



Hamilton

# INFORMATION REPORT

<b>TO:</b>	Governance Review Sub-Committee
<b>COMMITTEE DATE:</b>	October 13, 2020
<b>SUBJECT/REPORT NO:</b>	Recording of Closed Session Meetings (FCS20090/LS20027) (City Wide) ( <b>Outstanding Business List Item</b> )
<b>WARD(S) AFFECTED:</b>	City Wide
<b>PREPARED BY:</b>	Janet Pilon, Manager, Legislative Services/Deputy Clerk (905) 546-2424 Ext. 4304  Stacey Applebee, Solicitor (905) 546-2424 Ext. 4660
<b>SUBMITTED BY:</b>  <b>SIGNATURE:</b>	Andrea Holland City Clerk Office of the City Clerk
<b>SUBMITTED BY:</b>  <b>SIGNATURE:</b>	Nicole Auty City Solicitor Legal Services

## COUNCIL DIRECTION

At it's meeting of February 26/27, 2020 Council approved the following:

### Recording of In Camera Sessions (Item 11.2)

WHEREAS the Ontario Ombudsman recommends that all municipalities make audio recordings or video recordings of all meetings – both open and closed – to ensure a thorough record;

WHEREAS there are now 23 Ontario municipalities that have implemented either audio or audiovisual recordings of their closed meetings;

WHEREAS an audio or audiovisual recording of in-camera meetings provides a clear and accessible record for closed meeting investigators to review;

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OUR Vision: To be the best place to raise a child and age successfully.

OUR Mission: To provide high quality cost conscious public services that contribute to a healthy, safe and prosperous community, in a sustainable manner.

OUR Culture: Collective Ownership, Steadfast Integrity, Courageous Change, Sensational Service, Engaged Empowered Employees.

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WHEREAS such recordings of closed meetings will assist the municipality in quickly demonstrating that Council and staff did not stray from the legislated requirements during closed meetings; and,

WHEREAS such recordings of closed meetings will provide a complete record to be used by the municipality and/or Councillors for future references as needed;

THEREFORE, BE IT RESOLVED:

- (a) That the City Manager be directed to report back to the Governance Review Sub-Committee within 90 days on the costs and policies to implement an audio recording system to be utilized for the recording of in-camera meetings; and the ways and means for the City Clerk to archive and protect such records.
- (b) That the City Solicitor report back to the Governance Review Sub-Committee on qualified privileges of Members of Parliament, Members of Provincial Parliament and Councillors, and the risk of court subpoenas to access records.

This Information Report responds to the above directions.

**INFORMATION**

The Ontario Ombudsman, in their Open Meetings Guide for Municipalities (Fourth Edition) notes:

The Ombudsman recommends that all municipalities also make audio or video recordings of all meetings – open and closed – to ensure the most thorough record possible. After meeting behind closed doors, they should report in the open session on what transpired in the closed session, providing as much detail as the subject matter permits.

The Ontario Ombudsman, in their Annual Report 2019-2020 notes:

As well, more municipalities than ever now make audio or video recordings of all meetings, open and closed, as the Ombudsman recommends. We now know of 25: The Regional Municipality of Niagara, the Townships of Adelaide Metcalfe, McMurrich/ Monteith, North Huron, and Brudenell, Lyndoch and Raglan; the Towns of Amherstburg, Collingwood, Fort Erie, Midland, Pelham, and Wasaga Beach; the Cities of Brampton, Elliot Lake, London, Niagara Falls, Oshawa, Port Colborne, Sarnia, Sault Ste. Marie, Thorold, and Welland; and the Municipalities of Brighton, Central Huron, Meaford, and Southwest Middlesex.

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The City Clerk surveyed the municipalities in Ontario who currently record their in-camera meetings, requesting their insight on the audio or video recording practices within their municipality for closed sessions.

The survey conducted requested information as to the length of time they have been recording their closed session meetings; whether the initiative to record closed session meetings, was the result of an Ombudsman's Report; whether it has had a negative or positive impact on the discussions in closed session; who has access to the closed session recordings; how are they stored; whether they have ever had to disclose the recordings as part of a closed session investigation; and whether the recordings of their closed session meetings have been tested through the Freedom of Information (FOI) process, the responses can be found in Appendix 'A' to this report.

Council may audio only or audio & video record in-camera meetings:

An audio & video recording would be more beneficial to the Ombudsman during a Closed Meeting Investigation; the Integrity Commissioner and to the City Solicitor when the recording is reviewed for a legal proceeding as they would be able to see who is speaking. Audio only recording is the cheaper option, but staff believe an audio recording may make it difficult to decipher who is speaking.

Council may record the in-camera meetings of Council and/or Standing Committee.

When considering the recording of in-camera meetings the Clerk has the responsibility of ensuring that the security of the recordings while the in-camera meetings are being recorded and the security of the recordings after the in-camera meetings have been recorded is in place.

Staff are working with IT to ensure the highest security is in place to protect the recording of in-camera meetings by storing them on an encrypted stand-alone server separate from the City's existing servers with a location to be determined.

