



City of Hamilton
GENERAL ISSUES COMMITTEE (SPECIAL)
AGENDA

Meeting #: 23-005
Date: January 27, 2023
Time: 10:00 a.m.
Location: Council Chambers
Hamilton City Hall
71 Main Street West

Angela McRae, Legislative Coordinator (905) 546-2424 ext. 5987

1. CEREMONIAL ACTIVITIES

2. APPROVAL OF AGENDA

(Added Items, if applicable, will be noted with *)

3. DECLARATIONS OF INTEREST

4. STAFF PRESENTATIONS

4.1 Privacy, Records and Information Management Training for Council - Public Information

NOTE: These public materials are for information only - respecting Private and Confidential Item 5.1.

5. PRIVATE AND CONFIDENTIAL

5.1 Privacy, Records and Information Management Training for Council

Pursuant to Sections 9.3 and 9.5 of the City's Procedural By-law 21-021, as amended, and Section 239(2), Sub-section (f) and Section 239(3.1) of the *Ontario Municipal Act, 2001*, as amended, as the subject matter pertains to advice that is subject to solicitor-client privilege, including communications necessary for that purpose; and is meeting is being held for the purposes of educating or training members; and, at the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of Council or the Committee.

6. **ADJOURNMENT**

DEC-09-2013 15:14



Information and Privacy
Commissioner of Ontario
Commissaire à l'information
et à la protection de la vie privée de l'Ontario

5.13

December 9, 2013

VIA FACSIMILE

His Worship Mayor Bob Bratina
City of Hamilton
71 Main Street West, 2nd Floor
Hamilton, ON
L8P 4Y5

Dear Mayor Bratina:

I am writing in response to your letter to Commissioner Ann Cavoukian dated November 18, 2013 regarding councillor access to information held by municipal governments. The Commissioner has asked me to respond on her behalf.

The issue of access by councillors to the municipal government databases has been repeatedly considered by our office over the years. General information in municipal databases that does not contain personal information may be freely disclosed to individual councillors, where the specific information is not subject to a mandatory exemption from disclosure in the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). There is, however, no provision in the *Act* that allows for individual councillors to obtain unfettered access to personal information in order to carry out their constituency function.

Personal information may only be disclosed within the parameters of the disclosure rules provided under section 32 of the *Act*. In the past, this office has taken the position that routine, automatic access by councillors to the municipal government databases that contain personal information is not consistent with section 32. Previous decisions of this office have found municipal councillors are not "officers or employees" of the municipal government, 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...". Previous decisions have also held that, except in unusual circumstances, a member of municipal council is generally not considered to be an officer or employee of a municipal corporation. It is important to distinguish between the duties performed on behalf of the municipality (as functions of an institution), and the constituency activities of individual councillors, where councillors may not routinely obtain access to personal information under section 32(d). As an elected representative of the municipal council, councillors represent constituents in the wards in which they are elected. Their activities on behalf of constituents have not traditionally been seen as "municipal business".

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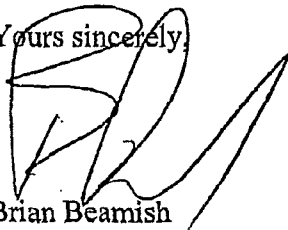
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It is also important to note that other parts of section 32 may support the disclosure of some information from municipal government databases to councillors. Under section 32(b), a constituent could consent to the disclosure of their personal information 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 our view, despite the potential for access under sections 32(b) and (c), unlimited access by councillors to the personal information databases does not appear to be supported by the *Act*.

Finally, the legal status of individual council members was discussed in a relatively recent decision by this office. A copy of this decision, Order MO-2821, is attached for your information. In particular, I would draw your attention to the discussion found at paragraphs 16, 26-30 of this order.

I trust this letter will provide greater clarity to members of Hamilton City Council on the issue of access to municipal government databases.

Yours sincerely,



Brian Beamish
Assistant Commissioner

Encl.

