

Ministry of  
Municipal Affairs  
and Housing

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DEC 19 2012



5.7

MIN13-60966

His Worship R. (Bob) Bratina  
Mayor  
City of Hamilton  
71 Main Street West  
Second Floor  
Hamilton On L8P 4Y5

Dear Mayor Bratina:

Premier Kathleen Wynne has asked me to respond to your letter regarding recordkeeping in municipal meetings that have been closed to the public. I appreciate you sharing the views of your council with me.

I understand from your letter that the City of Hamilton has asked the province to consider a request regarding the access and disclosure of electronically recorded in-camera meetings.

The ministry is currently undertaking a regular review of the Municipal Act. We have received and noted your request and will take it into consideration as the review continues.

Thank you for your suggestion and please accept my best wishes.

Sincerely,

A handwritten signature in black ink that reads "Linda Jeffrey".

Linda Jeffrey  
Minister

c. The Honourable Kathleen Wynne, Premier of Ontario



OFFICE OF THE MAYOR  
CITY OF HAMILTON

July 15, 2013

The Honourable Linda Jeffrey  
Minister of Municipal Affairs & Housing  
17th Floor, 777 Bay Street  
Toronto, Ontario  
M5G 2E5

**Subject: Electronic Recording of Closed Session Meetings**

Dear Minister Jeffrey,

At its meeting of July 12, 2015 Council approved Item 6(a) of the Audit, Finance & Administration Committee Report 13-007, which reads as follows:

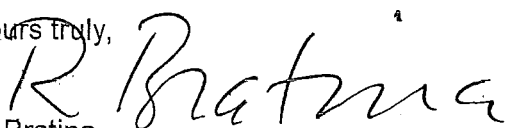
**6. Governance Review Sub-Committee Report 13-001 – June 10, 2013 (Item 8.4)**

**(a) Electronic Recording of Closed Session Meetings  
(CL12005(a)/LS12033(a)) (City Wide) (Item 4.1)**

- (i) That the City of Hamilton request 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; and,
- (ii) That a copy of this motion and Report CL12005(a)/LS12033, respecting the Electronic Recording of Closed Session Meetings, attached as Appendix "A" to Governance Review Sub-Committee Report 13-001, be forwarded to the Association of Municipalities Ontario (AMO) and the Association of Municipal Clerks & Treasurers of Ontario (AMCTO).

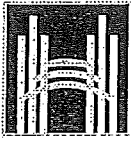
We respectfully request your consideration regarding this matter.

Yours truly,

  
R. Bratina  
Mayor

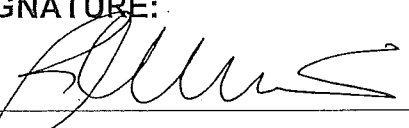

Attachment

Copied: The Honourable Kathleen, Premier of Ontario  
Association of Municipalities of Ontario  
Association of Municipal Clerks & Treasurers of Ontario



Hamilton

# INFORMATION REPORT

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

### 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.

**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 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.

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.

*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.

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.

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.