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Mayor David Miller and Members of Council  
City of Toronto  
Toronto City Hall, 2nd Floor  
100 Queen Street West  
Toronto, ON M5H 2N2

Dear Mayor Miller and Members of Council:

**Re: Opinion regarding Council Member "Read Only " Access to the Integrated Business Management System (IBMS)**

City Council, at its meeting held on September 26-27, 2007, had before it a report dated May 28, 2007 from its City Manager, regarding the feasibility of allowing councillors and their staff "read only" access to the IBMS system.

The Council at that time made the following decisions:

- Council direct the City Manager to commission a legal opinion from a law firm with respect to the right of access to information by: (a) members of the public and (b) members of Council;
- the report advise what adjustments to City policies and practices will be necessary to maximize access to information by these groups, at the same time, remaining within the intent of the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA"), as well as placing sufficient limits to avoid prejudicing by-law and Provincial statute investigations; and
- the report include comment on the feasibility of requesting the Province to amend the *City of Toronto Act, 2006* to change the role and status of members of Council.

## I. BACKGROUND

The issue of the extent to which members of a municipal council can or should have access as of right to information and records in the custody and control of a municipal corporation, has been a long-standing matter of concern, discussion and jurisprudence before and throughout the period since the enactment of MFIPPA, in 1991.

The immediate issues dealt with by the above report, addressed by members of Council both at the Government Management Committee meeting on September 18, 2007, and at the meeting of the full Council, focus on the extent to which certain planning information and records ("information") are or should be made available to members of Council and to residents, property owners, corporate officials and other members of the public ("constituents"). The issues relate primarily to the form and impact of proposed, commenced or completed building and alteration or demolition activity as it may impact on the public space, on property rights and interests of others, and on the public interest generally ("the requested information").

This would include issues of access to both general and specific records relating to planned developments and changes, including as well complaints, follow-up on complaints, investigations, inspections, charges and convictions. It would also include other City actions taken to deal with issues of concern, such as the exercise of City permit-granting, plan-reviewing, zoning and planning ("planning information"), and inspections, enforcement, prosecutions, and responses to complaints and other expressions of concerns by constituents ("enforcement information").

In general terms, the issues revolve around rights of access to municipal information and records, and the extent to which members of Council can lawfully be put in a position to respond to public requests concerning the requested information, and participate in ongoing dialogue relating to construction and development in the City, steps taken by the City to ensure compliance with and enforcement of the law for the purpose of ensuring orderly development, and the legal interests of the City, its citizens and the public interest generally.

It is against this backdrop, and in the context of currently applicable legislation, including the *City of Toronto Act, 2006*, MFIPPA, other current Provincial and municipal policies and legislation, and the statutory objectives of openness and transparency in municipal government, that the following analysis is provided.

In preparation for responding to this request for legal advice, I have reviewed the relevant Provincial legislation; reports, decisions and other records in the custody and control of the City;

many relevant papers, commentaries and other useful discussions of the issues; and a number of reported decisions of the Courts and of the Ontario Information and Privacy Commission ("IPC").

#### **GENERAL PRINCIPLES AND ISSUES ARISING IN THE CONTEXT OF THE CITY'S INTEGRATED BUSINESS MANAGEMENT SYSTEM (IBMS)**

IBMS is described in the City Manager's report of May 28, 2007 (the "Report"), referred to above, in the following way:

"IBMS is the integral information system supporting the business processes of City Planning, Municipal Licensing and Standards (MLS) Divisions and Toronto Building. It provides integrated business process workflow and information management for such matters as building permit applications, planning applications, and is a law enforcement database for property maintenance, building permit compliance and other investigations conducted under the authority of the *Building Code Act* and the City of Toronto Municipal Code. The system includes personal/private information as well as law enforcement information pertaining to the business functions of the divisions that access the system."

The references at the end of that statement to "personal/private information" and "law enforcement information" clearly mean that not all IBMS information is currently required or authorized by MFIPPA to be made available to the public. However, the thrust of Council intent is that, to the extent that IBMS includes information legally discloseable to councillors, directly or indirectly, and on a "read only" basis, it should be.

In this regard, members of Council who addressed these issues acknowledged that City information and records, to the extent that they include names of individuals, whether as owners, residents, complainants or otherwise, are considered "personal information" by reason of being "recorded information about an identifiable individual", as set out in the definition of "personal information" in section 2(1) of MFIPPA, clearly subject to the provisions of the Act addressing such information.

Attached as Appendix A is a list of types and classes of requested information in the custody or control of the City, including, for the purposes of this discussion, its Chief Building Official, including information relating to permit applications, floor-plate information, status of ongoing work, and enforcement and planning matters.

A substantial amount of the information in IBMS relating to applications for development and alterations of properties in the City is either already available on the City website or other on-line information, or will be in the near future.

The issues dealt with below pertain to types of information and records, dealt with, or required by law to be dealt with, by the City, but in all cases, will be addressed on the assumption that disclosure of the information or records sought would not involve divulging the name or other personal or enforcement information relating to any individual owner, resident, applicant, complainant or other person.

IBMS users include Toronto Building (including customer service), City Planning (including committee of adjustment), Municipal Licensing and Standards, and "a number of other business units external to these divisions, whose access to IBMS is determined by the prescribed inter-relationships within the business of these divisions".

The Report contains substantial background and explanation relating to information which may be sought by councillors and their staff involving "read only" access to the IBMS system.

In her Report, the City Manager recommends that, "*staff continue to provide information (e.g. memos, reports, in person updates) to members of Council and their staff in accordance with legislative requirements and the recognition of maintaining confidentiality of the law enforcement information contained within ... IBMS*".

In my opinion, this approach accurately reflects the legal principles dealt with in this report.

### **THE 3-1-1 TELEPHONE SYSTEM**

The 3-1-1 telephone system involves a telephone service to provide residents with easier access to non-emergency municipal services, for the purpose of providing enhanced levels of accessibility to citizens. Once the system is fully implemented, all service requests will be tracked from call through to completion with an advanced identification system that will allow citizens and staff to monitor process at each stage. A "first response" initiative provides the tools which contact-centre agents require to deliver answers to most inquiries without the need to transfer calls.

The 3-1-1 service is relatively new in Canada but has been operating in the United States since 1997.

## CONSULTATION WITH MEMBERS OF COUNCIL IN THE PREPARATION OF THIS OPINION LETTER

During my initial contacts with the City Solicitor's Office, arising out of my retainer, the City Solicitor requested me to consult with and obtain input from members of City Council with respect to difficulties that they had faced in attempting to ascertain information, and to obtain their suggestions as to what kinds of information and records would be useful to them in the performance of their duties as councillors.

In view of the fact that one of the most important purposes of the exercise is to assist members of Council in the performance of their duties, part of the dialogue that resulted also involved my obtaining and reviewing ideas and information involving how the councillors in question see or define the nature of their responsibilities, and what is needed to be done to assist and support their fulfilling them.

Accordingly, at the request of the City Solicitor, I arranged to make myself available to all members of City Council at established times and places during the month of November, 2007.

Specifically, I attended for two hours at City Hall on each of November 21<sup>st</sup> (in the afternoon) and November 22<sup>nd</sup> (in the morning) to meet with interested members of Council or their staff.

During the two days on which I attended, I met with a number of councillors. I also met, or had additional communications, with a number of others. Altogether, I consulted directly with eight members of City Council, and representatives of six others. Some dialogue was quite lively, especially during the morning session on November 22<sup>nd</sup>, when most of the participants stayed throughout the two-hour period. The following summarizes the thrust of the concerns expressed by one or more councillors in their communications to me, expressed in terms of actual or perceived problems which they identified and articulated:

- not everyone with whom I came in contact in this process felt that there was a need for further information to be available to councillors, but most did;
- the main concerns relate to information pertaining to properties, namely, the processing and status of applications, complaints, inspections, building plans, investigation and enforcement and prosecutions, in connection with particular properties. It is not the name of the owner of the property which is sought in each case, but sufficient information to enable a councillor to respond to citizens' concerns, and to ensure that the City enforces the law;

- councillors are not interested in "personal information" about individuals, but rather in ensuring proper administration, enforcement and compliance with the law;
- councillors wish to have the information which they seek provided to them on-line;
- there appears to be a general feeling that with 3-1-1 coming on-line, an opportunity will be presented to enable councillors to systematize the receiving of complaints and establishing the nature of calls;
- some councillors also want to find out the status of maintenance and building orders, and to be in a position to ensure that follow-ups are done;
- of importance to some councillors is their wish to receive information with respect to problem properties in their ward, where, for instance, work is going on without a permit, and consistent attempts to enforce the law or stop illegal activity have been unsuccessful. It would also help them to know what convictions have been registered, and when the next trial will be held in Court dealing with a particular property;
- some councillors are also concerned about a number of buildings whose owners are persistent offenders, or persons involved in land assemblies. Once again, the councillors believe that all information available to staff should be provided to councillors; the councillors believe that they should have access to all information, including addresses, plans, descriptions of properties and maps, in the possession of the corporation as a whole;
- some councillors are concerned about the effect of terms and agreements by which the City obtains some classes of information that may prohibit disclosure to councillors;
- some councillors wish to have up-to-date access to the "application status search report" form and what is produced on it;
- in general, councillors believe that the requested information in the possession of the City should be conveniently and immediately made available to them as of right.

I have not undertaken a thorough investigation to ascertain whether or not the conclusions and perceptions of councillors referred to above are accurate, or corroborated by documentation. Staff input at the meeting of the Government Management Committee, and my discussions with staff, indicate that most, if not all, of the information sought by the councillors is available to them at the present time in one form or another, so that the principal issue involves facilitating

their access to information on-line. In this respect, the issue is not so much legal impediments imposed by MFIPPA or other laws, but a question of systems and technology, and the resources required to enable the City to respond to councillor needs.

### THE CURRENT SITUATION

From the information provided to me, it is not entirely clear how much of the content of the requested information is now available on-line to members of Council, as well as, through the City's website and other sources, to other members of the public.

It appears, from the discussion at the Government Management Committee meeting of September 18, 2007, that much of the information in question is now accessible, in one form or another, on an individual search, computer search or on-line or website basis, to members of the public, and in most cases, if not all, to members of Council.

