



Ombudsman  
Toronto

*Listening. Investigating. Improving City Services.*

# OMBUDSMAN TORONTO REPORT

**ENQUIRY INTO HOW THE CITY OF TORONTO  
HANDLES HOMEOWNER THIRD-PARTY LIABILITY  
CLAIMS FOR BASEMENT FLOODING AND SEWER  
BACKUPS**

**NOVEMBER 12, 2020**



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# EXECUTIVE SUMMARY

## Basement Flooding in Toronto

Every year, Toronto homeowners experience distressing and costly basement flooding and sewer backups. With big rainstorms becoming more and more frequent in recent years, these events are becoming more frequent too. In some areas of the City, homeowners are dealing with repeated flooding of their basements, resulting in significant property damage each time.

Some homeowners are understandably frustrated and fed up.

## Request from Toronto City Council

Toronto City Council asked Ombudsman Toronto to review the City's process for investigating claims against the City by people whose properties have suffered damage due to basement floods and sewer backups.

Our focus was on the claims investigation process for property damage caused by floods or sewer backups. We did not examine the issue of what is causing repeated basement flooding events, which was outside the scope of the Enquiry.

## Third-Party Liability Claims Against the City

Many homeowners go to their home insurer for help when a basement flood or sewer backup damages their property. This is a first-party insurance claim.

A homeowner who believes the City's negligence caused the incident can submit a claim against the City in hopes of being reimbursed for the damages. An external claims adjuster under contract with the City investigates and handles these claims on the City's behalf. The City will only consider paying out a claim, however, when there is proof that the property damage was a result of the City's negligence.

### Third-Party Liability Claims: By the Numbers

From January 1, 2015 to December 31, 2019, Toronto homeowners filed 1,461 basement flooding/sewer backup claims against the City. Of those claims, the City denied 1,130—approximately 77 per-cent—based on the third-party claims adjuster's determination that claimants had not proved that the Toronto Water division's operations were negligent, either in maintaining the City's sewer system and/or in responding to individual flooding events.



## How Homeowners Feel

Many homeowners we spoke to expressed anger and frustration that their homes continue to be flooded, even after the City has completed upgrades to the sewers in their neighbourhood. Their anger and frustration are compounded when they submit a third-party liability claim against the City, believing that the City should be responsible for the property damage caused by the floods, only to have the third-party claims adjuster deny their claim.

Others told us they didn't understand the City's third-party liability claims investigation process, or how to file a claim against the City.

## Ombudsman Toronto's 2011 Investigation

In 2011, Ombudsman Toronto investigated the City's handling of third-party liability claims involving property damage caused by potholes, flooding and sewer backups, and falling tree limbs. That Investigation led to many changes and increased fairness in how the City handles such claims, including how it communicates with the public about them. With this Enquiry, we gathered information to see whether there was a need for further improvements.

## Findings

This Enquiry revealed that further improvements are necessary to ensure that the City has a fair and transparent third-party liability claims process for basement floods and sewer backups.

In particular, we found that:

- The City is not providing homeowners with clear and accurate information about the third-party liability process for basement floods and sewer backups, and how it assesses the claims it receives.
- The City is not always or adequately making homeowners aware that it will generally only pay a claim when the adjuster finds that the City's negligence caused the property damage.
- The City only tells claimants after denying their claims that the claimant has the job of proving the City's negligence. (We found that the first and only time this is explained is in claim denial letters.)



- Reporting a basement flood or sewer backup to 311 could make the difference in whether a claimant is able to prove that the City was negligent, but homeowners are not always told about the importance of contacting 311 if their basement floods and they are considering making a claim against the City.
- The City routinely requires claimants to sign a confidentiality clause as part of settling a claim, although the City will generally agree to delete the clause if the claimant asks. This compromises transparency of the process, highlights the power imbalance between the parties, and risks undermining the public's confidence that the City is being fair.
- Investigations of basement flood and sewer backup claims resulting from major "storm events" are often lengthy and complex processes, involving coordination and communication across multiple City divisions. Yet there are no written processes, policies or procedures to guide these investigations.

## Recommendations

In response to these findings, we made nine recommendations to improve the fairness and transparency of the City's third-party liability claims process for basement floods and sewer backups, which included:

- The City's Insurance & Risk Management and Toronto Water divisions should revise their *Basement Flooding – General Information* brochure to include better information about how the City handles basement flood and sewer backup claims, including specifically explaining that the City will only pay a claim where the claimant is able to prove that the City was negligent.
- The City should update all relevant sections of its website to ensure that the public gets clear, consistent and detailed information about how Toronto Water investigates basement floods and sewer backups.
- Insurance & Risk Management, in collaboration with Toronto Water, Legal Services and Strategic Communications, should work together to provide clear information on the City's website about the importance of reporting a basement flood or sewer backup to 311.
- Insurance & Risk Management should stop routinely including a confidentiality clause in the Final Release it has claimants sign when settling a claim. This should apply to all third-party liability claim settlements, not just those related to basement floods and sewer backups. The exception will be where the City Solicitor or outside counsel representing the City expressly recommends including the confidentiality clause in a particular case.



- Insurance & Risk Management, Legal Services and Toronto Water should develop a written “business process” to coordinate the investigation of storm event claims—including a clear definition of a "storm event", roles and responsibilities for all involved in the investigation process, and a formal communications strategy. The City should post information about the storm event claims investigations process on its website.
- Toronto Water should review the job responsibilities for the Coordinator – Business Process (an internal staff position to help it respond to third-party liability claims) and examine ways to share third-party liability claims data with sections of Toronto Water responsible for preventing and addressing basement floods and sewer backups.

## **The City's Response and Follow Up**

The City agrees with the Ombudsman’s findings. It accepts her recommendations and has undertaken to implement them by the end of March, 2021. Ombudsman Toronto will follow up to ensure it does so.





# INTRODUCTION

## The August 7, 2018 Storm Event and Basement Flooding in Rockcliffe-Smythe

1. On August 7, 2018, Toronto experienced a rainstorm the City’s water division (Toronto Water) categorized as a “storm event.” According to data Toronto Water collected, the storm was one of the most severe that Ontario has ever experienced; between 80 and 100 millimetres of rain fell within a two-hour period.
2. Although the storm led to basement flooding and sewer backups across the City, the “localized” nature of the storm meant that it affected some areas of the City more heavily than others.
3. One area particularly impacted by this storm was the Rockcliffe-Smythe neighbourhood. Located in Ward 5 (York South-Weston), Rockcliffe-Smythe lies within the Black Creek floodplain. Unfortunately, the residents of Rockcliffe-Smythe are all too familiar with basement flooding, as many properties in the area have experienced basement flooding during major storms caused by riverine flooding (that is, water overflowing from nearby rivers) and the overloading of the City’s sewer systems.<sup>1</sup>
4. The August 7, 2018 storm event caused extensive basement flooding in the Rockcliffe-Smythe neighbourhood. Previous storm events on May 12, 2000, August 19, 2005, and July 8, 2013 had done so too.<sup>2 3</sup>
5. In recent years, the media has reported on the devastating experiences of Toronto homeowners impacted by basement flooding, including homeowners in the Rockcliffe-Smythe neighbourhood.<sup>4</sup> The reports paint a picture of homeowners who are frustrated and dismayed with what they feel is inaction on the part of the City to address the repeated floods impacting their

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<sup>1</sup> <https://www.toronto.ca/legdocs/mmis/2018/pw/bgrd/backgroundfile-113634.pdf>.

