

September 30, 2022

**RULING ON OCA MOTION FOR DIRECTIONS
(Amended)**

**Mr. Justice Herman J. Wilton-Siegel
Commissioner**

1. In this public inquiry, Commission Counsel served a summons dated August 10, 2022 on Domenic Pellegrini, Senior Investigator, Audit Services, in the Office of the Auditor of the City of Hamilton requiring him to give testimony on certain specific issues. The Office of the City Auditor has expressed the concern that the legislative scheme governing the Office does not provide the commissioner of a municipal public inquiry with the jurisdiction to issue such a summons. The Office of the City Auditor has therefore brought this motion for directions.

Background to this Motion For Directions

2. Pursuant to s. 274 of the *Municipal Act, 2001*, S.O. 2001, c. 25 (the "*Municipal Act*"), the City of Hamilton (the "City") requested the appointment of a judge of the Superior Court of Justice to conduct an inquiry in accordance with Terms of Reference established by the City (the "Terms of Reference"). The Terms of Reference arose from the non-disclosure to the Council of the City (the "City Council") of a report of Tradewind Scientific Ltd. (the "Tradewind Report") regarding friction testing on the Red Hill Valley Parkway (the "RHVP").
3. The Tradewind Report was provided to the Engineering Services Division of the Department of Public Works of the City in January 2014, appended to a report of Golder Associates Ltd. ("Golder") delivered to the City at the same time (the "2014 Golder Report"). However, neither report was disclosed to City Council until February 6, 2019.

4. The undersigned was appointed as Commissioner of the public inquiry (the “RHVPI”) in May 2019 tasked with addressing a number of questions set out in the Terms of Reference, including the reasons for the non-disclosure of the existence of the Tradewind Report, the content of the Report, and the recommendations therein.
5. The RHVPI has received documents from the City regarding a “Value for Money Audit” conducted by the Office of the City Auditor (the “OCA”) which indicates that Domenic Pellegrini (“Pellegrini”) received a redacted copy of the 2014 Golder Report in or about November 2018 on behalf of the OCA in connection with this Audit. The information redacted from the 2014 Golder Report related to friction testing on the RHVP. Correspondence between Pellegrini and Gord McGuire, the Director of Engineering Services of the City (“McGuire”) indicates that McGuire directed that his office provide a redacted version of the 2014 Golder Report to the OCA on the advice of the City’s Legal Services Department and that such information was “related to friction testing and subject to an FOI/MFIPPA request on that subject.”
6. The documents received by the RHVPI also suggest that, following discussions with McGuire, Pellegrini reviewed the unredacted 2014 Golder Report and its appendices, which included the Tradewind Report, and took copies of the redacted information on December 4, 2018. Commission Counsel anticipate that McGuire will testify as to the content of the discussions with Pellegrini prior to his review of the unredacted 2014 Golder Report regarding Pellegrini’s entitlement to take copies of the redacted information.
7. The documents received by the RHVPI further indicate that Pellegrini attended a meeting with Gary Moore, the former Director of Engineering Services of the City (“Moore”), on February 4, 2019. The 2014 Golder Report, including the appended Tradewind Report, were delivered to Moore in January 2014. During his testimony before the RHVPI, Moore stated that he could not recall the subject-

matter of the meeting and, in particular, whether it addressed friction levels or friction testing on the RHVP.

8. In its factum, Commission Council advised that it intended to limit its examination of Pellegrini to the following topics:
 - 1) A brief background on the Value for Money Audit;
 - 2) The events leading to, and the details regarding, Pellegrini's receipt of a redacted version of the 2014 Golder Report;
 - 3) Pellegrini's understanding of his agreement with McGuire regarding his review of an unredacted copy of the 2014 Golder Report and Tradewind Report, and his review of the reports on December 4, 2018; and
 - 4) Pellegrini's meeting with Moore on February 4, 2019.
9. In oral submissions, Commission Counsel submitted that the February 4, 2019 meeting between Pellegrini and Moore was no longer anticipated to form part of Commission Counsel's examination.
10. The summons issued to Pellegrini on August 22, 2022 (the "Summons") requires Pellegrini to attend and give testimony to the RHVPI on October 7, 2022. The OCA takes the position that an investigator in the OCA cannot be required to give evidence at an inquiry constituted under s. 274 of the *Municipal Act* and that the Summons must therefore be quashed for want of jurisdiction. With one qualification expressed by the City addressed below, the City does not take a position on this motion for directions.

