Ms Watkiss:

I am attaching a copy of a letter sent this week by the Commissioner, Dr. Cavoukian, to Councillor Moscoe, regarding the issue of councillor access to city databases. Since a motion on this topic will be debated by council this afternoon, the Commissioner thought it would be of benefit to council as a whole to receive it.

The letter references a July 14th letter to the Mayor. That letter was also addressed to the City Manager and copied to you. The Commissioner would also appreciate if it could be distributed as well.

Thank you

Brian Beamish
Assistant Commissioner (Access)
Office of the Information and Privacy Commissioner/Ontario
HAND DELIVERED

September 22, 2008

Councillor Howard Moscoe
City of Toronto
City Hall
100 Queen Street West
Toronto, Ontario
M5H 2N2

Dear Councillor Moscoe:

Re: Access by Councillors to the City of Toronto IBMS Database

Thank you for the package of documents you sent me last week concerning access by City of Toronto councillors to the IBMS (Integrated Business Management System) database.

Upon review, the thrust of the documents you provided appears to be that since individual councillors constitute City Council, and Council constitutes the “Head” for the purposes of the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA), this should provide unfettered routine access by individual councillors to all information, personal and general, contained in the IBMS database. This is not the case.

The IBMS database contains the personal information of individuals residing in the City of Toronto, as well as other information, including law enforcement data. General information that does not contain personal information may be freely disclosed to councillors, where the specific information is not subject to a mandatory exemption from disclosure. (I understand that the City currently provides a considerable amount of general information to councillors, on a constituency basis.)

Personal information, on the other hand, may only be disclosed within the parameters of the disclosure rules provided under section 32 of MFIPPA. Nowhere does the Act provide that a Head or any other person may obtain unfettered access to personal information, by virtue of their office.

Section 32(d) provides that an employee or officer of an institution may obtain access to personal information where such access is necessary in order to perform a duty discharging the institution’s functions, and where it is proper to have such access. A Head must fit within these parameters in order to gain access to personal information.

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As I stated in my letter of July 14, 2008 to Mayor Miller, for the purposes of section 32(d), a councillor, acting in an individual capacity, is not considered to be an "officer" of the City, nor is he or she functioning as an employee of the City. It is very important to distinguish between the duties performed on behalf of the City (as functions of an institution), and the constituency activities of individual councillors, which are not functions of the City. In their personal capacity as individual councillors, councillors may not routinely obtain access to personal information under section 32(d).

An individual councillor may however, obtain access to personal information under one of the other provisions of section 32, for example, with the consent of the individual whose personal information is at issue – again, requiring a case-by-case analysis.

Permit me to comment on two of the examples raised in your memo to all members of Council, to demonstrate my point. You note that assessment roll information is public information and can be accessed by any individual at City Hall, on a property-by-property basis. I fully support the ability of councillors, with the consent of their constituents, to be able to access this information quickly and efficiently. However, this does not mean that councillors should have unqualified access to the assessment roll database, for example, by having the entire database of literally hundred of thousands, routinely accessible from their office computers.

Similarly, you state that councillors may not be given access to enforcement data relating to a used car dealership that is flouting the law. This is not the case. In fact, my office recently released Order MO-2342 involving the City of Toronto. That order dealt with by-law enforcement information relating to charges laid against businesses by the mobile inspection unit of the City's municipal licensing and standards department. My office ordered this information disclosed, and held that even if the defendants were individuals (sole-proprietors), rather than businesses, this information related to these individuals in their business capacity rather than a personal capacity. Clearly, this type of information may be disclosed and should be made available to councillors. Again, while councillors should have access to the information in order to respond to, and assist their constituents, this does not mean that councillors should have unfettered access to the entire IBMS database.

In conclusion, there is no provision under MFIPPA for individual councillors to obtain unfettered, routine access to personal information in order to carry out their constituency function.

Where councillors sit as a whole as Council (therefore acting jointly as the Head), and need to access specific personal information in order to carry out a function of the City, then access is permitted, on a case-by-case basis.

To summarize, case-by-case access, on a need-to-know basis, is clearly not consistent with the routine, automatic access to the IBMS database, requested by some councillors.

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It may be helpful to conclude by drawing a parallel between the application of the freedom of information and privacy laws at the municipal and provincial levels. Under the provincial Freedom of Information and Protection of Privacy Act, Ministers are the “heads” of their respective ministries. However, it is well understood that being the head does not confer, on the Minister, the right to access any personal information in the record holdings of their ministry. Quite the opposite. For example, it is inconceivable that the Minister of Health would be granted access to the ministry’s OHIP database simply because he or she was the head of that ministry. In addition, different rules apply when Ministers are functioning in their roles as local members representing their constituents. As with councillors, the general rule is that provincial members require an individual’s consent in order to access his or her personal information, when performing constituency functions.