<sup>2</sup> Ibid.

<sup>3</sup> On October 30, 2020, the City of Toronto and the Government of Canada announced a funding commitment of \$19 million to help reduce the impact of severe storms and flooding in the Rockcliffe-Smythe neighbourhood. <https://www.toronto.ca/news/city-of-toronto-receives-federal-funding-commitment-to-help-address-flooding-in-the-rockcliffe-smythe-neighbourhood/>

<sup>4</sup> See ‘Five feet of sewage’: Toronto homeowner inundated by floods begs city to step in (accessed 12 October 2020 at <https://www.cbc.ca/news/canada/toronto/toronto-flooding-humber-river-basement-sewage-1.5220928>), *In our backyard: What Climate Change in Canada Looks Like* (accessed 12 October 2020 at <https://www.cbc.ca/news2/interactives/inourbackyard/>) and *Hell and High Water* (accessed 12 October 2020 at <https://torontolife.com/city/the-age-of-the-flood/>).



neighbourhoods. Some homeowners have spent tens of thousands of dollars to repair the damages caused by basement floods, only to have another flood damage their just-completed repairs.

6. Since amalgamation, the City has contracted with an external claims adjuster to handle insurance (third party liability) claims against the City. This process allows homeowners who believe the City has been negligent in its management of the City's sewers, resulting in property damage, to submit a negligence claim against the City. The City will consider resolving a claim if the homeowner provides evidence that the damage sustained was the result of the City's negligence.
7. After the August 2018 storm event, 43 homeowners in the Rockcliffe-Smythe neighbourhood submitted negligence claims against the City, believing that the City should bear responsibility for the property damage from the basement flooding they experienced.
8. Of the 43 claims Rockcliffe-Smythe homeowners submitted, the City determined that there were grounds for resolving only three.

## **Toronto City Council Motion**

9. In July 2019, City Council asked Ombudsman Toronto to review the City's process for investigating third-party liability claims by members of the public whose properties have suffered damage due to basement floods and sewer backups.<sup>5</sup>

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<sup>5</sup> <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2019.GL6.12>. The item, which was first considered and adopted by the General Government and Licensing Committee on June 24, 2019, was adopted by City Council on July 16. The item reads: City Council requests that Ombudsman Toronto review the City's process for public claims for damage due to the escape of water from the City's sewage system, including basement flooding, and to investigate this process, if warranted.



# OMUBUDSMAN TORONTO ENQUIRY

## Enquiry Process

10. During our Enquiry, Ombudsman Investigators did the following:
  - Interviewed several homeowners about their experiences dealing with basement floods and the City's third-party liability claims investigation process
  - Met with the City Councillor from Ward 5, whose Ward is home to many residents whose homes have suffered significant damage from repeated basement flooding events
  - Reviewed a randomized selection of 45 basement flood and sewer backup claims the City's third-party claims adjuster investigated in 2018 and 2019 (including claims relating to the August 7, 2018 storm event) with a focus on:
    - Whether the third-party claims adjuster conducted a fair and thorough investigation of the individual circumstances of each claim;
    - Whether the third-party claims adjuster got the necessary information from Toronto Water to conduct a fair and thorough investigation;
    - Whether the third-party claims adjuster gave claimants clear and easy to understand reasons when it denied a claim;
    - Whether the third-party claims adjuster had documentation to support its decision, and the claimant was provided with this documentation;
    - Whether the claims investigation process was completed in a reasonable time, and whether claimants were kept updated on the status of the investigation
  - Reviewed information the City and the third-party claims adjuster gave claimants about the claims investigation process for basement flood and sewer backup claims



- Met with City staff from the City's Insurance & Risk Management, Toronto Water and Legal Services divisions to get more information about the third-party liability claims investigation process for basement floods and sewer backups claims
  - Reviewed documentation from Insurance & Risk Management and Toronto Water on the third-party liability claims investigation process for basement flooding and sewer backup claims
  - Conducted in-depth interviews with staff at Insurance & Risk Management, Toronto Water and the City's third-party claims adjuster.
11. Ombudsman Toronto sincerely appreciated the willingness of homeowners to share their experiences with us during this Enquiry. We also received excellent cooperation from Insurance & Risk Management, Toronto Water, Legal Services and the City's third-party claims adjuster.

### **Focus: The Claim Investigation Process**

12. As City Council requested, the focus of this Enquiry was on the third-party liability claims investigation process for property damage caused by floods or sewer backups. We did not examine the causes of repeated basement flooding events that impact certain areas of the City, like Rockcliffe.
13. As the City continues in its efforts to reduce the impact on Toronto homeowners of basement flooding and sewer backups, it is our hope that our Enquiry will increase transparency, fairness, and understanding about the third-party liability claims process as it relates to such events.

## **COMPLAINTS: WHAT PEOPLE ARE CONCERNED ABOUT**

14. From the beginning of 2019 to the end of October 2020, 28 people complained to Ombudsman Toronto about basement flooding. The complaints fell into three categories:
- Complaints about property damage from basement flooding and sewer backups



- Complaints about the third-party claims investigation process for property damage claims related to basement flooding and sewer backups
  - Complaints about property damage due to basement flooding and sewer backups specifically associated with storm events.
15. During our Enquiry, ten homeowners told us about their experiences with basement floods and, in some cases, the process of submitting a third-party liability claim against the City.
  16. One, who has experienced multiple basement floods, told us about the stress and anxiety he and his family feel whenever a rainstorm happens. He said that he did not file a claim with his insurance company after the most recent flood because he feared it would, once again, lead to a significant increase in his home insurance premiums. Or worse, he might lose his insurance all together. He told us that several of his neighbours no longer qualify for insurance to cover losses related to floods on account of the number of insurance claims they have submitted.
  17. As in the media reports, many homeowners who contacted us expressed anger and frustration that their homes continue to be flooded, even after the City has completed upgrades to the sewers in their neighbourhood. Their anger and frustration are compounded when they submit a third-party liability claim against the City, believing that the City should be responsible for the property damage caused by the floods, only to have the third-party claims adjuster deny their claim.
  18. One homeowner experienced flooding during the July 2013 storm event. After spending thousands of dollars making improvements to her property, including installing a back-flow preventer valve, and despite the City improving the sewers servicing her neighbourhood, her home experienced another basement flood during the August 2018 storm event.
  19. Believing that the basement flooding was due to negligence on the part of the City, she filed a claim against the City, only to be told that the investigation had found no negligence on the part of the City, and the cause of her flood was the extreme rainfall. She told us that she and other residents have a difficult time understanding how the City is not negligent when, even after the City has improved the sewers, properties continue to experience basement flooding.
  20. Some homeowners spoke about their frustration and confusion with what they saw as inconsistency in the City's third-party liability claims process, namely, that some homeowners' claims were denied, but a claim submitted by a



homeowner on a neighbouring property that also experienced flooding from the same storm event was successful in its claim against the City.