It appears to be the thrust of the concerns expressed by the councillors, not that the information is unavailable, but that it is not easily accessible to them immediately and on-line for dealing with concerns and questions expressed by their constituents.

At the meeting of the Government Management Committee on September 18, 2007, the position, as stated by staff (and supported by my research), was that MFIPPA is not a major stumbling block or bar to access by councillors to the requested information.

In some cases, both councillors and members of the public expressed concerns with respect to security and privacy interests in plans for the interior of buildings, particularly residential ones, for instance, with respect to such elements as floor plan, routes of access and description of living accommodation which could be disclosed by free and convenient public access to interior building plans.

During the debate, some councillors suggested that their principal interest involves "foot-print" issues, such as exterior size of buildings, setbacks, height, placement of windows, design and materials, and other features, such as density of use, rather than involving interior floor plan and issues of personal privacy or safety information, which are not always made freely accessible to members of the public or members of Council, whether or not they may be of serious concern to planning, fire safety and public health officials in the performance of their duties.

Accordingly, it will be primarily in the area of information relating to external or environmental impact, referred to as the "foot-print" types of information, to which much of the discussion in this opinion letter will be directed.

## WHAT INFORMATION IS NOW AVAILABLE?

Section 1.0.1 of the *Planning Act* provides that "information and material that is required to be provided to a municipality or approval authority under this Act shall be made available to the public."

In view of this broad and mandatory requirement which may apply to some of the information contained in IBMS, it is noted that this general requirement of public access to information is not subject to the exceptions contained in MFIPPA.

Any information required to be made available to the public obviously would also be available to every member of Council as a matter of law.

The Ontario *Building Code Act* contains no provision similar to that set out in the *Planning Act* quoted above. However, as will be discussed later in this paper, it appears to be the general approach that building permit applications and building plans, with personal information redacted, are generally made available to the public unless precluded by the application of one or more specific provisions of MFIPPA to the contrary.

In view of the foregoing, I will address in this opinion letter information and records included in IBMS not already required to be made available to the public by section 1.0.1 of the *Planning Act*.

It is also noted that among the stated purposes of the *Planning Act* is "to provide for planning processes that are fair by making them open, accessible, timely and efficient".

In this regard, it is also noted that the purposes of MFIPPA involve recognition of the principles that information should be available to the public, and that necessary exemptions from the right of access should be limited and specific.

I do not know whether or not a systematic and comprehensive survey has been conducted to determine what information is currently available to the public, City officials and staff, and other regulatory, enforcement and administrative bodies or functionaries, and of this, what types of information are available to councillors, how conveniently and in what form.

As stated above, with respect to proposed development, there is a significant amount of information and records now available on-line, equally accessible to members of the public, officials and City councillors.

Attached as Appendix B to this legal opinion letter is an outline of some of the types and categories of information and records now available on the City of Toronto website and to members of Council.

There are also summary documents available to councillors such as "summary of district investigations" demonstrating a number of investigations grouped under various headings, such as "property standards", "zoning and business/trades licence", "number of investigations", "citizen complaints", "complaints by members of council or other divisions", whether or not MLS initiated, and action taken (inspections, notices, orders, remedial action, prosecutions). This type of information does not, however, in itself, assist the councillors in addressing specific constituent concerns and neighbourhood problems, which they and their constituents may accept as being among their responsibilities of office.

The building application status site provides access to information relating to the status of active permit applications, allowing the user to follow the progress of a permit through the review and/or inspection stage.

This service includes, in general terms, the nature of the work, but no personal information, such as owner's name, address or other personal particulars, is included on the website.

Information in each case is updated as of the previous business day.

At the meeting of the Government Management Committee held on September 18, 2007, the City Clerk advised as follows:

- "... we have now 42 City divisions with routine disclosure plans and these are.... wide-ranging, such as the Licensing and Municipal Plan which releases orders to comply as part of the routine disclosure. We have Planning with their site plan releases and we have Buildings ... we now have a Buildings Plan Routine Disclosure Policy which allows members of the public to go directly to the front counter ...."
- "... Our Building Plan Policy was refined to allow access to copies of surveys, site plans and drain plans to all requesters, access to residential building plans from the date of permit issuance to three months after construction, provided the owner has not provided written objections on security grounds at the time of the application for a permit. Councillors have access to all building plans at any time under confidential cover. They can't disclose those to members of the public but they can have access to them ... The second part of the process where the requester is sent to the CAP office, is only triggered where initial conditions in the policy are not met. Information in building plans about height of structures, boundary lines, compliance is always information that is disclosed."

- "... What I would challenge councillors and other members of staff and the public to do, is where staff say, 'Oh, that information is not available because of MFIPPA'. I would like you to challenge that staff member and say, 'Why, why is that information not available?' It's not because of MFIPPA."

At that same meeting, Keith Barrett, then-Manager, Application Development and Support, Policy, Planning, Finance & Administration Division, advised as follows:

"... This is just the beginning. We have application information for the Building Division. We have information for Municipal Licensing and Standards. We are currently working with City Planning to have application information for the City Planning Division up and on-line. We've also submitted as part of our 5-year IT capital budget plan ... [programs] that would include full disclosure [of] plan review, inspection information, deficiencies, status of inspections, violations and clearances, as well as getting into on-line application submission. For Municipal Licensing and Standards, we're going to work with that Division to include processing licence renewals on-line, new licence applications on-line, as well as receiving Municipal Licensing and Standards enforcement complaints as well as posting all notices and orders on-line. So this is the beginning. Our intent is to move forward and make [available] as much information as possible through the web so that both members of Council as well as the public would have access to this information in a timely manner."

#### **THE RIGHT OF MEMBERS OF PUBLIC TO ACCESS TO BUILDING PERMIT APPLICATION INFORMATION**

In the small number of Information and Privacy Commissioner's orders which have addressed the issue, it appears to have been assumed that building plans will be disclosed to the public in the absence of detailed and convincing evidence demonstrating that such disclosure would be contrary to the public interest protected by MFIPPA, for instance where it could reasonably be expected to create a reasonable expectation of endangerment to the security of a building, as contemplated by section 8(1)(i) of MFIPPA. (Order MO-2074, Re City of Toronto [2006] O.I.P.C. No. 108; Order MO-2181 City of Toronto (2007) O.I.P.C. No. 71))

Relevant factors may include claims: that to disclose information may expose the owner unfairly to pecuniary or other harm; that the owner supplied the information to the municipality in

confidence; or that disclosure would constitute an unjust invasion of personal privacy or breach of copyright. In each case, if the owner's claim to expectation of confidentiality, security concerns or other grounds for refusal of disclosure have been demonstrated through actual evidence, such could form the basis for refusal to disclose, as an exception from the general principle that public records are accessible as of right.

The previous practice of the municipality may be a relevant factor in determining whether or not an applicant for a permit who files documents with a municipality has a genuine expectation that confidentiality will be maintained. (Order M-911, Township of Georgian Bay (1997) O.I.P.C. No. 75)

A recent decision of the Ontario Information and Privacy Assistant Commissioner (Order MO-2181; Toronto (City), [2007] O.I.P.C. No. 71) granted an application for copies of a building permit application and building plans relating to a proposed residential development, in a context in which the City had provided access to the building permit applications, while withholding the name of the owner, but had denied the requester access to the building plans.

The Assistant Commissioner ordered the City to disclose the building plans, having held that the City had not demonstrated that disclosure of them could reasonably be expected to endanger the security of the building, and thus paragraph 8(1)(i) of MFIPPA did not support refusal to disclose. Generally, a review of past IPC decisions suggests that public access will be given to building plans provided in support of a building permit application unless it is demonstrated that disclosure could reasonably be expected to endanger the security of the building, seriously threaten the safety or health of an individual, or constitutes an unjustified invasion of personal privacy. It appears to be generally accepted that building plans do not, in themselves, constitute "personal information" for the purposes of MFIPPA.

I am advised that, while building permit applications are not the subject of any current Toronto Building routine disclosure policy and do contain personal information, building plans are generally routinely available to the public except where to do so would run afoul of one of the grounds of disclosure refusal in section 8 of MFIPPA.

While the name of the building permit applicant in conjunction with the application does constitute personal information, this issue can in some cases be addressed by accepting the application for disclosure as pertaining to the property, and removing all references to the names of individuals from the records to be released. It may also be necessary in a particular case to address the issue of the City's practice in deciding whether or not to make building plans available to the public, and whether applicants believe that the information was being

submitted in confidence, either implicitly or explicitly. Issues dealt with in the decided cases refer to the test of whether or not there was a reasonable expectation of confidentiality on the part of the supplier.

This does not in itself necessarily mean that the City can automatically assume that all building proposals may be published to third parties, and the potential for MFIPPA to be found to preclude publication in individual circumstances, justifies the City's practice in providing some records to members of Council, on a "read only" basis.

#### **EXISTING TERMS OF PUBLIC ACCESS TO THE CITY'S WEBSITE – "READ ONLY"**

The City's website states that it is "a service to members of the public for the purpose of providing on-line information about building application status within the City of Toronto", and continues, "By using this site, you are agreeing to comply with, and be bound by, the following terms of use. Please review the following terms carefully."

There follows a three-page "terms of use agreement", followed by routine disclosure guidelines (3½ pages) and a directory of records (2½ pages).

I have not reviewed the law with respect to the binding nature or otherwise of the "terms of use agreement" which, it states, is agreed to by the user with respect to the building application status website, and "constitutes the entire and only agreement between the City and you for use of the site ...."

The "terms of use agreement" deals with a number of issues including:

- agreement by the user to review its terms and conditions;
- a unilateral right in the City to amend or terminate;
- acknowledgement of copyright and the prohibition of copying, redistribution, use or publication by user;
- that use is allowed for only personal, non-commercial purposes;
- that the user is granted the right to access, view and use the information for personal, non-commercial use, and to download, store and print single copies of items, subject to continuance of copyright;
- agreement by the user to indemnify, defend and hold the City harmless from liability;

- disclaimer – the site is provided on "as is" and "as available" basis;
- the City makes no express or implied warranties, representations or endorsements;
- the City will not accept liability;
- MFIPPA applies to all information, which is and will be collected, used and disclosed only in accordance with MFIPPA;
- there is to be no connection of the City site to third party sites;
- the information is not to be used for any harmful purpose;
- the site and the agreement are governed by applicable law.