A Guide for Members of Hamilton City Council

Managing Records and Information in a Councillors Office

This guide informs Members of Council of their rights and obligations under Legislation and IPC decisions and directives regarding access to and the maintenance of records in their custody and/or control when acting 1) in their capacity as an elected representative of their constituents and 2) in an official capacity as a Member of Council on behalf of the City of Hamilton as it relates to the:

- *Municipal Act, 2001*
- *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*
- Information & Privacy Commissioner of Ontario Fact Sheet 1 - *MFIPPA* and Councillors Records, 2016
- Procedural By-law 21-021
- Council Code of Conduct By-law 16-290
- City of Hamilton Protection of Privacy Policy
- Records and Information Management Policy
- Records Retention By-Law 11-040, as amended

A **record** as defined under section 2 of the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA) is “any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

- (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine-readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
- (b) subject to the regulations, any record that is capable of being produced from a machine-readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;”

Records in a Councillor’s office normally includes records pertaining to both a Councillor’s **constituency** business, and the **City’s** corporate business and need to be handled with care. The risks of inappropriately handling information are reduced if steps are taken to 1) minimize data collection to that which is necessary for the purpose and 2) securely handle and store records at all times (i.e. keep a clean desk policy, encrypt devices, store records in locked filing cabinets, lock computer screens when stepping away from your desk).

Constituency Records

Constituency records – (political records) includes records that generally relate to issues the Councillor is dealing with involving one or more members of the public who either live or own a business within the Councillor's ward. Documents and records received or created as a result of interacting with constituents are considered political records containing the personal information of constituents. Some examples include:

- Requests for assistance from constituents and any applicable responses
- Notes from meetings with constituents

These records may include letters, emails, telephone messages and mailing lists.

Constituency records held solely by the Councillors office are generally not considered to be in the custody or under the control of the City of Hamilton, limited exceptions are discussed below.

Custody or control: The Information and Privacy Commissioner of Ontario (IPC) has defined "in the custody or under the control" broadly and considers several factors in making a decision as to who has custody or control of a record. These factors go beyond the physical location of a record and include the purposes of the record, its originator, and whether the record pertains to the institution's mandate or functions.

The IPC Fact Sheet - *MFIPPA* and Councillors Records states:

"Councillors' records are subject to MFIPPA where:

1. a councillor is acting as an officer or employee of the municipality, or performs a duty assigned by council, such that they might be considered part of the institution, or
2. the records are in the custody or control of the municipality." (See Fact Sheet attached)

Councillors should be mindful when forwarding communications from constituents to City staff.

Once information has been sent to a member of the City's staff, it is now a corporate record and potentially subject to a Freedom of Information (FOI) access request.

Councillors are responsible for safeguarding this information in order for the City to comply with its obligations related to an individual's right of access to a record or part of a record in the custody or under the control of the City.

In addition, Councillors should redact any personal information or sensitive material of the constituent before forwarding the information to City staff. In such circumstances, personal information may include the constituent's name, address, email address, phone number, the views or opinions of another individual about that individual, as well as other sensitive information. If personal information or sensitive material is required to be forwarded to City

staff for action, the Councillor should seek consent from the constituent to share their personal information, and only share what is necessary under the circumstances. The statement below provides a sample that could be used:

I'd like to assist you in resolving your concern/issue [or more appropriate wording] by sending your email to the appropriate city staff/department for action. Do I have your permission to forward your email containing your personal information (along with any attachments)? Once the email is forwarded all the contents including your personal information will be made available to the recipient.

City/Municipal Records

City/Municipal records - includes the records of Members of Council that relate to managing or administering their activities on Committee or Council or in an official capacity on behalf of the City of Hamilton.

- Project files documenting involvement with Council directed initiatives
- Notes from committee or Council meetings

Documents and records created in connection with City business such as the schedule of meetings, meeting agendas or email correspondence with City staff respecting City business are considered City records. As are records related to a Councillor's responsibilities as a Member of Council or to some aspect of City Council's mandate as a member of Sub-Committee or a part of the City's Agency's Boards and Committee. These records are subject to the provisions of MFIPPA and may be requested by members of the public.

For example, in a recent IPC decision, a Councillor was corresponding via email sent from their own personal email address to an outside party. The IPC found that the email was a responsive record to an access request under the control of the municipality as the subject matter was related to city business and was related to the councillors mandate (IPC Order MO-3281).

