Thursday, April 17, 2008

To: The Chair and Members of the Government Management Committee

From: Howard Moscoe

Re: GM 13.27, Opinion Regarding Council Member "Read Only" Access to the IBMS System

Last week (April 10, 2008) the Ontario Information and Privacy Commissioner issued order MO-2289 in the matter of Remi Tabello vs: the City of Toronto.

Mr. Tabello appealed the decision of the City of Toronto to refuse him access to information related to 'illegal billboards'. The city contended that his requests were "frivolous or vexatious".

> *To date, you have submitted some 625 access requests of which 338 have been completed. This large volume of requests forms part of a pattern of conduct that amounts to an abuse of the right to access and has caused a burden on the City's systems of operations including those of Toronto Building, City Planning, Municipal Licensing and Standards and the Corporate Access and Privacy Office.*
>
> *"A pattern of conduct" requires "recurring incidents of related or similar requests on the part of the requester (or which the requester is connected in some material way)." An example of meaning of "abuse" is a situation where a process is used more than once, for the purpose of revisiting an issue or issues that have previously been addressed.*

As part of their defense the City of Toronto explains that "City council has established a Task force to deal with the issues of billboards in the City, one of which is to provide a better mechanism for compliance and enforcement...."

The City neglects to point out, however, that it is precisely in response to Mr. Tabello's findings through Access to Information that this task force was established.

The City's submission characterizes Mr. Tabello's motives as follows:

- To create confrontations in order to obtain information to post on his website in a further attempt to bring attention to his complaints.
- To harass the City in order to effectuate the requested policy change.
- The appellant is submitting a large number of requests for the purpose of gathering information to portray the city in a negative light.

The City's submission also contends that to process the applicants numerous requests amounts to a pattern of conduct that would interfere with its operations.

Mr. Tabello's submissions are that the purposes of his requests are:

- To provide City Councillors with an audit of the work that MLS has been doing on illegal billboards.
- To continue his organization's scrutiny of the City's enforcement against illegal billboards.

Ms. Corban's (The adjudicator's) findings are:

- The purpose of the appellant's request is not a factor that leads to a pattern of conduct that amounts to an abuse of the right of access.
- "I do not find that the appellant's requests, at this time, amount to a pattern of conduct that would interfere with the City's operations."
- It would not be reasonable to find that a request is frivolous or vexatious on the basis that it would 'interfere with the operations of the institution.'
- The appellant legitimately seeks the information in order to determine whether certain billboards are posted illegally, a determination that can not be made without review of the requested information.

The adjudicator issued the following order:

1. **I do not uphold the City's decision that the appellant's request in Appeal MA07-29 is frivolous or vexatious.**

2. **I order the City to issue an access decision for Appeal MA07-20 in accordance with section 19 of the Act, treating the date of this order as the date of the request.**

This order is extremely relevant to the issue before us in that the entire issue focuses on the right of Councillors to obtain on line access to IBMS which is shrouded in a veil of *interference in the law enforcement process.*

The second, perhaps more important issue, is who is the HEAD of Council?

Under the Act council has the power to delegate this role to staff. Mr. Rust-D'Eye in his legal opinion states:

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

Much of his analysis flows from that understanding. I have not seen any evidence of that delegation and I submit that if this is not accurate the response to issues raised in this report and the recommendations would be quite different. Hence I would recommend that this matter be set aside so we can resolve this most significant issue.

The City's response in the Tabello matter also assumes the power of delegation. I submit that if, in fact, council had been able to shape the "City's" position the information that Mr. Tabello has been seeking would have been freely given. I, for one, view Mr. Tabello as something of a civic hero. He is making the City accountable for its failure to set in place mechanisms to enforce its billboard bylaws and as a result of the issues that he has raised we are finally beginning to get our act together in this area. I believe that this is something that all members of Council want to see happen.

Recommendations:

1. That this matter be deferred until the next meeting of the Government Management Committee:

2. The Clerk provide to members of the Government Management Committee the actual minutes of Council that delegated the function of HEAD to the Clerk.

3. George Rust-D'Eye be requested to comment on how the delegation of HEAD under MFIPPA could be modified in a way that separates out the administrative functions of the role of the Clerk and yet still permits council to retain the position of HEAD.

4. If it can be proved that Council has, in fact, delegated the position of HEAD to the Clerk Mr. Rust D'Eye be requested to advise how this delegation can be rescinded or modified in a manner that will permit members of Council access to the information that they require.