August 20, 2008

CONFIDENTIAL SOLICITOR-CLIENT LEGAL ADVICE
TO THE CORPORATION OF THE CITY OF HAMILTON

The City Council
City of Hamilton
City Centre, 77 James Street North
Hamilton, ON  L8R 2K3

Attention: Mr. Joseph L. Rinaldo
Acting City Manager

Dear Members of Council:

Re: Review of a Possible Contravention of Council’s
Code of Conduct by Mayor Fred Eisenberger

This is in response to the communication dated July 8, 2008 from the City Solicitor, advising that
the City Council had, at its meeting held on June 25, 2008, passed a Resolution directing the
City Manager “to obtain outside legal counsel to conduct a review of a potential breach of
conduct by Mayor Fred Eisenberger respecting taped conversations between the Mayor and a
member of the media”.

A copy of the Resolution adopted by the Council is attached as Appendix 1.

The following is provided to the City of Hamilton in response to the Council’s request pursuant
to that Resolution.

SUMMARY OF FACTS

The following is a summary of the relevant sequence of events in this matter.

In a series of meetings commencing in December of 2006, the City dealt with issues involving
the operations of the Building and Licensing Division of the Standards & Licensing Section,
Planning & Economic Development Department (the "Department").

On February 13, 2007, the Building and Licensing Division Operational Review Sub-Committee,
meeting in camera, gave consideration to a private and confidential Appendix to the Audit
Report of the Division, leading to discussions concerning the performance of identifiable individuals in the Department, including [redacted].

At its meetings held on February 26 and 28, 2007, the Committee of the Whole received a report from the Sub-Committee, and oral advice from the City Solicitor, including advice with respect to [redacted].

At the meeting of February 28, 2007, which was closed to the public, the City Solicitor provided to the Committee of the Whole his oral opinion, the thrust of which was that the City [redacted].

At that time, the Committee of the Whole issued an in camera direction to the City Manager to [redacted] and report back quarterly.

At its meeting held on May 16, 2007, the Committee of the Whole received a private and confidential report from the City Manager. After an in camera session, Council approved, in open session, a recommendation to appoint a new General Manager (the "new General Manager"), effective June 1, 2007, as well as other recommendations affecting the future administration of the Department.

My information is that, as a result of, and in accordance with, the Council's decision, the [redacted].

It appears that this offer was conveyed to [redacted] who ultimately decided, on May 29, 2007.

The issues which the Council has requested me to address involve the press coverage, particularly that of The Hamilton Spectator, given to the events at City Hall which led to the [redacted].

A more specific Chronology of relevant events is attached as Appendix 2.

STATUTORY AUTHORITIES

Every municipal corporation in Ontario is a creation of Provincial legislation, and functions in a primarily statutory environment of which the Municipal Act, 2001 is in this case the principal component.
The City of Hamilton is a municipal corporation incorporated under the *City of Hamilton Act*, 1999, S.O. 1999, c. 14, as a city and a local municipality, with a council composed of the mayor, elected by general vote, and 15 other members.

As in the case of municipalities across Ontario, the duties and powers of the Council and its members are established or addressed by the provisions of the *Municipal Act, 2001*.

Most significant for the purposes of this opinion letter is the fact that the incumbent of the position of Mayor, a position also created by statute as the head of the municipal council, has a number of specific duties and obligations of leadership, administration and execution, unique to that position, and distinct from the responsibilities imposed upon any other member of City Council. Statutory provisions outlining the duties and powers of the head of council under both previous provisions of the *Municipal Act* and current provisions of the *Municipal Act, 2001*, are contained in Appendix 3 attached.

In summary, it is the role of the head of council to act as chief executive officer of the municipality, to preside over council meetings so that its business can be carried out efficiently and effectively, and to provide leadership to the council.

As chief executive officer, the head is specifically required, by section 226.1 of the *Municipal Act, 2001*, to uphold and promote the purposes of the municipality, promote public involvement in the municipality's activities, act as a municipal representative, and participate in and foster activities that enhance the economic, social and environmental well-being of the municipality and its residents.

**OPENNESS AND TRANSPARENCY OF MUNICIPAL GOVERNMENTS**

Both the Provincial Legislature and the courts have supported generally the right of members of the public to access to local government, a trend which supports the proposition that information and records will be disclosed to or accessible by members of the public except in specific defined circumstances where the public interest supports confidentiality.

For instance, section 253 of the *Municipal Act, 2001* (included in Appendix 3) provides, subject to the *Municipal Freedom of Information and Protection of Privacy Act*, that any person may at all reasonable times inspect records under the control of the Clerk.

Relevant provisions of the *Municipal Freedom of Information and Protection of Privacy Act* are attached as Appendix 4. The thrust of that Act is to provide a public right of access to information under the control of municipalities, subject to specific exceptions, such as those
relating to personal information, including employment information, and information subject to solicitor-client privilege.

OPEN MEETINGS

Under section 239 of the Municipal Act, 2001, except as provided in that section, all meetings of municipal councils are required to be open to the public. A council may close a meeting to the public if the subject-matter being considered involves personal matters about an identifiable individual (including a municipal employee); employee negotiations; and advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

Provisions authorizing the holding of meetings closed to the public are attached as Appendix 5.

RELEVANT LEGISLATIVE PROVISIONS MAINTAINING CONFIDENTIALITY

There are a number of legislated provisions, both Provincial legislation and municipal by-laws, relevant to the issue of maintaining confidentiality over municipal information and records.

Some of these provisions, such as those contained in the Municipal Freedom of Information and Protection of Privacy Act, relevant to issues referred to herein, are included in the Appendices to this Report.

Had I come across information suggesting contravention of, or inconsistency with, any other legislation, I would have dealt further with that issue in this opinion letter. However, it is the City's Code of Conduct for Members of Council (the "Code of Conduct") which is the relevant legislation in this case in responding to the Council's request for legal advice.

NOT A CRIMINAL MATTER

In my investigation of this matter, I did give consideration to potentially relevant or applicable provisions of the Criminal Code of Canada.

Although I am familiar with and have reviewed the provisions of the Criminal Code dealing with issues such as breach of trust and municipal corruption, there is no suggestion in any of the information that I have considered which would come even close to suggesting that I should pursue those issues further in this case.

One issue which did arise during my inquiries, is whether or not there is any statute or other law prohibiting the taping of a telephone conversation without the permission of the other party.
Although the *Criminal Code* makes it an offence to intercept a telephone conversation, with the definition of "intercept" including making a recording, there is an exception to this law if either the originator of the conversation, or the person to whom the conversation is addressed, consents to the recording, either expressly or impliedly. Consequently, since the Mayor was involved directly in the conversation, and was aware that the tape was being made of it, this law would not apply.

**THE CODE OF CONDUCT**

Section 223.2 of the *Municipal Act, 2001* provides as follows:

**Code of conduct**

**223.2 (1)** Without limiting sections 9, 10 and 11, those sections authorize the municipality to establish codes of conduct for members of the council of the municipality and of local boards of the municipality.