The City has developed and published Routine Disclosure Guidelines, citing the fact that MFIPPA authorizes the City to establish a routine disclosure program when there is nothing in the Act to prevent the City from giving access to information. As noted in the Guidelines, "*Routine disclosure is a cost-effective and customer-friendly way of providing information to the public, directly by program areas, without a formal access request.*"

While the material provided to me does not contain a definition of "read only", I would assume that at least most of the terms and conditions referred to above in respect of public access to the City's website, except with respect to undertakings of personal use and indemnity, would be appropriate to apply to disclosure of the information and records in question to members of Council, and would be useful for inclusion as a useable description of "read only" in any decision of the Council responding to the requests by members of the public for access to information discussed in this opinion letter.

#### **CITY NOTIFICATION THAT COMMUNICATIONS TO IT MAY BECOME AVAILABLE TO THE PUBLIC**

It is desirable that, where possible, the City provide to persons supplying information to it, specific notice of the use to which it is to be put, who will have access to it, and the specific authority under which the City collects such information. That is now the case with respect to some communications to the City. For instance, in its publication of meeting agendas, the City includes notification to persons making written or oral presentations that such communications may become part of a public record and/or otherwise become available to members of the public.

Of course, the City collects information for various purposes and under the authority of various statutes. When dealing with personal information, the City is required by the provisions of Part II of MFIPPA to:

- (a) have authority; and
- (b) provide a notice of collection citing the authority.

It is not sufficient to "give notice" that the personal information collected may be shared with councillors for the purpose of enabling them to fulfil their responsibilities of office. Individual councillors do not have any special status for the purpose of MFIPPA, and consequently also does not have a basis upon which the City could rely as authority to collect and disclose personal information to councillors. While the notice does provide that the City collects information to enable it to make informed decisions, this does not mean that it should be suggested to applicants for building permits that whatever they provide to the City will be circulated routinely to members of Council.

Once again, information made available to members of the public would also be presumed to be available to each member of Council. It would probably be useful for the City's notice to state that the information collected may be provided to members of Council for the purpose of enabling Council members to make informed decisions on the relevant issues.

At the very least, every member of Council has access to every agenda, report and other document provided to meetings of Council, committees and other bodies of which the Council member is a member.

The provision of a notice to the public would not in itself make it lawful for the City to provide either the public or any councillor access to information or records to which they would not otherwise have a right, or to operate in any manner inconsistent with the requirements of MFIPPA. However, with respect to information provided to the City which, under MFIPPA, would be so accessible, it would bring to the attention of such persons that freedom of information laws have the effect of making much of the information and records in the hands of the City publicly discloseable.

#### **THE DECLARATION OF OFFICE BY EVERY MEMBER OF COUNCIL**

Section 186 of the *City of Toronto Act, 2006* requires every elected member, before taking a seat on City Council, to take the Declaration of Office, by which the member solemnly promises

and declares "*that I will truly, faithfully and impartially, to the best of my knowledge and ability, execute the office ... to which I have been elected ....*"

The Courts have defined the nature of the duty owed by a member of a municipal council to the municipal corporation to be analogous to rules applicable to trustees, including the duty to maintain all confidences.

This, in itself, in some circumstances puts members of Council in a different position from other members of the public who, having obtained access to information or documents under freedom of information legislation, are generally free to disclose it to others, as they see fit, whereas a member of council who has the right of access to confidential information necessary to enable him or her to perform the duties as a councillor, both by undertaking and by operation of law, such as the Code of Conduct referred to below, is prohibited from doing so.

#### **MEMBERS' CODE OF CONDUCT**

The Code of Conduct for members of Council includes provisions relating to confidential information, including prohibiting:

- the disclosure by a member of any confidential information acquired by virtue of office, in either oral or written form, except when required by law or authorized by Council to do so;
- the use by a member of confidential information for personal or private gain, or for the gain of relatives or any person or corporation;
- disclosure of any matter discussed at in camera meetings, at least until the matter is discussed at a meeting open to the public or the information is otherwise lawfully released to the public;
- access or attempted access by any member to confidential information in the custody of the City unless it is necessary for the performance of the duties of a councillor and not prohibited by Council policy.

#### **"A COUNCILLOR'S GUIDE TO ACCESS AND PRIVACY LEGISLATION"**

With respect to current availability of City information and records to both members of Council and other members of the public, the City has published a substantial number of extremely informative and useful documents for the assistance of City Council and other affected persons and parties. Among the documents made available to me, and which I reviewed in the course of the preparation of this legal opinion, are those listed on Appendix C attached.

One publication, by Corporate Access and Privacy, entitled "A Councillor's Guide to Access and Privacy Legislation", appears to summarize the issues involving councillor access to information, and to make the appropriate and legally-supportable distinction between the requirements of MFIPPA, which apply generally to access to information by members of the public, on one hand, and the law with respect to councillors' rights to information required to enable them to perform their duties, on the other.

In this respect, the Guide states as follows:

"Only in restricted circumstances may councillors have the right to access certain types of information not available to the general public:

- If the information is necessary for the business of Council
- If the information is reasonably necessary for decision making purposes.

Depending on the nature and type of information requested, records may be provided in confidence to committee or Council members under confidential cover solely for the purpose of review and decision making (for example, in the case of draft reports on pending projects or policies, employment matters, legal advice, or details of ongoing negotiations or transactions). In these circumstances, the information in question is considered confidential and Council members are prohibited from releasing the information in any form without the express authorization of Council. The same is true for information provided to councillors in preparation for closed Council or committee meetings."

This document recognizes the current situation, which is that the formal duties of members of municipal councils involve participation and voting at the Council, committees and other forms of collective decision-making within the jurisdiction of those bodies as conferred by Provincial legislation.

The report goes on to describe how councillors may, if the particular information is not available to them under the principles stated, submit a formal freedom of information request under MFIPPA, and "in this case the councillor has the same status as any member of the public and City staff will process the request in accordance with MFIPPA".

## II. DISCUSSION

### THE PARAMETERS OF ACCESS BY A MEMBER OF COUNCIL TO INFORMATION AND RECORDS IN THE CUSTODY OR CONTROL OF THE CITY

This opinion letter responds to the broad and open-ended request by the Council to provide "a legal opinion ... with respect to the rights of access to information by ... members of the public and ... members of Council."

The generality of this request may be narrowed by the context in which it was made, namely, of delineating lawful means for members of Council to respond to their constituents, by obtaining access to information relating to proposed or ongoing changes to the physical fabric of their immediate environment, whether by building or structural erection, demolition, physical alteration or change to existing buildings and properties, or the erection or other development of new buildings, other structures, and any other development or evolution involving physical change, and to ascertain what physical changes are proposed or happening in their ward.

All of these "external" factors, where not involving recorded information about an identifiable individual, relating to the personal characteristics or status of an individual, or identifying an individual, would not, in the evidence of information to the contrary, appear to constitute either security information or "personal information" for the purposes of MFIPPA, and could be made available to the councillors as well as to the public, provided that the recorded or other information maintained by the City in its custody and control is indexed and linked not to an individual or the name of an individual, but identified entirely by address or location.

In other words, at least in general terms, City information and plans relating to proposed development or alterations to properties in the City, not involving or dependent upon the names of individuals who may be related to the property in question, and provided they do not fall within some other specific exemption in MFIPPA, would appear to be included in the general description of "information available to the public" within the meaning of MFIPPA, which would then make such information, within the requirements of MFIPPA, (1) available to the public and (2) available to each individual member of Council.

In the staff reports and responses to City Council in the debate leading up to the adoption of this request for legal advice, it appears to have been generally accepted and assumed that, for the most part, information relating to building plans and other matters involving proposed development do not, and need not, involve the disclosure of personal information, and are not precluded by MFIPPA from public disclosure.

Concerns appear to relate more to the form and manner of record-keeping by the City, and the extent to which the various individual files and databases maintained for individual purposes, dealing with specific departments, subject-matters, areas of concern or statutory responsibilities, could or should be provided to members of Council in an organized and directed way, thereby providing a useable, comprehensive and issue-directed response to councillor concerns.

In this respect, the issue is not so much a matter involving the need for legal advice as to rights of councillor access, as it is for co-ordination and consolidation of available information relative and relevant to the particular needs that the provision of the information is sought to serve.

### **THE THRUST AND PURPOSE OF COUNCIL'S REQUEST FOR ADVICE**

The following appears to be the key issue the Council has referred to me:

**"Can every member of the City Council, by keying in the address of a City property, legally obtain access to all non-personal information and records, and every database of the City, which includes information relating to that address?"**

It is difficult simply to give a legal answer to that question without additional input relating to such matters as information technology, availability of manpower, financial resources, political priorities and objectives, the technological capabilities of City systems and procedures, the importance and comparative urgency which Council attaches to such objectives, and other issues and priorities of resource allocation and decision-making. These matters, where relevant, should be assessed in responding to the questions raised, quite apart from legal issues as to whether access to any particular information or record may be permitted or allowed under MFIPPA, or other applicable principles of law.

In general terms, and quite apart from issues specific to the needs of councillors, I believe that the City has significant flexibility under MFIPPA to disclose at least a substantial amount of the types of information and records under discussion to members of the public and to members of the City Council, provided that steps are taken to ensure that no such disclosure involves the release of personal, privacy, security or confidential law enforcement information, except within the strict terms and conditions imposed by MFIPPA or other law upon such disclosure.

Grounds for this conclusion include my legal opinion that the disclosure of information by reference to a street address alone, whether or not it may be possible, through extrinsic means, to ascertain the name of the owner or resident of the address in question, does not in itself involve the disclosure of personal, information in breach of MFIPPA.

It is also my opinion that the City has the legal power to establish a "one-window of access to information" to consolidate information from a number of its databases, on the basis of proposed development relating to any particular property, indexed by street address and disclosing such non-personal information or records to any member of City Council, and that such would be consistent with the provisions of MFIPPA.

The same would apply with respect to the proposed 3-1-1 information number to monitor the progress and disposition of applications.

