

March 7, 2006

To: Policy and Finance Committee
From: Administration Committee
Subject: **Bill 123, *Transparency in Public Matters Act, 2005***

Recommendation:

The Administration Committee recommended to the Policy and Finance Committee that City Council recommend to the provincial government that the provisions of Bill 123, being "*An Act to require that meetings of provincial and municipal boards, commissions and other public bodies be open to the public*" be incorporated into the proposed *City of Toronto Act 2005 (Bill 53)*.

Background:

The Administration Committee on March 6, 2006, considered a report (January 18, 2006) from the City Clerk advising City Council of possible enactment of Bill 123, being "*An Act to require that meetings of provincial and municipal boards, commissions and other public bodies be open to the public*". The short title of the Bill is the *Transparency in Public Matters Act, 2005*.

Recommendation:

It is recommended that this report be received for information.

(Report dated January 18, 2006, from the City Clerk,
addressed to the Administration Committee)

Purpose:

To advise City Council of possible enactment of Bill 123, being "*An Act to require that meetings of provincial and municipal boards, commissions and other public bodies be open to the public*". The short title of the Bill is the *Transparency in Public Matters Act, 2005*.

Financial Implications and Impact Statement:

In the event that Bill 123 receives Third Reading and is passed into law, the City of Toronto may incur significant additional costs if the minutes of all meetings of City Council and Committees need to be enhanced.

Recommendations:

It is recommended that this report be received for information.

Background:

Bill 123 is a Private Member's Bill, which would require municipalities, school boards and public hospital boards to give reasonable notice of their meetings and to ensure that those meetings are open to the public except in certain circumstances. There are many similarities as well as conflicts between Bill 123 and the current *Municipal Act, 2001* and the proposed *City of Toronto Act, 2005 (Bill 53)* provisions.

Legal Services made representations on the City's behalf during hearings by the Standing Committee on Regulations and Private Bills in September 2005, which read in part:

“Toronto supports in principle the openness of meetings and access to the public records of those meetings. Toronto does want to work with the province to address these matters and is currently doing so ... Bill 123 is not the place to deal with these matters. The City of Toronto Council, its committees, agencies, boards and commissions respectfully submit that the place to deal with these matters is the *City of Toronto Act* review.”

In the First Reading of the bill, the bill applied to many public bodies, including universities, colleges, boards of health, health profession councils, police services boards, public library boards, and the OMB. At the initiative of the private member sponsoring the bill, the Second Reading version of the bill that has been ordered for Third Reading, only applies to municipalities, school boards and public hospital boards.

On February 15, 2006, Mayor Miller wrote Premier McGuinty requesting that given the government's support for the principles and provisions of Bill 53 that the City of Toronto be exempt from Bill 123 should it be introduced for Third Reading and enacted (see Appendix 3).

The Bill has been endorsed by organizations such as the Ontario Press Council, the Ontario Community Newspapers Association and the Canadian Civil Liberties Association and the Information and Privacy Commissioner of Ontario. These organizations are of the view that the proceedings of municipal councils should be more open.

Comments:

Bill 123:

- requires meetings to be open, with limited exceptions
- designates public bodies (municipal councils and committees, school boards, hospital boards) that will be subject to its provisions regarding open meetings
- requires prescribed public bodies to give reasonable notice of meetings
- requires posting of minutes and drafting minutes, of deliberations made in closed sessions

- provides that any person who believes that the designated public body has contravened or is about to contravene a provision of Bill 123 may make a complaint to the Information and Privacy Commissioner of Ontario (IPC)
- prevails over other statutes and regulations, “except to the extent that the other Act or regulations provides for greater openness of meetings or greater accessibility to minutes of meetings”
- requires a member of council be appointed to oversee compliance with the bill's requirements with respect to minutes and with the public body's rules with respect to notice and minutes
- empowers the IPC with the authority to issue orders voiding any decision, recommendation or action made at a meeting whose procedures fall short of the requirements of Bill 123