21. Some homeowners told us they didn't understand the City's third-party liability claims investigation process, and how to file a claim against the City.
22. Some said that staff from Toronto Water had visited their homes after the August 2018 storm event and asked questions about the flooding they experienced. These visits from Toronto Water left with them with the impression that this was part of the third-party liability claims investigation process. They later learned that this was not the case. They said that Toronto Water staff did not explain to them the third-party claims liability process, or how to file a claim against the City.
23. In any event, the homeowners we spoke with questioned whether it would have even been worthwhile to submit a negligence claim against the City, since they understood that the City denies most claims.

## BACKGROUND

### **Ombudsman Toronto 2011 Investigation of the City's Claims Process**

24. In 2011, Ombudsman Toronto investigated the City's handling of third-party liability claims involving property damage caused by potholes, flooding and sewer backups, and falling tree limbs.<sup>6</sup>
25. Our Investigation found that the third-party claims adjuster the City had a contract with at that time was automatically denying claims.<sup>7</sup> They were then sending a letter to the claimant saying that there had been an investigation, when in fact no investigation had taken place.
26. We found in 2011 that the third-party claims adjuster routinely closed claims when claimants stopped contacting them, without telling claimants that the files were being closed. And adjuster decisions to reject a claim were not supported by facts or reasons.
27. Our Investigation also found that the City provided insufficient and misleading information on its website about third-party liability claims, and that claimants

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<sup>6</sup><https://www.ombudsmantoronto.ca/OmbudsmanToronto/media/Documents/Investigative%20Report/Ombudsman-Report-Potholes,-Floors-and-Broken-Branched-October-2011.pdf?ext=.pdf>

<sup>7</sup> The City now has a contract with a different third-party claims adjuster.



did not understand the third-party liability claims investigation process and the need to show that the City was negligent.

28. The 2011 Ombudsman Investigation report made 10 recommendations to the City to improve its third-party liability claims investigation process to ensure fair, thorough, transparent, and timely claim investigations. They included:
  - The third-party claims adjuster should request detailed documentation from the City division responsible for the maintenance of the infrastructure to determine whether the City properly maintained its infrastructure.
  - Decisions to deny a claimant's third-party liability claim should be made after a proper consideration of the facts and must be supported by documentation.
  - Claimants should be given clear and detailed explanations of the results of the claims investigation, and claims must not be closed without notifying the claimant.
  - The City should ensure that it provides clear language to the public about the claims investigation process, including:
    - An explanation of third-party liability and negligence;
    - The criteria used to determine the claim, including the City's position and information on minimum maintenance standards; and
    - The timeframe for a decision.
29. The City accepted all of our 2011 recommendations. Ombudsman Toronto then followed up with the City to ensure that it implemented them.
30. One thing this Enquiry considered was whether the City and its third-party claims adjuster were still following the recommendations we made in our 2011 Investigation, as they related to basement flood and sewer backup claims.



# BASEMENT FLOODING AND SEWER BACKUPS: GENERAL INFORMATION

## What the City is Doing to Prevent and Respond to Basement Flooding

31. The City's website includes information on the causes of basement flooding, what to do if a basement floods, how homeowners can reduce their risk of basement floods, and what the City is doing to prevent basement flooding.
32. One City initiative to help prevent basement flooding is the Basement Flooding Protection Program. This is a multi-year program by Toronto Water to help reduce the risk of basement flooding by improving the City's sewers. Improvements may include adding additional or larger storm or sanitary sewers, constructing storm water sewer tunnels and measures to slow the drain of rain water into the sewer system.
33. Individual homeowners can also apply for subsidies through the Basement Flooding Protection Subsidy Program. This initiative, part of the larger Basement Flooding Projection Program, offers financial subsidies to homeowners to install devices designed to protect their homes against basement flooding.<sup>8</sup>
34. More information about the Basement Flooding Protection Program and Subsidy Program can be found on the City's website.<sup>9</sup>
35. The City also has a Mandatory Downspout Disconnection Program. During heavy rainfall, the City's sewers can become overloaded and this can increase the risk of basement floods. The program requires homeowners to disconnect their downspouts from the City's sewer system, where feasible. This results in stormwater being directed onto a homeowner's property rather than into the sewers, reducing the risk of a sewer overload.

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<sup>8</sup> In 2017, the City of Toronto Auditor General released a report titled *Improving the Effectiveness of the Basement Flooding Protection Subsidy Program*. One of the objectives of the audit was evaluating whether the subsidy program was effective in assisting homeowners to protect their homes against basement flooding. The report made eight recommendations to help the City continue to improve controls, administration and performance monitoring of the Subsidy Program. The Auditor General's report can be accessed at <https://www.toronto.ca/legdocs/mmis/2017/au/bgrd/backgroundfile-107814.pdf>. Further, as part of her 2020/21 Workplan, the Auditor General is planning to review the Basement Flooding Protection Program. The audit will assess the effectiveness of the program in reducing basement flooding in areas where improvements have been completed.

<sup>9</sup> <https://www.toronto.ca/services-payments/water-environment/managing-rain-melted-snow/basement-flooding/basement-flooding-protection-subsidy-program/>





36. Further, over the past several years, Toronto Water's Environmental Monitoring and Protection Unit has run multi-media and public education campaigns (including the "What Not to Flush" and "Basement Flooding" campaigns) to inform homeowners and businesses about the impact of discharging fats, oils and grease into private plumbing or the City's sewers.<sup>10</sup>

## **Regular City Sewer Maintenance and Cleaning**

37. We spoke with the Manager for Program Maintenance at Toronto Water about how the City inspects, cleans and maintains the City's sewer system.
38. The Program Manager explained that Toronto Water used to inspect and clean (or flush) all sections of the City's sewers every five years. He said that this was difficult to accomplish, since there are approximately 10,000 kilometres of sanitary and storm sewer making up the City's sewer system. In addition, he said that Toronto Water found that it was cleaning large sections of the City's sewer that did not require cleaning. This, he said, was costly and unnecessary.
39. Currently, instead of cleaning all sections of the City's sewers every five years, Toronto Water inspects the City's sewers using an acoustic inspection tool known as the Sewer Line Rapid Assessment Tool (SL-RAT).<sup>11</sup> The SL-RAT uses acoustic sensing technology to give Toronto Water staff an assessment of whether there is a blockage in a sewer line. If there is a blockage in a section of the sewer, a work order is created to have the sewer cleaned. The Program Manager explained that this way, only sections of the sewer that require cleaning are cleaned, saving the City both time and money.
40. Toronto Water also conducts regular inspections of the maintenance holes,<sup>12</sup> combined storm/sanitary sewers, and storm sewers<sup>13</sup> that make up the City's sewer infrastructure system. Toronto Water fixes any issue with the operation of the City's sewers that it discovers during its inspections.

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<sup>10</sup> These are examples of the Environmental Monitoring and Protection Unit's efforts to ensure homeowners and businesses comply with the requirements of Chapter 681 – Sewers of the *Toronto Municipal Code*.

<sup>11</sup> The SL-RAT is a Trademark of Measur-It Technologies, Ltd.

<sup>12</sup> Toronto Water inspects maintenance holes once every five years.

<sup>13</sup> Toronto Water inspects combined storm/sanitary sewers at least once every 15 years and inspects storm sewers at least once every 20 years. Toronto Water uses CCTV (Closed-circuit television) technology for these inspections.



