July 14, 2008

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)

The City Solicitor has requested me to report to City Council with respect to certain issues raised at the meeting of the Government Management Committee held on July 9, 2008 and the Recommendations to Council made at that meeting. The following is supplementary to my previous reports of April 4, 2008 and July 2, 2008 with respect to this matter.

THE DELEGATION OF THE POWERS AND DUTIES OF THE MFIPPA HEAD

For the purposes of the Municipal Freedom of Information and Protection of Privacy Act ("MFIPPA"), the Council, or a member or committee designated under section 3 of MFIPPA, is the Head.

Section 3 of MFIPPA authorizes the members of Council by by-law to designate from among themselves an individual or a committee of the Council to act as Head for the purposes of the Act. City Council has not exercised this power to date.

Council has not exercised the designating power under section 3. It remains the Head for the purposes of MFIPPA.

Section 49(1) of MFIPPA authorizes a Head to delegate a power or duty granted or vested in the Head to one or more officers of the City, subject to such limitations, restrictions, conditions and requirements as the Head may set out in the delegation.

City Council of the City of Toronto, by its enactment of By-law No. 3-1998, on January 6, 1998, has delegated to the Clerk, who is both an officer and an employee of the City, all of the powers and duties of the Head for the purposes of MFIPPA.
In order for the Council to exercise any of the powers or duties of the Head, it would first have to revoke that delegation.

MY COMMENTS ON THE OPINION LETTER OF MR. MARTIN ZARNETT

It is my respectful opinion that Mr. Zarnett, in his opinion letter of July 8, 2008, is in error, in certain statements made in the letter, and in the unstated assumptions and non-sequiturs upon which his opinion is based, errors so serious as to be fatal to his analysis.

Mr. Zarnett states: "As Head, Council members have the full right of access to all City information for the proper purpose of functioning as the Head under MFIPPA."

This statement contains several serious errors of law, among which are as follows:

- Mr. Zarnett appears to assume that whoever functions as the Head has, by reason of that fact alone, the full and unrestricted right of access to all records and information in the custody or control of the City. This is not the case, nor is it corrected by the reference to the "proper purpose of functioning as the Head". The information in question is in law in the custody and control of the municipal corporation, to which MFIPPA provides limited rights of access to certain specific City functionaries for specific purposes. While the duty to address a specific MFIPPA request for access to a specific record could require the Head to review the information in the record, such power would be limited to that record for that purpose. If the request were made by a member of Council, it would be inappropriate for that member to be given disclosure of the record for the purpose of participating in deciding whether he or she should be given such disclosure.

- Equally fallacious is the suggestion that where the Council functions as the Head, each member of the Council as an individual is given any increased personal access to City information to which they would otherwise not be entitled.

- Mr. Zarnett appears to proceed on the assumption that City Council has not delegated to the Clerk the powers and duties of the Head for the purposes of MFIPPA. In my respectful opinion, such powers and duties have been delegated by the City's enactment of sections 2 and 3 of By-law No. 3-1998, which delegate the duties and responsibilities of the Clerks of the former municipalities in what is now the City of Toronto. While this by-law is not necessarily as clear and specific as one might like, I believe that it does clearly express the intent, and effect the purpose, of implementing this delegation, a conclusion which the City of Toronto, and all of its Councillors and staff, have accepted and acted upon for the last 10 years. Of course, the decision is entirely in the hands of
the Council, and it is open to it to take upon itself the functions and duties, as well as the office, of the Head by revoking some or all of the duties and responsibilities delegated to the Clerk. For reasons stated in my previous reports, it is my recommendation to the City that it not revoke such delegation but, instead, that Council enact a by-law more clearly stating its intent.

By reason of the erroneous legal conclusions and assumptions referred to above, Mr. Zarnett appears to conclude that each individual member of Council has a full and unrestricted right of access to all City information, and the only issue is whether or not he or she is entitled to disclose it to others. This conclusion ignores the statutory and other legal limitations on the powers of a member of a municipal council, including the absence of a statutory authority for a councillor to define his or her own role, or confer upon councillors or staff the right of access to information not specifically authorized by MFIPPA.

Mr. Zarnett also appears to assume that public rights of access to City information depend in some way on who or what body functions as the Head for the purposes of MFIPPA, and that were the City Council to function as Head, its members' entitlement to access to City information would be uncontrolled. This is simply not the case. Were the City Council to function as Head, its members would not, as a matter of legal principle, have any increased personal rights of access to City information for that reason alone.