New Powers of the Information and Privacy Commissioner (IPC)

The IPC is currently responsible for appeals of decisions regarding freedom of information, and investigating privacy complaints. Under Bill 123, the IPC would be granted significant new powers to:

- receive, hear and investigate complaints regarding contraventions of Bill 123
- receive complaints for a period of up to a year after the matter giving rise to the complaint first came to the attention of the complainant or should reasonably have come to their attention
- conduct reviews on the IPC’s own initiative
- enter and inspect any premises without warrant (dwelling places with a warrant)
- demand the production of documents and compel oral or written evidence on oath or affirmation
- void decisions, recommendations and actions taken at meetings if it is determined that Bill 123 provisions have not been followed
- issue orders directing municipalities to perform a duty imposed by Bill 123
- direct practices to change, cease, or not commence at all
- require the implementation of certain practices reasonably necessary to comply with Bill 123
- commence a review, on the IPC’s own initiative, of a designated body in relation to a suspected contravention or a contravention that the IPC believes is about to occur

These new powers are greater than the comparable powers of the Provincial Ombudsman in regard to provincial bodies. Most important is the power for the IPC to void Council decisions for failing to comply with the Bill. There is no time limit for the IPC to issue such orders, and the IPC would also have the power to vary the order or make further orders on the same matter at any time. An appeal of an IPC order may only be made strictly on a point of law, not on any other grounds.

These powers could have serious implications if important Council decisions were overturned by the IPC. Under Bill 123 it would be possible for a decision to be overturned because of a technicality, such as an incorrect meeting notice or minutes deemed to be not sufficiently

detailed. In effect, these new powers would grant the IPC with substantial oversight authority over the decision-making of City Council.

Granting the IPC these powers would contradict several provisions of Bill 53, if enacted. Bill 53 states that one of its purposes is to create a framework which recognizes that the City must be able to ensure both that the City is accountable and that City processes are transparent:

“1(1). The City of Toronto exists for the purpose of providing good government with respect to matters within its jurisdiction, and the city council is a democratically elected government which is responsible and accountable.

2. The purpose of this Act is to create a framework of broad powers for the City which balances the interests of the Province and the City and which recognizes that the City must be able to do the following things in order to provide good government:

4. Ensure that the City is accountable to the public and that the process for making decisions is transparent.”

Bill 53 would grant the City broad powers to pass by-laws with respect to accountability and transparency of the City and to its operations and procedures.

New Investigation Powers – Records of Councillors and Others

Currently, the IPC’s powers under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA) to require the production of records are limited to records in the City’s custody or control. It has been determined that, in general, records created and retained by councillors in regard to ward business are outside of the scope of MFIPPA.

Bill 123 would empower the IPC to enter and inspect without a search warrant, any premises (except dwellings) if the IPC has grounds to believe that the premises contain records relevant to a suspected contravention. The IPC would also have the power to enter residential premises with a search warrant. This would grant the IPC with the power to search the offices or residences of members of Council, or any company or individual who may have had dealings with the City or with a Councillor, and seize any records deemed relevant to their investigation.

Notice of Meetings

Section 4 requires advance notice to the public of all meeting agendas. Once the agenda has been posted, Council would be prohibited from adding new items to the agenda unless the amended agenda has been posted publicly and a two-thirds majority of the members has agreed to add the new item. There is an exception for emergency items where there is a “significant danger to life, health, property or the environment.”

Rules for Closed Meetings

Section 5 contains different rules from those in the *Municipal Act, 2001* (carried forward in Bill 53) to allow meetings to be closed. These differences are outlined in Appendix 1. Bill 123 says that it will take precedence in the event of a conflict, “except to the extent that the other Act or

regulation provides for greater openness of meetings or greater accessibility to minutes of meetings.”

It is not clear how these competing sets of rules would work in practice. It is clear, however, that a number of problems would arise if the two sets of rules were in force simultaneously.