**No offence**

**(2)** A by-law cannot provide that a member who contravenes a code of conduct is guilty of an offence.

This provision, as well as some of the provisions set out in Appendix 3, were established or included in the *Municipal Act, 2001* by the *Municipal Statute Law Amendment Act, 2006* (formerly known as Bill 130), substantially in force as of January 1, 2007.

A copy of the Code of Conduct as adopted by the Council, and now in effect, is attached as Appendix 6.

To summarize the issue to be addressed, the question is whether or not Mayor Eisenberger, in his telephone conversation with Andrew Dreschel, a copy of the transcript of which has been provided to me (attached as Appendix 7), contravened the Code of Conduct, by breach of one or more of the following prohibitions, contained in the "Confidentiality" part of the Code:

- failing to maintain confidentiality over all information, documentation or deliberation received, reviewed or taken in closed session of Council and its committees;

- disclosure or release of confidential information acquired by virtue of office to any member of the public;
permitting any person other than those entitled, to have access to information that is confidential.

The meetings at which matters involving were lawfully closed to the public, were so conducted pursuant to the City's current Procedure By-law, By-law No. 03-301, "A by-law to govern the proceedings of Council and Committees of Council", enacted October 29, 2003, which provides as follows:

8.1 No meeting or part thereof shall be in camera unless the subject matter being considered is:

(b) personal matters about an identifiable individual, including municipal or local board employees;

(f) the receiving of advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

(g) a matter in respect of which a council, board, committee or other body has authorized a meeting to be closed under another Act.

In this case the information in question involved personal information relating to, employment information relating to, and solicitor-client legal advice received by the City from its solicitor relating to all of which were the subject-matters of the in camera meetings of City Council or its committees.

DISCUSSION

It is my understanding of my instructions from the City Council that I am to conduct a review of relevant facts involving any potential breach of conduct by Mayor Eisenberger demonstrated in a taped conversation between the Mayor and a member of the media, and report to the Council my conclusions as to whether or not the Code of Conduct was contravened.

For this purpose, I have reviewed all of the relevant documents and statements available to me, including Mayor Eisenberger's statement, originally made on June 25th, reading from his prepared text in which he stated: "It is my belief that I have contravened Council's Code of Conduct."
A copy of the Mayor's Media Statement which he released at that time, is attached as Appendix 8.

In my recent interviews with the Mayor, he did not in any way retract or disagree with that assessment, but confirmed that that was his understanding at the time, in that he did talk about issues that were discussed in camera, and advice which he had received, and that such appears to him to have constituted a contravention of the prohibition in the Code of Conduct against permitting any persons, other than those who are entitled, to have access to information that is confidential.

While I believe that the Mayor's own understanding of the requirements of the Code of Conduct, and his obligations under it, are relevant to my inquiry, I do not believe that I am bound to accept his conclusion as finally determinative of the issues which have been assigned to me for advice.

First of all, my review of the various statutory provisions contained in the Municipal Act, 2001 establishing the powers and duties of the head of council, confirms my conclusion that the Mayor, as head of Council, has a number of specific responsibilities, involving both statutory powers and statutory duties, which makes that position quite different from that of other members of Council.

The provisions of the Municipal Act, 2001 which specifically relate to the powers and duties of the head of council, must be taken into account in any assessment of the Mayor's conduct, and in determining whether or not any actions by the Mayor may have contravened the Code of Conduct, also authorized by Provincial legislation. Such subordinate legislation is subject to any relevant or applicable statutory provisions in the event of any conflict, inconsistency or vagueness as between the application of the various Provincial and municipal legislative authorities.

It is not necessary at this point to review all of the specific issues of fact that were the subject-matter of Council consideration up to and including May, 2007, relating to the

To enable me to provide an assessment of the implications and effects upon the City, if any, of whatever communication of information did take place, it is necessary to review the conduct of the Mayor as a whole, taking into account, once again, not only the words, but the objectives and intent, of relevant legislation.
It is clear that at least most of the information communicated by the Mayor to Mr. Dreschel in their telephone conversation, represented by that time a decision of the Council already made at the public meeting held on May 16, 2007, and was thus a matter of public record and municipal policy, at the time that the discussion took place.

The fact that confidential information has previously been improperly or illegally "leaked" to the press, does not itself absolve any member of Council from complying with the Code of Conduct for Members of Council, and other requirements of law referred to above. Nevertheless, such issues are clearly relevant to my inquiry, as are issues relating to the intent and objectives of the Mayor himself, particularly taking into account his statutory obligations and responsibilities, which led him to communicate to the public through the public press, in circumstances in which a significant amount of information surrounding the subject-matter had already been published, one way or another, and was already the subject of public discussion and possible controversy.

In preparing this report, I have reviewed the Council’s proceedings leading up to the time of the telephone conversation between the Mayor and Mr. Dreschel, various published information, including both news reports and columns in The Hamilton Spectator (extracts of which are attached as Appendix 9), transcripts of the various statements made and/or published by Mayor Eisenberger, the full transcript of the telephone conversation between Mayor Eisenberger and Mr. Dreschel, and whatever other information and communications I have received in connection with this matter.

I believe that I have obtained the information I need to respond to the Council’s request.

THE CONTEXT TO THE TELEPHONE DISCUSSION BETWEEN MAYOR EISENBERGER AND ANDREW DRESCHEL

Neither Mayor Eisenberger nor Andrew Dreschel made a record of when the telephone interview took place.

It appears that Mr. Dreschel may also have interviewed the Mayor immediately after the Council meeting of May 16, 2007, but neither one had specific recollection or a record of that interview having taken place. Mr. Dreschel does mention, in his column of May 23, 2007, that he had interviewed Mayor Eisenberger "that same night after council had wrapped up its regular meeting", and at that time Mayor Eisenberger had reinforced his feeling of anger, outlined in his e-mail to councillors, concerning confidential information having leaked out about the plan to [redacted] as demonstrating "despicable behaviour" and a "blatant lack of integrity", clearly breaching the Code of Conduct, and being "completely inappropriate and totally unacceptable".
There would appear to be some basis in fact for the conclusion of Mr. Dreschel, in his column of May 14, 2007, that "Hamilton council, of course, is notorious for leaking like a sieve. It's been that way for years, regardless of who's in the mayor's chair or sitting around the council table."

While perhaps somewhat over-generalized and trite, this observation would have been exemplified in what appear to have been regular unauthorized and improper communications (or "leaks") by person or persons other than the Mayor during the period in question relating to the decision-making of the Council with respect to its [REDACTED] and the attempts by the Mayor to address this problem, and to enforce the Code of Conduct, to the extent that he was able to do so.