Record Keeping Best Practices

Councillors should take care by developing administrative practices around Constituency and City records. Councillors should maintain all electronic and paper records in separate filing systems that differentiate between constituent and city records. This can be achieved by using separate filing cabinets for physical records and using separate electronic filing systems and file naming conventions for both types of records. For email communications this can include using separate email folders, one that specifically stores incoming constituency records and another that stores incoming City records. Email 'sent folders' could also be set up to separately house responses containing constituency records in one and City records in the other.

Protecting Personal and Confidential Information - Safeguarding Information

Regardless of the type of record, documents containing personal and confidential information should be store in locked cabinets except when in use. Data stored on laptop computers, USB drives or similar devices should be encrypted and should not be left unattended. The disposal of paper documents should be done in a safe and secure manor in a City facility by depositing the records in a specially marked shredding console or bin. Care should be taken to ensure that personal and/or confidential information is not disclosed during public meetings. For personal information, written consent of the constituent is required prior to disclosure. Personal Information obtained from constituents should only be used for the purpose it was collected and not used for other purposes such as to communicate on other matters without the constituent's consent.

Office of the Mayor

The Mayor, as Head of Council, is an officer of the City. The Mayor's records that relate to mayoral duties are considered to be in the City's custody or control and therefore subject to MFIPPA (IPC Order MO-1403).

Access to Information by Members of Council

Members of Council have the same rights of access to City records as a member of the public. The City has made significant efforts to make information available on the City's website:

- The City of Hamilton makes all legislative information excluding and confidential information available through the City Clerk's webpage:
<https://www.hamilton.ca/council-committee/council-committee-meetings/meetings-and-agendas>
- City By-laws: <https://www.toronto.ca/city-government/accountability-operations-customer-service/access-city-information-or-records/how-to-access-city-information/#detail-info>
- Open data Program: <https://www.hamilton.ca/city-initiatives/strategies-actions/open-data-program>
- Routine Disclosure and Active Dissemination (lists of information made available by City departments): <https://www.hamilton.ca/government-information/accountability/routine-disclosure-and-active-dissemination>

Access to Records Required to Conduct Corporate City Business

Council as a body has a right to access information if it is required in the performance of its duties. Councillors frequently receive confidential information to make decisions through the Council/Committee process. Confidential information as defined in the Council Code of Conduct includes but is not limited to information:

- '(i) in the possession of the City that the City: is prohibited from disclosing; is required to refuse to disclose; or has exercised its discretion to refuse to disclose, under the *Municipal Freedom of Information and Protection of Privacy Act* or any other law; and
- (ii) concerning matters that are considered in an in-camera meeting under section 239 of the *Municipal Act, 2001*'

Confidential information generally includes information developed or received by the City in confidence. It is the responsibility of Members of Council to ensure that this information is kept confidential as required by law and by the Council Code of Conduct.

Members of Council are entitled to confidential information held by the City if the record is required for the performance of the Member of Council's role in carrying out duties related to that function:

- Confidential records not distributed or circulated to Members through Committee/Council (e.g. Memorandums of Understanding and Agreements) may be viewed by Members in the Office of the City Clerk via the following process:
 - Members of Council are required to submit their request to the Office of the City Clerk in order to provide staff with adequate time to review and assess the record to ensure it contains no personal information and/or other information not relevant to the nature of the request.
 - After this review, staff will contact the Member of Council to schedule a time to view the record. Recording copies, taking photographs/scans or writing notes about the content within these documents is not permitted. All access to documents is logged.

Access to Personal Information

'Personal Information' as defined under section 2 of MFIPPA means "recorded information about an identifiable individual including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual; “

Databases

The IPC has provided the City of Hamilton with guidance on Councillors access to personal information contained in City databases. The IPC's position is that 'routine automatic access by Councillors to Municipal government databases that contain personal information is not consistent with MFIPPA'. See attached correspondence from the IPC.

Outgoing Members of Council

When a member of Council is completing their term and will no longer be a member of the newly elected Council, City records need to be properly stored and constituency records shall be deleted.

- All City records are to be submitted by the Member of Council to either the Records Management or IT support team in the paper or electronic format in which they exist. These records will be retained for a period not longer than the end of the next term of Council.
- As it pertains to constituency records, Councillors should securely destroy these records upon their vacancy from office.

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