Barristers & Solicitors

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July 2, 2008

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File 00916.00024

Chair and Members, Government
Management Committee
City of Toronto
Toronto City Hall, 2nd Floor
100 Queen Street West
Toronto, ON M5H 2N2

Dear Chair Lindsay Luby and Members of the Committee:

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

Attached hereto is my report, dated July 2, 2008, prepared in response to a request by your Committee, made at its meeting held on April 17, 2008, for legal advice with respect to consideration of the merits of a possible decision by the City Council to revoke, rescind or modify its delegation to the City Clerk of the powers and duties of the Head under the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA").

At the outset, I wish to address certain assumptions implicit in the Committee's request arising out of a written submission, dated April 17, 2008, to the Committee made by Councillor Howard Moscoe:

Both of the two parts of the motion to be addressed in this opinion are premised on the assumption that City Council itself could function as the City's "Head" for the purposes of MFIPPA, and exercise, collectively, all of the discretionary decision-making required by the Act to be exercised with respect to all of the individual requests for access received by the Act.

After extensive review and consideration of this issue, I have concluded that this assumption cannot be supported, either in terms of administrative law or practicality, and that the scheme of MFIPPA, and its legislative intent, preclude such a scheme from being implemented in the City of Toronto.

The requests contained in the motion also appear to be premised on the assumption that there is a body or type of information or City record properly required by members of City Council to enable them to carry on their functions of office, but which is now not

available to them by reason of the fact of Council's delegation to the Clerk of the powers and duties of Head for the purposes of MFIPPA.

However, I have not been provided with any examples or information supporting this assumption, nor any example of an attempt by a member of Council to obtain necessary information to which the Clerk refused to accede. Should such an example be brought forward, I would be pleased to address specifics of that example and issues arising from it in this context.

I have concluded that, having regard to the factors discussed in my previous report of April 4, 2008, a decision by the Council to take upon itself the discretionary decision-making responsibilities of the Head, would not provide individual members of Council with any IBMS or other additional source of useable information over that which is now legally accessible to them in any event.

Members of Council would still not have legal access or right to disclosure of the names of complainants, records of enforcement or prosecution evidence, or any information identifying an individual or which could be used to identify an individual, or information pertaining to an individual.

SUMMARY OF MY REPORT OF APRIL 4, 2008

This is a summary of my legal opinion of April 4, 2008 relating to the right of access to information by members of the public and members of Council.

The specific issue which was the focus of my legal opinion involved access to planning and other information contained in the IBMS system, but pertained as well to such matters as complaints and investigations.

The governing statute is the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA").

The thrust of the legislation is that information in municipal records should be available to the public unless exempt from disclosure under one of the mandatory or discretionary exemptions contained in the Act. Mandatory exemptions from required disclosure include "personal information" about an identifiable individual.

An important discretionary exemption pertains to records the disclosure of which could reasonably be expected to interfere with a law enforcement matter, such as where the identity of

a confidential source of information, such as a complainant, is disclosed. Such disclosure would also be precluded by mandatory exemptions, as would information relating to enforcement of the law against any person.

In general, I conclude that that principles embodied in MFIPPA involving disclosure and prohibited disclosure, apply equally to members of Council and other members of the public.

The councillors with whom I met stated that they were not interested in obtaining personal information or law enforcement information, but rather on-line information about actual and proposed development of property, taking into account the public interest in ensuring proper administration, enforcement and compliance with the law.

My review disclosed that most, if not all, of the information properly sought by the councillors is available to them in one form or another at the present time, and that the City's administration is actively involved in developing a program of wider voluntary disclosure, both to councillors and the public, through which disclosure both to councillors and the public of legally accessible information is or will be facilitated.

To the extent that full disclosure of such information has not been yet attained, this is more the result of Council priorities and financing, rather than legal or bureaucratic impediments.

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

The City has developed and published *Routine Disclosure Guidelines*, as authorized by MFIPPA, which acknowledges that "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 some of the information in question is now provided to councillors on a "read only" basis, where necessary to enable the councillors to participate in Council legislative decision-making, I conclude, in summary, that most, if not all, of the information properly sought by councillors, and not subject to statutory exemptions, will become available to them, as well as to other members of the public, generally through the Routine Disclosure Policy. The City's Corporate Access and Privacy document, *A Councillor's Guide to Access and Privacy Legislation*, appears to summarize accurately the issues involving councillor access to information.