I have not been able to pinpoint the date upon which the call was made. It appears, however, that it was within one week after the end of the meeting of City Council held on May 16, 2007 in which certain decisions were made with respect to the [REDACTED] and the appointment of Tim McCabe to the position of General Manager, Planning & Economic Development Department, effective June 1, 2007.

It is clear that matters involving the administration of the Planning & Economic Development Department had been under discussion at the City Council for some period of time, and had been the subject-matter of a considerable amount of discussion and comment by the public and the press prior to the Council meeting of May 16, 2007. For instance, the operational review of Standards & Licensing Section, Planning & Economic Development Department, conducted by the Audit Services in December, 2006, had led to the production of a substantial report (Report 07-001), all of which (with the exception of Schedule E, "Confidential Issues"), including 48 recommendations for addressing issues raised, had been the subject of review at Council and committee meetings, and was available to the public.

In this case, the information that was the subject of the telephone conversation involved the following types of information:

- personnel matters: [REDACTED]
- matters relating to the legal affairs of the City: [REDACTED]
This subject-matter included legal advice with respect to

- "personal information"

I have concluded that there is ample evidence to support the conclusion that the first and third general areas of information had, by the time of the telephone conversation between Mayor Eisenberger and Mr. Dreschel, been either directly published to and by the press, or that the features and, in fact, details, of the subject-matter of the confidential meeting had been made fully made available at least to one or more members of the press, by sources other than the Mayor.

The article by Nicole McIntyre published on May 16, 2007 appears to have been based on substantial access to this information, including to the reports and advice to be dealt with by the Committee of the Whole and City Council at their meetings which were to be held later on that date.

A copy of the Mayor's confidential e-mail to members of Council, in the form as published, is attached as Appendix 10. It is noted that the confidential e-mail, addressed only to members of Council and sent on May 16, 2007, was posted in its entirety by Nicole McIntyre, on Hall Marks, The Hamilton Spectator's City Hall blog site, on the same day it was sent out.

It does not appear that the bylines of either Nicole McIntyre or Andrew Dreschel appeared in The Hamilton Spectator on May 17, 2007, although that day's edition did contain a short news article headed "Council removes licensing boss", setting out substantially the "bare bones" facts of the decision made by the Council the night before.

On May 18, 2007, Andrew Dreschel's column, "Council goes for a no nonsense manager", referred to the same basic components of the Council decision,
In his column of May 23, 2007, Mr. Dreschel refers to his having interviewed Mayor Eisenberger "in an interview that same night after council had wrapped up its regular meeting last week". While such an interview may have taken place (which would have been late in the evening of May 16, 2007), I have concluded that the telephone conversation producing the transcript which is the subject-matter of this opinion letter, occurred after Mr. Dreschel's column of May 18th had been printed.

In that conversation, Mr. Dreschel states to the Mayor, "I'm assuming you read the piece I wrote about taking over the stuff with...", apparently referring to his column published on the morning of May 18, 2007.

It is also clear, for reasons discussed later, that by the time of Mr. Dreschel's column of May 25, 2007, the telephone discussion with Mayor Eisenberger had occurred.

**THE TELEPHONE CONVERSATION**

After a period of 15 months has gone by, it is understandable that neither Mayor Eisenberger nor Mr. Dreschel have a clear and specific memory of the details of their conversation or when or how it occurred. Both appear to agree that in all likelihood Mr. Dreschel made the initial approach to the Mayor, although the transcript obviously commences after the start of the interview, following discussion apparently relating to other matters.

At the commencement of the conversation included in the transcript, Mr. Dreschel initiates the issue of previous investigative newspaper reports dealing with the issuance of building permits, in respect of which the Mayor states that he does not wish to discuss the matter until he has "had the opportunity to sit down with... staff and I want to do that before I comment on this issue. I owe them at the very least an opportunity for them to clarify whatever has been reported on and give me information from their perspective ...."

Mr. Dreschel refers to a "continuing investigation that the Spectator has done", referring to investigative pieces by Steve Buist, another writer for the Spectator, who had written a series of articles referring to development which proceeded without building permits from the City, which clearly had been a significant factor in staff proposals for improving the operation of... and providing for its reorganization.
After a discussion of those issues, in which the Mayor referred to "a lack of understanding it seems of what is actually going on day-to-day in the Building Department", Mr. Dreschel turned the subject to issues involving. Mr. Dreschel stated that he had heard "from more than one source".

Mr. Dreschel then, in referring to the Planning & Economic Development Department, states: "... we keep hearing about that department in disarray, it's chaos, it's so systemic that nobody really has a good handle on the range there. Is this an instance of that in your view?"

In response, Mayor Eisenberger states as follows:

- "... you're right, [we're] making changes in that department for all the right reasons ..."
- "... there is a lack of understanding it seems of what is actually going on day-to-day in the Building Department ..."
- "... that's cause for concern. And it could be very well that □ doesn't know just as it seems □ didn't know."
- "... there is a reorganization proposed."
- □ now kind of elevated to be in charge ... to get a handle on what the heck is going on, and fix it."
- "Now □ is also. If □ it's also hoped that □ has an understanding of where potentially the problems lay ... and what some of the fixes are."
- "... I need the staff to sit down with me and tell me what's going on here, what is it that's fallen through the cracks, if anything and then what's to fix."

After a brief discussion as to □ Mr. Dreschel initiates the issue involving his previous column, relating to "taking over the stuff with □" and outlines the fact that there appear to be two different positions on □.
At that point, Mayor Eisenberger responds: "I am just trying to remember what's public and what isn't. The recommendations, you're aware of those, right?" Mayor Eisenberger then goes on to advise that: "Look, I'll give you what I know off the record ... just in a general sense and I'll give to you the way it was told to me."

At that point, Mayor Eisenberger states: "Look I'll give you what I know off the record". This was the third reference during the interview, the first by Mr. Dreschel and the second two by the Mayor, confirming that the discussion was "off the record".

The Mayor went on to refer to the "58 recommendations" [actually 48] which had emerged from the Auditor's Report, suggesting that...

After Mayor Eisenberger asked again, "Are we still off the record?", he then replied to questions raised by Mr. Dreschel involving...

In referring to the [58] recommendations, the Mayor went on to state:

"...

Mayor Eisenberger then refers to the report's recommendations, and to the fact that...

After Mayor Eisenberger indicated clearly to Mr. Dreschel that...

Mr. Dreschel refers to discussion going on "amongst your fellow members of council"
Mayor Eisenberger responded to this suggestion by referring to ______ which the Council had received.

Referring to the issue as to ______

Mayor Eisenberger has advised me that once the tape of the telephone conversation with Mr. Dreschel had been completed, ______ took the tape away for storage and Mayor Eisenberger never saw it again.

I did discuss with both Mayor Eisenberger and Mr. Dreschel their understanding of the meaning of "off-the-record" relating to the giving of an interview to a journalist. I believe that it is generally accepted that the phrase means that the reporter will not attribute any interview information published, or communicate the fact that the interview took place. In this case, I conclude that Mr. Dreschel complied with his undertaking that his interview with the Mayor was "off the record", in that, apart from his reference to interviewing the Mayor immediately after the Council decision, which would not appear to relate to this particular telephone conversation, there is no reference to it in any column since.

