

## **Appeals of Access Decisions in Relation to Records of Members of Council and Retention of Outside Counsel**

<b>Date:</b>	October 21, 2011
<b>To:</b>	City Council
<b>From:</b>	City Clerk and City Solicitor
<b>Wards:</b>	All
<b>Reference Number:</b>	

### **SUMMARY**

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This report advises of an increasing number of access requests and appeals respecting records held by Members of Council and of recent decisions or positions taken by the Information and Privacy Commissioner of Ontario ("IPC"). These have implications for the separate management of records held by Members of Council and the possible need for separate legal representation of Members of Council.

The recommendations, if approved, would authorize the retention of the firm of Heenan Blaikie LLP with services to be led by Priscilla Platt, a lawyer with significant expertise in the area of freedom of information law. The purpose of the retention is solely to allow access by individual Members of Council to any required legal advice and representation with respect to the Member's separate interests in any IPC appeal relating to access to the Member's records or in any court action as a result of an IPC appeal. Access would be subject to certain conditions as set out in this report.

### **RECOMMENDATIONS**

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The City Clerk and the City Solicitor recommend that City Council:

1. Authorize the retention of the firm of Heenan Blaikie LLP to provide independent advice and representation from time to time to Members of Council in relation to

- any proceedings before the Information and Privacy Commissioner of Ontario concerning access to records held by a Member of Council; such retainer to be subject to the condition that the City Clerk and the City Solicitor confirm that the proceeding pertains to the individual interests of the Member of Council prior to counsel being retained to provide advice and representation;
2. Authorize the utilization of account A70001 the Council General Expenses Account for the payment of external counsel within the financial commitment limit authority for staff; and
  3. Direct the City Clerk to report yearly in conjunction with the operating budget process on the extent and costs of utilization of outside counsel by Members of Council.

### **Financial Impact**

The recommended external counsel was selected by the City Solicitor after contacting a number of firms identified as having the requisite expertise. The recommended external counsel has competitive rates.

It is difficult to estimate the costs associated with the proposed retention and engaging of external counsel by Members of Council as the number of requests and appeals cannot be anticipated. Once the main principles on custody, and the main principles on control, and the extent of what constitutes City business have been clarified by the IPC or the courts on an appeal, there would be less need by Members of Council to access external counsel and the matter of the retention of outside counsel could be revisited.

### **ISSUE BACKGROUND**

Access requests for records held by Members of Council are increasing. In 2010 there were 12 requests for Members of Council records compared to 48 in 2011 (as of October 14<sup>th</sup>), an increase of 400%. The City's decisions that records held by Members of Council are not in the custody or control of the City have been appealed four times this year.

Denial of access to the records of a Members of Council is in accord with the commonly held position on the nature of such records. The City of Ottawa and the IPC co-published 'A Councillor's Guide' in 2001 that focuses on how the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA") applies to records in the possession of Members of Council. While certain records (such as the purple confidential documents) in the possession of Members of Council may be considered to be in the custody or control of the City as they would be considered part of the business of a committee or council, the Guide (co-published by the IPC and maintained on their website) establishes the IPC's position, that generally, records of Members of Council are

to be considered personal records that are not within the City's custody or control, thus not subject to MFIPPA.

We believe there is a need to provide for separate legal advice and representation of Members of Council, if this position is being re-examined by the IPC. There are two developments that give rise to concerns that the IPC is reviewing its position concerning the City's custody or control of records held by Members of Council.

First, a recent decision of the IPC on a privacy breach (an e-mail by a councillor) took a broad approach to the concepts of City custody or control over records held by Members of Council and what falls within the mandate of City business. Second, there are currently four ongoing appeals relating to access to records held by Members of Council. In one appeal, the IPC has requested that the Member of Council make representations directly to the IPC defending the City's decision to deny access to the records.

While the City will be defending its decisions on access and, in particular, on the matters of what constitutes custody or control and the City's business mandate, the City should not be representing individual Members of Council before the IPC or reviewing the personal records of an individual Member of Council as part of any submissions. This could compromise the argument that records held by Members of Council are not business records of the City.

## **COMMENTS**

### Custody or Control Issues

The issues of the City's custody or control records held by Members of Council are significant. Aside from the fact that Members of Council may be subject to increased access demands and participation in more appeals before the IPC, if the City was determined to have custody or control of records held by Members of Council generally, these are some of the consequences:

- Records held by Members of Council would be subject to the City's Records Retention By-law
- Members of Council would be required to issue Collection notices when constituents give them personal information
- Members of Council would be required to set up processes to respond within the 30 day legislated time frame to provide records related to MFIPPA requests to the City Clerk's Office
- Members of Council would be subject to formal privacy complaint investigations by the IPC about the manner in which they collect, use, disclose or dispose of any information they receive from the City or residents
- Additional resources may be required to accommodate the Members of Council access and privacy needs

## External Counsel Representation

These recent developments give rise to the issue that Members of Council should have access to representation of their separate interests in matters related to the IPC. The Councillors' Indemnification Policy does not apply to the appeal process associated with access requests and therefore a separate process needs to be considered.

Given the common issues associated with general access to records held by Members of Council and the governance issues associated with the matter, as these matters arise, it is appropriate that an external law firm with expertise in the area be retained for the provision of legal advice and representation from time to time to Members of Council, subject to the concurrence by the City Clerk and the City Solicitor as reflected in the recommendations of this report. Given that the IPC has imposed very short time lines within which responses are required, the recommended process of consultation with the City Clerk and the City Solicitor prior to engaging the designated outside counsel will ensure that the IPC timeframes can be met.

If the recommendations in this report are not adopted, the City Clerk and the City Solicitor will only be able to co-ordinate general assistance for Members of Council in relation to the custody or control issue respecting their records, and individual Members of Council will be responsible for the preparation of any representations requested by the IPC with respect to the Member's separate interests with respect to the issue of the potential applicability of MFIPPA to the Member's records.

The firm of Heenan Blaikie LLP is being recommended for such retention with services to be led by Priscilla Platt. The City Solicitor solicited proposals from those lawyers known to have the requisite expertise in the area of freedom of information law. The recommended counsel was selected based on expertise, availability, and competitive rates.

## **CONTACT**

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## **SIGNATURE**

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Ulli Watkiss  
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