The implementation of these powers would, of course, involve a cost to the City, and I have not received information as to whether or not the City Council has recognized, prioritized and established funding for the implementation of such a program for that purpose. Such decision-making would have to be proceeded with first, and funds provided where deemed by Council to be available, in order to support a program of this nature.

### III. THE LAW

#### THE PROVISIONS OF APPLICABLE LEGISLATION

The principal determinant of the power and responsibilities of the City with respect to disclosure of information and records is the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA"), which applies to all municipalities.

In addition, section 199(1) of the *City of Toronto Act, 2006* specifically makes the right of persons to inspect records under the control of the Clerk subject to MFIPPA. As described below, the Clerk is the City's "head" for the purposes of MFIPPA.

Section 2(1) of MFIPPA and section 3(1) of the *City of Toronto Act, 2006* define "record" to mean information however recorded or stored, whether in printed form, on film, by electronic means or otherwise, and includes documents, financial statements, minutes, accounts, correspondence, memoranda, plans, maps, drawings, photographs and films".

Under section 200(1) of the *City of Toronto Act, 2006*, the City is required to retain and preserve the records of the City in a secure and accessible manner and, under subsection (7), it is specifically stated that:

**... The requirement to retain and preserve records in an accessible manner means that the records can be retrieved within a reasonable time and that the records are in a format**

**that allows the content of the records to be readily ascertained by a person inspecting the records.**

City records are also, of course, made subject to the City's records retention by-law under section 201(1) of the Act, although I do not know the extent, if any, of the impact of this fact, in this age of technology and computer databases.

Under MFIPPA, every institution, including every municipality, must have a "head" responsible for decision-making under the Act with respect to access to records.

It is my understanding that the City Council has designated its Clerk as the "head" for the purposes of MFIPPA, pursuant to its powers under s. 49(1) of that Act.

Council delegation of a power may be made subject to such conditions and limits as City Council considers appropriate. Any exercise by the City Council of its own powers in this regard would also be subject to all of the requirements of MFIPPA, including the requirements of Regulation 823 to MFIPPA that **"every head shall ensure that only those individuals who need a record for the performance of their duties shall have access to it"**. This would appear to pertain to all records not authorized generally to be disclosed to the public.

Confidentiality, in the question dealing with IBMS information, is addressed by the "read only" limitation proposed, and the Code of Conduct.

In view of the appropriateness of the decision by the Council to delegate to its Clerk the functions of "head", involving dealing with the large number of requests for access to City information, I would not expect that the Council would wish to take this complex and time-consuming responsibility back onto itself, nor to delegate such decision-making discretion of the head to a committee of Council members.

Even if the Council as a whole were to function as the head, this would not in itself mean that every member of Council would have full access to every document and record in the custody of the City, only that the Council as a whole would have the responsibility to address each individual application for access and dispose of it in accordance with MFIPPA.

#### **THE STATUTORY ROLE OF THE CITY, CITY COUNCIL AND MEMBERS OF COUNCIL**

The following are the principal types of entities or functionaries responsible at law for the government of the City of Toronto:

- (1) the City corporation;
- (2) City Council; and
- (3) each member of the City Council.

(1) The City Corporation

The City corporation, known as the City of Toronto, a body corporate, composed of the inhabitants of its geographic area, is a legal entity which exists for the purpose of providing good government with respect to matters within its jurisdiction,. It is a legal entity, referred to as a municipality, a statutory creation deriving the bulk of its powers from the *City of Toronto Act, 2006*.

(2) City Council

Under section 132 of the Act, the powers of the City shall be exercised by City Council, by by-law, whether conferred by the *City of Toronto Act, 2006* or otherwise, unless otherwise specifically provided.

Under section 6 of the Act, the powers of the City must be interpreted broadly so as to confer broad authority on the City to enable the City to govern its affairs as it considers appropriate and to enhance the City's ability to respond to municipal issues.

Under section 7 of the Act, the City has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its statutory authority.

Section 1 of the Act describes the City Council as "a democratically-elected government which is responsible and accountable".

In addition to establishing and conferring legislative powers on City Council, the Act, in section 131, sets out the role of City Council, summarized as follows:

- to represent the public;
- to consider the well-being and interests of the City;
- the development and evaluation of City policies and programs;

- to determine which services the City provides;
- to ensure that administrative policies, practices and procedures are in place for the implementation of the decisions of Council;
- to ensure accountability and transparency in the City's operations;
- to maintain the City's financial integrity; and
- to carry out the statutory duties of Council.

### (3) The Members of City Council

Section 133 of the Act sets out the role of the Mayor. Section 134 imposes a number of specific duties upon the holder of that office.

Otherwise, the Act does not define the "role" of an individual member of Council, nor does it specifically impose public duties or confer powers upon members, other than provisions relating to the capacity to hold and continue to hold office on the Council.

Members of Council are legislative officers who participate in the collective decision-making of the Council, and to that extent play a role in the fulfilment of the role of the Council itself. In this position as a member of the directing mind of the municipal corporation, and the body which establishes its policies and programs, and enacts all of its legislation, individual members have a significant responsibility.

This legislative role may create a need for members to be provided by staff with information and documents not available to the public generally, necessary to enable them to fulfil their legislative function.

In effect, such disclosure, reception and utilization to and by the councillor, constitutes use by the institution of the information for the purpose for which it was created or acquired.

In addition, individual members of Council also, of course, have the right of access to information and records available to members of the public generally under MFIPPA and other legislation.

By establishing the role of City Council, the Provincial Legislature has established the factors relevant to the determination of the role of a member, thereby informing and providing direction as to what the functions of councillors should be, and what information and types of information

they may require in participating in decision-making and implementation of Council authority in the context of its role.

Members of Council are expected, for instance, to participate and take active steps in representing the public, considering the well-being and interests of the City, and furthering the accountability and transparency of City operations. To the extent that the members of Council collectively are successful in enabling the Council to fulfil its lawful role, the legislative, management, oversight and transparency functions of the City will have been achieved.

In the absence of delegation, an individual member of Council does not have the right to exercise powers conferred upon the City, nor does a member of Council, as an individual, have the legal duty to fulfil the duties imposed upon the Council as a whole. Recognition of the role of the councillor in the collective legislative function of the Council provides the context for determining when a member of Council should be given access to specific types of information under the control of the City which would not be available to the public under MFIPPA, where necessary to enable the councillor to fulfil his or her responsibilities.

I would think that the number and types of circumstances in which a councillor would need to be given access to personal information would be very few indeed, and would not appear to arise at all with respect to the IBMS databank under discussion. The councillors from whom I received information appeared to agree that they do not require access to personal information in the control of the City, for this purpose.

It must be emphasized that, to the extent that any individual member of Council requires or seeks information or records from the City, any right to such access arises directly from the authority conferred upon the member by the *City of Toronto Act, 2006*, particularly the provisions of that Act establishing the role of Council and providing the City Council with its powers and capacity.

Consequently, issues of access required to support the legislative functions of councillors are quite limited. On the basis of the information I have been given by City staff, existing practices would appear to address substantially the appropriate needs of members of Council:

In my investigation of these matters, I do not believe that I have come across examples of a type of information or record relevant and necessary to the fulfilment of the role of councillors with respect to planning and development issues, which is not already made available to them in some form and through some process of the City.

## DISCUSSION OF THE ROLE OF COUNCILLOR

Many of the ambiguities involved in addressing issues relating to rights of councillors to access to information are caused by the fact that MFIPPA speaks in terms of the "right" of access to information, and a functionary of the institution who "needs" the record in the performance of their "duties", where the "disclosure is necessary" and proper in the discharge of the institution's functions, on one hand, while imposing and conferring extremely ambiguous and undefined duties, powers and obligations upon members of municipal councils, on the other.

The difficulty in analysis in responding to the City's request for advice is, to a large extent, due to the fact that the *City of Toronto Act* defines the role and confers powers upon the City Council, but does not address the role of the individual member of Council.

Obviously, there is a significant difference between a role, on one hand, and a power or duty, on the other. "Role" is a term which in this context is principally aimed at functional differentiation, imposing no legal obligations upon, nor providing any authority or powers to, any individual member of council, whom the legislation anticipates will exercise his or her legal duties by voting as part of a collective decision-making process.

It also means, in the context of this discussion, that in some respects it is open to the Council, whether under its general legislative powers in sections 7 and 8 of the Act, the power of delegation of powers and duties under Part II of the Act, the power under section 157 of the Act to establish a code of conduct, or under section 189 to pass a procedure by-law, to exercise some legislative authority which may have an impact on what its members actually do, and areas of concern which they may actually address in practice. This, however, falls short of providing legal authority to the Council to define its own powers in a manner broader than that provided to it by statute, or to pass any law or take any step inconsistent with the powers granted to it by Provincial legislation.

## DELEGATION OF COUNCIL POWERS

Whatever may be the "role" of council under section 132, this language does not in its generality transfer or delegate to individual members of council any of the powers conferred by other provisions of the Act upon the Council itself.

The fact that the Council as a whole may have access to information by reason of its capacity and authority to exercise the legislative powers of the City, does not mean that any individual member of Council may exercise such a power him or herself, or have a basis for greater right of access to information as an individual member.

While section 20(1) of the Act acknowledges that section 7 and 8 authorize the City to delegate its statutory powers and duties to a person or body, nevertheless, any power so delegated is subject to any limits on the power and to any procedural requirements which apply to the power, and any duties related to the power are deemed to be delegated with it.

Under section 203(1) of the Act, neither a City employee, nor any other person who holds any administrative position of the City is eligible to be elected as a member of City Council, or hold office as a member. Similarly, a member of City Council cannot be appointed to "any administrative position of the City", nor, specifically, to the position of Clerk, Treasurer, Integrity Commissioner, Auditor General or Ombudsman. If such an appointment were to take place, the Council office of the member would automatically become vacant under section 104(a) of the Act.

This automatic removal of a member of Council from that position (which is the result of the declaration by the Act of a seat becoming vacant) would occur by operation of law, and would not involve or require any decision or by-law of the Council. At the time the appointment took effect, the member would cease to have the qualifications required to remain a member.

