



**STAFF REPORT
ACTION REQUIRED**

Proposed *Public Sector and MPP Accountability and Transparency Act, 2014*: Implications for Toronto's Ombudsman Function

Date:	March 25, 2014
To:	City Council
From:	City Manager
Wards:	ALL

SUMMARY

The City of Toronto is committed to accountable, transparent, open government. Toronto has one of the most robust accountability frameworks of any city, world-wide and is a leader in this area, setting best practices for local government.

Anticipating the need for more accountability, City Council established an Auditor General in 2002 and an Integrity Commissioner in 2004 and requested authority from the Province of Ontario to empower the accountability functions. The Province subsequently included a requirement in the *City of Toronto Act, 2006*, for the establishment of an Auditor General, Integrity Commissioner, Ombudsman, and for the establishment of a Lobbyist Registry with the ability to appoint a Registrar. The Act also provides authority for the City to appoint an Open Meeting Investigator to investigate complaints about compliance with the open and closed meeting provisions of the Act and Procedures By-law. The City appointed an Open Meeting Investigator in 2007.

On March 24, 2014, the Ontario government introduced proposed legislation, *Public Sector and MPP Accountability and Transparency Act* to strengthen political accountability, enhance oversight and increase transparency in the government and the broader public service.

The bill if passed will have implications for Toronto including:

- Amending the *Ombudsman Act* to extend the role of the Ontario Ombudsman to include municipalities, local boards and municipally controlled corporations; and
- Amending the *Municipal Freedom of Information and Protection of Privacy Act* by requiring institutions to adopt measures to preserve records in accordance with

applicable rules and also by creating the offence of wilful destruction of records with the intent to deny access to records, with a fine of up to \$5000.

Based on a preliminary review of the proposed legislation, the Act if passed could have significant implications for the City of Toronto. For example, the Ontario Ombudsman is not appointed by City Council but rather is appointed by the Lieutenant Governor in Council on the recommendation of the Legislative Assembly. The government that is elected and accountable for the delivery of services should be responsible for those services, including directing changes and improvements to the services within its jurisdiction.

The Act proposes to amend the *City of Toronto Act, 2006* to require City Council, a local board or city-controlled corporation to meet in closed session where the subject matter being considered is an ongoing investigation by the Ontario Ombudsman, Toronto Ombudsman or Open Meeting Investigator. This is contrary to the current process where City Council and its local boards deliberate these matters in public. Closing a meeting or part of a meeting to consider an investigation by the Ontario Ombudsman, Toronto Ombudsman and most importantly, the Open Meeting Investigator, seems inconsistent with principles of an open and transparent government. This proposal will require amendments to Toronto Municipal Code Chapter 27, Council Procedures.

Extending the jurisdiction of the Ontario Ombudsman to Toronto to investigate similar matters, within the jurisdiction of the Toronto Ombudsman and Open Meeting Investigator, would be both duplicative and potentially confusing for the public. The proposed legislation could also result in City staff having to provide information and participate in an investigation twice – once by the Toronto Ombudsman or the Open Meeting Investigator and again if the matter is reviewed by the Ontario Ombudsman. This would have resource implications.

Ensuring that all Ontarians, outside of Toronto, have access to a municipal Ombudsman is a positive direction however Torontonians already have access to a municipal Ombudsman unlike other municipalities in Ontario. As a result, this report recommends that City Council request the Province of Ontario exempt Toronto from the jurisdiction of the Ontario Ombudsman as the City has met its statutory requirements to appoint an Ombudsman and an Open Meeting Investigator.

RECOMMENDATIONS

The City Manager recommends that:

1. City Council request the Province of Ontario to exempt the City of Toronto from the proposed jurisdiction of the Ontario Ombudsman as the only municipality required to appoint its own Ombudsman and as a municipality with an Open Meeting Investigator;

2. City Council include all City-controlled corporations in the Toronto Ombudsman's jurisdiction and authorize the City Solicitor to bring forward a bill directly to City Council to amend Toronto Municipal Code Chapter 3, Accountability Officers to effect this change;
3. City Council authorize the City Manager to submit this report and make oral submissions as required to the Provincial Standing Committee that is considering the government bill to enact the *Public Sector and MPP Accountability and Transparency Act, 2014*; and
4. City Council authorize a Member of City Council to make written and oral submissions on behalf of City Council to the Provincial Standing Committee that is considering the government bill to enact the *Public Sector and MPP Accountability and Transparency Act, 2014* as required.