However, in his column of May 25, 2007, at a time ______ Mr. Dreschel stated in his column as follows:

________
THE MAYOR’S REASONS FOR GIVING OUT THE INFORMATION

In one of my interviews with the Mayor, he advised that he was concerned at the

"very distortive view of what was going on . . . . so, you know, my anger in terms of the very fact that this was released to the media not once but a number of different times in relation to a personnel issue was the cause of me sending out a missive saying this is completely inappropriate . . . . My conversation with Mr. Dreschel was to provide appropriate context for some of the issues that he had already reported on. I think I provided clarity in pretty unequivocal terms in terms of what that advice had been . . . ."

The Mayor went on to outline his concern about the distortion to the public of . . . and that his conversation with Mr. Dreschel . . .

Mayor Eisenberger went on to confirm that his concern at the time was to set the record straight, and not to . . .

To summarize the Mayor’s statement of the reasons for his statement to the press:

"... my recollection at the time was I was enormously angry that this got out in the media in the first place. . . . . My, you know, efforts and discussions in terms of the reaction to the leak in the first place was trying to set the record straight, on a background kind of basis, and my effort was to at least . . . . So, I mean, I wasn't looking for publication of this but I certainly was looking for the
media to understand that their concept of [redacted] was considerably different than what they had previously reported on.

... So if there was impact, I'm not aware of the impact. Certainly I was trying to bolster [redacted]

Mayor Eisenberger went on to describe how on this occasion and others, he has spoken to reporters to provide context, background and understanding concerning a subject-matter in which much information had already been disseminated in the media and been released by others, for the purpose of clarifying the distorted impression which he felt had been conveyed, and to try to ensure that the public had as accurate an impression of the facts as possible, in relation to matters which had already, properly or improperly, been placed in the public domain by others.

During my interviews with Mayor Eisenberger, he expressed anger at the frequent leaks to the media of information pertaining to affairs of the City, not only the divulging of information which should have been maintained in confidence, but also the distorted and incorrect understanding that piecemeal leaking of such information would cause.

With respect to the legal advice, [redacted]

The Mayor also confirmed that the legal advice given at that time was oral, so that there was not a document releasable to the press pertaining to its substance.

Mayor Eisenberger confirmed that the column referring to [redacted] was published on May 25, 2007, at a time [redacted]
ANALYSIS OF THE INTERVIEW

Mr. Dreschel, in his Spectator column of May 25, 2007, wrote, in his column under the title, "Embattled manager ponders her options":

In my interview with Mr. Dreschel, he was not prepared to answer questions as to whether or not he or any of his colleagues at The Hamilton Spectator had received that information from any source other than the Mayor, taking the usual position of journalists not to reveal their sources. He also was not prepared to respond to questions involving whether or not he had received that information before May 25th, or knew of its being previously divulged, other than to confirm, as stated in his telephone interview with the Mayor, that there were other sources of information contributing as a basis for his columns.

THE POSITION OF THE MAYOR

Both the documentation which I have been provided, and my several interviews with each of the Mayor and Mr. Dreschel, lead me to the conclusion that the Mayor has acted consistently throughout in his attempts to protect the interests of the City of Hamilton, to prevent unauthorized leaks of confidential City information to the public, to provide context and background in response to the publication of what he sees to be inaccurate information, and to

On the basis of information available to me, there is no doubt that, in the period of time in 2007 under discussion, one or more persons in the City were the source of leaks of confidential information to the press, conduct which is clearly improper and, if committed by a member of Council, could involve a breach of the Code of Conduct. This Code also applies, of course, to the Mayor himself.
At the same time, it is important to take into consideration the fact (referred to above) that the Mayor has a number of public duties specific to his position as Mayor and Head of Council, and that in his reaction to leaks of information concerning he was addressing what he believed to involve the spreading of misinformation, and I believe that his position taken on both was consistent with the duties of his office.

It is also clear that, at the time of the interview, news of the Council decision itself, a significant amount of information concerning, were all publicly known and had been the subject-matter of significant media coverage.

There is one area remaining to be addressed, however, involving information provided by the Mayor to Mr. Dreschel in the course of the interview, which involved the divulging of the oral legal opinion provided to the City by its solicitor.

This fact must be addressed in the context of the requirements of the Code of Conduct, particularly duties of confidentiality binding members of Council with respect to Council business and that of the municipal corporation.

In the information which the Mayor provided to Mr. Dreschel during the course of the interview, was included the substance of specific confidential legal advice provided to City Council at a meeting closed to the public,

Clearly it was the intention of the Mayor to pass on this information for the purpose of providing context and background in a situation in which he believed that media coverage of City affairs

However, the communication of that confidential legal advice, whether or not for that purpose, constituted, in my opinion, a contravention of the Code of Conduct.

The provisions of the "Confidentiality" section of the Code of Conduct clearly mandate that legal advice reviewed or taken in closed session of Council and its committees must be maintained as confidential, and specifically prohibits members from disclosing or releasing by any means to
any member of the public any such confidential information acquired by virtue of their office except when required by law to do so.

The provisions make specific reference to "matters relating to the legal affairs of the City", in this regard.

Moreover, the information which the Mayor provided

At the same time, as mentioned above, there is reason to believe that media coverage by the Spectator in this regard may well have involved one or more sources other than the Mayor, and there is no information available to me suggesting that the publication of this information had any effect on

It might, in fact, have been considered, and the conclusion independently arrived at by others that, implicit in the decision-making by the City Council

At the same time, the Mayor's publication of the information came at a time

Fortunately, there is no evidence to suggest that that did happen here.

CONCLUSION

In view of the foregoing, I have concluded that Mayor Eisenberger, in the course of his interview given to Mr. Dreschel, did contravene the Code of Conduct by divulging, without authority, confidential legal advice given to City Council at an in camera meeting of its Committee of the Whole.
POSSIBLE SANCTIONS

Although, as stated in my Recommendation, I do not believe any sanction by the Council to be in order arising from what I believe to be the Mayor's contravention of the Code of Conduct, I will address briefly, in general terms, what possible courses of action are available to it in such circumstances.

In accordance with the requirements of the Municipal Act, 2001, the Code of Conduct does not include an offence provision and, consequently, no court prosecution can be taken under the Code itself in respect of any alleged breach.

In general terms, there is no legislation, other than the procedures addressed under Part V.1 of the Municipal Act, 2001, which specifically authorizes a municipal council in these circumstances to impose sanctions upon a member in respect of conduct alleged to be in contravention of the Code of Conduct enacted under section 223.2 of the Municipal Act, 2001.