The Summons Power of the RHVPI

11. Section 274 of the *Municipal Act* sets out the provisions which govern a municipal public inquiry:

274 (1) If a municipality so requests by resolution, a judge of the Superior Court of Justice shall,

(a) investigate any supposed breach of trust or other misconduct of a member of council, an employee of the municipality or a person having a contract with the municipality in relation to the duties or obligations of that person to the municipality;

(b) inquire into any matter connected with the good government of the municipality; or

(c) inquire into the conduct of any part of the public business of the municipality, including business conducted by a commission appointed by the council or elected by the electors.

(2) Section 33 of the *Public Inquiries Act, 2009* applies to the investigation or inquiry by the judge.

(3) The judge shall report the results of the investigation or inquiry to the council as soon as practicable.

(4) The council may hire counsel to represent the municipality and pay fees for witnesses who are summoned to give evidence at the investigation or inquiry.

(5) Any person whose conduct is called into question in the investigation or inquiry may be represented by counsel.

12. Section 33 of the *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Sched. 6 (*the "Public Inquiries Act"*) grants a municipal inquiry the power to summons witnesses. The relevant provisions of that section are as follows:

33 (3) The person or body conducting the inquiry may require any person by summons,

(a) to give evidence on oath or affirmation at the inquiry; or

(b) to produce in evidence at the inquiry such documents and things as the person or body conducting the inquiry may specify,

relevant to the subject matter of the inquiry and not inadmissible in evidence under subsection (13).

...

(13) Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

The Relevant Duties and Powers of the OCA

13. The OCA was appointed by the City in accordance with s. 223.19 of the *Municipal Act* and by-law 19-180 of the City (the “By-Law”). The OCA is responsible for, among other things, reporting to City Council and for assisting City Council in holding itself and its administrators accountable for the quality of stewardship over public funds and for the achievement of value for money in municipal operations. Section 223.19 (1.1) of the *Municipal Act* provides that the OCA “shall perform his or her responsibilities... in an independent manner”.
14. The investigative powers of the OCA are governed by s. 223.19 of the *Municipal Act*, the relevant provisions of which are as follows:

223.19 (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.

(1.1) The Auditor General shall perform his or her responsibilities under this Part in an independent manner.

...

(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.

...

(5) The Auditor General may delegate in writing to any person, other than a member of council, any of the Auditor General’s powers and duties under this Part.

(6) The Auditor General may continue to exercise the delegated powers and duties, despite the delegation.

(7) The Auditor General is not required to be a municipal employee.

...

223.21 (1) The Auditor General may examine any person on oath on any matter pertinent to an audit or examination under this Part. 2006, c. 32, Sched. A, s. 98.

(2) Section 33 of the *Public Inquiries Act*, 2009 applies to an examination by the Auditor General.

15. On this motion, the OCA relies, among other provisions, on ss. 223.22 and 223.23 of the *Municipal Act*, which impose the following obligations of secrecy or confidentiality on the OCA:

223.22 (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*.

223.23 Neither the Auditor General nor any person acting under the instructions of the Auditor General is a competent or compellable witness in a civil proceeding in connection with anything done under this Part.

16. As discussed below, the OCA relies in part on the fact that both the OCA and the

RHVPI are entitled to the benefit of s. 33 of the *Public Inquiries Act*.

