



Hamilton

REPORT 13-001

GOVERNANCE REVIEW SUB-COMMITTEE

Monday, June 10, 2013

2:00 p.m. Room 264

Hamilton City Hall

Present: Councillor R. Powers, Chair
Councillors M. Pearson, T. Whitehead

**Absent with
Regrets:** Councillor R. Pasuta – City Business
Councillor B. Clark - Illness

Also Present: Councillor T. Jackson

**THE GOVERNANCE REVIEW SUB-COMMITTEE PRESENTS REPORT 13-001 AND
RESPECTFULLY RECOMMENDS:**

- 1. Electronic Recording of Closed Session Meeting (CL12005(a)/LS12033(a))
(City Wide) (Item 4.1)**
 - (a) That the City of Hamilton requests that the province establish the appropriate legislative framework under the *Municipal Act 2001* relating to the access and disclosure of electronically recorded in camera meetings to properly protect municipal interests;
 - (b) That a copy of this motion and report CL12-005(a) attached as Appendix “A” to Governance Review Sub-Committee Report 13-001 be forwarded to Association of Municipalities Ontario (AMO).

- 2. Departmental Reporting Structure Changes (no copy) (Outstanding
Businesses List Item) (Item 4.2)**
 - (a) That the reporting structure of the Culture Division from the Emergency and Community Services Committee to the General Issues Committee be made permanent;
 - (b) That the Procedural By-law be amended to reflect this change.

3. Correspondence from the Association Canadienne-Francaise de l'Ontario – Régional Hamilton (ACFO), requesting Francophone Representation on committees (Item 4.4)

That the correspondence from the Association Canadienne-Francaise de l'Ontario – Régional Hamilton (ACFO), requesting Francophone Representation on committees be referred to the Selection Committee for discussion on whether there is a need to include a francophone component into the Committee selection process.

FOR THE INFORMATION OF COMMITTEE:

(a) CHANGES TO THE AGENDA (Item 1)

The agenda was approved as presented.

(b) DECLARATIONS OF INTEREST (Item 2)

None

(c) APPROVAL OF MINUTES (Item 3)

(i) November 26, 2012 (Item 3.1)

The minutes of the November 26, 2012 meeting of the Governance Review Sub-Committee, were approved.

(d) DISCUSSION ITEMS (Item 4)

(i) Electronic Recording of Closed Session Meeting (CL12005(a)/LS12033(a)) (Item 4.1)

City Solicitor, Ms. Atwood-Petkovski gave a brief overview indicating that that the *Municipal Act* does not offer guidance for the practice of recording meetings, whether they are open or closed. Currently the City is keeping proper closes session minutes in accordance with the *Municipal Act*. The Committee discussed the issues surrounding the electronic recording of closes session meeting, indicating that the legislation has not kept up with the technology used to capture the proceedings of meetings.

Please refer to item 1 for disposition.

(ii) Departmental Reporting Structure Changes (no copy) (Outstanding Businesses List Item) (Item 4.2)

General Manager of Planning and Economic Development, Mr. McCabe spoke to the Committee respecting the success of having the Culture Division report through the General Issues Committee. The Committee discussed the matter and concurred with the success of the pilot.

Please refer to item 2 for disposition.

(iii) Securing of Confidential Reports (no copy) (Outstanding Businesses List Item) (Item 4.3)

Deputy Clerk, Mary Gallagher spoke to the new type of paper being used to print private and confidential reports. The Committee was pleased with the change, as the reports are easier to read.

The update respecting the securing of confidential reports, was received.

(iv) Correspondence from the Association Canadienne-Francaise de l'Ontario – Régional Hamilton (ACFO), requesting Francophone Representation on committees (Item 4.4)

The Committee indicated that the ACFO is permitted to be in attendance at any public meetings at City Hall.

Please refer to item 3 for disposition.

(v) AODA Requirements in Report Writing (referred from the Audit Finance & Administration Committee on January 17, 2013) (Item 4.5)

Director of Customer Service, Access & Equity, Jane Lee, spoke to work the City is performing in preparation of being AODA compliant.

