



March 12, 2019

Council for the City of Hamilton  
Hamilton City Hall  
71 Main Street West  
Hamilton, Ontario L8P 4Y5

*Via mail and email*

Dear Members of Council for the City of Hamilton:

**Re: Complaint to the Ontario Ombudsman**

I am writing to inform you of the outcome of our review of 14 complaints about the City of Hamilton received by the Ontario Ombudsman in July 2018. The complaints relate to public access to candidates' elections documents at the City Clerk's office leading up to the 2018 municipal election. Given the level of public interest in this issue, we wish to share what we learned with members of council.

**Complaints**

Prior to the 2018 municipal election, our Office received complaints that City of Hamilton elections staff prevented members of the public from taking photos of papers filed with the Clerk by candidates running in the election. All candidates are required to file certain forms with the city, and those documents are public records. Members of the public were limited to viewing the documents, taking handwritten notes, or paying for photocopies at the rate of \$0.40 per page. Complainants told our Office that the city's position unreasonably restricted access to the documents and made it more difficult to facilitate discussion about the information candidates had disclosed in their filings, which are matters of public interest.

Bell Trinity Square  
483 Bay Street, 10th Floor, South Tower, Toronto, ON M5G 2C9  
483, rue Bay, 10<sup>e</sup> étage, Tour sud, Toronto (Ontario) M5G 2C9  
Tel./Tél. : 416-586-3300  
Facsimile/Télécopieur : 416-586-3485 TTY/ATS : 1-866-411-4211

## **Role of the Ontario Ombudsman**

The Ombudsman is an independent and impartial Officer of the Ontario legislature with authority to address complaints about the administrative conduct of municipalities, universities, school boards, and provincial government organizations. The Ombudsman's role with respect to municipalities is to review and investigate complaints about municipal government administration. When problems are identified, he may make recommendations to a municipality to improve its processes, as well as to strengthen local governance and accountability.

## **Information collected under the *Municipal Elections Act, 1996***

Under the *Municipal Elections Act, 1996* ("the Act"), the clerk of a municipality is responsible for conducting a municipal election.<sup>1</sup> Candidates must file the prescribed nomination forms with the clerk, including Form 1 (Nomination Paper) and Form 2 (Endorsement of Nomination). The 2018 municipal election was the first time candidates for municipal council were required to obtain the endorsement of 25 eligible voters as part of the nomination requirements.<sup>2</sup>

The Act sets out the requirement for municipalities to provide public access to certain elections documents, and states that documents and materials filed with the clerk are public records.<sup>3</sup> This includes candidate nomination forms collected prior to the election, as well as other forms, such as financial disclosures, that are collected after an election. The Act requires that these documents be made available for inspection during business hours and that municipalities provide copies of the documents for a nominal fee or allow anyone to make extracts of them.<sup>4</sup> The Act indicates that the fee for copies shall not exceed the lowest rate the clerk charges for copies of other documents. This scheme facilitates timely, inexpensive, and convenient access to elections documents without requiring the public to go through the freedom of information process under the *Municipal Freedom of Information and Protection of Privacy Act*.

While the Act does not specifically state that photography is allowed, neither does it prohibit municipalities from allowing photography of elections documents.

---

<sup>1</sup> SO 1996, c 32, Sch at s. 11

<sup>2</sup> *Ibid* at s. 33

<sup>3</sup> *Ibid* at s. 88(5)

<sup>4</sup> *Ibid* at s. 88(7)-(8)



## Our review

We spoke with city staff regarding these complaints to gain more information about the city's practices with respect to accessing election documents. We were advised that the City of Hamilton does not have a formal policy about access to elections documents by members of the public, but that it is guided by the *Municipal Elections Act*. We confirmed that in response to inquiries made by our Office and members of the public, the city posted a notice communicating the prohibition on photography and applicable photocopying fees for elections-related documents.

As a best practice, all levels of government should strive to maximize openness and transparency wherever possible. Transparent practices increase public trust in government. With this in mind, we reviewed the relevant legislation, court decisions, and decisions of the Information and Privacy Commissioner. We also spoke with staff at other municipalities to canvass best practices around facilitating public access to elections documents.

Our review of relevant case law indicated that the courts have not yet directly considered the meaning of “making extracts” or photography in the context of the *Municipal Elections Act*, but have commented on the purpose of the Act. The Ontario Divisional Court described the objectives of the Act as “to ensure the integrity of the democratic process and the accountability of those who seek public office.”<sup>5</sup>

We spoke with other municipalities to canvass their practices and procedures with regard to public access to municipal elections documents. Most indicated that they already allowed photography or would do so if someone asked to take a photo of documents deemed to be public records under the Act. We were also told that:

- Given that the documents are deemed to be public records and that members of the public may request photocopies, there was not a compelling privacy-related justification to restrict photography.
- Allowing photography reduced the administrative burden on municipal staff as less staff time was spent providing photocopies and supervising access.
- By providing more options for accessing the information, municipalities were able to improve customer service and accessibility.
- Maximizing access was felt to be consistent with the objectives of the *Municipal Elections Act*.

---

<sup>5</sup> *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* 2002 CanLII 53259 (ON SCDC) at para 21.

### **Best practice suggestions shared with city staff**

Prior to the October 22, 2018, municipal election, we shared the results of our review with the city's Clerk, Elections Manager, and City Solicitor, as set out above. We explained that requiring citizens to pay for photocopies rather than allowing them to take a photo of the same documents could impose a financial burden and act as a barrier to participation for those interested in local democracy. We noted that there were over 100 candidates for council in the City of Hamilton's 2018 election, and that for a single candidate for municipal council, a nomination package could consist of at least ten pages.

We recognize that under the Act, the City Clerk has discretion in determining how to conduct aspects of an election that are not otherwise provided for in the Act. As a best practice, we suggested that the city may wish to consider permitting photography of public election documents in order to maximize transparency, in light of the purposes of the Act, and the concerns shared with our Office by complainants.

We appreciate the cooperation of city staff in discussing these issues with our Office.

### **Discussions with the Ministry of Municipal Affairs and Housing**

Subsequent to the October 22, 2018, municipal election, the Ombudsman met with the Ministry of Municipal Affairs and Housing. The Ombudsman expressed concern about inconsistent approaches to public access to elections documents taken by different municipalities. He reiterated his support for greater accountability and transparency in municipal government and noted that the Ministry may wish to issue guidance to municipalities on public access to elections documents. We understand that this issue will be taken into consideration by the Ministry going forward and our Office will continue to monitor developments.

### **Conclusion**

I am pleased to share the results of our review with council for the City of Hamilton. The Ombudsman strives to promote accessibility and transparency in governance wherever possible. Following our review, we shared the information set out above with city staff, as it may be of assistance in maximizing the transparency of future municipal elections. I trust that this information will also be of interest to members of council.

Should you have any further questions, please contact Cameron McKeich of our Office at 416-586-3384.

Sincerely,



Joanna Bull

Senior Counsel

Office of the Ontario Ombudsman

cc.

Janet Pilon, Clerk

Nicole Auty, City Solicitor