Analysis and Conclusions

17. In its factum, the OCA argues that the Summons is beyond the jurisdiction of the Commissioner of the RHVPI for the following interrelated reasons:
- 1) That the OCA and the RHVPI are at law “equivalents” in the exercise of their powers with the result that the Summons seeks an examination that constitutes an “investigation of the investigator”;
 - 2) That the OCA has no “new” or “originating” evidence because the OCA was exercising powers under the *Public Inquiries Act* to collect the same evidence available to the RHVPI;
 - 3) That the OCA is statutorily independent from the City, which independence evaporates if its conduct is subject to subsequent review at the insistence of the same municipal council which appointed the independent Auditor General; and
 - 4) That, for policy reasons, the statutory provisions governing the jurisdiction of a municipal Auditor General should be interpreted to ensure that Auditors are not only independent but are seen to be independent.
18. Essentially, the OCA makes two principal arguments based respectively on the provisions of s. 223.22 of the *Municipal Act* regarding the obligation of secrecy or confidentiality therein and on s. 223.19(1.1) of that Act regarding the independence of an Auditor General. I will address each of these submissions in turn after first dealing with two preliminary matters.

Preliminary Matters

19. Before addressing the principal arguments of the OCA, I note the following two matters which are relevant to the determination made herein.

20. First, the OCA does not suggest that the testimony sought from Pellegrini is subject to any privilege, including without limitation the forms of privilege referred to in s. 223.22(3) of the *Municipal Act*.
21. Second, I am satisfied that the evidence sought by Commission Counsel is relevant. It will assist in reaching conclusions on the questions set out in the Terms of Reference in the following manner.
22. Under the Terms of Reference, the Commissioner is required to determine who received or was aware of the Tradewind Report after it was provided to the Engineering Services Division in January 2014 and after it came to the attention of McGuire in 2018. The Commissioner is also required to determine whether appropriate steps were taken to disclose the Tradewind Report once it was discovered by McGuire in 2018.
23. The first three topics identified for Pellegrini's testimony will cover how Pellegrini became aware of the 2014 Golder Report and the appended Tradewind Report and/or how, when or from whom the redacted report was provided to Pellegrini by November 27, 2018, all as part of the Value for Money Audit. Pellegrini's testimony will also cover the circumstances under which he reviewed the unredacted report and took copies of the redacted information for the OCA on December 4, 2018. Such information is not available through documents received by the RHVPI. This information is therefore directly relevant to the particular matters in the Terms of Reference described above.

The Argument Based on the OCA's Obligation of Secrecy or Confidentiality

24. The OCA's position is principally based on the secrecy obligation set out in s. 223.22(1) of the *Municipal Act*. I accept that Pellegrini's testimony may contain information over which he is required to maintain secrecy, subject to the statutory exceptions set out therein. However, I conclude that the provisions of s. 223.22 are not a bar to the production of information to the RHVPI under summons for the following reasons.

25. The legal significance of a statutory confidentiality provision was addressed in *Transamerica Life Insurance Co. v. Canada Life Assurance Co.*, 1995 CanLII 7258 (ON SC), at pp. 15-17. In addressing the operation of a comparable statutory confidentiality provision in the *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18 (3rd Supp) in respect of a subpoena ordered by a court in a civil proceeding, Sharpe J., as he then was, held as follows:

..., even if these statutory promises of confidentiality do apply to the information sought here, in my view, a statutory promise of confidentiality does not constitute an absolute bar to compelling production of the documents and information in the possession and control of OSFI. I see no reason to give statutory confidentiality a higher degree of protection than any other form of confidentiality. There is no reason why Parliament should be taken to have adopted the legal category of confidentiality without intending that category to have in its ordinary legal meaning and effect. It is well established that confidential information may be subpoenaed and introduced in evidence if ordered by a court. The general rule is that although information is confidential, it must be produced unless the test laid down in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 ... is met. Parliament could have provided that the information and documents at issue here could not be compelled by summons, but in my view, to accomplish this end, specific language to that effect would be required. (For discussion of statutes having this effect, see Bushnell, "Crown Privilege" (1973), 51 C.B.R. 551 at 552 - 555.) I see no reason to impute an intention to accomplish that end where Parliament has adopted a recognized and established legal category which does not have that effect: see Hogg, *Liability of the Crown* (2nd ed. 1989) at p. 76:

Many statutes contain provisions that expressly make information confidential ...The scope of these provisions is a matter of interpretation in each case. Those provisions that specifically prohibit the introduction of evidence in court will obviously be effective to withhold the protected material from litigation. More commonly, however, such provisions prescribe confidentiality but say nothing specific about the introduction of evidence in court. Such provisions have been interpreted as not barring either the production of documents in court or oral testimony in court. (footnotes omitted)

26. The principle in *Transamerica Life* was applied in the decisions of Commissioner Goudge in *Ruling on the CPSO Motion for Directions* (October 10, 2007) at p. 8, Report on Inquiry into Pediatric Forensic Pathology in Ontario, Vol. 4, Appendix 16 at pp. 752-767 and Commissioner Linden in the earlier decision *Commissioner's Ruling Re: Motion by Ontario Provincial Police and Ontario Provincial Police Association* (August 15, 2005) at para. 29-33, Report of the Ipperwash Public Inquiry, Vol. 3, Appendix 13C at pp. 162-178. Each of these decisions addressed the question of whether statutory duties of secrecy or confidentiality bar compliance with a summons under the *Public Inquiries Act*, concluding that they did not.
27. In the present circumstances, there is similarly no language in the *Municipal Act* that expressly bars a summons compelling testimony by a representative of the OCA. In this regard, I also note that s. 223.22(4) of the *Municipal Act* provides that the duty of secrecy prevails over the *Municipal Freedom of Information and Protection Act*. In the absence of a similar provision providing that the OCA duty of secrecy prevails over the power to summons provided in s. 33 of the *Public Inquiries Act*, I do not think it is reasonable to impute such an intention to the Legislature.
28. In this regard, I also note the following features of the provisions of s. 223.22. First, among other purposes, the confidentiality obligation appears to allow the OCA to conduct its investigations free from any third party interference arising out of disclosure of any evidence provided to the OCA. There is, however, no right of any third party who provides information to the OCA to enforce confidential treatment of that information. Second, as the OCA acknowledged in the hearing on this motion, pursuant to the provisions of s. 223.19 (3) and the By-Law, City Council could request a report on the subject matters of the proposed examination of Commission Counsel. Any such report would necessarily involve disclosure of any erstwhile confidential information received by Pellegrini in the course of his investigation. Moreover, as suggested by Commission Counsel, it could reasonably be argued that, in setting the Terms of Reference, City Council

has in substance requested that such a report be delivered in the form of testimony provided to the RHVPI. While the conclusions reached herein are not based on such an expansive interpretation of s. 223.22, the foregoing considerations should inform the issue of the intention of the Legislature in respect of the operation of s. 223.22 in the present circumstances.

29. Further, consistent with this conclusion, while s. 223.23 provides that neither the OCA nor any person acting under the instructions of the OCA is a competent or compellable witness in a civil proceeding in connection with anything done in carrying out its duties, there is no prohibition on the OCA being compelled to testify before a public inquiry for the reason that a public inquiry is neither a criminal trial nor a civil action for the determination of liability: see, for example, the decisions of Commissioner Goudge in *Ruling on the CPSO Motion for Directions* (October 10, 2007) at p.12-13, Report on Inquiry into Pediatric Forensic Pathology in Ontario, Vol. 4, Appendix 16 at pp. 752-767 and Commissioner Linden in the earlier decision *Commissioner's Ruling Re: Motion by Ontario Provincial Police and Ontario Provincial Police Association* (August 15, 2005) at para. 42-44, Report of the Ipperwash Public Inquiry, Vol. 3, Appendix 13C at pp. 162-178.