Financial Impact

As the Ontario Ombudsman will have authority over matters within the jurisdiction of the Toronto Ombudsman and Open Meeting Investigator, there will be additional staff resource and financial implications related to duplication.

The Deputy City Manager and Chief Financial Officer has reviewed this report and agrees with the financial impact information.

ISSUE BACKGROUND

On March 6, 2014, the Ontario government announced its intention to introduce a government bill to strengthen accountability.

On March 24, 2014, the Ontario government introduced the proposed legislation, *Public Sector and MPP Accountability and Transparency Act* to strengthen political accountability, enhance oversight and increase transparency in the government and the broader public service. One of the key objectives of the proposed legislation is to ensure that all Ontarians have access to a municipal Ombudsman and to a consistent Ombudsman process.

There has been very limited time to review the bill. However, based on a preliminary review, the bill, if passed, will among other things:

- Amend the *Ombudsman Act* to extend the role of the Ontario Ombudsman to include municipalities, local boards and municipally controlled corporations; and
- Amend the *Municipal Freedom of Information and Protection of Privacy Act* by requiring institutions to adopt measures to preserve records in accordance with applicable rules and also by creating the offence of wilful destruction of records with the intent to deny access to records, with a fine of up to \$5000.

The proposed legislation can be found at the link below:

http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2962&detailPage=bills_detail_the_bill

This report provides City Council with information about the implications on Toronto resulting from the Province of Ontario enacting the proposed *Public Sector and MPP Accountability and Transparency Act, 2014*.

COMMENTS

1. The City of Toronto – A Responsible and Accountable Government

The *City of Toronto Act, 2006* (COTA) is the fundamental source of the City's powers and recognizes Toronto, as the capital of Ontario, and the economic engine of Ontario and Canada. The Act recognizes that the City is a government that is capable of exercising its powers in a responsible and accountable fashion and that the role of the City is to provide good government within its jurisdiction, through a democratically elected, responsible and accountable government.

COTA also recognizes that it is in the best interests of the Province and City to work together in a partnership based on respect, consultation and cooperation.

A. Accountability and Transparency

As an early sign of its commitment to accountable and transparent government, City Council established an Auditor General in 2002 and an Integrity Commissioner in 2004 and requested authority from the Province to establish empowered Integrity Commissioner, Lobbyist Registrar and Ombudsman functions. The Province of Ontario subsequently included a requirement in the *City of Toronto Act, 2006*, to establish an Auditor General, an Integrity Commissioner, an Ombudsman, a Lobbyist Registry and authority to appoint a Lobbyist Registrar (collectively the "Accountability Officers").

As in other jurisdictions, it is the Accountability Officers' role to be objective and independent checks on the City's activities and hold the City administration and legislative arm of the City government accountable.

- The **Auditor General** is responsible for assisting City Council in holding itself and its administration accountable for public funds and for the achievement of value for money in City operations including all City divisions, agencies, and the offices of the Mayor and Members of Council.
- The **Integrity Commissioner** is responsible for providing advice, complaint resolution and education to elected officials (the Mayor and Councillors) and appointees of local boards on the application of their respective Code of Conduct, and other bylaws, policies and legislation governing ethical behavior.

- The **Lobbyist Registrar** promotes and enhances the transparency and integrity of City government decision making through public disclosure of lobbying activities and regulation of lobbyists' conduct.
- The **Ombudsman** is responsible to investigate in an independent manner any decision or recommendation made or act done or omitted in the course of the administration of the City, its local boards (restricted definition) and such city-controlled corporations as City Council may specify.