The foregoing demonstrates the clear intent of the legislation, as a whole, to differentiate the roles of City Council from the administrative functions of staff. The principles inherent in this specific and important distinction would also result in a concomitant differentiation in terms of the respective rights of access provided to members of those groups under MFIPPA, appropriate to the statutory role to be fulfilled by that member.

Obviously, reading these provisions together makes it clear that the City does not intend that Council be authorized to appoint any member of its Council, whether by delegation or otherwise, to an administrative position in the City, nor is the Council in a position to make any decision or pass any by-law inconsistent with MFIPPA, particularly in view of the provisions of section 53(1) of that Act, which provides that: "This Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise."

#### **ENTITLEMENT OF A MEMBER OF A MUNICIPAL COUNCIL TO MUNICIPAL INFORMATION**

Long-standing authorities support the legal proposition that an individual member of a municipal council has the right to information necessary to enable him or her to perform the duties of his or

her municipal office.<sup>1</sup> This is a principle that, in terms of MFIPPA, recognizes the Council's role as the directing mind of the municipal "institution", whose members participate in its direction by voting and other legislative acts.

Otherwise, however, in the absence of a legislative mandate, an individual member of a council does not necessarily have any further specific rights to information, other than as a member of a collective decision-making municipal body. For instance, a member of a council who is not a member of a particular committee of the council is not necessarily entitled as of right to attend meetings of that committee not open to the public, nor is he or she necessarily entitled to access to every particular confidential document in the hands of municipal staff, in the absence of a decision by the council itself, or a board or committee charged with a duty, to require disclosure of the information sought, and having the power to do so pursuant to MFIPPA.

As an example of the fact that members of council do not have unlimited access to municipal records, in one case the Ontario Superior Court of Justice quashed a council resolution requiring that a list of the names of all recipients of social assistance be provided to the council. Despite the fact that a portion of the funding of the program was supplied by local municipal and property taxes, the Court held that the resolution contravened the protection of privacy provisions of the Act, on the basis of section 32(d) of MFIPPA, which provides that personal information is not to be disclosed unless the disclosure is made to an officer of the institution who requires the information in the performance of his or her duties, and it is necessary and proper in the discharge of the institution's duties. The Court held that that provision requires more than mere interest and concern on the part of a municipal council. In that case, there was found to be no evidence of either need or necessity.<sup>2</sup>

This decision, which was not appealed, also appears to stand for the proposition that in such cases the Court has the jurisdiction, in the context of applicable Provincial and municipal legislation, not subject to the individual wishes of either councillors or members of the public, to decide whether or not the disclosure would be considered necessary and proper in the discharge of the institution's functions.

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<sup>1</sup> Raymond M. Plant, Q.C., Freedom of Information and Protection of Privacy Act, 1987, Case Law and their Effects on Ontario Municipalities, prepared for CBA-O Institute of Continuing Legal Education, "Current Issues of Interest to Municipal Lawyers", February 5, 1998

*R. v. Barnes Borough Council, Ex p. Conlan*, [1938] 3 All E.R. 226; *Barr v. Hackney London Borough Council, Ex p. Gamper*, Queen's Bench Division, England, referred to in Law Society Gazette, February 13, 1986; *Birmingham City District Council v. O. et al.*, [1983] A.C. 578 (H.L.)

<sup>2</sup> *H.(J.) v. Hastings (County)* (1992), 12 M.P.L.R. (2d) 40 (Ont. S.C.J.)

Once again, I have not been provided with information suggesting that the Council has identified any specific requirements or duties, whether existing or proposed, which would impose upon members of the Council a requirement that each of them have access to any particular type of information or records now in the custody and control of the City, and which is not now available to them. Consequently, it appears to be the situation that all or most of the information now required by councillors to enable them to fulfil their duties of office, is now in place, or could, if funding is made available, be put in place, to ensure that each member of Council has sufficient information conveniently available necessary to enable him or her to fulfil their legal duties.

With respect to the duties of Council generally, the Council is required, by section 212 of the *City of Toronto Act, 2006*, to adopt and maintain policies with respect to the manner in which the City will try to ensure that it is accountable to the public for its actions and the manner in which the City will try to ensure that its actions are transparent to the public.

The thrust of this and other Provincial legislative provisions is to encourage and support municipalities generally in making such information available to members of the public, as well as to members of the Council itself.

#### **PERSONAL HEALTH INFORMATION PROTECTION ACT, 2004**

Staff has requested me to briefly address one additional statute addressing the use and disclosure by public bodies of information coming under their custody and control.

The type of information likely to be included in IBMS is in direct contrast to that which is the subject-matter of the *Personal Health Information Protection Act, 2004* (PHIPA), which may be summarized as "privacy legislation", dealing with rights of individuals to their "personal health information", and sharply controlling access to records of such information in the custody or under the control of a health information custodian as a result of the work that they do or in connection with the powers or duties they perform. In PHIPA, the objective of the Act is to protect the personal health information of individuals, while ensuring that it is used judiciously to improve health care.

As opposed to the governing presumption of MFIPPA, that every person has a right of access to a record in the custody or control of an institution unless the subject of a specific exemption, under PHIPA, the guiding principle is that personal health information should be collected, used or disclosed only in the most limited way necessary, and individual consent is generally necessary for such collection, uses and disclosures except in strictly limited circumstances.

PHIPA provides rules for those who receive personal health information from a physician or other custodians, such as insurers, employers and other organizations outside of health care, who are subject to restrictions on the use and disclosure of that information, and patients must provide express consent to their doctors before such information is provided to such organizations.

Personal health information is, of course, also included within the definition of "personal information" under MFIPPA, and thereby comes within the provisions of that Act prohibiting the disclosure of personal information to any person other than the individual to whom the information relates except in specific circumstances set out in the Act, or if the disclosure does not constitute an unjustified invasion of personal privacy. Under section 14(3) of MFIPPA, a disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if it relates to medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.

#### **AVOIDING PREJUDICE TO ENFORCEMENT, INVESTIGATIONS AND PROSECUTIONS**

Contravention or alleged contravention of the requirements or prohibitions contained in any statute or municipal by-law, may be the subject-matter of a complaint by a member of the public or a member of Council, observations or investigation by police, City officials or other enforcement officers, and initiatives and enforcement by officers or employees of the City, where it is believed that a breach of the law has occurred.

Typically, the enforcement process may make use of documents or other records relating to or arising out of one or more complaints, written or recorded notes of observations, interviews or other enforcement activity, photographs, drawings, plans, applications and permits, statements of anticipated evidence by enforcement officers, residents, neighbours and others, decision-making leading to the laying of the charge, and the information through which the prosecution is commenced, memoranda of legal advice, interdepartmental correspondence and instructions written by or involving officers and other staff and persons involved in the enforcement process.

Provisions of MFIPPA make it very clear that the Provincial Legislature does not intend that principles of freedom of information should interfere with, or be used for the purpose of interfering with, "law enforcement", defined by section 1 of MFIPPA to mean "*policing, investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or the conduct of [such] proceedings ....*"

Most of the above information and records relating to law enforcement, by reason of their very nature, would probably also come within the definition of "personal information".

Section 8 of MFIPPA provides that a head may refuse to disclose a record if the disclosure could reasonably be expected to (among other things):

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- ...
- (f) deprive a person of a right to a fair trial or impartial adjudication ....

Under section 8(2), "a head may refuse to disclose a record ... that is a record prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with the law."

The provisions of the Act dealing with the role of City Council do not impose upon councillors responsibilities with respect to enforcement of either City by-laws, or statutes such as the *Building Code Act*. The role of City Council deals primarily with developing and evaluating policies and programs of the City and the provision of services, and ensuring the implementation of its own decisions. Individual councillors, as such, have no specified direct statutory responsibilities relating to the enforcement of the law.

Consequently, enforcement information and records, such as those described above, should be treated with great care and concern for security, and must be handled in strict compliance with the requirements of the Act.

Regard must also be had to the following provision of MFIPPA, applicable generally to public disclosure of municipal records:

**6.(1) A head may refuse to disclose a record ... (b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.**

Under section 190(2) of the *City of Toronto Act, 2006*, a meeting may be closed to the public if the subject-matter being considered is the security of the property of the municipality, personal matters about an identifiable individual, litigation or potential litigation, or advice subject to solicitor-client privilege.

Provisions of MFIPPA applicable to law enforcement, contained mainly in sections 7 and 8, are attached hereto as Appendix D.

Those provisions apply whether or not the information in question is personal information, and involves the discretionary right of a head to refuse to disclose a confidential record which involves or would interfere in any way with a law enforcement matter.

Section 8(3) authorizes a head to refuse to confirm or deny the existence of a record to which subsection 8(1) or (2) applies.

Under section 12, a head may also refuse to disclose legal advice that is subject to solicitor-client privilege, including any legal opinion prepared by or for counsel employed or retained by the City for use in giving legal advice or in contemplation of or for use in litigation, which would include enforcement proceedings in the courts.

It is not within the duties of a member of a municipal council to be involved in or be in a position to interfere with, investigations, prosecutions or other law enforcement matters. Consequently, City staff would be justified in refusing to disclose such information to any member of Council or to Council as a whole, in the absence of some specific legal authority authorizing or mandating such disclosure, or where such disclosure is authorized by some other provision of MFIPPA.

Accordingly, it would be inappropriate and not authorized by MFIPPA for a member of Council or a member of the public to be provided with the names of complainants, witnesses, or persons to be charged with an offence, or with any information of a confidential nature involving law

enforcement other than information otherwise lawfully available to the public, such as court records involving charges laid, dates of trials, records of conviction and sentencing.

Whatever the requirements of MFIPPA, a number of principles of law apply to duties of enforcement and to the right of a person charged to a fair trial.

First, a prosecutor or other enforcement officer must determine at the outset whether a *prima facie* case exists, whether there is a reasonable prospect of conviction, and whether it is in the public interest that the prosecution be continued.

Secondly, there are also legal principles of disclosure which may apply to the prosecution of by-law offences, through which a person charged with an offence may have a right to disclosure of material from those involved in the investigation and collection of evidence leading to the laying of the charge. This information is not available to the public.

Thirdly, the prosecution process is subject to strict legal rules and principles, and the City must take whatever steps are necessary to ensure that there is no improper interference with or weakening of the enforcement of by-laws and the prosecution of those believed to have contravened them.