Generally, in such circumstances the Council has no legal jurisdiction otherwise: (1) to take any direct action affecting the holding of municipal office by a member, or the capacity or eligibility of a member of a council to fulfil the responsibilities imposed or provided by law involving duties or obligations of municipal office, (2) or to suspend, reduce or terminate the compensation to which the Mayor or other member is entitled by law.

Consequently, while a council may make statements, express its disapproval, conclude that there has been a breach of its code of conduct, or censure or reprimand a member, and may take such conduct into account in the making of appointments where lawful and relevant to do so, it has, in the absence of conduct disruptive of a meeting, or circumstances relevant to section 259 ("vacant seat") of the Municipal Act, 2001, no right to take any action to suspend or remove a member from office or attendance at meetings, except to the extent specifically authorized by law.

RECOMMENDATION

While, in accordance with the foregoing, I have concluded that the conduct of Mayor Eisenberger, in communicating the substance of confidential legal advice received by the City to a member of the public not authorized to receive it, constitutes a contravention of the Code of Conduct, I do not recommend that the City impose any sanction in respect of the contravention.

In fact, I believe that the motives and objectives of Mayor Eisenberger in attempting to deal with unauthorized leaks of information and to correct misinformation, were wholly proper, consistent
with the duties of his office, and done in the public interest. His contravention of the Code of Conduct does not appear to have had any negative impact on the liability or legal position of the City. No other law was broken and no one's rights infringed. This should end the matter.

IMPORTANT OF MAINTAINING CONFIDENTIALITY OVER THIS LEGAL LETTER

In dealing with the subject-matter of the Council's request for a legal opinion, I have included, by necessity, advice and information which are subject to mandatory and/or discretionary prohibitions on public disclosure legislated by the Municipal Freedom of Information and Protection of Privacy Act (the "Act").

Specifically, this legal opinion is a record subject to solicitor-client privilege, prepared by counsel retained by the Corporation of the City of Hamilton for use in giving legal advice to the City and its Council.

This legal letter also contains "personal information", meaning recorded information about an identifiable individual, including employment history, views or opinions of the individual held by other individuals, and the individual's name appearing with other personal information relating to the individual.

The Act imposes the principal responsibility for dealing with public rights of access to records in the custody or control of the City upon the City Council, either directly, or by appointment of its "head", a position occupied by the City Clerk.

Under the Act, the head may refuse to disclose a record subject to solicitor-client privilege and is required to refuse to disclose personal information to any person other than the individual to whom the information relates, except in accordance with the provisions of the Act, which include the right of the individual in question to receive notice and the opportunity to make representations as to whether or not the information should be disclosed.

It is therefore essential that the City maintain confidentiality over this legal opinion, at least until it has been received and dealt with by the Council, and a lawful decision made which could have the effect of authorizing or requiring disclosure of all or part of it to the public.
I trust that the foregoing will be of assistance to you, and will be pleased to discuss this matter further with you at any time.

Yours truly,

WeirFoulds LLP

George H. Rust-D'Eye

Attachments

c: Peter A. Barkwell, City Solicitor
   Ron Sabo, Assistant City Solicitor

1066945.1
12.1 A Personal Matter about an Identifiable Individual

(McHattie/Whitehead)
(a) That Tim McCabe be appointed to the position of General Manager, Planning and Economic Development Department, effective June 1, 2007, and all severance costs be recovered through the management restructuring.

(b) That funding be approved for one year’s salary and benefits for the opportunity for staff to oversee the implementation of the operational reviews for the Standards & Licensing, Building and Animal Control Sections.

(c) That in the alternative approval be given to hire a temporary Project Manager for 12 to 18 months to oversee the implementation of the operational reviews for the Standards & Licensing, Building and Animal Control Sections, and that one-time funding of $90,000 be provided from the Tax Stabilization Reserve for this temporary position.

CARRIED

Item 12.1, subsection (b) was Carried on a recorded vote:

Total: 12

Nay: Councillors B. Clark, S. Merulla and B. Morelli
Total: 3

Item 12.1, subsection (c) was Carried on a recorded vote:

Total: 14

Nay: Councillor B. Clark
Total: 1
## APPENDIX 2

### CHRONOLOGY OF EVENTS

<table>
<thead>
<tr>
<th>DATE</th>
<th>EVENT</th>
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<tbody>
<tr>
<td>February 13, 2007</td>
<td>Building and Licensing Division Operational Sub-committee met and considered “in camera” a private and confidential Appendix to the Audit Report of the Standards &amp; Licensing Division of the Planning &amp; Economic Development Department, identifying problems in the Division and the conduct of identifiable individuals.</td>
</tr>
<tr>
<td>February 28, 2007</td>
<td>Dealing with a report from the Building and Licensing Operational Review Sub-committee, the Committee of the Whole (&quot;COW&quot;) received oral advice from the City Solicitor.</td>
</tr>
<tr>
<td>April 10, 2007</td>
<td>The Hamilton Spectator reported that Hamilton's Building Department was undergoing an operational review, to examine the practice of allowing home construction to begin without a building permit, &quot;with a public report to follow on what must be done to restore confidence in the department&quot;.</td>
</tr>
<tr>
<td>May 14, 2007</td>
<td>The Hamilton Spectator (article by Andrew Dreschel):</td>
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<tr>
<td></td>
<td>• &quot;As you know, largely because of the initiative of Mayor Fred Eisenberger, Hamilton council is exploring the idea of creating an integrity commissioner for the city.&quot;</td>
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<td></td>
<td>• &quot;But Hamilton council, of course, is notorious for leaking like a sieve. It's been that way for years, regardless of who's in the mayor's chair or sitting around the council table.&quot;</td>
</tr>
<tr>
<td>May 16, 2007</td>
<td>The Hamilton Spectator (article by Nicole McIntyre):</td>
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<tr>
<td></td>
<td>• &quot;Council will decide today if it wants to replace the head of the city's beleaguered building and licensing department.&quot;</td>
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</table>
|                | • Declined to comment yesterday, saying employment decisions about senior management must be made by council. 'It's a
<table>
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<th>DATE</th>
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</table>
|            | confidential staff matter. I'm not going to comment until council has made a decision."

- Confidential e-mail by Mayor Eisenberger to City Council:

  "The leaked information in today's Spectator article is yet another example of a Council member (or members) stepping way over the line, displaying a blatant lack of integrity. The leak is a clear breach of the Code of Conduct for Members of Council, which we have all sworn to uphold through taking an oath as elected municipal representatives.

  As we are all well aware, leaks of confidential information shared during in-camera sessions of Council are in contravention of the code, particularly information concerning personnel matters. This act is completely inappropriate and totally unacceptable. It besmires both the image and reputation of Council, and does absolutely nothing to assist us in proceeding with the day to day business of running City Hall. More importantly, such acts continue to seriously harm the reputations of city staff needlessly and show a complete lack of sensitivity to all staff, causing more damage to both morale and Council's relationship with staff.