## Reporting a Basement Flood or Sewer Backup to the City

41. The City's website, under the heading *Blocked or Backed-Up Basement Drain*, instructs homeowners experiencing a sewer blockage to contact 311 to have Toronto Water investigate. It states that Toronto Water will investigate the blockage within four hours (or longer during periods of extreme weather).
42. Toronto Water's blocked or backed-up basement drain investigation process involves two steps:
  1. Staff will first investigate the sewers near the property (the main sewer line) to ensure they are draining properly. If not, staff will initiate emergency repairs to fix the problem.
  2. If the main sewer is working properly, staff will inspect the property's sewer service pipe (the part that connects a property's sewer line to the main sewer line, otherwise known as the sewer lateral pipe) and try to clear the blockage. If the blockage is on the private property's side of the sewer service pipe, the homeowner is responsible for addressing any associated repairs. However, if staff find that the problem is on the City's side of the sewer service pipe (that is, the part of the pipe that runs from the City's main sewer line up to the part of the sewer service pipe that connects the private side) Toronto Water will conduct the repairs at the City's expense.<sup>14</sup>
43. Another section of the City's website, under the heading *What to do if Your Basement is Flooded*, also advises homeowners to report a basement flood to the City either by calling 311 or submitting an online 311 self-service request. It says that City staff will investigate, assess the flooding and attempt to determine the source or sources of the flooding.<sup>15</sup>
44. We found that there is different information in different places on the City's website about Toronto Water's role respecting basement floods and sewer backups.
45. The section titled *What to do if Your Basement is Flooded* does not provide as much or as detailed information about the Toronto Water investigation process as the section of the website titled *Blocked or Backed-Up Basement Drain*. (It is

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<sup>14</sup> <https://www.toronto.ca/services-payments/water-environment/your-water-pipes-meter/water-related-help-advice/blocked-or-backed-up-basement-drain/>

<sup>15</sup> <https://www.toronto.ca/services-payments/water-environment/managing-rain-melted-snow/basement-flooding/what-to-do-if-your-basement-is-flooded/>



our understanding that Toronto Water’s investigation process for a sewer backup or a basement flood is the same.)

## **Some History on No-Fault Grant Programs in the City**

46. Some people we spoke with believed the City should provide financial support to homeowners to help them with the cost of repairing damage caused by basement flooding or sewer backups, regardless of fault.
47. The City has in the past created a no-fault grant program to help homeowners impacted by basement flooding or sewer backups.
48. In June 2006, City Council approved the 2005 Flood Damages Grant Program.<sup>16</sup> The program, also referred to as the “No-Fault Grant Program” was created for the specific purpose of providing a grant of up to \$3,000 to homeowners who had experienced flood damage caused by an August 19, 2005 storm event. In order to qualify for the program, eligible homeowners also had to have contacted their City Councillor or Toronto Water within six months of the storm event.
49. Whether or not the City should have a no-fault financial support program for basement flooding and sewer backups in 2020 is a policy question for City Council. Ombudsman Toronto does not oversee policy making by Council or its committees. We therefore did not examine that question in this Enquiry.

# **THE CITY’S CLAIMS INVESTIGATION PROCESS FOR BASEMENT FLOODING AND SEWER BACKUPS**

## **Background: Third-Party Liability Claims and the Need to Prove Negligence<sup>17</sup>**

50. Homeowners’ claims against the City seeking compensation for property damage caused by basement flooding or sewer backups are third-party liability claims.

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<sup>16</sup> <https://www.toronto.ca/legdocs/mmis/2007/pw/bgrd/backgroundfile-6331.pdf>

<sup>17</sup> Information in this section is taken from Ombudsman Toronto’s 2011 Investigation Report on the City’s handling of third-party liability claims. See Footnote 5 to access the Investigation Report.



51. The City is not the first-party insurer for homeowners, and third-party liability claims are different from first-party liability claims. When a homeowner makes a third-party liability claim against the City, the onus is on the homeowner to prove their claim.
52. It is not enough for a homeowner to simply provide proof that a basement flood or sewer backup resulted in property damage. For the City to pay the claim, the homeowner must also prove that the property damage was the result of the City's negligence.
53. This means the homeowner must demonstrate in the claim that the City acted wrongly or failed to act appropriately, and the homeowner must prove that the City's negligent conduct caused the actual loss/property damages.
54. Third-party liability claims are adversarial in nature, since homeowners are making allegations against the City. The City, therefore, defends itself against these claims where it does not believe there is evidence that it has been negligent.

## **By the Numbers: Basement Flooding and Sewer Backup Claims for the City<sup>18</sup>**

55. From January 1, 2015 to December 31, 2019, homeowners filed 1,461 basement flooding/sewer backup claims against the City. Of those claims, the City denied 1,130, or approximately 77%, based on the third-party claims adjuster's finding that claimants had not demonstrated that Toronto Water's operations were negligent.
56. In 2019 alone, homeowners made 260 basement flooding/sewer backup claims against the City. Of those, the City determined that there were grounds for resolving only 11; the average paid claim value was \$1,701. Of the remaining 249 claims, the City denied 148, with the remaining claims still awaiting determination.

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<sup>18</sup> Statistics provided in this section are taken from the January 2020 Claims Disclosure Report. The report can be accessed here: <https://www.toronto.ca/wp-content/uploads/2020/01/968c-Claim-Disclosure-Report-2019-Final.pdf>



## Information for the Public

57. Public information about making a third-party liability claim against the City is on the City's website.<sup>19</sup> Toronto Water also has a brochure called *Basement Flooding – General Information*, which includes some information about submitting a claim against the City.

### The City's Website

58. The website says that if someone believes the City has been negligent in its management of City sewers and this has caused injury or property damage, they can submit a liability claim against the City.

59. The website explains that there are differences between submitting a claim through someone's insurance company (first-party liability) and making a negligence claim against the City (third-party liability). It explains that:

- Homeowners' insurance coverage is generally more extensive than what may be recovered through a third-party liability claim against the City;
- The City of Toronto is not the insurer for the homeowner; and
- Making a third-party claim against the City does not guarantee that a homeowner will receive payment from the City.

60. The website also explains that submitting a third-party liability claim against the City is different from pursuing legal action against the City in court. It notes that any legal action against the City must be taken within two years of the date of loss.<sup>20</sup>

### The Toronto Water Brochure

61. Toronto Water gives its *Basement Flooding – General Information* brochure to homeowners who report basement floods or sewer backups to 311.

62. The brochure includes general information about how to make a claim against the City. But it does not explain to homeowners that a claim against the City is a third-party liability claim, or how the process is different from submitting a claim to their own insurance company.

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<sup>19</sup> [www.toronto.ca/city-government/accountability-operations-customer-service/complaints-claims-compliments/make-a-claim-against-the-city/](http://www.toronto.ca/city-government/accountability-operations-customer-service/complaints-claims-compliments/make-a-claim-against-the-city/)

<sup>20</sup> *Limitations Act, 2002.*



63. The brochure also does not refer homeowners to the City's website, where there is more information about the third-party claims investigation process.