Accordingly, whatever may be considered to be the duties of members of a municipal council, direct involvement in the prosecution of by-law offences would not be among them.

Legal principles also support the principle that the integrity of established legal systems and procedures for the exercise of prosecutorial discretion in the laying and determination of the disposition of charges for breach of the law, should not be subject to or interfered with by matters extraneous to the principles supporting the legal process.

These principles also would not authorize the provision to the public, including the person charged or to be charged with an offence, of any notes, observations or evidence obtained by enforcement staff, which might or might not be required to be disclosed, to that person.

None of the above responsibilities are among the duties or responsibilities assigned or delegated by law to individual members of Council.

On the other hand, where complaints have been received and prosecutions commenced, I see no objection to a system being established whereby members of Council would have convenient access to up-to-date information with respect to the status and disposition of each complaint or charge, such as whether or not enforcement staff have been advised of the complaint, attended

at the site or laid charges; where the hearing of the matter will take place (which could include the time and date and court number as well as the nature of the charge); whether or not a conviction or acquittal is registered; and what fine or other penalty may have been imposed.

I conclude that such matters as the fact of the complaint (although not the name of the complainant), the general substance of the complaint, the enforcement officer assigned, the date of inspections, and whether or not a prosecution has been commenced, would all be issues of fact which, if considered appropriate in the individual circumstances, could be disclosed to members of Council as well as members of the public in a manner consistent with the requirements of MFIPPA.

Generally, it is not the role of individual members of City Council to participate in, direct or influence the conduct of prosecutions or enforcement of City by-laws; in respect of which discretion is to be exercised by City enforcement staff who are responsible for making such decisions. These principles are quite separate from issues involving access to information concerning the status of prosecutions, to the extent that providing access to such information does not in any way conflict with the principle of maintaining the confidentiality of law enforcement information contained within the IBMS system.

In this respect, as noted in the Staff Report, access to information is not an absolute right. The provisions of access and privacy legislation require the City to recognize and comply with the requirements of law that police officers, Provincial Offences officers and City staff engaged in law enforcement investigations, maintain their independence and discretion in carrying out investigations and other public duties in the public interest, totally separate from the corporate interests of the City.

This would support the existing practice that members of Council and their staff do not have direct access to IBMS, but may be provided with pertinent information which would be available to members of the public generally, to address their concerns and questions to the extent that such does not contravene legislation or other laws. It is my understanding that such information is either currently the subject of routine disclosure plans, or in the process of inclusion in such plans.

I do not believe that the City Council would have among its powers the jurisdiction to define the duties of its councillors in a manner which would infringe on the above-stated important principles mandating requirements of confidentiality and independence in the law enforcement process.

#### IV. POSSIBLE ACTION TO BE CONSIDERED: THE CREATION AND APPOINTMENT OF A COUNCILLOR INFORMATION ACCESS CO-ORDINATOR

As has been discussed above, it is my conclusion that most, if not all, of the requested information sought by councillors, is available to them at the present time. Should the Council decide that it wishes to proceed with a program whereby further information and records are disclosed to members of Council, in a systematic and comprehensive manner, it will be necessary as well for the Council to then consider the optimum approach to ensuring the collection and consolidation of such information, and to provide the necessary funding to enable the program to proceed, consistent with the Council's objectives and priorities.

While the City Clerk currently functions as the "head" for the purposes of MFIPPA, that decision-making authority arises only in response to specific requests for disclosure and access to information. As stated above, the Council itself, as a whole, is not in a position to deal generally with individual requests for access to information.

In any event, the Council has substantial and significant powers of delegation under MFIPPA, as well as sections 20 to 24 of the *City of Toronto Act, 2006*. In view of the difficulty in controlling and preventing unauthorized use of information and records, once beyond the control of those responsible for the administration of the City's information program and the law, it would appear preferable, rather than giving direct access to all databases to each member of Council individually, that a member of the administration, or a functionary, together with necessary staff, be established to ensure and facilitate the provision of councillor access to City databases, information and records which they require to enable them to fulfil their duties as councillors.

By having access to legal advice, this could also address the potential for misuse of information, ensure full compliance and consistency with MFIPPA, and also ensure that information is provided in context, and that staff input into the interpretation of any information provided be available, if required.

The Council's request for this legal opinion appears to have anticipated discussion of the provision to individual councillors of access to various databases in the custody and control of the City, indexed on the basis of street addresses.

If it has not already been done, I believe that it would be useful to review the roles and functions of the Corporate Access and Privacy Office and other City functionaries and officers to ascertain whether or not it would be appropriate and feasible to develop a single mandated source of

information responsible for providing access to members of the City Council to information which they require in the performance of their duties.

In view of the requirements of MFIPPA, and the undefined responsibilities and entitlements to information of a member of Council, it would appear useful for Council to establish a review and determination of such duties, with a view to centralizing and facilitating access, on a consistent, uniform and user-friendly basis, in compliance in all respects with the requirements of MFIPPA and any other applicable law.

As suggested above, such a function may already exist, or a functionary may already exist to which could be assigned this additional role, with staffing and electronic communication capabilities that could ensure the provision to members of Council on an individual basis, or through one or more committees or agencies, of whatever support is necessary to enable them to obtain the information which they need to perform their duties.

I have not reviewed or discussed with City staff the costing of the establishment of a functionary and/or department for the foregoing purposes. Obviously, before proceeding with such a proposal, the Council would wish to review its priorities and available budget, and decide upon the source and allocation of funding for this purpose.

#### **THE COMMUNICATION OF INFORMATION**

The collective role of City Council includes representation of the public and ensuring the accountability and transparency of the operations of the City. Accordingly, communications to and from constituents is recognized as a public duty of City government.

In view of the conclusion, stated above, that it appears that members of City Council now have legally available to them the information and records necessary to enable them to fulfil these responsibilities. It follows that the next issues which may be pursued by Council and/or staff relate to the question of how access to such information may best be systematized and facilitated by the administration, with the necessary funding and functional analysis to enable the institution of such a system to proceed.

As mentioned above, most of the information and records which are the subject-matter of the discussion in this opinion letter are already available to members of Council on an individual basis. If the intent and objectives of the members of Council referred to above are to be pursued further, such consideration should include means of funding of the establishment of systems and access facilitation, whether in a database form or otherwise, in order to further facilitate assistance to members of Council in the fulfilment of their existing legal roles. This would also

pertain to the establishment of co-ordinated computer access to many of the IBMS databases and to the 3-1-1 system, to the extent outlined above.

#### **DETERMINING PUBLIC RIGHTS OF ACCESS UNDER MFIPPA**

A necessary component in analysis and decision-making with respect to the duties of members of Council, their rights of access, and the types of information and records which are the subject-matter of this legal opinion, would be ascertaining why and how the information and records first came into the custody and control of the City, and whether or not one or more of the various exemptions apply with respect to accessibility of the information to third parties.

Provisions of MFIPPA most likely to apply to such analysis involve the following questions:

- with respect to a record revealing advice or recommendations to the City by an officer, employee or consultant, does it include contents described under section 7(2) of MFIPPA, ("factual material"), which is not exempt from disclosure?
- would the record or information involve law enforcement, and would its release interfere with a law enforcement matter or investigation, or disclose information provided in confidence to the City? (see MFIPPA, s. 8)
- would the record reveal commercial or financial information supplied in confidence and reasonably expected to prejudice any person's competitive position, result in similar information no longer being supplied to the City, or result in undue loss or gain to any person? (see MFIPPA, s. 10)
- has the person to whom the information relates consented to the disclosure? (see MFIPPA, s. 10(2))
- in the case of personal information, was the personal information collected and maintained specifically for the purpose of creating a record available to the general public, and would the disclosure constitute an unjustified invasion of personal privacy? (see MFIPPA, s. 14(1))
- would the release of the information endanger the security of a building? (see MFIPPA, s. 8(1)(i))
- in determining whether disclosure could constitute an unjustified invasion of personal privacy,
  - would access to the personal information promote public health and safety?

- is personal information relevant to a fair determination of rights affecting the person who made the request?
- is the personal information highly sensitive?
- was the personal information supplied in confidence to the City? (see MFIPPA, s. 14(2))
- is the record or the information contained in the record published or currently available to the public, or is it anticipated that it will be in the near future? (see MFIPPA, s. 15)
- is there a compelling public interest in the disclosure of the record that outweighs the purpose for an exemption under the Act? (see MFIPPA, s. 16)

In determining under MFIPPA what information may be available to members of Council as members of the public, and available through them to other members of the public, such decision-making is the role of the Clerk, the Council's delegated "head" for the purposes of that statute.

While it is open to the Council to revoke that delegation and take upon itself the duties of the "head", this would involve the Council's assuming responsibilities to deal with and decide requests for access to records, not a general authority for individual members of Council to obtain access to the corporation's records as a whole.

In any event, as stated above, the requested information is substantially legally accessible by the members of Council, leaving the issues to be dealt with those involving funding and systems, to a greater extent than legality.

It is noted that, under the Act (MFIPPA, s. 50), if a head may give access to information under the Act, nothing in the Act prevents the head from giving access to that information in response to an oral request or in the absence of a request. It is this feature of MFIPPA that authorizes the City's program of routine disclosures, relating to certain kinds of records.

In some cases, records may be truncated, summarized removed, expunged or redacted, in order to comply with MFIPPA or other requirements of law, including requirements imposed by by-law by the City Council itself. It is difficult to provide any one conclusion or procedure applicable to all of the wide range and types of information and records which may be or come into the custody and control of the City corporation, and be subject to the requirements and principles of MFIPPA and other legislation and laws which apply to them.

This section also provides that MFIPPA does not preclude access to information (other than personal information) to which access by the public was available by statute, custom or practice prior to the enactment of that Act on January 1, 1991.

As a general matter, MFIPPA prevails over any confidentiality provision in any other Act, unless the other Act or MFIPPA specifically provides otherwise. For instance, the *Assessment Act*, s. 53(1), by reason of section 53(2) of MFIPPA, prevails over MFIPPA.