Section 5 states that if Council decides to close a meeting, a motion to close the meeting must be made in public clearly stating the nature of the matter to be considered and the general reasons why the public is being excluded.

Meeting Minutes

Section 7 of the Bill addresses meeting minutes. This section prescribes that minutes “contain sufficient detail to adequately inform the public of the main subject-matters considered, any deliberations engaged in and any decisions made.” This provision contradicts the *Municipal Act, 2001* and Bill 53, which requires the Clerk “to record, without note or comment, all resolutions, decisions and other proceedings of the council.” The Association of Municipal Managers, Clerks and Treasurers of Ontario has advised its members that the combined effect of these provisions may result in a requirement to produce verbatim minutes of all meetings, which would have significant resource implications for the City Clerk’s Office.

Section 7 also requires that minutes of *in camera* meetings be produced, and that “details that would reveal any information that was the basis for excluding the public” may be removed from the minutes, but not “more details than are reasonably necessary”. This contradicts the *Municipal Act, 2001* and Bill 53, which do not require details of *in camera* meetings to be included in minutes.

Compliance Overseer

Section 9 requires Council to appoint one of its members to oversee compliance with Bill 123's requirements regarding minutes and with the public body's rules regarding public notice of meetings, of minutes and of those rules themselves. Again, this section should be distinguished from the *Municipal Act, 2001* and Bill 53 which do not incorporate this role. This contradiction will only serve to create greater confusion in carrying out the intentions of this legislation.

Position of the Association of Municipal Managers, Clerks and Treasurers of Ontario (AMCTO)

The Association of Municipal Managers, Clerks and Treasurers of Ontario (AMCTO) has raised serious concerns with Bill 123 and requested that municipalities be removed from its scope. AMCTO has recommended that matters of open meetings be addressed through the ongoing *Municipal Act* review. This position is consistent with the City of Toronto’s position that these matters be considered as part of Bill 53.

AMCTO’s attached letter to the Minister of Municipal Affairs and Housing states:

“Over and above the additional costs that Bill 123 will entail, regrettably, the practical effect of the bill will be to create two competing sets of statutory rules for conducting municipal meetings and two parallel systems for challenging council decisions on procedural grounds. We believe that the result will be confusion and increased litigation that will undermine the local decision-making process. For that reason, we continue to press for the removal of municipalities from the list of designated public bodies in Bill 123 and for consideration of the issues raised by Bill 123 with respect to municipalities in the review that your ministry has underway.”

Conclusions:

Bill 123 has received Second Reading, has been reviewed and amended by a standing committee of the Legislature, and has been ordered for Third Reading. If enacted, the bill would establish a set of rules for open meetings parallel to and overlapping with the statutory scheme currently set out in the *Municipal Act, 2001* and Bill 53, with broad powers of the IPC to investigate complaints regarding contraventions of the Bill and to issue orders directing municipalities to conform with the Bill.

This report has been prepared in consultation with the Legal Services Division and the City Manager’s Office.

Contact:

Suzanne Craig, Director, Corporate Access and Privacy Office - phone: 392-9683

Appendix 1: Differences in Closed Meeting Provisions

<i>Municipal Act/City of Toronto Act (Bill 53)</i>	<i>Transparency in Public Matters Act (Bill 123)</i>
no equivalent	financial, personal or other matters of such a nature that the desirability of avoiding public disclosure outweighs the desirability that meetings be open to the public
no equivalent	matters of public security
security of City property	security of Council members or City property
no equivalent	personal health information
no equivalent	a person involved in a civil or criminal proceeding may be prejudiced
no equivalent	safety of a person may be jeopardized
personal matters about an identifiable individual, including City employees	personnel matters about an identifiable individual, including City employees
labour relations or employee negotiations	negotiations or anticipated negotiations relating to labour relations or employment by the City

litigation or potential litigation, including matters before administrative tribunals	litigation or contemplated litigation
advice that is subject to solicitor-client privilege, including communications necessary for that purpose	legal advice to Council or matters of solicitor-client privilege
a proposed or pending acquisition or disposition of land	no equivalent
matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act	other matters designated by regulation
consideration of a request under MFIPPA	no equivalent



October 18, 2005

To: All Ontario Municipalities

Subject: Bill 123, the Transparency in Public Matters Act, 2005

I am writing to seek support of your municipality for the position that AMCTO, the Association of Municipal Managers, Clerks and Treasurers of Ontario, has taken on Bill 123, the Transparency in Public Matters Act, 2005.