## **How to Submit a Claim**

64. If a homeowner decides to submit a claim against the City for property damage related to a flood or sewer backup, they can do so either by mail or online through a Claims Submission Web Form.

## **Claims Investigations**

65. The City's third-party claims adjuster investigates claims against the City. The purpose of the investigation is to determine whether the claimant can show that the damage to their property was caused by the City's negligence. The investigation involves obtaining information about the basement flood or sewer backup both from the claimant and from Toronto Water.
66. Within two business days of the City receiving the claim, the third-party claims adjuster sends an acknowledgement to the claimant confirming receipt of the claim, informing them that the matter is being investigated, and providing the name and contact information of the individual adjuster assigned to investigate the claim. They also provide a link to the City's website with information about the third-party claims investigation process.
67. The third-party claims adjuster obtains and reviews records that Toronto Water may have on the property and any information about the flood or sewer backup incident in question. This could include 311 service requests and response times related to the property, completed work orders, and records of preventative maintenance for the sewer servicing the property.
68. The investigation may also review weather-related information including rain gauge records, since a significant rainfall over a short period of time can result in the City's sewers being overwhelmed, which may cause sewer backups and basement flooding.
69. If the investigation finds that Toronto Water exercised a reasonable standard of care in the maintenance of the City's sewers and met its service standards in responding to and addressing a homeowner's reported basement flood and sewer backup, the City will deny the claim.



70. However, if the investigation finds that Toronto Water did not meet the appropriate standard of care, and that failure resulted in property damage, the City will try to resolve the claim by negotiating a settlement with the claimant.
71. The City's website emphasizes that the City will not be responsible for property damage related to floods or sewer backups if the City has met "installation and maintenance standards" for its sewer infrastructure.
72. One thing this means is that if the City installed a sewer system "in accordance with the engineering practices that prevailed at the time" (and has reasonably maintained it since), the City will deny the claim.
73. The website notes that the City denies the "majority" of property damage claims against it "as City divisions (i.e. Toronto Water) regularly meet or exceed service standards."

### **Third-Party Claims Adjuster Service Standards**

74. Insurance & Risk Management has created a "Service Standards Compliance Report" that it uses to ensure that the third-party claims adjuster meets its service standards associated with claim investigations.
75. The service standards, many of which come directly from the Ombudsman 2011 recommendations, require that:
  - An acknowledgement is sent to the claimant within 48 hours of receipt of the claim.
  - The adjuster orders relevant reports from the relevant City division within two business days of receiving the claim.
  - With regards to the investigation itself:
    - A proper review takes place;
    - Claimants are not misled;
    - Decisions are made on a proper consideration of the facts;
    - The claimant is provided with a clear explanation for a decision;
    - Claimants are provided with information and relevant activity on their files;



- Files are not closed without notification to the claimant;
  - Letters sent to claimants denying their claim contain clear language and are consistent with the above requirements.
76. As part of its contract with the City, the third-party claims adjuster is required to conduct monthly audits of 40 files, selected at random, to ensure that it is meeting the service standards.<sup>21</sup>
77. Our review of 45 completed claims investigation files suggested that the third-party claims adjuster is meeting the service standards Insurance & Risk Manager has established.

## **Onus of Proof**

78. As noted earlier, the third-party liability claims process is based on the legal concept of negligence. To succeed in a claim against the City, a homeowner has the onus (or job) of proving that the City failed in its duty of care.
79. If the third-party claims adjuster determines through its investigation of the claim that Toronto Water met reasonable installation, maintenance, and response time standards, the City will deny the claim.
80. The claim denial letters that we reviewed all contained the following sentence: “In order for you to be successful in your claims against the City of Toronto, you must prove that the City was negligent.”
81. However, we found that this denial letter is the first time the City (or anyone on its behalf) tells claimants that it is the claimant who “must prove that the City was negligent.”

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<sup>21</sup> Although Insurance & Risk Management requires the third-party claims adjuster to conduct monthly audits of 40 random files, the third-party claims adjuster told us that it audits 50 files per month.





82. The City's website used to have a section called *Insurance Claims: Frequently Asked Questions*. With respect to making a claim for a sewer backup, it said:

**12. Can I make a claim?**

Yes. You may wish to refer to your own insurance company. Sewer backup, cleanup and the cost of repairing or replacing damaged property is covered under many insurance policies. Your insurance company may try to recover the amount of your deductible as well as the claim they paid.

A claim can still be made directly against the City. **However, the onus will be on you to demonstrate the City's negligence.** (emphasis added)

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83. This information is no longer on the City's website.
84. When we asked Insurance & Risk Management why, they said they believed that the City's Strategic Communications division had decided to remove all *Frequently Asked Questions* sections from the City's website.

## WHEN THE CITY ACCEPTS A CLAIM

85. If the third-party claims adjuster's investigation finds that Toronto Water failed to meet a reasonable standard of care, and that failure could have contributed to the property damage caused by the basement flood or sewer backup, the City will consider that there are grounds to try and resolve the claim.

### Confidentiality Clause

86. During our Enquiry, we spoke with one homeowner whose property was damaged by a sewer backup and who settled her claim with the City. When we asked her to share with us her experiences of going through the claims investigation process, she said she could not do so, because of a confidentiality clause in the release she had signed.
87. As part of the claim settlement, the City routinely asks claimants to sign and date a Final Release. This document includes the following paragraph:



And we further solemnly and expressly covenant and agree not to reveal the circumstances of our settlement with the City of Toronto and their insurer to anyone, whether directly or indirectly and without limitation, through hints, or innuendo and should we violate these covenants and agreement, we acknowledge that the City of Toronto and its insurers shall be entitled to recover the settlement funds paid plus damages if incurred.

88. We asked Insurance & Risk Management why they include the confidentiality clause in the final settlement. They said there is a general concern that a claimant discussing a claim settlement could lead to more people becoming aware of the opportunity to make a negligence claim against the City. They said this is something that the City generally does not want to advertise.
89. This is not the first time the City has told Ombudsman Toronto it does not want to advertise to the public the process of making a third-party liability claim against it.
90. During our 2011 Investigation, Insurance & Risk Management told us about the City's long-standing attitude towards disclosing information to the public about the possibility of making a third-party liability claim. Basically, the approach was to not provide information to the public about this process because the City did not want to encourage claims.
91. In 2011, we found that the City had not done enough to help the public understand the third-party liability claims process. We recommended that the City be much more transparent in its communications.

## **WHEN THE CITY DENIES A CLAIM**

92. If the third-party claims adjuster's investigation finds that Toronto Water followed reasonable installation and maintenance standards for the City's sewers, and that Toronto Water responded and addressed the basement flood or sewer backup in accordance with its service standards, the City will defend itself against the claimant's allegation of negligence and deny the claim.
93. Before the adjuster tells a claimant that their claim is denied, a supervisor reviews the file to ensure that there was a thorough investigation, that the evidence supports denying the claim, and that the decision letter to the claimant clearly outlines the results of the claim investigation and reasons for denial.
94. Adjusters use a template letter to explain the results of the investigation. They amend the template to describe the specific circumstances of each claim and



the reasons for the denial. In addition, they send the claimant all the information in the Toronto Water report the adjuster considered in coming to a decision.