Access to the recordings would be restricted and controlled by the City Clerk and Deputy Clerk. Access to the recordings would be for any investigation by the Ombudsman or Integrity Commissioner only.

**Financial Implications:**

*Options for the recording of in-camera in-person meetings are as follows:*

***Recording of audio & video of in-camera meetings*** would cost approximately \$65,000 (included as part of the existing system in the Council Chamber) and ensure the security of the recordings while being recorded and after.

**Recording of audio only of in-camera meetings** would cost approximately \$45,000 to \$50,000 (included as part of the existing system in the Council Chamber) and would also ensure the security of the recordings while being recorded and after.

*Options for the recording of in-camera meetings during COVID-19 while our meetings are being conducted in virtual mode:*

**Recording using Webex of in-camera meetings** would be a minimal cost, for the encrypted USBs used for retaining the recordings of the in-camera meetings.

### **Retention of the In-Camera Meeting Recordings:**

Staff are recommending that the recordings of all in-camera meetings be retained for a one-year period from the date of the meeting, as an inquiry from the Ombudsman's Office is requested within a few days of the meeting date.

The written closed session minutes constitute the permanent official meeting record, in accordance with the *Municipal Act, 2001* and the City of Hamilton's Retention By-law. All closed session minutes are approved by Council.

### **Policies to implement the audio & video or audio only recordings of in-camera meetings:**

Appendix 'B' attached to this report, has been drafted as the proposed policy for the recording of in-camera meetings.

### **Qualified Privilege:**

Federally and Provincially elected officials respectively enjoy the defence of Absolute Privilege for remarks made during a proceeding in Parliament. Black's Law Dictionary defines Absolute Privilege as "a privilege that immunizes an actor from suit, no matter how wrongful the action might be, and even though it is done with an improper motive."

The defence of Qualified Privilege is available to Municipal Councillors for remarks made in the course of Council meetings. Qualified Privilege as defined by Black's Law Dictionary is "a Privilege that immunizes an actor from suit only when the privilege is properly exercised in the performance of a legal or moral duty". As such, statements made reasonably and in good faith are protected pursuant to Qualified Privilege, however statements made with malice or that extend beyond the limits of privilege are not protected.

In 2014 Ontario Courts confirmed that municipal councillors enjoy Qualified Privilege for comments made in the course of their council meetings but refused to extend the law to provide municipal councillors with the immunity of Absolute Privilege. The request to expand Absolute Privilege to municipal councillors was denied at least in part because of what the Court saw as a lack of rules and regulations governing Municipal proceedings and the behaviour of its members. This case arose at a time when the Municipal Act permitted but did not require Municipalities to establish Codes of Conduct for its members or to appoint an Integrity Commissioner to investigate alleged breaches thereof. Importantly the courts left the door open to expanding the defence of Absolute Privilege to Municipal Councillors in the future.

### **Risk of Court Subpoenas to Access Records:**

The Rules of Civil Procedure (the “Rules”) provide for the discovery of documents. A document is defined to include a sound recording, videotape and film.

Pursuant to the Rules, relevant documents that are in possession, control or power of a party to the action must be disclosed whether or not privilege is claimed in respect of the document and must be produced for inspection if requested unless privilege is claimed. The Court may order the production of documents that are not privileged and where privilege is claimed, the court may inspect the document to determine the validity of the claim.

The Rules also provide that on Motion by a party to an action, the court may order production of a document that is not privileged and that is in the possession, control or power of that third party if the document is relevant to a material issue in the action and it would be unfair to require the moving party to proceed without discovery of the document. Where privilege is claimed in relation to the document the court may inspect the document to determine the issue.

While production of a document, including an audio or video recording of an in camera meeting, could be sought, an opportunity to claim privilege prior to production would be afforded and the court would be charged with determining the validity of any such claim.

The Rules also provide for the issuance of a Summons to Witness to compel the attendance of a person for examination and the Summons to Witness may require the person to bring to the examination and produce for inspection all documents relevant to any matter in issue that are in his or her possession and not privileged. Again, a determination by the Court regarding a claim of privilege in relation to a document would occur before production takes place.

While it was once understood that privilege only arose from traditional categories (ie: Solicitor-Client Privilege or Litigation Privilege), the courts have acknowledged that

common law also permits privilege in new situations. In determining whether documents sought to be produced are protected by privilege under the common law, the Supreme Court of Canada confirmed the four principles applicable to the determination:

1. The communications must originate in a confidence.
2. The confidence must be essential to the relationship in which the communication arises.
3. The relation must be one which should be "sedulously fostered" in the public good.
4. If all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation

There do not appear to be any reported cases which consider whether video or audio recordings taken of in camera Council meetings are privileged and thus protected from production under the Rules of Civil Procedure.

#### **APPENDICES AND SCHEDULES ATTACHED**

Appendix A – Municipalities Surveyed on the Recording of In Camera Meetings

Appendix B – Audio & Video or Audio only Recording of Council and Standing Committee In-Camera Meetings Policy