Part V of the *City of Toronto Act, 2006*, provides powers and protections enabling each Accountability Officer to fulfill their respective mandate, including the power to gather evidence, compel disclosure of information, summons and examine witnesses under oath. The Act also establishes a duty of confidentiality on the part of the Accountability Officers and persons working under their instructions. The duty prevails over the provisions of the *Municipal Freedom of Information and Protection of Privacy Act*.

Open Meeting Investigator

City Council and its agencies are required to follow the open and closed meeting provisions of the *City of Toronto Act, 2006*, as well as the closed meeting rules set out in the Council Procedures (or agency procedures if they have their own). Generally, the City and its agencies are required by law to give notice and to hold all meetings in public. Sometimes it is necessary to close a meeting or part of a meeting to the public so Council or an agency can consider confidential information as permitted by law.

Meetings of City Council and its agencies can only be closed to consider confidential information that falls into specific statutory categories/exceptions. No votes can be taken in closed session, except for votes on procedure and votes to give confidential instructions to City staff, its agencies or agents. Council and its agencies are also required to begin and end a meeting in public and to adopt a motion to close a meeting setting out the nature of the subject to be discussed and the statutory reason for closing the session.

As provided for in the *City of Toronto Act, 2006*, the City has appointed an investigator to handle complaints and investigate compliance with the open and closed meeting provisions of the Act and the Procedures Bylaw. If the investigator finds that a meeting has been closed improperly, he or she will report that finding to Council or the appropriate agency together with any recommendations.

B. Compliance with Part V, Accountability, City of Toronto Act and Enactment of Toronto Municipal Code Chapter 3, Accountability Officers

To meet its statutory obligations and round out the City's accountability system, City Council established a lobbyist registry and appointed a Lobbyist Registrar in 2007 and an Ombudsman in 2008. The City had already appointed an Auditor General in 2002 and an Integrity Commissioner in 2004. City Council appointed an Open Meeting Investigator in 2007.

At its meeting on October 27, 2009 City Council enacted Toronto Municipal Code Chapter 3, Accountability Officers which sets out the powers and duties of the Accountability Officers required under Part V of COTA as well as their responsibilities, term, selection process, reports and accountability to City Council. This by-law chapter reinforces their arms-length relationship to the City administration and independent status within the City's governance system. The Officers' report to and are directly accountable to City Council for the management of their offices, the administration of the services they provide, their performance in fulfilling their mandates and their use of public funds.

Independence is essential to the effectiveness and credibility of these offices, and to the ability of the Accountability Officers to fulfill their statutory duties. Features of independence, established through a range of provisions in the by-law chapter including for example appointment and removal by a 2/3 vote of all Members, removal for cause only, and a defined and transparent appointment, renewal and removal process, are in line with the independence provisions in place in other governments for similar positions. Accountability to City Council is reinforced through a number of provisions including for example, an annual report to City Council on the activities of their office, an annual compliance audit, inclusion in the City's annual attest audit, a regular external peer review of the Auditor General's Office, and annual City Council approval of the Officers' budget requests.

C. Establishment of the Toronto Ombudsman

At its meeting on October 22, 2007, City Council established an independent Ombudsman for the City of Toronto as required by COTA including the powers, jurisdiction and operating framework for the function. COTA confers upon the Toronto Ombudsman powers similar to those of the Ontario Ombudsman including the power to compel the provision of information and documents (including information subject to privacy legislation), and examine persons under oath.

The operating framework that Council adopted for the Toronto Ombudsman is in line with parliamentary and independent Ombudsman functions found in most Canadian, Australian and British provincial and federal jurisdictions, including the framework for the Ontario Ombudsman. This framework, set out in Toronto Municipal Code Chapter 3, Accountability Officers, establishes the procedures for investigation including that the Ombudsman may initiate an investigation on her or his own initiative (in addition to at the request of City Council or to respond to an individual's complaint), and can refuse to investigate a complaint based on specific criteria.

One of the universal and fundamental principles of a parliamentary and independent Ombudsman is that the Ombudsman's findings will not be reviewed or quashed. This principle affords an Ombudsman the ability to arrive at his or her views and conclusions independently and to report them to the legislative body without interference.