## **It is Important to Report a Basement Flood or Sewer Backup**

95. For two reasons, it is important for homeowners to promptly report basement floods or sewer backups to the City through 311, allowing Toronto Water staff to investigate.
96. First, Toronto Water staff uses information that homeowners report to 311 about basement floods and sewer backups as part of the Basement Flooding Prevention Program. The Manager for the Basement Flooding Prevention Program explained to us that this information helps the program by giving it “the best indication” of which properties have experienced flooding or sewer backups.<sup>22</sup>
97. Second, if a homeowner decides to submit a third-party liability claim against the City, details of Toronto Water’s investigation of the basement flood or sewer backup form part of the claim investigation.
98. We reviewed some claims where the claimants did not report a basement flood or sewer backup to 311. Toronto Water therefore did not have an opportunity to investigate. In these cases, a typical denial letter from the third-party claims adjuster stated the following:

We have obtained the Toronto Water Report relating to this matter and attach a copy of the same for your review. This report provides the entire Water Call Report history relating to your property.

The report revealed that there was no call placed to Toronto Water detailing any incident at the location of loss, on or near the date of loss of (Month/Date/Year).

In order for you to be successful in your claim against the City of Toronto, you must prove that the City was negligent. While we do not dispute that an incident occurred, there is no information that has been brought to our attention that would suggest that the City of Toronto is liable in causing the damages to your property. Accordingly, we

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<sup>22</sup> The Manager explained to us that the Basement Flooding Prevention Program uses computer models to show how many properties in a designated section of the City could be impacted by flooding. He explained that basement flood and sewer backup data taken from 311 is used to “validate” the computer modelling. That is, data from 311 is used to verify if the properties the computer model predicted could be impacted by flooding are the same ones that have been reported as flooded. Adjustments are made to the computer model to account for the properties that have been impacted by basement flooding or sewer backups, if the model did not initially predict that these properties could be impacted by flooding.



can find no negligence against the City of Toronto. In the absence of any liability, we have no alternative but to respectfully deny your claim in full.

99. Both Insurance & Risk Management and the third-party claims adjuster said that it is “ideal”, for the purposes of the claim investigation process, if a homeowner reports a basement flood or sewer backup to 311 so Toronto Water can investigate the incident.
100. They explained that this is because the results of that investigation will be included in Toronto Water’s report that the adjuster reviews. This will allow the adjuster to review things like whether Toronto Water adhered to established service standards when responding to and addressing the flood or sewer backup, as well as Toronto Water’s determination of the cause of the basement flood or sewer back up. These are important details for the adjuster to have when considering whether the City was negligent.
101. One of the recommendations we made in our 2011 Investigation was that the City clearly explain to the public the criteria it uses when reviewing third-party liability claims for common claims, including basement floods or sewer backups.
102. We also noted that giving the public more information about principles of negligence and third-party liability claims processes could actually reduce the number of claims made against the City (rather than increasing them). The public would understand how difficult it is to prove negligence and successfully make a claim.
103. As discussed above, the onus of proving that the City was negligent rests with the claimant. One piece of evidence the third-party claims adjuster considers when reviewing a basement flood or sewer backup claim is the Toronto Water investigation. Where a claimant does not report the incident to the City through 311, and Toronto Water has no opportunity to investigate the incident, it will be much more difficult for the claimant to prove that the City was negligent.

## **STORM EVENT CLAIMS**

104. On July 8, 2020, some Toronto homeowners experienced basement flooding and sewer backups after a rain storm dumped upwards of 65 millimetres of rain over parts of the City. One homeowner we spoke to from the Rockcliffe-Smythe area experienced a basement flood as a result of this storm event. Remarkably, this marked the third time in seven years that her basement had flooded; it also happened during the July 2013 and August 2018 storm events.



105. After a major rainstorm, it is not unusual for the City to receive a high number of claims for basement floods and sewer backups. In such cases, it groups the claims into a “storm event” category. The third-party claims adjuster tells claimants when their claim falls into a storm event category that investigation of their claim will take longer than the 90-day timeframe that normally applies for a claim investigation, because of the high number of claims.
106. The City told us that the decision to categorize a claim as a “storm event” claim is “determined on a principled basis”, specifically:
  - ...in circumstances where there is an identified significant rainfall event affecting one or more areas of the City on a given day, and where there is a corresponding significant volume of basement flooding calls made to the City that overlap with the area(s) of the City affected by the rainfall event.
107. After the August 7, 2018 storm event, the City received 280 basement flood/sewer backup claims. According to the third-party claims adjuster, it took almost one full year to deliver a liability determination for all these files. Of the 280 claims, the City settled only three with the claimants. It settled a fourth claim through court litigation.
108. The City staff that we interviewed explained that investigating and responding to storm event claims is a complex task. This is because of the high number of claims against the City, as well as the challenges of gathering enough information to determine in each case whether property damage was caused by the storm overwhelming the City’s infrastructure, or whether it was because of the City’s negligence.
109. The process of investigating and responding to storm event claims is a coordinated effort among Insurance & Risk Management, Legal Services, and various sections of Toronto Water, but primarily Water Infrastructure Management, which has responsibility for the Basement Flooding Prevention Program. The third-party claims adjuster is also involved in this effort, but mainly just to maintain communication with the claimant about the status of the claim investigation.
110. Presently, there are no written processes, policies or procedures to coordinate how Toronto Water and Insurance & Risk Management handle storm event claims.



## Toronto Water Enters Private Homes for Storm Event Investigations

111. Generally, when responding to a report to 311 about a single incident of basement flooding or a sewer backup (not related to a storm event) Toronto Water does not enter private homes as part of their investigation.
112. Beginning after a July 8, 2013 storm event, and again after the storm event of August 7, 2018, Toronto Water staff has entered private homes with homeowners' consent (whether the homeowner has made a third-party negligence claim or not) as part of its investigations to determine the cause of the flood or sewer backup.
113. Because of the increased number of storm events causing basement floods and sewer backups, Toronto Water believes that entering private homes impacted by a storm event is beneficial, since it helps them to get as much information as possible to try to determine the causes of basement floods or sewer backups.
114. As noted above, some of the homeowners we spoke with mistakenly believed that Toronto Water's attendance at their property after a storm event was part of the third-party liability claim investigation process.

## TORONTO WATER AND NEGLIGENCE CLAIMS

115. In the fall of 2017, Toronto Water created an internal staff position to help it respond to third-party liability claims. Initially, the position was a temporary development opportunity offered to Toronto Water employees and was scheduled to last approximately 12-months. Later, Toronto Water converted it into a full-time position.
116. The title of the position is Coordinator - Business Support ("Coordinator"). The Coordinator's primary responsibility is to provide dedicated insurance & risk management functions within Toronto Water to improve the effectiveness and efficiency of the negligence claims process.
117. When we spoke with the Coordinator, he told us that he gets involved with only a fraction of third-party liability claims against Toronto Water. On an annual basis, he estimated he might be asked to review 100 negligence claims.<sup>23</sup> He explained that this could include helping the adjuster to understand the more technical and complicated aspects of Toronto Water's operations as part of a

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<sup>23</sup> In 2019, there were 582 claims made against Toronto Water.



claim investigation. As he explained it, his role is to provide the “facts” of Toronto Water’s involvement of an incident that is the subject of a claim investigation. He does not provide an opinion on whether Toronto Water was negligent; that determination is left to the adjuster.

