. In both cases, adjudicators of this office identified a conflict of interest on the part of the decision-maker, and required that the decision-making power be re-exercised by another, properly authorized, decision-maker.

[34] I understand from the city's reliance on these orders that the delegation was made in a good faith attempt to avoid this result. However, a delegation of decision-making authority made to avoid the appearance of conflict of interest must be done in compliance with the *Act*. Otherwise, the decision-making process may be free from the apprehension of bias, but may be defective on other grounds.

[35] More similar to the circumstances in these appeals is the situation described in Order MO-1221, not cited by the city. In that case, the mayor of a town issued a decision under the *Act* as though he were head of the institution, although there had been no designation to that effect. The *Act* provides that in the absence of a designated head, the municipal council is the head of the municipality.⁴ The adjudicator recognized that the mayor was considered the "head" of town council, and reviewed the claim that the mayor had signed the decision letter on behalf of council, in his capacity as head of council, rather than on his own behalf. Nonetheless, on the facts before her, the adjudicator found the mayor had not been acting on behalf of town council, the proper head under the *Act*, but rather in his own stead when making the impugned

² Namely, the delegate is not "an officer ... of the institution or another institution" as required by section 49(1) of the *Act*.

³ In its representations, the city says it is "aware it is unusual for outside counsel to be considered an officer of a municipal corporation," but it does not elaborate on this statement. The city has not provided me with any basis to make a finding that the named delegate ought to be considered "an officer" of the city in the circumstances of these appeals.

⁴ Section 3(3)(a) of the *Act*.

decision. She also found that a by-law designating the mayor as head of the institution, passed shortly after the issuance of the decision, could not save the decision, which was invalid at the time it was made. As a result, the adjudicator found that the mayor had not been properly delegated (or designated) as head at the relevant time. His decision was therefore invalid for lack of authority.

[36] The delegation at issue in these appeals is more problematic on its face than the one considered in Order MO-1221. In this case, the city clerk delegated the powers and duties of the head to an individual who has no connection with the city, who is not an officer of the city or some other person to whom a delegation may be made under section 49(1) of the *Act*. While I accept that these actions were taken by the city in good faith, this has no bearing on the question of their validity under the *Act*.

[37] For the reasons given above, I find the delegation of authority made to the decision-maker is invalid. As the decision on access made pursuant to an invalid delegation is itself invalid, I will order the city to issue a new decision on access. If the city deems it necessary to delegate decision-making authority for the new decision, the delegation must be made in accordance with the requirements of the *Act*.

[38] Any appeals of a valid decision made by the city will be addressed in a separate inquiry process.

ORDER:

1. The city's decision is void.
2. I order the city to issue a decision on access in accordance with sections 19, 21 and 22 of the *Act*, and having regard to sections 2(1), 3 and 49(1) as necessary, treating the date of this order as the date of the request.
3. In order to verify compliance with provision 2 of this order, I order the city to provide me with a copy of the decision letter on the same date it is sent to the parties.

Original Signed BY:
Jenny Ryu
Adjudicator

July 9, 2015