I dealt with these matters in greater detail in my letter to Mayor Miller, which I enclose for your information. I hope this will be of some assistance.

Sincerely yours,

[Signature]

Ann Cavoukian, Ph.D.
Commissioner

cc: Mayor David Miller, City of Toronto
    Shirley Hoy, City Manager
    Ulli Watkiss, City Clerk

Encl.
July 14, 2008

Mayor David Miller
City of Toronto
City Hall, 2nd Floor
100 Queen Street West
Toronto, Ontario
M5H 2N2

Shirley Hoy
City Manager
City of Toronto
City Hall, 11th Floor East
100 Queen Street West
Toronto, Ontario
M5H 2N2

Dear Mayor Miller and Ms Hoy:

My office has reviewed the Decision Document detailing the deliberations of the Government Management Committee on July 9, 2008. In particular, the Committee recommended the following:

_The City Clerk be directed to provide Councillors with access to the IBMS database on matters within their own ward, based on the expert legal opinion with respect to the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA) outlined in the communication (July 8, 2008) from Mr. Martin P. Zarrett of Sandler, Gordon, Barristers and Solicitors (communication GM16.1.8)._ 

With due respect, this legal opinion can hardly be characterized as “expert,” given that it provides at best, faulty advice — a point which I will expand upon shortly. The issue of access by councillors to the IBMS database has been repeatedly considered by my office, the Office of the Information and Privacy Commissioner/Ontario (the IPC), over the years. That database contains both personal information about city residents and law enforcement information. My office has consistently taken the position that routine, automatic access by councillors to the IBMS database is not consistent with the Municipal Freedom of Information and Protection of Privacy Act. The IPC has taken the position that municipal councillors are not “officers or employees” of the city, as contemplated by section 32(d) of the Act. That section provides for disclosure of personal information to “an officer, employee, consultant or agent of the institution who needs the record in the performance of their duties and if disclosure is necessary and proper in the discharge of the institution’s functions...” The IPC has consistently found that, except in unusual circumstances, a member of municipal council is generally not considered to be an officer or employee of a municipal corporation.

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My office has pointed out to city staff that other parts of section 32 may support the disclosure of some information from the IBMS database to councillors. Under section 32(b), a constituent could consent to the disclosure of their personal information contained in the database to a councillor. In addition, in some situations, a councillor may be able to rely on section 32(c) if the councillor intends to use the personal information for a purpose consistent with the purpose of the original collection. The ability to rely on this “consistent purpose” exemption, will, by necessity, be fact specific. However, in my view, despite the potential for access under sections 32(b) and (c), unlimited access by councillors to the database is simply not supported by the Act. As noted by former Assistant Commissioner Tom Mitchinson in Investigation Report MC-980018-1 in 1998, the fact that a councillor may need the personal information of a constituent in order to help that constituent does not necessarily mean that the councillor “needs” the personal information of everyone in the database.

I note that this position has been conveyed to city staff and councillors on numerous occasions, including a letter I sent to Mayor Mel Lastman dated May 2, 2000. Most recently, my senior solicitor and Manager of Legal Services, Mary O’Donoghue, attended a meeting with Councillors on September 18, 2007, to outline the IPC’s position on their access rights under the Act.

Having reviewed the legal opinion of Mr. Martin Zarnett, referred to in the Decision Document, as well as the earlier legal opinions provided to the Government Management Committee by Mr. George Rust-D’Eye, there is no comparison. Please find attached the legal opinions provided by Mr. Rust-D’Eye. The legal opinion of Mr. Zarnett appears to draw the conclusion that were City Council to exercise the powers of the “Head” under the Act, individual councillors would have a full right of access to all City-held information. With due respect, this is ludicrous. Should members of council take on the responsibility of the Head, they would not in law, have expanded access to records to which they do not presently have access. The Head of any institution does not, by reason of that position, have access to any record held by that institution as of right. Please note that Mr. Rust-D’Eye’s opinion is in agreement with this position.

I understand that the recommendation of the Government Management Committee will be debated at an upcoming meeting of City Council. I trust that this letter will provide greater clarity in opposing unrestricted access by councillors to the IBMS database, and should assist in preventing a potential breach of the Act.

Sincerely yours,

Ann Cavoukian, Ph.D.
Commissioner

cc: Ulli Watkiss
City Clerk, City of Toronto