In general, I conclude that it would be dangerous for the City to accept or act upon the advice provided by Mr. Zarnett in his letter of July 8, 2008, although none of the foregoing departs from my original conclusion that all, or virtually all, of the information and records properly sought by Councillors as described in my previous reports is now accessible in law to every one of them.

IMPLICATIONS OF THE RECOMMENDATIONS OF THE GOVERNMENT MANAGEMENT COMMITTEE

From a legal point of view, there would be no difficulty in supporting paragraph 1 and paragraphs 3 to 6 of the Committee's Recommendations, at least to the extent that they are not dependent on Recommendation 2. However, it is my opinion, for a number of reasons, that the Recommendation contained in paragraph 2 not only is incapable of legal implementation, it could place the City, and possibly members of Council, and certain staff members, in the position of being party to an unlawful act constituting a breach of statute. It could also place the Clerk in a very awkward position of receiving a purported direction by Council which it has no legal authority to give and which she has no legal authority to comply with, and where to do so would constitute a contravention of statute.
The Integrated Business Management System (IBMS) database referred to in the Recommendation has been described as follows (as quoted in my report of April 4, 2008):

"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." (emphasis added)

In my advice to the City to date, I have emphasized that the great majority of the information in IBMS is now available in law to members of the public, and to each member of Council as a member and representative, of the public. In the context dealt with in my reports, I have referred to some of the small number of specific types of information contained in IBMS to which members of Council and members of the public may not have legal access as of right. Generally, these are grouped under the following headings:

- personal information;
- property security rights;
- names of informants/complainants;
- confidential investigations/enforcement information.

Accordingly, the Committee's Recommendation would purport to direct the Clerk to provide Councillors with access to information where to do so could constitute a contravention of MFIPPA, with the result that the actions of the Clerk were she to comply with the Councillor's "direction", could constitute a contravention of Provincial statute.

The Clerk is a municipal officer, appointed by the City, to hold an office created by statute, namely, section 137 of the City of Toronto Act.
While that statute includes among the functions of the Clerk to perform duties assigned by the City, as well as the fulfillment of duties under Provincial legislation, the Clerk would not be in a position in law to comply with a direction by City Council to commit an act which would contravene Provincial statute or other law.

Section 48 of MFIPPA provides that wilful disclosure of personal information in contravention of the Act, constitutes an offence with a maximum fine on conviction of $5,000.00. Such a charge could be brought against the City, and any employee of the City, and any member of Council, deemed to be a party to the offence.

Any decision by the City not to comply with MFIPPA could also lead to civil proceedings brought on behalf of the Province of Ontario, the Information and Privacy Commissioner, or other proper party, to restrain the disclosure of municipal information in contravention of a prohibition contained in MFIPPA.

In addition to whatever statutory or other remedies may be available should a municipality decide to act in contravention of a statute, another substantial factor to be taken into account is the importance of the public confidence that its municipal government will comply with the law.

Among the significant considerations of this nature supporting compliance with MFIPPA, are included the reasonable expectations by members of the public that information and records which they provide to the City will be maintained as confidential, and used for the purpose for which the information was provided or created, and not for any purpose inconsistent with the purpose for which they were provided. The public also has a reasonable and justified expectation that the City of Toronto will comply with the law.

It is the acknowledgement and balancing of public and private interests which form the basis for MFIPPA and support restricting access to certain types of information to the public, to Councillors and to staff, but providing for such access under certain conditions, for example, where the individual needs the record in the performance of a duty and the disclosure is necessary and proper in the discharge of the City’s functions.

In assessing the right of a particular person to access to information, significant differences may exist between members of Council and members of staff, and among various members of each group. Each must be looked at in terms of the specific duties of the individual in question and the purposes for which disclosure is sought. The Committee's Recommendation 4 refers to "members of Council and their staff", apparently equating the two, despite the fact that a
member of City staff, whether or not assigned to a member of Council, does not necessarily have a right of access to information by reason of that fact alone.

RECOMMENDATIONS

(1) It is recommended that the City Council not act upon the Recommendation contained in paragraph 2 of the report of the Government Management Committee; and

(2) It is recommended that City Council provide and confirm by by-law that the powers and duties granted or vested in the Head for the purposes of the Municipal Freedom of Information and Protection of Privacy Act be and the same are delegated to the City Clerk.

Yours truly,

George H. Rust-D'Eye

GHRJD

c: Anna Kinastowski, City Solicitor

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