(a) The update respecting the Accessibility for Ontarians with Disabilities Act (AODA) requirements in report writing, was received.

(b) The item was placed on the Outstanding Business List for future updates.

(vi) Off-Site Standing Committee Meetings (referred from the Planning Committee on April 30, 2013) (Item 4.6)

The Committee discussed the logistics involved with having meetings held off-site, and indicated that it can be quite problematic, as not all outlining areas have the ability to accommodate a standing committee meeting, nor do they have the technological abilities that are available in the Council Chamber.

The discussion respecting Off-Site Standing Committee Meetings, was received.

(e) OTHER BUSINESS (Item 5)

(i) Removal from Outstanding Business List

The following item were removed from the Outstanding Business List as the items are completed:

- (i) Item A – Departmental Reporting Structure – one year trial period
- (ii) Item D – Securing of Confidential Reports
- (iii) Item F – Electronic Recording of Closes Session Meeting

(f) ADJOURNMENT (Item 6)

The Governance Review Sub-Committee meeting adjourned at 3:15 p.m.

Respectfully submitted,

Councillor R. Powers, Chair
Governance Review Sub-Committee

Christopher Newman
Legislative Coordinator



INFORMATION REPORT

TO: Chair and Members Governance Review Sub-Committee	WARD(S) AFFECTED: CITY WIDE
COMMITTEE DATE: June 10, 2013	
SUBJECT/REPORT NO: Audio Recording of Closed Session Meetings (CL12005(a)/LS12033(a)) (City Wide)	
SUBMITTED BY: Rose Caterini City Clerk Corporate Services Janice Atwood-Petkovski City Solicitor Legal Services	PREPARED BY: Mary Gallagher, Manager, Legislative Services/Deputy Clerk 905-546-2424 ext. 4304 Lisa Pasternak, Solicitor, Legal Services 905-546-2424 ext. 7292 Ron Sabo, Assistant City Solicitor, Legal Services 905 546-2424 ext. 3143
SIGNATURE: 	
SIGNATURE: 	

Council Direction:

Governance Review Sub-Committee at its meeting of November 26, 2012 approved the following:

(iii) Electronic Recording of Closed Session Meetings (CL12005) (City Wide) (Item 4.3)

That staff report back, respecting a policy for the recording of closed session meetings.

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Information:

The following information is provided by City Clerks and Legal Services staff as it is relevant to any consideration by Committee with respect to recommending a policy for the electronic recording of Closed Session Meetings:

1. Legislative framework regarding recording closed meetings
2. Benefits to electronically recording closed meetings
3. Impacts and potential risks of electronically recording closed meetings
4. Decision points in developing a policy

1. Legislative framework regarding recording closed meetings

Minimal requirements for "minutes" of meetings

The Ontario Municipal Act sets out minimal requirements with respect to keeping a record of meetings, requiring only that minutes be kept. There is no legislative requirement to make audio/visual recordings of public or closed meetings.

In certain U.S. jurisdictions where recordings of closed meetings are required, there are legislative protections and provisions on the use and availability of recordings. Without legislative protections and guidance on matters such as who can access the recordings and how the recordings might be used, the City's interests are at risk in creating and keeping recordings.

Ontario's Municipal Act provisions have not changed much over the past several decades. Currently, s. 239(7) of the Act require the municipality or committee to record "*all resolutions, decisions and other proceedings at a meeting of the body, whether it is closed to the public or not.*"

In 2007, the Act was amended with the addition of 'accountability and transparency' provisions. Municipalities have responsibility for the proper use of closed meetings, that is, to conduct a meeting in closed session when their interests and the public interest are best served and protected. Oversight of the use of closed meeting provisions was provided through the establishment of closed meeting investigations, carried out either by an appointed closed meeting investigator, or by the Ombudsman.

In the first few years immediately following 2007, following investigations into complaints about closed meetings in several municipalities, the Ombudsman made recommendations concerning the maintenance of proper minutes of closed meetings.