Bill 123 is a private member's bill currently before the Ontario Legislature. It received approval in principle on second reading late last year and is currently before the Standing Committee on Regulations and Private Bills.

In its present form, Bill 123 would impose new rules for public access to meetings on a wide range of public bodies, including regulatory colleges, university boards, college boards, hospital boards, school boards and—most important from AMCTO's perspective—municipal councils and local boards. The sponsor of Bill 123 recently announced amendments that would limit the legislation to three types of bodies—hospital boards, school boards and municipal councils.

The proposed rules in Bill 123 include:

- All meetings must be open to the public subject to exceptions **similar but not identical to** those in the Municipal Act.
- Minutes must be in sufficient detail to inform the reader of any **deliberations engaged in** not just decisions made, as prescribed by the Municipal Act.
- Any person may challenge council decisions on procedural grounds by making a complaint to the Information and Privacy Commissioner.
- The Commissioner may issue orders voiding any decision, recommendation or action made at a meeting whose procedures fall short of the requirements of the act.

AMCTO previously raised concerns about Bill 123 in a position paper adopted in February 2005 and in a presentation to the Standing Committee on Regulations and Private Bills in September 2005 ([copies](#) available in the Government Relations section of AMCTO's website). While fully supporting openness, accountability and transparency in the conduct of public business, including municipal business, our submissions noted the overlap of the provisions in Bill 123 with the notice, meeting and minute provisions of the Municipal Act that—in conjunction with the electoral process—already support openness and accountability in local government. We subsequently prepared the table that you will find enclosed detailing the extent of overlap between the two pieces of legislation.

AMCTO

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Over and above the additional costs that Bill 123 will entail, regrettably, the practical effect of the bill will be to create two competing sets of statutory rules for conducting municipal meetings and two parallel systems for challenging council decisions on procedural grounds. We believe that the result will be confusion and increased litigation that will undermine the local decision-making process.

For that reason, we are continuing to press for the removal of municipalities from the list of designated public bodies in Bill 123 and for consideration of the issues raised by Bill 123 with respect to municipalities through the review of the Municipal Act that the Ministry of Municipal Affairs and Housing has underway.

Section 273 of the Municipal Act already provides that the Superior Court of Justice may, on the application of any person, quash any by-law of a municipality in whole or in part for illegality. If the Province now wants additional mechanisms to enforce compliance with procedural requirements, we believe that there are options available in addition to a system of complaints to a provincial commissioner. As an example, could compliance be achieved through training of municipal councillors on their existing obligations under the Municipal Act? Could section 239 of the Municipal Act be amended to require sign-off by the municipal solicitor or clerk of a council decision to go in camera? Could municipalities be authorized to appoint a **local** integrity commissioner to hear complaints (an idea AMCTO put forward in its October 2004 submission on the Municipal Act review)?

Bill 123 takes a "one size fits all" approach inconsistent with developing local solutions to local problems.

We would appreciate it if you could bring our letter to your council's attention asking them to adopt a resolution endorsing our position, which is that municipalities should be removed from the list of public bodies subject to Bill 123 and that any openness and transparency issues that the Province wants addressed for municipalities should be addressed through the Municipal Act review.

We are intervening in this instance because of our ongoing interest in policy, legislation and regulations that promote healthy local democracy and facilitate the efficient and effective delivery of municipal services. We believe that the Government of Ontario should respect the principle that the Minister of Municipal Affairs and Housing articulated when he described municipalities as "a level of government, duly elected just like the provincial and federal levels."