#### **WHETHER THERE IS A NEED FOR AMENDMENT TO THE *CITY OF TORONTO ACT, 2006***

As outlined above, the Province has been actively involved over the last seven years in effecting substantial amendments to municipal law in the Province of Ontario, including particularly the enactment of the *City of Toronto Act, 2006*, the bulk of which came into effect on January 1, 2007.

The development of that Act involved substantial input by the City of Toronto, producing a substantial and all-inclusive piece of legislation establishing broad enabling legislative jurisdiction to the City Council, recognizing it as a third level of government and providing it with virtual autonomy regarding matters within Provincial jurisdiction affecting the operation of the City, including its governance and the duties of members of its Council.

The Province has also, over the last 17 years, developed and effected Provincial policies and legislation addressing the public interest in municipal freedom of information and protection of privacy, producing a statute which has proven to be useable, effective and consistent with the principles and rules applicable, as well, to other local governments in the Province.

In both cases, I think it unlikely that the Province would now be prepared to entertain and effect further amendments to its legislation, at least in the absence of a demonstrated need for legislative amendment, together with proposed draft legislation for consideration by the Provincial Legislature as to how that need could be addressed, in a manner consistent with Provincial legislative policy generally.

My review of the above issues, together with the fact that members of the Toronto City Council already have substantial access and rights of disclosure, lead me to conclude that it has not been demonstrated that there is at the current time a need for the City to request the Province to make legislative amendments for this purpose, nor that the Province is likely to enact such legislation, on the basis of current circumstances.

Accordingly, it is not recommended that the City Council at this time request the Province to amend the *City of Toronto Act, 2006* to change the role and status of members of Council, with respect to the right of access to City information.

I also conclude that, at the present time, there is no need for the City Council to request the Province to amend MFIPPA generally to provide further access to members of the public to municipal information and records, the bulk of which is already, substantially to the extent that current Provincial and municipal policies support, accessible, to a large extent, through routine disclosure policies, to members of the public, and as such, to members of City Council as well.

### **MAINTAINING ENTITLEMENT OF COUNCILLORS TO INFORMATION THEY REQUIRE**

As has been noted above, the Clerk, functioning as the head delegated by the Council for the purposes of MFIPPA, has advised the Council that plans filed in support of permit applications are provided to members of Council on a confidential basis, but would not be provided to members of the public through the usual MFIPPA processes.

Members of the Council are entitled, as mentioned above, to City information necessary to enable them to carry out their duties as members of Council, quite outside their rights as citizens, and quite outside the regime established by MFIPPA.

One exception to this general principle arises with respect to information obtained by the City pursuant to terms and conditions laid down by third parties, such as MPAC, Teranet, or other levels of government, in which the City has no opportunity to negotiate with the information providers or to amend the terms imposed upon them in respect of the information provided.

In other circumstances, it may be open to City officials, in negotiating terms and conditions upon which information is obtained by the City, to seek to remove any conditions which would preclude access to councillors, and, where such is possible, to provide notice to the information provider that members of Council may, by reason of the requirements of their office, be given access to such information.

It is my understanding from discussions with City staff that they understand and accept as their objective the need to provide all members of Council with all necessary information which they need in order to exercise their role as councillors.

To the extent that any duty or right of a member of Council to obtain access to information or records in the possession of the City and not discloseable to members of the public generally, the councillor should ensure that:

- (1) the right of access to such information is required for the proper and legal exercise of the councillor's role and duties, whether pursuant to Council delegation or authority under the *City of Toronto Act* or other legislation, and in accordance with the requirements of MFIPPA;
- (2) such right and authority is exercised in the interests of the City;
- (3) security and confidentiality are maintained at all times over the information and records to which he or she has been given access, that they remain in the possession and control of the City, and that they are dealt with fully in compliance with the provisions of MFIPPA;
- (4) as in the case of other records in the possession of the City, some of those in the possession of individual councillors relating to City business may also be the subject of public requests for access, subject to MFIPPA, including requirements relating to the collection and disclosure of personal information.

While a member of Council, in fulfilling his or her duties involving participation in the fulfilment of the role of Council generally, particularly legislative responsibilities, may have a genuine need for access to information, including personal information, the fact that the councillor may have received a request for access to personal information in the possession and control of the City does not thereby necessitate the member obtaining access to personal information for that purpose alone.

The City Council does not have the legal power to grant to itself more powers than have been granted to it by the Provincial Legislature, nor does it have the power to expand the legal power of all or any of its members whose duties and authority are also the subject of Provincial enabling legislation.

## V. CONCLUSIONS

- (1) The Right of Access to Non-Personal Information
  - (a) By Members of the Public:

MFIPPA embodies the principle that most non-personal information under the control of institutions such as the City should be available to the public, and provides that every person has a right of access to a record or part of a record in the custody or under the control of the City unless it falls within one of the exemptions under sections 6 to 15, subject to the requirement to disclose a record that the head has reasonable and probable grounds to believe should be disclosed in the public interest as revealing a grave environmental, health or safety hazard to the public.

Generally, the type of non-personal information sought by the councillors as "requested information", as outlined in this opinion letter, is now available, much of it through routine disclosure, to members of the public.

(b) By Members of Council:

Members of a municipal council have at least the rights to disclosure of non-personal municipal information available to other members of the public. A member of Council has also the legal right to be provided with information and records in the custody and control of the City necessary to enable the member to carry out his or her duties as an elected member of Council. Such latter types of information may be disclosed to councillors on a confidential basis (as exemplified by the "read only" conditions set forth in the question giving rise to this legal report). Much of the non-personal information contained in the IBMS system, and the proposed 3-1-1 telephone information system, is available to members of Council in any event, with the exception of personal information or information the disclosure of which might interfere with a law enforcement matter, or infringe personal privacy.

- (2) There is no statutory or other law that defines specifically the roles and duties of a member of a municipal council. Such roles and duties may, however, be discerned from those provisions of the *City of Toronto Act, 2006* and other legislation establishing duties and functions of the City Council as a whole, including representing the public and ensuring the accountability and transparency of the operations of the City.
- (3) In the context of the legislative powers and discretion conferred upon the Council by the *City of Toronto Act, 2006*, members of Council participate in its collective decision-making as legislative officers, in providing good government for the City in accordance with the authority conferred by that Act, and in the context of the City Council's role in the development and evaluation of policies and programs of the City.
- (4) A member of Council has at least all of the rights of members of the public generally with respect to disclosure of information in the hands of the City.
- (5) Except with respect to personal information and confidential enforcement matters, almost all of the records and information contained in IBMS and sought by councillors are available to them at the present time, at least in general terms, on an individual search basis.
- (6) Most, if not all, of the information sought is permitted to be disclosed to councillors under MFIPPA in most circumstances.

- (7) Access to some other types of information, such as building application material, is available to members of Council on a confidential basis, quite apart from MFIPPA.
- (8) The City administration has significant and comprehensive programs in place through which a substantial amount of the information and records sought by councillors is now available to them and to others, including the City's website, and other database availability.
- (9) In addition to this impressive record of openness and MFIPPA compliance, City staff are working actively to improve the system of information disclosure, utilize routine disclosure principles, and enlarge the overall amount and types of information and records made available to both members of Council and members of the public.
- (10) The intent of the councillors, to see quick, user-friendly and useable on-line disclosure of information and records, to the extent permitted by MFIPPA and other legislation, is reasonable in terms of legal principle, and permitted by law.
- (11) Councillors have acknowledged that they are not seeking personal information, and that they do not have a right to legal access to confidential law enforcement information.
- (12) The expansion and other improvements to the provision of full on-line accessibility by councillors to corporate information pertaining to planning and development matters and the performance of their duties, will involve funding and other decisions beyond the purview of this opinion letter.

## VI. RECOMMENDATIONS

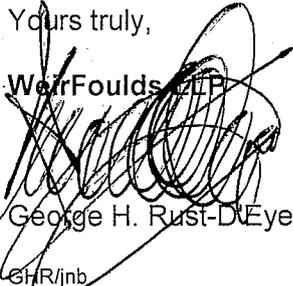
- (1) Should the City Council decide that, in addition to the facilities now provided through the City Clerk's office, it is also open to the City Council to give consideration to the establishment, and funding, of a position in the administration, whether in CAP or the City Clerk's office, of a "councillor information access facilitator and co-ordinator". Such an official, or group of staff, could, under authority of the City Clerk, work to improve the appropriate use of the City's existing and developing technology and information capabilities; that any disclosure of information or records to members of Council would be in accordance with MFIPPA, Council policies and other requirements of law; and that each councillor would be given appropriate assistance and support with respect to information which he or she requires in the performance of his or her duties.
- (2) Council may wish to consider whether or not to provide additional funding and staff to the Clerk to enable the establishment of a program to direct and provide

routine access to members of Council to all "foot-print information", involving the magnitude and detail of exterior proposed development, thus avoiding issues of personal privacy and security which may be involved, and have to be assessed, in dealing with interior plans. It may be that such plans are now the subject of the Buildings Plan Routine Disclosure Policy of the City. The issue would be to facilitate access by councillors to such plans in the most useful manner possible.

- (3) It is not recommended that the City at this time request the Province to enact amending legislation to provide additional rights of access by City councillors to information and records in the custody and control of the City.

I trust that the foregoing will be of assistance to you, and will be pleased to discuss this matter further with you at any time.

Yours truly,

  
WeirFoulds LLP

George H. Rust-D'Eye

GHR/jnb  
Attachments  
1033535.1

## APPENDIX A

### TYPES AND CLASSES OF INFORMATION DEALT WITH IN THIS REPORT

- (1) Building and Alteration Permit Applications:
  - application documentation;
  - building plans;
- (2) "Floor Plate Information":
  - imprint of proposed buildings and structures on property, dimensions of walls and service components, setbacks from street and other properties, height of buildings, placement of windows and other similar information of particular interest to neighbouring constituents;
- (3) "Floor Plate Information" with respect to existing buildings and what changes, if any, will happen to them;
- (4) Current status of applications;
- (5) Description of properties:
  - precise location of property and fixtures;
- (6) Extent to which physical work has been completed;
- (7) Ongoing status of City processes:
  - what is pending?;
  - permits granted, permits revoked, other actions;
  - records of inspections;
  - compliance reports;
  - record of complaints [not including name of complainant];
  - response to complaints and results achieved;
  - current status;
- (8) Enforcement:
  - complaints received [not including name of complainant]
  - inspections and actions taken;
  - results of inspections, and warnings;

- any notices or orders given or issued;
- enforcement inspections;
- charges laid;
- status of charges relating to a property;
- court dates, date set for trial;
- conviction or acquittal;
- if conviction, fine or other sanctions or disposition;
- enforcement of payment of any fines and current status;

(9) Planning matters:

- zoning and re-zoning amendments and applications;
- committee of adjustment applications (e.g. severance or minor variance);
- OMB applications, and current status;
- OMB and/or court proceedings.