The City of ... should ensure that minutes of closed session provide an accurate and meaningful record of the proceedings, including sufficient

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details to identify the subjects that were discussed and the nature of the discussion.

In the Ombudsman's 2009 publication "Open Municipal Meetings in Ontario", he recommended that, at a minimum, closed meeting records should contain,

reference to the general nature of the proceedings, and the subjects discussed; the time the meeting began and ended, and the names of attendees (except to the extent that this undermines the reason for holding a discussion in closed session)...

Ideally, a written record of a closed meeting should include reference to:

- *Where the meeting took place;*
- *When the meeting started and adjourned;*
- *Who chaired the meeting;*
- *Who was in attendance, with specific reference to the clerk or other designated official responsible for recording the meeting;*
- *Whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;*
- *A detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered;*
- *Any motions, including who introduced the motion and seconders; and*
- *All votes taken, and all directions given.*

All of the above recommendations can be incorporated into written meeting minutes and the City of Hamilton minutes of closed meetings do incorporate all these recommendations with the exception of recording whether a Member of Council has left, or arrived, while the meeting is in progress.

In the Ombudsman's 2011-2012 Annual Municipal Open Meetings Report, his recommendations introduced the suggestion that municipalities make audio and/or video recordings of all meetings.

Practices across Ontario municipalities vary significantly

The official record of proceedings, in accordance with legislative requirements, continues to be the minutes maintained by the Clerk. These minutes provide a summary of the items considered and decisions made at meetings.

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For public meetings, many municipalities have adopted live audio or audio/visual transmission of open Council meetings and, sometimes, committee meetings. These recordings are retained according to the Retention By-laws adopted by each municipality. Hamilton provides live audio/visual transmissions, and keeps these transmissions, as recordings, for the open meetings of Council and Standing Committees. Technical difficulties or other problems have occurred from time to time in making these recordings, but because they are not required by law or by-law, the meetings can proceed.

In Hamilton, transmission for sub-committees is affected by location of meetings and the availability of technology.

While the legislation is completely silent regarding audio/visual transmissions/recordings of meetings, municipalities have begun to develop their own individual practices around public access to audio recordings, and retention periods, etc. Some municipalities have audio but not visual transmissions/ recordings some limit transmissions/recordings to Council meetings only, and extend this to standing committees but not sub-committees; recordings may be available on the internet or on request during time periods from three months to five years.

U.S. jurisdictions set out legislative protections

Legislation in other jurisdictions, such as Illinois, which impose a requirement to maintain a verbatim record of all closed meetings in the form of an audio or visual recording, provide considerable legislative guidance on the use, retention, disclosure, and destruction of such recordings. The Illinois Open Meetings Act also contains significant protections against use of the verbatim record in civil, criminal or other proceedings.

Unless the public body has made a determination that the verbatim recording no longer requires confidential treatment or otherwise consents to disclosure, the verbatim record of a meeting closed to the public shall not be open for public inspection or subject to discovery in any administrative or judicial proceeding other than one brought to enforce this Act. ... If the court determines that a complaint or suit brought for non-compliance under this Act is valid it may, for the purposes of discovery, redact from the minutes of the meeting closed to the public any information deemed to qualify under the attorney-client privilege. [5 ILCS 120/2.06(e)]

2. Benefits to electronically recording closed meetings

As expressed by the Ombudsman, the key benefits of audio/visual recordings of Closed Session meetings would be to keep members of Council on topic and to reduce the time spent by the Ombudsman's team interviewing elected officials.

OUR Vision: To be the best place in Canada to raise a child, promote innovation, engage citizens and provide diverse economic opportunities.

OUR Mission: WE provide quality public service that contribute to a healthy, safe and prosperous community, in a sustainable manner.