Yours truly,



John Craig, CMO
President



Overlap between Bill 123 and the Municipal Act, 2001

Subject	Bill 123	Municipal Act	Comment
Definition of Meeting	Sec. 3	Subsec. 238(1)	The two provisions are similar (e.g., both cover committee meetings), although Bill 123 provides greater precision with respect to electronic and telephone meetings, while the Municipal Act provides greater precision for the kinds of committees covered (e.g., a 20-member community advisory committee with one council member is apparently caught by Bill 123 but not by the Municipal Act).
Notice of Meetings	Sec. 4	Subsec. 238(2), sec. 240 and sec. 251	Sec. 4 of Bill 123 says that the public body “a shall give reasonable notice to the public of every of its meetings ” and post or publish a “clear, comprehensive agenda of the items to be discussed at the meeting.” The Municipal Act provisions cover the same ground. Subsec. 238(2) requires every municipality and local board to adopt a procedural by-law. Sec. 240 provides further direction on the calling of special meetings. Sec. 251 requires notice to be given “in a form an in the manner and at the times that the councils considers adequate to provide reasonable notice. (This is the general provision—there are additional notice provisions elsewhere in the Municipal Act and in other acts.)
Meetings to Be Open	Subsec. 5(1)(5)(6), sec. 6	Subsec. 239(1)	The two provisions are similar, although Bill 123 addresses electronic and telephone meetings explicitly while the Municipal Act does not.
Exceptions to Open-Meeting Requirement	Subsec. 5(2)	Subsec. 239(2)(3)	The exceptions are similar, although there is nothing in the Municipal Act comparable to the exemption found in clause 5(2)(a) of Bill 123 (“the desirability of avoiding public disclosure of them in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that meetings be open”), and the Municipal Act offers greater specificity having regard to the statutory and policy framework for municipal government (e.g., by mentioning the Municipal Freedom of Information and Protection of Privacy Act and expanding “litigation” to include matters involving administrative tribunals).

* The version analyzed is the first reading version—i.e., without the amendments that the bill’s sponsor has announced that will limit the application of the act to hospital boards, school boards and municipal councils.



AMCTO

Subject	Bill 123	Municipal Act	Comment
Procedure for Going In Camera	Subsec. 5(3)(4)	Subsec. 239(3)(4)(5)(6)	The two sets of provisions are similar.
Requirements for Taking Minutes	Subsec. 7(1)(2)(4)(5)	Subsec. 228(1),	The Municipal Act designates the clerk as the person responsible for taking the minutes and stipulates that the minutes should reflect decisions, not deliberations (the clerk is "to record, without note or comment"). Bill 123 does not designate anyone as responsible for taking minutes and suggests that more of a verbatim record is expected (the minutes must "contain sufficient detail to adequately inform the public of the main subject-matters considered, any deliberations engaged in and any decisions made").
Minutes to Be Accessible	Subsec. 7(3)(4)(5)	Sec. 253	Both statutes provide access, although Bill 123 goes further by requiring the posting of a copy of the minutes in a public place or website, whereas the Municipal Act says simply that the clerk must allow the minutes to be inspected. On the other hand, the Municipal Act requires the clerk, on request, to provide a certified copy under seal of the municipality of minutes and related documents, while Bill 123 does not appear to address this. This is in addition to the broad right of access to municipal records that the public enjoys under MFIPPA.
Adoption of Procedural By-Law	Sec. 8	Sec. 238	The intent of the two provisions is essentially the same although the Municipal Act goes further by requiring council to give notice of its intention to adopt a procedural by-law.
Designation of Compliance Overseer	Sec. 9	No such provision	The general rule under the Municipal Act is that council as a whole is responsible.