  Ironically, citizen appointments to the Accountability and Transparency Sub-Committee will come before Council tonight for approval. At this point, the issue of the latest leak of confidential information cannot be advanced until Council has dealt with the appointment of an Integrity Commissioner. As Chair of Council, I am calling for a stop to such despicable behaviour, and I urge all members of Council, once again, to respect the Code of Conduct and to display proper decorum inside and outside of Council Chambers."

- May 16, 2007
  COW received a private and confidential report from the City Manager regarding restructuring of the Planning & Economic Development Department. After an in camera session, Council approved a rather cryptic set of recommendations which had the effect of appointing a new General Manager for the Division, effective June 1, 2007,
<table>
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<tr>
<th>DATE</th>
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<tr>
<td>May 16, 2007</td>
<td>Meeting of COW – Closed Session. The Committee adopted Resolution 12.1, as follows:</td>
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<tr>
<td></td>
<td>&quot;(a) That Tim McCabe be appointed to the position of General Manager, Planning and Economic Development Department, effective June 1, 2007, and all severance costs be recovered through the management restructuring.</td>
</tr>
<tr>
<td></td>
<td>(b) That funding be approved for one year’s salary and benefits for the opportunity for staff to oversee the implementation of the operational reviews for the Standards &amp; Licensing, Building and Animal Control Sections.</td>
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<td></td>
<td>(c) That in the alternative approval be given to hire a temporary Project Manager for 12 to 18 months to oversee the implementation of the operational reviews for the Standards &amp; Licensing, Building and Animal Control Sections, and that one-time funding of $90,000 be provided from the Tax Stabilization Reserve for this temporary position.&quot;</td>
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<tr>
<td></td>
<td>It is noted that this recommendation was adopted after the Council had reconvened in open session, and consequently became public knowledge at that time.</td>
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<td></td>
<td>There were recorded votes on paras. (b) and (c), which carried on 12-3 and 14-1 votes, respectively, with Mayor Eisenberger voting on the &quot;Yea&quot; side on both.</td>
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<td></td>
<td>The Council meeting adjourned at 9:20 p.m. It appears that the two items, one referred to as &quot;a personal matter about an identifiable individual&quot; (Resolution 12.1 quoted above), and a second matter in respect of which &quot;there was no direction provided&quot;, were dealt with at the end of the meeting, just before the enactment of By-laws, including By-law No. 07-163, confirming the proceedings of City Council.</td>
</tr>
<tr>
<td>May 17, 2007</td>
<td>The Hamilton Spectator (no byline):</td>
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<td></td>
<td>• &quot;Council has removed the top manager of its troubled building and licensing department.&quot;</td>
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<td>DATE</td>
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<tr>
<td>May 18, 2007</td>
<td><strong>The Hamilton Spectator</strong> (article by Andrew Dreschel):</td>
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<tr>
<td>May 18, 2007 (?</td>
<td>Telephone conversation between Mayor Fred Eisenberger and Andrew Dreschel, the subject-matter of the attached transcript (Appendix 7), and of this Report. I have concluded that this conversation took place between the morning of May 18 and May 25, 2007. Mayor Eisenberger's was responsible for the taping of the telephone conversation between Mayor Eisenberger and Mr. Dreschel, later transcribed. It is not clear that Mr. Dreschel knew that the call was being taped by the Mayor's Office. Mr. Dreschel advises that he did not tape the call. The tape apparently remained in the possession of the Mayor's Office for some time after it was made. There is no information to suggest that the Mayor has ever, deliberately or otherwise, provided or released the tape to any other person, or had anything further to do with it after it was made and first stored in his office.</td>
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<tr>
<td>May 23, 2007</td>
<td><strong>The Hamilton Spectator</strong> (article by Andrew Dreschel):</td>
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<tr>
<td></td>
<td>• reference to &quot;an angry e-mail [Fred Eisenberger] sent to councillors after confidential information about ... was leaked to The Spectator&quot;</td>
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<td></td>
<td>• [in reference to the Mayor's reaction to leaks of information], &quot;all of which Eisenberger reinforced in an interview that same night after council had wrapped up its regular meeting last week&quot;</td>
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<tr>
<td>May 25, 2007</td>
<td><strong>The Hamilton Spectator</strong> (article by Andrew Dreschel):</td>
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<tr>
<td>May 30, 2007</td>
<td>The Hamilton Spectator (article by Nicole McIntyre):</td>
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<tr>
<td></td>
<td>• Acknowledgement of &quot;some question as to whether I have broken</td>
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<tr>
<td></td>
<td>Council's Code of Conduct for having this 'off the record' unpublished</td>
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<tr>
<td></td>
<td>conversation with this reporter. It is my belief that I contravened</td>
</tr>
<tr>
<td></td>
<td>the Council's Code of Conduct.&quot; [Key excerpt highlighted]</td>
</tr>
<tr>
<td></td>
<td>• Reference to the conversation being &quot;off the record&quot;.</td>
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<tr>
<td></td>
<td>• &quot;I take full responsibility and encourage staff and Council to</td>
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<td></td>
<td>recommend appropriate remedy or action as required.&quot;</td>
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<td></td>
<td>• &quot;Let me state I have never wilfully leaked or released a private</td>
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<tr>
<td></td>
<td>and confidential document verbally or otherwise to any member of the</td>
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<td></td>
<td>media for express purpose of broadcast. I have on occasion had 'off</td>
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<td></td>
<td>the record' conversations with members of the media to provide</td>
</tr>
<tr>
<td></td>
<td>context or to correct misinformation.&quot;</td>
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<tr>
<td>June 25, 2008</td>
<td>Mayor Eisenberger, on his letterhead as Mayor, issued a Media</td>
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<td></td>
<td>Statement including the following:</td>
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<tr>
<td></td>
<td>• Acknowledgement of &quot;some question as to whether I have broken</td>
</tr>
<tr>
<td></td>
<td>Council's Code of Conduct for having this 'off the record' unpublished</td>
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<td>conversation with this reporter. It is my belief that I contravened</td>
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<tr>
<td></td>
<td>the Council's Code of Conduct.&quot; [Key excerpt highlighted]</td>
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<td>• Reference to the conversation being &quot;off the record&quot;.</td>
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<td>• &quot;I take full responsibility and encourage staff and Council to</td>
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<td>recommend appropriate remedy or action as required.&quot;</td>
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<td>and confidential document verbally or otherwise to any member of the</td>
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<tr>
<td></td>
<td>media for express purpose of broadcast. I have on occasion had 'off</td>
</tr>
<tr>
<td></td>
<td>the record' conversations with members of the media to provide</td>
</tr>
<tr>
<td></td>
<td>context or to correct misinformation.&quot;</td>
</tr>
<tr>
<td>June 25, 2008</td>
<td>Mayor Eisenberger requested the Council to direct an investigation into</td>
</tr>
<tr>
<td></td>
<td>whether he had violated the Code of Conduct.</td>
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<tr>
<td>July 8, 2008</td>
<td>Letter to WeirFoulds LLP from the City Solicitor, requesting, in</td>
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<td>accordance with the decision of the City Council made at its meeting</td>
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<td>held on June 25, 2008, that a review be conducted &quot;of a potential</td>
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<td></td>
<td>breach of conduct by Mayor Fred Eisenberger respecting taped</td>
</tr>
<tr>
<td></td>
<td>conversations between the Mayor and a member of the media&quot;.</td>
</tr>
<tr>
<td>July 11, 2008</td>
<td>The Hamilton Spectator (article by Andrew Dreschel):</td>
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<tr>
<td>DATE</td>
<td>EVENT</td>
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<td></td>
<td>&quot;Eisenberger is under investigation for possibly leaking confidential information to me during an off the record interview last year.&quot;</td>
</tr>
<tr>
<td></td>
<td>&quot;I won't discuss the contents of the off the record conversation I had with the mayor because it was private and confidential.&quot;</td>
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<tr>
<td></td>
<td>&quot;But I can point out nothing from that conversation was published, and Eisenberger's comments to me came after a story on the issue we discussed had already appeared in The Spectator due to a different leak.&quot;</td>
</tr>
</tbody>
</table>
APPENDIX 3