On the basis of the above conclusions, I recommended that the City consider the establishment and funding of a "Councillor Information Access Facilitator and Co-ordinator" under the authority of the City Clerk, to centralize and make more specific the exercise of a number of duties already performed by various City staff.

I also recommended consideration of providing additional funding and staff to the Clerk to enable the establishment of a program to direct and provide routine on-line access to members of Council to "footprint" information relating to proposed development.

SUMMARY OF MY REPORT OF JULY 2, 2008

The key municipal MFIPPA functionary is the "Head", a statutory position whose responsibilities include exercising judgment and discretion with respect to MFIPPA applications for access to municipal records.

As in the case of most, if not all, other Ontario municipalities, City Council has, by By-law No. 3-1998, designated as its "Head" the City Clerk, whose department includes the Corporate Access and Privacy Unit, to manage freedom of information requests and privacy protection for the City. It is currently the Clerk, as Head, who exercises the judgment and discretion delegated to the holder of that position by City Council under MFIPPA.

For the Council by by-law to terminate the designation of the Clerk as Head and resume that role itself, would create a peculiar and unique situation, with decision-making on individual requests for access to City records being exercised by a collective body of 45 elected officials. This could not have been, and was not, the intention of the Legislature in enacting either MFIPPA or the *City of Toronto Act*.

I see no justification for the City's proceeding with this proposal, or what Council or member objectives would be attained. The City Council functioning as Head would still be subject to all of the same principles and requirements of MFIPPA that now apply to the Clerk in the exercise of those responsibilities. Mandatory exemptions from disclosure would continue to apply, as would MFIPPA principles applicable to discretionary exemptions.

Aside from the practical impossibility of the Council as a whole dealing with over 5,000 requests, I do not see how the Council could comply with the strict time periods imposed on City decision-making, such as that requiring response to requests within 30 days of the receipt of the request, except where the Head has decided that the request is frivolous or vexatious, or a specific extension of the time period has been communicated to the requester. It is also difficult to

visualize any particular benefits to the public interest or to the functioning of Council arising out of such an arrangement, in that:

- as concluded in my first report, the City administration is currently, primarily through routine disclosure policies, expanding and facilitating disclosure to both members of Council and to the public of information made accessible to them under MFIPPA, including the information properly sought by councillors to assist them in the fulfilment of their role;

- designating the Council as the Head would not enable its members as individuals to obtain access to personal information or law enforcement information which is not available to them now under MFIPPA;

- under MFIPPA, all Council consideration and decision-making with respect to requests for access would occur at in camera meetings;

- a significant amount of increased staffing resources would be required to provide councillors with the technical and logistical back-up essential to enable them to make the decisions which would be within their exclusive domain;

- the Council as a collective body would also become involved in direct participation in appeals from its decisions to the Information and Privacy Commissioner;

- for the Council to undertake decision-making on all of the access requests expected to be received by the City would, in all likelihood, bring other Council functioning to a halt.

It would be simply too complicated and time-consuming to try to establish a system whereby the Clerk would continue to perform the administrative responsibilities pertaining to the function of the Head, on a delegated basis, but would leave the quasi-judicial decision-making responsibilities to be exercised by the Council itself.

While theoretically possible to administer such a system, in reality, in view of the volume of requests received and the number and complexity of decisions required to be made by the Head, taking into account the limited availability of human and financial resources, and the finite time available to individual councillors, such a proposal would, in my opinion, prove unworkable.

With respect to access to information sought by councillors, which led to both reports, it is difficult to visualize what, if any, additional types of information would become available to councillors as individuals. Since councillors are not responsible for the enforcement of by-laws,

neither restricted law enforcement information nor the names of complainants or other personal information, could be disclosed to them in any event.

Even if councillors were to file their own requests for access, it would not be appropriate for them to hear and decide upon such applications, and the Council Code of Conduct involving confidential information and the requirements of MFIPPA, would continue to apply to limit their access and use in any event.

Even if a system were established whereby the Council would decide only access requests not granted by the Clerk, a theoretical possibility in terms of legal and administrative principle, this would be unlikely to make the functioning of Council as the Head either appropriate or feasible, nor would it achieve any gains in political accountability.

In any event, I conclude that the volume of requests for access anticipated to be received by the City would make this proposal, too, unworkable.

Yours truly,

WeirFoulds LLP

George H. Rust-D'Eye

GHR/mb
c. Anna Kinastowski, City Solicitor

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