

Summary – Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)

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The intent of the freedom of information (“FOI”) legislation is clear. The public has a basic right of access to information within an institution’s control **unless all or part of this information falls within a specified exemption**. The very first section of the Act sets out its purposes:

- a) to provide a right of access to information under the control of institutions in accordance with the principles that:
 - i. information should be available to the public,
 - ii. necessary exemptions from the right of access should be limited and specific; and
 - iii. decisions on the disclosure of information should be reviewed independently of the institution which controls the information

The person or body responsible for carrying out the FOI legislation, or “head”, is, in fact, originally either the Council itself, or a designated committee of Council. In turn, the responsibilities under the Act can be delegated, in writing, to officer(s), subject to any limitations, qualifications or conditions the Council or committee chooses to impose.

s. 3 (1) **designation of “head”**

The **council members may by by-law designate** from among **themselves** an **individual or committee of council to act as head of the municipality** for the purposes of this Act.

s. 3 (3)

If council appoints no “head”, the head is deemed to be the council itself.

s. 49 (1) **Delegation of head’s powers – s. 49 (1)**

the head may **in writing** **delegate a power or duty to an officer(s) of the institution subject to such limitations, conditions,** etc. as head may set out

.../2

Information exempted from public access falls into eight categories (sections. 6 – 16). In the case of some exemptions, the head has the discretion to decide whether or not to deny access to the following: **draft by-laws**; records that reveal **advice or recommendations by an officer, employee or consultant**; documents that contain information that **might interfere with** any aspect of “**law enforcement**”, a very broadly defined term; **economic interests**; **solicitor-client privilege**; **danger to safety or health**; and **information that is to be published within 90 days**.

In other cases, the head must deny access to the following: information provided by **other governments** (or levels of government, for example provincial or federal government departments) where that information was **received in confidence, unless** the organization **consents** to the disclosure; **third party** information, essentially, financial and other information that, if disclosed, might lead to significant interference with an existing contract or negotiations, labour relations, etc.; and documents which contain information that would interfere with **personal privacy**.

Some of the exemptions are very narrowly defined. For example, a head may deny access to an employee’s advice or recommendations, but must still grant access to all of the available factual, statistical, research and budgetary estimates to which the advice relates. Other sections, such as the third party exemption, are very broadly defined. For example, this section could easily be invoked to deny CELOS access to the City’s contracts with influential people or corporations. Others, like personal privacy, are expressly defined to permit access to information about a current or former employee – his/her position, responsibilities, benefits and salary range. Similarly, another section expressly provides for access to **financial or other details of a contract for personal services between an individual and an institution**. This section is interesting as it expressly contemplates that information regarding an employee or individual contractor cannot be denied on the grounds of personal privacy; however, presumably, it could still be denied on other grounds, for example economic or third party interests. However, this section would give strong argument to the fact that all contracts, whether with individuals or corps should be publicly accessible; if not, why the clear intention to disallow a claim of personal privacy?

However, even where a head refuses to provide access, s/he has an obligation to **sever** the record, and provide all of the requested information except that which falls within the exemption.

s. 4 (2) – the head **shall disclose as much of the record as can reasonably be severed without disclosing information that falls under one of the exemptions**

The head has a public duty to disclose any information that s/he reasonably thinks is in the public interest and reveals an environmental, health or safety hazard to the public. Interestingly, **this duty overrides all the other provisions of the Act**, and presumably is to be carried out whether or not a request has been made for the information, and if so, before the usual 30 day deadline.

s. 5 (1) **Obligation to disclose**

Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the **public** [*note: this is one of very few references to the public in the Act; most of the other sections refer to a "person"*] if the head has reasonable and probable grounds to believe that it is **in public interest to do so, and that the record reveals an environmental, health or safety hazard to the public**. Presumably, this section would impose a duty on the FOI head to promptly disclose the December 24, 2004 Occupational Health and Safety report that "necessitated" shutting down the park, and would be a very interesting avenue to keep in mind in the event of other similar bureaucratic interference justified on the grounds of "safety" or "health" .