OUR Values: Accountability, Cost Consciousness, Equity, Excellence, Honesty, Innovation, Leadership, Respect and Teamwork

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This would assist immeasurably in ensuring officials do not stray from the legal requirements once they retreat behind closed doors, and would provide a clear, accessible record for investigators to review. Many investigations would take no longer than the time needed to review the recording – and a great deal fewer interviews would be required.

3. Impacts and potential risks of electronically recording closed meetings

The interests of the municipality intended to be protected by holding in camera meetings can be compromised, where recordings become available to others. The release of a recording would in some of these situations have financial consequences. Because the opportunity to force disclosure arises in litigation, one obvious consequence is that individuals looking to obtain recordings of closed meetings would commence litigation with that goal in mind, or seek tribunal or court ordered disclosure where the recordings are relevant to the issues in dispute.

It would be anticipated that in any litigation which involves a closed meeting, the closed meeting recording (or transcript) would be sought. Examples of this would include an action for wrongful dismissal and/or grievance arbitration involving employees; an action challenging a municipality's sale of its property; an action brought by a municipality seeking recovery fees or damages; an action alleging a municipality acted improperly in a zoning matter.

The Ombudsman, courts and tribunals would be able to order production of the complete recording and transcript (which would be required to ensure the listener/reader knows who is speaking and/or to redact privileged or private content) for investigations or their legal proceedings. Orders to disclose documents can exclude privileged or private content, but the other topics allowed to be dealt with in camera do not have the same protection from disclosure. The requester and the City would make submissions on privilege or privacy issues on case-by-case basis and such submissions, whether consenting to or opposing disclosure, would involve City resources.

Explicit statutory protections, such as those in U.S. jurisdictions which require recordings, would simplify production and give protection for municipal interests as the Ontario Legislature may decide. U.S. jurisdictions provide various mechanisms for protecting against disclosure of portions of the closed meeting involving privilege and privacy. Other issues which ought to be addressed through legislation are when third parties or public authorities might be granted disclosure of some or all of closed meeting recordings, and the restrictions that might be imposed on their use and subsequent release.

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The impact on decision-making is also a consideration. Closed meetings provide an opportunity to fully air issues allowed by the Municipal Act. There has been much recognition, for example in a U.S. public policy paper entitled "Too Much Sun?" and in a recent Ontario court decision, of the need for municipal government to have frank discussions in closed meetings when considering such issues.

4. Decision points in developing a policy

There is no legislative prescribed or generally adopted practice in Ontario municipalities for electronically recording closed meetings. There is a patchwork of practices which have developed around audio/visual recordings of open meetings.

In order to develop a policy relating to electronically recording closed meetings, there are a number of "decision points" which need to be addressed. The questions below identify some of the more obvious ones:

- Audio or audio/visual recordings?
- Closed Council and Standing Committees meetings only?
- Or all sub-committees and task forces, if there are closed sessions?
- What if technical difficulties arise, could closed meeting proceed in absence of audio/visual recording?
- Who (staff/members of Council) can review closed meeting audio/visual recording?
- When would a verbatim transcript be done— immediately or on request only?
- How/when would the transcript be reviewed/received by Council?
- Where/how would the recording (and transcript) be stored?
- What would the retention period be for closed recordings/transcripts?
- Would there be a review before destruction (as in Illinois legislation)?
- Who would be involved in a review, if any?

This list does not include the decisions to be made when third parties or public authorities are granted access and the restrictions that might be imposed on use and further release. The City would not be able to exercise control over access order by public authorities and the use or further release by third parties who obtain access through that means.

In summary, the Clerks Office keeps an official record of meetings in accordance with the recommendations of the Ombudsman. When the City of Hamilton has been the subject of an investigation, the closed and open session minutes provided by the City Clerks Office have been disclosed and on each occasion the investigator has been able to arrive at an informed opinion on the matter before the Council or Committee.

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To date, only one municipality in Ontario is known to have a practice of audio recording closed sessions of Council. Looking to the U.S., where the practice is more widespread, it may be beneficial for the province to consider legislation to assist municipalities in following a standard practice that gives consideration to impacts and potential risks, following the American example.