118. Toronto Water staff told us that the Coordinator is only rarely involved in basement flood or sewer backup claims, because investigation of these claims most often occurs as part of storm event investigations, a process in which the Coordinator typically does not have a role.
119. Even so, the Coordinator told us he tries to identify trends and potential systemic improvements from basement floods and sewer backups reported to Toronto Water.
120. Recently, the Coordinator initiated a review of all properties where Toronto Water attended two or more times to investigate basement flooding incidents. He is reviewing Toronto Water’s report for each property to see whether he can determine the reason for the recurring floods. If he uncovers something that he thinks could help prevent and/or address the repeat floods, he will share it with the appropriate section of Toronto Water for their action.

## **ANALYSIS AND FINDINGS**

### **Fairness and Transparency**

121. The focus of Ombudsman Toronto’s work is fairness. We work to ensure that the City treats people fairly in delivering public services and programs.
122. One aspect of fairness that administrative law requires is Fair Process. This is about how an administrative decision is made. Fair process requires that a decision-maker (i.e. the City) provide clear and understandable communication about the decision-making process and explain the outcome and the reasons for it.
123. Our 2011 Investigation of the City’s handling of third-party liability claims found that the City had not acted in a fair and transparent manner in receiving, investigating and deciding homeowners’ claims.
124. In the years since we completed that Investigation, the City has taken significant steps to improve the fairness and transparency of its third-party liability claims process. This includes providing greater information about the process on the



City's website and creating service standards to ensure a fair and thorough claims investigation for all third-party liability claims.

125. Notwithstanding the significant improvements the City has made since our 2011 Investigation, however, we found during this Enquiry that further improvement is necessary, to ensure that the City has a fair and transparent third-party liability claims process for basement floods and sewer backups.

## **The City Only Pays a Claim When a Homeowner Proves the City Was Negligent**

126. Toronto Water gives its *Basement Flooding – General Information* brochure to homeowners when it is investigating a basement flood or sewer backup following a report to 311. The brochure tells homeowners that they can submit a claim against the City, but it does not explain that this is a third-party liability claim alleging negligence on the part of the City, or what that means. The brochure also does not direct people to the website, which provides more information on making a claim against the City for a basement flood or sewer backup.
127. It is only fair to homeowners that the City give them clear information about the third-party liability process, how the City assesses the claims it receives, and that a claim will only be paid if a homeowner can prove the City was negligent.
128. We recommend that Insurance & Risk Management and Toronto Water revise the *Basement Flooding – General Information* brochure to include better information for the public about how the City handles basement flood and sewer backup claims. This information should include:
  - The fact that making a third-party claim against the City does not guarantee payment; and
  - That the City will only pay a claim where the claimant is able to prove that the City was negligent.
129. The brochure should also direct readers to the City's website for information on making a claim against the City. **Recommendation 1**





## **The Claimant has the Onus of Proof to Establish Negligence**

130. Throughout our Enquiry, Insurance & Risk Management and the third-party claims adjuster repeated that the onus is on the claimant to prove that it was the City's negligence that caused the property damage.
131. However, in all the information the City gives claimants about the claims process – on its website, its brochure and in written correspondence from the third-party adjuster – we found that the first and only time this is explained is in claim denial letters.
132. Fairness requires that the City clearly explain to the public up front that for the City to pay out a basement flood or sewer backup third-party liability claim, the job of proving that the City was negligent – either in how it maintained the sewers, or in failing to meet its service standards responding to the incident – lies with the homeowner making the claim.
133. While this information may be understood by people familiar with insurance & third-party liability/negligence claims, homeowners may not appreciate that it is their responsibility to prove the City was negligent for it to be liable for damages caused by a basement flood or sewer backup.
134. We recommend that Insurance & Risk Management ensure that the City's website and all written communications to claimants about the claims investigation process clearly explain that the onus is on the claimant to prove the City's negligence. **Recommendation 2**

## **Information for the Public Must be Clear and Accurate**

135. As discussed above, different parts of the City's website give different information about how Toronto Water investigates basement floods and sewer backups. But there is in fact no difference.
136. We recommend that Insurance & Risk Management and Toronto Water work with the City's Strategic Communications division to revise all relevant sections of the City's website to ensure that the public gets clear, consistent and detailed information about how Toronto Water investigates basement floods and sewer backups. These sections should also provide clear, easy to understand information about how the City handles third-party liability claims for basement floods and sewer backups. **Recommendation 3**



## Reporting to 311 May Make the Difference

137. Reporting a basement flood or sewer backup to 311 so that Toronto Water can investigate the incident plays an important part in the claim investigation process. In some cases, it could make a difference in whether a claimant is able to prove that the City was negligent. The City owes it to homeowners considering making a third-party liability claim against the City to tell them this.
138. We recommend that Insurance & Risk Management, in collaboration with Toronto Water, Legal Services and Strategic Communications, provide clear information on the City's website about the importance of reporting a basement flood or sewer backup to 311. The information on the website should explain why reporting a basement flood or sewer backup incident to 311 to allow Toronto Water to investigate may play an important part in the claims investigation process. **Recommendation 4**

## Confidentiality Clause on Settlement

139. Insurance & Risk Management told us that this clause is standard in the Final Release it has claimants sign before settling a claim, although on occasion when a claimant objects to the clause, they will remove it.
140. This raises the question of whether the confidentiality clause is necessary. There is also a question of whether it is fair, especially to a claimant who represents themselves in the settlement process, and may not realize that they can ask the City to remove the confidentiality clause.
141. Insurance & Risk Management told us they are concerned that a claimant discussing the details of their settlement with the City could lead to an increase in public awareness about the opportunity to submit a third-party liability claim against the City.
142. The City's website already gives the public information about the claims process (and we believe fairness requires that it provide more and better information, as recommended above). It seems unlikely that a claimant speaking about his or her successful third-party liability claim against the City would increase the number of claims. And even if it did, why would the City want to hide the process from the public?
143. We recommend that Insurance & Risk Management stop routinely including a confidentiality clause in the Final Release it has claimants sign when settling a claim. This should apply to all third-party liability claim settlements, not just those related to basement floods and sewer backups. The exception will be



where the City Solicitor or outside counsel representing the City expressly recommends including a confidentiality clause in a particular case.