Rather than making decisions, an Ombudsman makes findings and recommendations, which are not subject to appeal. The COTA reinforces this principle by providing that proceedings of the Ombudsman may only be challenged for lack of jurisdiction.

City Council confirmed the broad jurisdiction of the Ombudsman to include City divisions and most local boards, except the restricted local boards pursuant to COTA (the Toronto Police Services Board, Board of Health and Toronto Library Board). City Council included Toronto Community Housing Corporation within the mandate of the Toronto Ombudsman and may include other City corporations as City Council determines appropriate.

The Ombudsman function has been effective. Since its inception, City Council has adopted and endorsed all of the Toronto Ombudsman's recommendations. The Ombudsman has to-date commenced 25 systemic investigations, many on her own initiative, resulting in 96 recommendations for systemic improvements to the administration of public services, often related to the City's most vulnerable residents. The systemic investigations have included for example, an investigation into Municipal Licensing and Standard Division's treatment of a resident with dementia that resulted in guidelines for working with vulnerable residents, improved training and enhanced operating procedures and an investigation into Toronto Community Housing Corporation's (TCHC) practices of evicting seniors that resulted in enhanced staff training, performance management, and improved implementation and tracking of internal policies and practices, particularly related to seniors.

2. Extend the Jurisdiction of the Ontario Ombudsman to Toronto

The bill proposes to amend the *Ombudsman Act* (the OA) to extend the jurisdiction of the Ontario Ombudsman to "municipal sector entities" including municipalities, local boards and municipally controlled corporations. This amendment will mean that the Ontario Ombudsman may investigate decisions, recommendations, acts or omissions of Toronto including its local boards and City corporations.

The bill proposes to enable the Ontario Ombudsman to investigate complaints after a complainant had already exhausted the Toronto Ombudsman's processes or the Toronto Ombudsman had decided not to investigate. The OA will also allow the Ontario Ombudsman to enter premises occupied by a municipality, local board or municipal corporation and carry out an investigation on the premises. Prior to entry, notice would be required and the municipal body would be given an opportunity to give reasons why the entry was inappropriate. Entry into a dwelling would require consent or a warrant.

The Ontario Ombudsman's jurisdiction will be similar to that of the Toronto Ombudsman, including the power to compel production of documents and examine people under oath, except that it can only be exercised if the Toronto Ombudsman has already investigated the complaint or the time limit for making a complaint to the Toronto Ombudsman has expired.

Like Toronto's Ombudsman, it appears that the Ontario Ombudsman would be able to initiate investigations. This means that the Ontario Ombudsman will be able to initiate a systemic investigation in Toronto or across Ontario municipalities on his or her own initiative.

The bill proposes amendments that would require the Ontario Ombudsman to report to the municipality, local board or the municipal corporation where the investigation results in recommendations. It would also allow the Ontario Ombudsman to request notification of any steps taken in response to the recommendations. The Ontario Ombudsman would also be able to make the report public.

As restricted local board under COTA, the Toronto Police Services Board and the Toronto Public Library Board are not currently within the Toronto Ombudsman's jurisdiction. However, it appears from the proposed bill that these two boards are within the jurisdiction of the Ontario Ombudsman. Exemption of these boards from the jurisdiction of the Ontario Ombudsman could be made through a regulation.

City Council included Toronto Community Housing Corporation within the mandate of the Toronto Ombudsman and may include other City corporations as City Council determines appropriate. This report recommends that all city-controlled corporations be included (not just TCHC) in the jurisdiction of the Toronto Ombudsman to ensure that the Toronto Ombudsman's processes are followed for these entities.

A. Changes to the Requirements Related to Open Meetings

The bill proposes to amend the COTA to expand the jurisdiction of the Ontario Ombudsman to investigate a complaint about improperly closing a meeting to the public. Currently the Ontario Ombudsman can only investigate these complaints if the municipality has not appointed its own Open Meeting Investigator. Toronto has an Open Meeting Investigator, so the Ontario Ombudsman currently has no jurisdiction to investigate complaints about meetings of Toronto Council, local boards or their committees.