AMCTO

Subject	Bill 123	Municipal Act	Comment
Challenges to Procedural Decisions	Sec. 10-22	Sec. 273	Bill 123 establishes a complaint system administered by the Information and Privacy Commissioner, with the Commissioner able to identify and remedy infractions of the rules. The Municipal Act authorizes any person to apply to court for an order quashing any by-law in whole or in part for illegality. In addition, under the common law, meeting in camera inappropriately can be evidence of bad faith. Avenues of redress in addition to going to court including participation in the municipal electoral process and requesting the Minister of Municipal Affairs and Housing to launch an inquiry under sec. 10 of the Municipal Affairs Act.
Interpretation & Relation to Other Acts	Sec. 23	Sec. 9	Bill 123 prevails over other legislation except to the extent that the other legislation is stricter.
Regulations	Sec. 24	Sec. 453	Bill 123 authorizes the Province to facilitate the implementation of the Transparency in Public Matters Act, 2005, by regulation. The Municipal Act authorizes the Province to facilitate the implementation of the act by regulation.

Mayor
DAVID MILLER

February 15, 2006

The Honourable Dalton McGuinty
Premier of Ontario
Legislative Building
Room 281, Queen's Park
Toronto ON M7A 1A1

Dear Premier:

As the Legislature has resumed and with Second Reading of Bill 53, *the Stronger City of Toronto for a Stronger Ontario Act*, I urgently request that the government not support the introduction for Third Reading of Private Member's Public Bill 123, *the Transparency in Public Matters Act, 2005*.

The City of Toronto strongly supports the principles of open, transparent and accountable municipal governments. However, the effects of the enactment of Bill 123 and Bill 53 for the City of Toronto will be to create two competing sets of statutory rules for conducting municipal affairs and two parallel systems for challenging council decisions on procedural grounds.

The City of Toronto and the Province of Ontario have successfully worked hard to establish a mature provincial/municipal relationship. Bill 53, if adopted, confirms provincial recognition that Toronto has a government that is capable of exercising its powers in a responsible and accountable fashion. Specifically, Bill 53 sets out the statutory scheme for the City of Toronto to manage municipal meetings in such a way as to embody the principles of an open, accountable and transparent order of government. Bill 53 states further that one of its fundamental purposes is to create a framework of broad powers which recognizes that to provide good government the City must be able to ensure both that the City is accountable to the public and that the City processes for decision making are transparent.

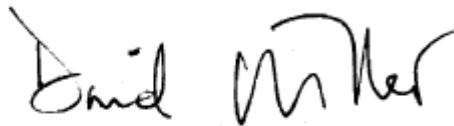
However, Bill 123 if enacted would prescribe various accountability and transparency measures for the City that would duplicate, overlap or contradict those in Bill 53. Furthermore, it would prescribe measures which would make Toronto's government subject to unelected, provincial oversight. This would diminish, not enhance, local democratic accountability and autonomy and foster public uncertainty rather than clarity in matters of local jurisdiction. It is also contrary to the government's policy direction towards enhancing local government autonomy and accountability in the planning reforms under Bill 51.



When Bill 123 was considered by the Standing Committee on Regulations and Private Bills, the City strongly urged the government to address matters regarding Council practices and procedures in the *City of Toronto Act* review rather than in Bill 123.

The City of Toronto has been proud to work co-operatively and jointly in the development of Bill 53. Unfortunately Private Member's Bill 123 has been reported for Third Reading with provisions that both undermine the principles of Bill 53 and overlap or contradict its accountability framework. We ask the government to not support introduction of Bill 123 for Third Reading or if introduction is necessary, to exempt Toronto from the list of designated bodies under the Bill.

Yours truly,

A handwritten signature in black ink, appearing to read "David Miller". The signature is fluid and cursive, with the first name "David" and the last name "Miller" clearly distinguishable.

Mayor David Miller
City of Toronto

cc: Hon. Jim Bradley, Government House Leader
Hon. John Gerretsen, Minister of Municipal Affairs & Housing