MUNICIPAL ACT PROVISIONS

Section 70 of the former Municipal Act, R.S.O. 1990, c. M.45, set out the following duties of the head of a municipal council:

It is the duty of the head of the council,

(a) to be vigilant and active in causing the laws for the government of the municipality to be duly executed and obeyed;

(b) to oversee the conduct of all subordinate officers in the government of it and, as far as practicable, cause all negligence, carelessness and violation of duty to be prosecuted and punished; and

(c) to communicate to the council from time to time such information and recommend to it such measures as may tend to the improvement of the finances, health, security, cleanliness, comfort and ornament of the municipality.

Although this statute was repealed by the current Municipal Act, it may well be taken as having acknowledged what have by law been traditionally considered the duties of the head of council generally, and is not inconsistent with the provisions of the current Act.

Current Role and Duty of Head of Council

The Municipal Act, 2001 confers and imposes responsibilities upon the head of council as follows:

Role of head of council

225. It is the role of the head of council,

(a) to act as chief executive officer of the municipality;

(b) to preside over council meetings so that its business can be carried out efficiently and effectively;

(c) to provide leadership to the council;

(c.1) without limiting clause (c), to provide information and recommendations to the council with respect to the role of council described in clauses 224 (d) and (d.1);

(d) to represent the municipality at official functions; and
(e) to carry out the duties of the head of council under this or any other Act.

Head of council as chief executive officer

226.1 As chief executive officer of a municipality, the head of council shall,

(a) uphold and promote the purposes of the municipality;
(b) promote public involvement in the municipality's activities;
(c) act as the representative of the municipality both within and outside the municipality, and promote the municipality locally, nationally and internationally; and
(d) participate in and foster activities that enhance the economic, social and environmental well-being of the municipality and its residents.

The Role of Council

The role of the municipal council, of which, of course, the Mayor is a member, is set out in more general form, as follows:

Role of council

224. It is the role of council,

(a) to represent the public and to consider the well-being and interests of the municipality;
(b) to develop and evaluate the policies and programs of the municipality;
(c) to determine which services the municipality provides;
(d) to ensure that administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of council;
(d.1) to ensure the accountability and transparency of the operations of the municipality, including the activities of the senior management of the municipality;
(e) to maintain the financial integrity of the municipality; and
(f) to carry out the duties of council under this or any other Act.
Powers of the Council

The powers of a municipal council are conferred by a large number of specific provisions in the Municipal Act, 2001 and other statutes, including the following provisions of the Municipal Act, 2001:

Purposes

2. Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each municipality is given powers and duties under this Act and many other Acts for the purpose of providing good government with respect to those matters.

Powers exercised by by-law

5.(3) A municipal power, including a municipality’s capacity, rights, powers and privileges under section 9, shall be exercised by by-law unless the municipality is specifically authorized to do otherwise.

Scope of powers

8. (1) The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality’s ability to respond to municipal issues.

Powers of a natural person

9. A municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act.

Broad authority, single-tier municipalities

10. (1) A single-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public.

By-laws

(2) A single-tier municipality may pass by-laws respecting the following matters:

1. Governance structure of the municipality and its local boards.

2. Accountability and transparency of the municipality and its operations and of its local boards and their operations.
5. Economic, social and environmental well-being of the municipality.


**Inspection of records**

253. (1) Subject to the Municipal Freedom of Information and Protection of Privacy Act, any person may, at all reasonable times, inspect any of the records under the control of the clerk, including,

(a) by-laws and resolutions of the municipality and of its local boards;

(b) minutes and proceedings of regular, special or committee meetings of the council or local board, whether the minutes and proceedings have been adopted or not;

(c) records considered at a meeting, except those records considered during that part of a meeting that was closed to the public;

(d) the records of the council;

(e) statements of remuneration and expenses prepared under section 284.

**Certified copies**

(2) Upon request, the clerk shall, within a reasonable time, provide a certified copy under seal of the municipality of any record referred to in subsection (1) to any applicant who pays the fee established by council.
APPENDIX 4

MUNICIPAL FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

1. The purposes of this Act are,

(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 controlling the information; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

2. (1) In this Act,

   "personal information" means recorded information about an identifiable individual, including,

   (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

   (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

   (c) any identifying number, symbol or other particular assigned to the individual,

   (d) the address, telephone number, fingerprints or blood type of the individual,

   (e) the personal opinions or views of the individual except if they relate to another individual,

   (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal Draft by-laws, etc.

6. (1) A head may refuse to disclose a record,

(a) that contains a draft of a by-law or a draft of a private bill; or

(b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

(a) in the case of a record under clause (1) (a), the draft has been considered in a meeting open to the public;

(b) in the case of a record under clause (1) (b), the subject-matter of the deliberations has been considered in a meeting open to the public; or

(c) the record is more than twenty years old.

12. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

14. (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
(b) access to the personal information may promote public health and safety;

(c) access to the personal information will promote informed choice in the purchase of goods and services;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(d) relates to employment or educational history;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

50. (1) If a head may give access to information under this Act, nothing in this Act prevents the head from giving access to that information in response to an oral request or in the absence of a request.

53. (1) This Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.
APPENDIX 5

MEETINGS OPEN TO THE PUBLIC

With respect to meetings of municipal councils, section 239 of the Municipal Act, 2001 provides as follows:

Meetings open to public

239. (1) Except as provided in this section, all meetings shall be open to the public.

Exceptions

(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

(a) the security of the property of the municipality or local board;

(b) personal matters about an identifiable individual, including municipal or local board employees;

(d) labour relations or employee negotiations;

(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;

(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

Resolution

(4) Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution,

(a) the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting; or

(b) in the case of a meeting under subsection (3.1), the fact of the holding of the closed meeting, the general nature of its subject-matter and that it is to be closed under that subsection.