The legislation calls for a clear balancing act between the principles of public access and compelling reasons for denying access to certain information. Significantly, a compelling **public interest** can be invoked to override a claim for exemption from disclosure in all but the law enforcement and solicitor-client categories. [*note: it will be very interesting to look at the Commissioner's report to see if/how often and in what circumstances this has been invoked, and how it has been interpreted in different fact situations.*]

Where a request is made to the "wrong" institution, s. 18 (2) places the onus on the bureaucracy to make a **timely** response (15 days) and to make **reasonable inquiries** to find another institution that has the requested record, and give **written notice to the person requesting it** that the request has been transferred. The head's discretion to extend the time to respond to a request is very wide; however, there is a built-in disincentive to extend the time, as s/he must provide written notice of the length of, and reason for, the extension, and must still respond to the request within this newly established time frame.

The Minister responsible for FOI must make, update every three years and publish a list of all institutions (and the contact information for requests) that fall under the FOI legislation. The head of the City must prepare a public document setting out the City's structure and responsibilities, the general types of records it controls and contact information. Interestingly, the head must prepare an annual report for the FOI Commissioner which includes the following: the number of FOI requests received; the number of **refusals; the provisions of Act** under which **access was refused**; how many times each **provision was invoked**; the amount of **fees collected by City**; and any other information regarding **efforts by the City to put the Act's purposes into practice** (sections 24-26).

PART II of the Act, sections 27 – 38, deals with the protection of individual privacy.

PART III sets out the appeal process in sections 39 – 44. Almost any decision by a head can be appealed within **30 days** of receipt of the head's notice. An appeal can lead to mediation or directly to an inquiry. The Commissioner has very wide powers to examine or demand production of any record an institution possesses, or to search for a record herself. She can summon any witness who may have information relevant to the appeal.

In a hearing, the head has the burden of proving that **record or part of it falls within one of the specified exemptions in Act**. As the Act is silent as to who has the burden to prove a **compelling public interest**, the burden falls on the person who seeks to prove this. On appeal, the Commissioner can make any **order** and impose any conditions she considers appropriate. She cannot, however, overrule a head's discretion to grant or deny access.

The last, **General** part of the Act deals with fees, the Commissioner's other powers, and the regulation-making provision. *[note: there is, conceivably, a way of making access prohibitive purely due to the cost; It will be interesting to find out about the City's record regarding this from its pre and post amalgamation annual reports]. Along with a very liberal cost provision, however, is a provision for the waiver of payment, if, in the head's opinion, this is reasonable and equitable, on the grounds that the actual cost of locating the record differs from the set fee, or due to financial hardship of the requestor, or any other grounds set out in the regulations [Look up regulations for anything regarding additional grounds for fee waiver. Also look up what is done with the money paid by people who request access to records].*

A person who does anything forbidden under the Act may be prosecuted only under **this Act**. A person who is carrying out his/her duties under the Act **in good faith** cannot be sued. However, the Act expressly preserves a person's right to sue both the employee and the municipality for any tort (for example negligence, negligent or fraudulent misrepresentation, etc.) where the employee has not acted in good faith.

s. 46 Powers and duties of Commissioner

The Commissioner **may**:

- a) receive representations from the public concerning the operation of this Act;**
- d) engage in or commission research into matters affecting the carrying out of the purposes of this Act;**
- e) conduct public education programs and provide information regarding the Act and the Commission's role and activities**

s. 47 (1) Regulations

The Lieutenant Governor in Council **may make regulations regarding**:

- a) relevant considerations when determining whether to waive all or part of costs**
- f) fees regarding access requests, appeals, etc.**

s. 48 Offences

No person shall:

- a) willfully make a false statement or attempt to mislead the Commissioner in any of her functions**
- b) willfully fail to comply with a Commissioner's order**

s. 48 (2) Penalty

fine not > \$ 5000

s. 48 (3) Consent of AG

need Attorney General's consent to prosecute [clearly there is no political scope for AG to prosecute head of municipality]