**Recommendation 5**

## **Investigating Basement Flooding and Sewer Backup Claims Caused by Storm Events**

144. During our Enquiry, there appeared to be an anecdotal consensus amongst those we spoke with that the City is experiencing storm events that cause basement flooding and sewer backups with greater frequency and severity.
145. We heard that the investigation of basement flood and sewer backup claims resulting from a storm event is often a lengthy and complex process, involving coordination and communication across multiple City divisions. Yet, there are no written processes, policies or procedures to guide these investigations.
146. We recommend that Insurance & Risk Management, Legal Services and Toronto Water develop a written “business process” to coordinate the investigation of storm event claims. **Recommendation 6**
147. In developing a business process for storm event claim investigations, the City should consider the following:
  - Including a definition of a “storm event” for the purposes of grouping negligence claims into a storm event category
  - Objectives of the storm event claims investigations process
  - Sources of evidence to be considered in the storm event claims investigations process
  - Outlining the roles and responsibilities of the various actors involved in the storm event claims investigations process
  - Establishing/outlining a process to share evidence Toronto Water staff gathers during the storm event claims process with other sections of Toronto Water (e.g. the Basement Flooding Prevention Program)
  - Developing a communications strategy to:
    - Implement a schedule to ensure regular communication with claimants about the status of the storm event claims investigations



- Give homeowners information about the negligence claims process, including making homeowners aware of the difference between reporting a flood/sewer backup incident to 311 and making a third-party liability claim against the City
  - Give homeowners information about storm event claims investigations, including general explanations of why some homeowners impacted by a storm event may be successful in their claims while others might not. **Recommendation 7**
148. The City should also post information about the storm event claim investigations process on its website. **Recommendation 8**

## **Toronto Water Coordinator Position and Basement Flooding**

149. The Coordinator's position currently does not include any job responsibilities for working directly with sections of Toronto Water tasked with addressing basement flooding and sewer backups, such as Program Maintenance or Water Infrastructure Management (responsible for leading the Basement Flooding Prevention Program). Although we heard from the Coordinator and other Toronto Water staff that the Coordinator does communicate with program staff in these sections, it appears that this is done on an irregular and informal basis.
150. It is important for Toronto Water to ensure that relevant claims data related to basement flooding and sewer backups is shared among relevant sections of Toronto Water, and that this occurs in a regular, documented, and coordinated way.
151. We recommend that Toronto Water review the job responsibilities for the Coordinator position and examine ways in which negligence claims data could be shared with all sections of Toronto Water responsible for preventing and addressing basement floods and sewer backups. **Recommendation 9**



## RECOMMENDATIONS

152. In consideration of the information gathered through this Enquiry and our findings, we make the following recommendations, which the City should implement as soon as possible:

### **Explain that the City Only Pays When a Homeowner Proves the City Was Negligent**

1. Insurance & Risk Management and Toronto Water should revise the Basement Flooding – General Information brochure to include better information for the public about how the City handles basement flood and sewer backup claims. This information should include:
  - The fact that making a third-party liability claim against the City does not guarantee payment;
  - That the City will only pay a claim where the claimant is able to prove that the City was negligent;
  - Reference to the City's website for information on making a claim against the City.

### **Explain the Claimant's Onus of Proof to Establish Negligence**

2. Insurance & Risk Management should ensure that the City's website and all written communications to claimants about the claim investigation process clearly explain that the onus is on the claimant to prove that the City was negligent.

### **Information for the Public Must be Clear and Accurate**

3. Insurance & Risk Management and Toronto Water should work with the City's Strategic Communications division to revise all relevant sections of the City's website to ensure that the public gets clear, consistent and detailed information about how Toronto Water investigates basement floods and sewer backups, and ensure that these sections of the website also provide information



about how the City handles third-party liability claims about basement floods and sewer backups.

## **Tell People Reporting to 311 May Make the Difference**

4. Insurance & Risk Management, in collaboration with Toronto Water, Legal Services and Strategic Communications, should provide clear information on the City's website about the importance of reporting a basement flood or sewer backup to 311. The information on the website should explain why reporting a basement flood or sewer backup incident to 311 to allow Toronto Water to investigate may play an important part in the claims investigation process.

## **Stop Routinely Asking for a Confidentiality Clause on Settlement**

5. Insurance & Risk Management should stop routinely including a confidentiality clause in the Final Release it has claimants sign when settling a claim. This should apply to all third-party liability claim settlements, not just those related to basement floods and sewer backups. The exception will be where the City Solicitor or outside counsel representing the City expressly recommends including a confidentiality clause in a particular case.

## **Develop a Process for Storm Events**

6. Insurance & Risk Management, Legal Services and Toronto Water should develop a written "business process" to coordinate the investigation of storm event claims.
7. In developing a business process for storm event claim investigations, Insurance & Risk Management, Legal Services and Toronto Water should consider the following:
  - Including a definition of a "storm event" for the purposes of grouping third-party liability claims into a storm event category;
  - Objectives of the storm event claims investigations process;



- Sources of evidence to be considered in the storm event claims investigation process;
  - Outlining the roles and responsibilities of the various actors involved in the storm event claims investigations process;
  - Establishing/outlining a process to share evidence Toronto Water staff gathers during the storm event claims process with other sections of Toronto Water (e.g. the Basement Flooding Prevention Program);
  - Developing a communications strategy to:
    - Implement a schedule to ensure regular communication with claimants about the status of the storm event claims investigations;
    - Give homeowners information about the negligence claims process, including making homeowners aware of the difference between reporting a flood/sewer backup incident to 311 and making a third liability claim against the City;
    - Give homeowners information about storm event claims investigations, including general explanations of why some homeowners impacted by a storm event may be successful in their claims while others may not.
8. The City should post information about the storm event claims investigations process on its website.

## **Make Better Use of the Toronto Water Coordinator Position**

9. Toronto Water should review the job responsibilities for the Coordinator – Business Process position and examine ways in which third-party liability claims data could be shared with sections of Toronto Water responsible for preventing and addressing basement floods and sewer backups.



## THE CITY'S RESPONSE TO THE FINDINGS AND RECOMMENDATIONS

153. As a matter of procedural fairness, we shared a draft of this report with the leadership of Insurance & Risk Management and Toronto Water, as well as their legal advisors. We then met with them to give them an opportunity to make representations on our findings and recommendations.
154. The Director, Insurance & Risk Management has informed the Ombudsman that the City agrees with the findings in this Enquiry. It accepts the Ombudsman's recommendations and has undertaken to implement them by the end of March, 2021. (See Appendix A)

## OMBUDSMAN TORONTO FOLLOW-UP

155. Ombudsman Toronto will follow up with the City quarterly, until we are satisfied that implementation of our recommendations is complete.

(Original Signed)

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Susan E. Opler  
Ombudsman





**Melissa Ferreira**  
Director

**Finance and Treasury Services**

**Insurance & Risk Management**  
**City Hall**  
100 Queen Street West  
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November 12, 2020

Susan E. Opler, Ombudsman  
Ombudsman Toronto  
375 University Avenue  
Toronto, Ontario

Sent by email to: [susan.opler@toronto.ca](mailto:susan.opler@toronto.ca)

**RE: Ombudsman Toronto Report: Enquiry into How the City of Toronto Handles Homeowner Third-Party Liability Claims for Basement Flooding and Sewer Backups**

Dear Susan,

Thank you for conducting a review of the City's claims investigation process for damage caused by floods or sewer backups.

As you know, since the Ombudsman 2011 report which investigated the City's handling of third-party liability claims, the City has made some great strides, including the breadth of information we provide to the public about the claims process on the City's website; however, we appreciate your objective enquiry and the recommendations to enable the City to continuously enhance how we serve the public and ensure fairness and transparency in our claims investigation process.

We agree with your findings, accept the recommendations and will undertake to implement them by the end of March 2021.

Sincerely,

A handwritten signature in black ink that reads "M Ferreira".

Melissa Ferreira  
Director, Insurance & Risk Management

c.c.: William Shea, Toronto Water  
Diana Dimmer, Legal Division