The Argument Based on the Independence of the Auditor General

30. The other argument of the OCA is that the independence of a municipal Auditor General will be compromised if its conduct is subject to subsequent review via a public inquiry called by the same municipal council which appointed the Auditor General. There are two aspects of this argument that will be addressed in turn.
31. First, the OCA argues that the OCA and the RHVPI are at law "equivalents" in the exercise of their powers and that, accordingly, there is a "jurisdictional conflict" that must be resolved in favour of the OCA in furtherance of the independence of the OCA. I accept that a municipal Auditor General and a public inquiry called by a municipality have independent powers of investigation which may extend to the same matters. I also accept that such independent powers of

investigation are derived from the same source, being the provisions of s. 33 of the *Public Inquiries Act*.

32. However, the fact that two parties charged with the responsibility to conduct separate investigations have the same investigative powers does not, on its own, create a “jurisdictional conflict” between the two parties. In the present case, the subject matter of the Terms of Reference of the RHVPI and of the Value for Money Audit of the OCA, as it existed in 2018, are not substantially similar. It is not correct to characterize these investigations as “parallel investigations.” The only “overlap” between the two investigations consists of certain factual circumstances arising in the conduct of the OCA investigation that are relevant to the Terms of Reference of the RHVPI. The existence of such circumstances does not give rise to a “jurisdictional conflict” based on the subject matter of the investigations. Without suggesting that parallel investigations regarding the same subject matter would necessarily present a “jurisdictional conflict,” I do not see a basis for any such conflict in the present circumstances given these factual circumstances.
33. As a related matter, there is no requirement under s. 33 of the *Public Inquires Act* or s. 274 of the *Municipal Act* that the evidence sought from Pellegrini be “new” or “originating” evidence as the OCA suggests in its factum.
34. Further, insofar as the alleged “jurisdictional conflict” refers to the existence of inconsistent statutory provisions, I note that statutory provisions are not inconsistent unless they cannot stand together: see, for example, *Urban Outdoor Trans Ad. V. Scarborough (City)*, [2001] O.J. No. 261 (C.A.) at para. 21. In this case, there is nothing on the face of s. 33 of the *Public Inquiries Act* that supports the view that the existence of the same powers of investigation in favour of separate parties gives rise to any such inconsistency.
35. I also do not see any conflict between the summoning power in s. 33 of the *Public Inquires Act* and the statutory duty of secrecy under s. 223.22(2) of the *Municipal Act*. These provisions can stand together for the reason that there is no

language in s. 223.22(2) that indicates that the latter provision is intended to be the complete code governing disclosure by the OCA for the reasons discussed above.

36. The second aspect of the OCA argument, and it appears its principal concern, is that the independence of the OCA, and its ability to conduct its investigations free from any concern for that independence, would be imperilled by an obligation to testify before a public inquiry regarding any such investigation. As a related matter, the OCA characterizes the circumstances in which an OCA investigator is compelled to testify as giving rise to “an investigation of the investigator”. While I accept the importance of maintenance of the integrity of the OCA as an entity independent of the City, I do not accept that either the independence of the OCA or the OCA’s appearance of independence is engaged in the present circumstances for the following reasons.
37. First, as a factual matter, the present circumstances do not engage the concern expressed by the OCA of an investigation of the investigator, as counsel for the OCA acknowledged at the hearing. As set out above, Commission Counsel seeks evidence that is limited to the actions of certain City employees regarding disclosure of the Tradewind Report and the 2014 Golder Report. Pellegrini’s evidence is sought entirely for the purpose of understanding and assessing the actions of such City employees in respect of disclosure of the Tradewind Report and the 2014 Golder Report after they became known to McGuire in 2018. The actions of the OCA, and Pellegrini in particular, in the Value for Money Audit are not the subject of the Terms of Reference. Accordingly, the evidence is not sought for the purpose of assessing the appropriateness of such investigation or of any of Pellegrini’s actions in conducting that investigation. In particular, the evidence does not, in any manner, address any decisions of the OCA in pursuing its investigation, the OCA conclusions after completing its investigation, or the decision-making process and rationale of the OCA related to any of the foregoing.