The proposed amendments would extend the jurisdiction of the Ontario Ombudsman to those situations in which Toronto's Open Meeting Investigator had concluded an investigation and also to situations in which any time limit for requesting an investigation by Toronto's Investigator had expired. Like the Open Meeting Investigator, the Ontario Ombudsman would be required to report on an investigation if he concluded that the open meeting rule was violated, and the report would be public.

The amendments would also modify the open meeting rule in COTA by requiring that meetings be closed to the public if their subject matter is an ongoing investigation of the City by Toronto's Ombudsman, the Ontario Ombudsman or the Open Meeting Investigator.

3. Proposed Amendments to the *Municipal Freedom of Information and Protection of Privacy Act*

The bill proposes amendments to two parts of the *Municipal Freedom of Information and Protection of Privacy Act*. Firstly, it would require the head of an institution to ensure that reasonable measures are in place to preserve records in accordance with record keeping and record retention obligations that apply to the institution. The *City of Toronto Act, 2006* imposes record keeping obligations on the City. Secondly, the bill proposes to create the offence of altering, concealing or destroying a record with the intention of denying a right to the record under MFIPPA. The amendment would allow for commencement of a prosecution up to two years from the date that the offence was discovered.

The City Clerk is designated the institutional head pursuant to MFIPPA and works closely with the City Manager and City organization to manage City information through its lifecycle including implementing legislative, by-law and policy requirements. The City of Toronto is considered a leader in open government and information management and has the required by-laws (including Retention By-laws regularly approved by City Council), policies and procedures in place to ensure record keeping obligations are met.

4. Implications for Toronto

Based on a preliminary review of the proposed legislation, the Act if passed could have significant implications for the City of Toronto. The City Manager, in consultation with the City Solicitor, will complete a more detailed review of the proposed legislation and report further as required.

A. Accountability to City Council for Municipal Services within its Jurisdiction

The government that is elected and accountable for the delivery of services should be responsible for those services, including directing changes and improvements to the services within its jurisdiction. The Ontario Ombudsman is not appointed by and does not report to City Council but rather is appointed by the Lieutenant in Council on the recommendation of the Legislative Assembly.

The Act proposes to amend the *City of Toronto Act, 2006* to require City Council, a local board or city-controlled corporation to meet in closed session where the subject matter being considered is an ongoing investigation by the Ontario Ombudsman, Toronto Ombudsman or Open Meeting Investigator. This is contrary to the current process where City Council and its local boards deliberate these matters in public. Closing a meeting or part of a meeting to consider an investigation by the Ontario Ombudsman, Toronto Ombudsman and most importantly, the Open Meeting Investigator, seems inconsistent with principles of an open and transparent government. This proposal will require amendments to Toronto Municipal Code Chapter 27, Council Procedures.

B. Potential Duplication and Increased Red Tape for Toronto Residents and Businesses

The bill proposes to provide the Ontario Ombudsman authority over matters within the jurisdiction of the Toronto Ombudsman and Open Meeting Investigator. The Toronto Ombudsman is an impartial investigator of residents' complaints about the administration of Toronto's government. The Toronto Ombudsman is an office of last resort for Toronto residents after they have used the regular channels and the public service's procedures and processes have not resolved their complaint. Extending the jurisdiction of the Ontario Ombudsman to Toronto to investigate similar matters, within the jurisdiction of the Toronto Ombudsman and Open Meeting Investigator, could be both duplicative and potentially confusing for the public.

C. Impact on Public Service Resources

Toronto is the only municipality in Ontario required to have a municipal Ombudsman. Toronto has over 50,000 employees, including its agencies, and is a larger public service than most Canadian provinces. The proposed legislative changes could result in staff having to provide information and participate in an investigation twice – once by the Toronto Ombudsman or the Open Meeting Investigator and again if the matter is reviewed by the Ontario Ombudsman, which would have resource implications.

CONCLUSION

This report recommends that City Council request the Province of Ontario to exempt Toronto from the jurisdiction of the Ontario Ombudsman as Toronto City Council has met its statutory requirement to appoint an Ombudsman (and other accountability officers) who report to and are accountable to City Council, and these functions have been effectively carried out for over 5 years.

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