## APPENDIX B

THE CITY OF TORONTO WEBSITE ([www.toronto.ca](http://www.toronto.ca)) INCLUDES THE FOLLOWING:

[http://www.toronto.ca/building\\_app/home.htm](http://www.toronto.ca/building_app/home.htm)

- the status of active building permit applications
  - recent building application activity –
    - application number
    - application type
    - date
    - status
    - street address
    - ward
    - permits issued
    - date permit issued
    - City staff person(s) working on the file
    - does not contain information about permits that are more than five years or are closed or cancelled;
    - type of building (e.g. SSD (Single Family Detached))
    - type of application (e.g. plumbing, small residential project, two-piece washroom)

<http://www.toronto.ca/licensing/index.htm>

- by-law violation information for apartment buildings
  - address
  - order to comply
  - order number
  - date issued
  - expiration date
  - order status (e.g. active)

- re-inspection dates
- deficiency list on a floor-by-floor basis (e.g. porch not maintained in a clean/sanitary condition, plumbing fixture not maintained in good working order – sink is not secured to wall)
- demolition application status
  - where authority delegated to staff
  - address
- approval – conditions on approval
- major development applications
  - general overview of major development activity
  - involving six or more residential dwelling units or more than 1,000 square metres of non-residential floor space
  - residential and non-residential
  - monthly report on major applications
  - for each project
    - application type (e.g. site plan application, condominium, OPA/rezoning)
    - application number
    - status (e.g. under review, circulated)
    - street address
    - ward
    - proposed use type (e.g. residential/apartment, residential/townhouse)
    - proposed use description (e.g. number of storeys, units, parking levels)
    - commercial/residential
    - number of condominium units
    - mixed use (e.g. residential and hotel)
    - height of building

- proposed non-resident GFA, residential GFA, total GFA
- proposed number of units
- proposed lot size
- application date
- name of planner and telephone number
- committee of adjustment applications
  - whether consent or variance application
  - application number and community council area
  - name of applicant
  - street address and ward
- licensing tribunal decisions
  - name of applicant/licensee
  - report number
  - type of licence and licence number
  - tribunal action and disposition
  - street address where fixed business location

## APPENDIX C

1. Municipal Freedom of Information and Protection of Privacy Act – Privacy Guidelines – Issued by Metropolitan Clerk's Department, Corporate Access and Privacy Office, November 1990 (71 pages)
2. Exercising Discretion under section 38(b) of the Municipal Freedom of Information and Protection of Privacy Act, A Best Practice for Police Services – Produced by the Toronto Police Service and the Information and Privacy Commissioner/Ontario, January 2002
3. City of Toronto Access and Privacy Manual, 2<sup>nd</sup> Edition, March, 2006 (36 pages)
4. Routine Disclosure Guidelines for City of Toronto Staff – Published by Corporate Access and Privacy Office, April 2006
5. A Councillor's Guide to Access and Privacy Legislation – Prepared by Corporate Access & Privacy, November 17, 2006 (7 pages)
6. IPC Annual Report s. 5a Contributing Factors – City of Toronto's Corporate Access & Privacy Office, 2006 Report to the Information and Privacy Commissioner, January 2007
7. The Municipal Councillor's Guide – Published by Province of Ontario, 2007 (75 pages)
8. Code of Conduct for Members of Council and Local Boards (Restricted Definition), City of Toronto, 2007
9. City of Toronto Staff Report, dated May 28, 2007 from the City Manager to the Government Management Committee
10. Disclosure of Building Records and Plans, Toronto Building, Bulletin Number A-11d, dated June 15, 2007, prepared by Jim Laughlin, DCBO and Director (24 pages)
11. City of Toronto Decision Document, Licensing and Standards Committee, Meeting No. 7, Meeting Date: September 11, 2007, re: "Confidentiality of Legal Actions taken by Municipal Licensing and Standards Staff"
12. Access to IBMS, Privacy and Security Issues – Prepared by Application Development & Support, Policy, Planning, Finance & Administration Division, City of Toronto, October 11, 2007 (24 pages)
13. City of Toronto: Building Division – Project Review Programs (printed from City of Toronto website January 14, 2008)

## APPENDIX D

### Sections 7 and 8 of *Municipal Freedom of Information and Protection of Privacy Act*:

7.(1) A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

8.(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
  - (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
  - (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
  - (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
  - (e) endanger the life or physical safety of a law enforcement officer or any other person;
  - (f) deprive a person of the right to a fair trial or impartial adjudication;
  - (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
  - (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
  - (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
  - ...
  - (l) facilitate the commission of an unlawful act or hamper the control of crime.
- (2) A head may refuse to disclose a record,
- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law; [except] a report prepared in the course of routine inspections by an agency that is authorized to enforce and regulate compliance with a particular statute of Ontario.

...

- (c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or

...

(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

(4) Despite clause (2)(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency that is authorized to enforce and regulate compliance with a particular statute of Ontario.

# CITY OF TORONTO – IBMS REPORT TO CITY COUNCIL

## EXECUTIVE SUMMARY

In the context of the analysis, reasoning and authority set out in the attached opinion letter, it is my opinion that:

### I. CONCLUSIONS

(1) The Right of Access to Non-Personal Information

(a) By Members of the Public:

MFIPPA embodies the principle that most non-personal information under the control of institutions such as the City should be available to the public, and provides that every person has a right of access to a record or part of a record in the custody or under the control of the City unless it falls within one of the exemptions under sections 6 to 15, subject to the requirement to disclose a record that the head has reasonable and probable grounds to believe should be disclosed in the public interest as revealing a grave environmental, health or safety hazard to the public.

Generally, the type of non-personal information sought by the councillors as "requested information", as outlined in this opinion letter, is now available, much of it through routine disclosure, to members of the public.

(b) By Members of Council:

Members of a municipal council have at least the rights to disclosure of non-personal municipal information available to other members of the public. A member of Council has also the legal right to be provided with information and records in the custody and control of the City necessary to enable the member to carry out his or her duties as an elected member of Council. Such latter types of information may be disclosed to councillors on a confidential basis (as exemplified by the "read only" conditions set forth in the question giving rise to this legal report). Much of the non-personal information contained in the IBMS system, and the proposed 3-1-1 telephone information system, is available to members of Council in any event, with the exception of personal information or information the disclosure of which might interfere with a law enforcement matter, or infringe personal privacy.

(2) There is no statutory or other law that defines specifically the roles and duties of a member of a municipal council. Such roles and duties may, however, be discerned from those provisions of the *City of Toronto Act, 2006* and other legislation establishing duties and functions of the City Council as a whole, including representing the public and ensuring the accountability and transparency of the operations of the City.

- (3) In the context of the legislative powers and discretion conferred upon the Council by the *City of Toronto Act, 2006*, members of Council participate in its collective decision-making as legislative officers, in providing good government for the City in accordance with the authority conferred by that Act, and in the context of the City Council's role in the development and evaluation of policies and programs of the City.
- (4) A member of Council has at least all of the rights of members of the public generally with respect to disclosure of information in the hands of the City.
- (5) Except with respect to personal information and confidential enforcement matters, almost all of the records and information contained in IBMS and sought by councillors are available to them at the present time, at least in general terms, on an individual search basis.
- (6) Most, if not all, of the information sought is permitted to be disclosed to councillors under MFIPPA in most circumstances.
- (7) Access to some other types of information, such as building application material, is available to members of Council on a confidential basis, quite apart from MFIPPA.
- (8) The City administration has significant and comprehensive programs in place through which a substantial amount of the information and records sought by councillors is now available to them and to others, including the City's website, and other database availability.
- (9) In addition to this impressive record of openness and MFIPPA compliance, City staff are working actively to improve the system of information disclosure, utilize routine disclosure principles, and enlarge the overall amount and types of information and records made available to both members of Council and members of the public.
- (10) The intent of the councillors, to see quick, user-friendly and useable on-line disclosure of information and records, to the extent permitted by MFIPPA and other legislation, is reasonable in terms of legal principle, and permitted by law.
- (11) Councillors have acknowledged that they are not seeking personal information, and that they do not have a right to legal access to confidential law enforcement information.
- (12) The expansion and other improvements to the provision of full on-line accessibility by councillors to corporate information pertaining to planning and development matters and the performance of their duties, will involve funding and other decisions beyond the purview of this opinion letter.

## II. RECOMMENDATIONS

- (1) Should the City Council decide that, in addition to the facilities now provided through the City Clerk's office, it is also open to the City Council to give consideration to the establishment, and funding, of a position in the

administration, whether in CAP or the City Clerk's office, of a "councillor information access facilitator and co-ordinator". Such an official, or group of staff, could, under authority of the City Clerk, work to improve the appropriate use of the City's existing and developing technology and information capabilities; that any disclosure of information or records to members of Council would be in accordance with MFIPPA, Council policies and other requirements of law; and that each councillor would be given appropriate assistance and support with respect to information which he or she requires in the performance of his or her duties.

- (2) Council may wish to consider whether or not to provide additional funding and staff to the Clerk to enable the establishment of a program to direct and provide routine access to members of Council to all "foot-print information", involving the magnitude and detail of exterior proposed development, thus avoiding issues of personal privacy and security which may be involved, and have to be assessed, in dealing with interior plans. It may be that such plans are now the subject of the Buildings Plan Routine Disclosure Policy of the City. The issue would be to facilitate access by councillors to such plans in the most useful manner possible.
- (3) It is not recommended that the City at this time request the Province to enact amending legislation to provide additional rights of access by City councillors to information and records in the custody and control of the City.