38. Second, given the analysis above, there is no basis on which it can reasonably be argued that a power to summons granted to a commissioner appointed to conduct a public inquiry under s. 274 of the *Municipal Act* would inhibit or constrain any investigation undertaken by the OCA. Because parties providing evidence to the OCA in the course of an investigation cannot enforce confidential treatment of such information and because the City as represented by City Council has the right to call for a report on matters otherwise subject to confidentiality, there is no obvious impact of a power of summons on the ability of the OCA to conduct an investigation.
39. Lastly, and most importantly, the OCA acknowledges that its principal concern is that a power of summons in favour of a public inquiry could be used by a municipal council in other circumstances to deprive the OCA of its independence in the conduct of an investigation. I accept that such independence is fundamental to the OCA's conduct of any investigation. However, the real concern of the OCA, as I understand it, is that the OCA could become the subject of "political attack and inquiry" after it commences, or after it has completed, an investigation. In respect of a municipal inquiry, the specific concern of the OCA is that City Council could use the threat of a public inquiry to investigate an OCA investigation as a means of controlling such investigation, thereby destroying the independence and/or perceived independence of the OCA investigation.
40. This is, as mentioned, a purely hypothetical concern as these circumstances are not presented in the current situation. I am not persuaded that this theoretical concern should inform the decision herein. In addition to practical and political constraints which may operate to prevent the occurrence of the scenario envisaged by the OCA, there are administrative law remedies that could be invoked in such circumstances that could directly address the exercise of the statutory power of a municipal council to call a public inquiry under the *Municipal Act*. Such remedies would be properly targeted to the particular actions that jeopardize the independence of the OCA. In these circumstances, I do not agree that it is either necessary or desirable, as a policy matter, to interpret the

provisions of ss. 223.19 and 223.22 to exclude or override a power of summons in favour of a municipal inquiry under s. 33 of the *Public Inquiries Act*. Furthermore, for the reasons addressed above, in the absence of any statutory basis for the OCA position that a power of summons is excluded in respect of confidential information, I do not think it is open to me to interpret ss. 223.19 and 223.22 in such manner.

Disposition of this Motion for Directions

41. Accordingly, I decline the OCA's request to quash the Summons and direct that Pellegrini is required to comply with the Summons.
42. As noted above, Commission Counsel submitted that the February 4, 2019 meeting between Pellegrini and Moore is no longer anticipated to form part of Commission Counsel's examination. As such, I direct that the scope of Pellegrini's examination by Commission Counsel and by any of the other participants in the RHVPI (the "Participants") be limited to the first three topics set out at paragraph 8 above, subject to leave of the Commissioner.
43. I further direct that Commission Counsel shall confine its examination of Pellegrini in respect of the background to the Value for Money Audit to that information regarding the context of the Audit that is necessary for the remainder of his examination.
44. Although the City does not take a position on this motion, it has advised by a letter dated August 22, 2022 from its counsel in this matter that the City requests that the Participants be provided with any contemporaneous notes associated with any meetings or interviews of City staff in respect of which Pellegrini is directed to give evidence at the RHVPI. In oral submissions, counsel for the OCA and Commission Counsel advised that there are no such notes in respect of the three topics on which Commission Counsel has indicated that it seeks evidence from Pellegrini.
45. Lastly, in accordance with the RHVPI *Rules of Procedure*, Pellegrini's counsel may attend in such capacity during his testimony and question him following his

examination by Commission Counsel and any Participant's counsel who may wish to cross-examine.



**Mr. Justice Herman J. Wilton-Siegel
Commissioner**

September 30, 2022