Open meeting

(5) Subject to subsection (6), a meeting shall not be closed to the public during the taking of a vote.
Exception

(6) Despite section 244, a meeting may be closed to the public during a vote if,

(a) subsection (2) or (3) permits or requires the meeting to be closed to the public; and

(b) the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board.

Record of meeting

(7) A municipality or local board or a committee of either of them shall record without note or comment all resolutions, decisions and other proceedings at a meeting of the body, whether it is closed to the public or not.
Appendix “H”
CODE OF CONDUCT FOR MEMBERS OF COUNCIL

PREAMBLE

A written Code of Conduct helps to ensure that the members of Council share a common basis for acceptable conduct. These standards are designed to provide a reference guide and a supplement to the legislative parameters within which the members must operate. These standards should serve to enhance public confidence that Hamilton’s elected representatives operate from a base of integrity, justice and courtesy.

The City of Hamilton Council Code of Conduct is a general standard that augments the provincial laws and municipal by-laws that govern their conduct. It is not intended to replace personal ethics.

GENERAL

All members shall serve their constituents in a conscientious and diligent manner. No member shall use the influence of office for any purpose other than the exercise of his or her official duties.

GIFTS AND BENEFITS

Members shall not accept fees, gifts, hospitality or personal benefits that are connected directly or indirectly with the performance of duties as City Councillors, except compensation authorized by law.

This section does not apply to tokens, mementoes, souvenirs, or such gifts or benefits up to and including a value of $100.00 that are received as an incident of protocol or social obligation that normally accompanies the responsibilities of office. Tokens, mementoes, souvenirs or gifts with a value of greater than $100.00 shall be the property of the municipality.

No Member shall seek or obtain by reason of his or her office any personal privilege or advantage with respect to City services not otherwise available to the general public and not consequent to his or her official duties.

CONFIDENTIALITY

All information, documentation or deliberation received reviewed or taken in closed session of Council and its committees are confidential.

Members shall not disclose or release by any means to any member of the public either in verbal or written form any confidential information acquired by virtue of their office, except when required by law to do so.

Members shall not permit any persons other than those who are entitled thereto to have access to information that is confidential.
Procedural By-law

Particular care should be exercised in ensuring confidentiality of the following types of information:

- Personnel matters;
- Information about suppliers provided for evaluation which might be useful to other suppliers;
- Matters relating to the legal affairs of the City;
- Sources of complaints where the identity of the complainant is given in confidence;
- Items under negotiation;
- Schedules of prices in contract tenders;
- Information defined as "personal information" under the Municipal Freedom of Information and Protection of Privacy Act.

This list is provided for example and is not inclusive. Requests for information should be referred to the appropriate staff to be addressed as either an informal request for access to municipal records, or as a formal request under the Municipal Freedom of Information and Protection of Privacy Act.

USE OF CITY PROPERTY

No member shall use for personal purposes any City property, equipment, supplies, or services of consequence other than for purposes connected with the discharge of City duties or associated community activities of which City Council has been advised.

No member shall obtain financial gain from the use of City-developed intellectual property, computer programs, technological innovations, or other patentable items, while an elected official or thereafter. All such property remains the exclusive property of the City of Hamilton.

No member shall use information gained in the execution of his or her duties that is not available to the general public, for any purposes other than his or her official duties.

WORK OF A POLITICAL NATURE

No member shall use City facilities, services, or property for his or her re-election campaign.

No member shall use the services of City employees for his or her re-election campaign, during hours in which the employees are in the paid employment of the City.

CONDUCT AT COUNCIL

During Council meetings, members shall conduct themselves with decorum. Respect for delegations and for fellow members and staff requires that all members show courtesy and not distract from the business of the Council during presentations and when other members have the floor.

REPRESENTING THE CITY

Members shall make every effort to participate diligently in the activities of the agencies, boards, and commissions to which they are appointed.
Procedural By-law

INFLUENCE ON STAFF

Members shall be respectful of the fact that staff work for the City as a body corporate and are charged with making recommendations that reflect their professional expertise and corporate perspective, without undue influence from any individual member or group of members of Council.

In addition, members shall be respectful of the fact that staff carry out directions of Council and administer the policies of the municipality, and are required to do so without any undue influence from any individual member or group of members of Council.

BUSINESS RELATIONS

No member shall borrow money from any person who regularly does business with the City unless such person is an institution or company whose shares are publicly traded and who is regularly in the business of lending money.

No member shall act as a paid agent before Council or a committee of Council or any agency, board, or committee of the City.

ENCOURAGEMENT OF RESPECT FOR THE CITY AND ITS BY-LAWS

Members shall encourage public respect for the City and its by-laws.

HARASSMENT

Harassment of another member, staff or any member of the public is misconduct. It is the policy of the City of Hamilton that all persons be treated fairly in the workplace in an environment free of discrimination and of personal and sexual harassment.

Harassment may be defined as any behaviour by any person that is directed at or is offensive to another person on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, handicap, sexual orientation, marital status, or family status and any other grounds under the provisions of the Ontario Human Rights Code.

INTERPRETATION

Members of Council seeking clarification of any part of this Code of Conduct should consult with the City Clerk or City Solicitor.
APPENDIX 7

Fred Eisenberger interview with Andrew Dreschel
Re: Personnel Issues
Transcript:

DRESCHEL:
Let's switch horses to the whole building permit stuff. Eh Fred, early April I think it was obviously this is first when Steve Buist's first investigative pieces came out, City Manager says basically this is an abhor ration, those are his words not his because this is not common practice for the city to do this and basically took that message to you and you took that message to the public, at least that's what you were quoted as saying you know that someone misspoke or was misinterpreted. You're lead to believe, and this is a direct quote from you, "That you are lead to believe by the City Manager and others that this is an isolated case". Clearly, this is not an isolated case if you accept the investigation, the continuing investigation that the Spectator has done. Where does that leave you now, what is going on?

EISENBERGER:
Well, and I need to know that myself. So to be fair I have not had the opportunity to sit down [redacted] staff and I want to do that before I comment on this issue. I owe them at the very least an opportunity for them to clarify whatever has been reported on and give me information from their perspective, so I haven't had that opportunity, so I really don't feel that I'm in a position to comment at this point other than you know like anyone else I want to understand clearly what exactly is going on, so I'm where you are, I don't have that clarity just yet. I need to rely on our staff or my staff, city staff to give me information that's accurate and up to date and I haven't been given that opportunity so I'm going to do that in the next day or so and then hopefully be in a position to speak to the issue.

DRESCHEL:
That's all fair game. Let's go off the record on this.

EISENBERGER:
Sure.

DRESCHEL:
Is this a question really of [redacted] honestly not knowing [redacted] And I don't really mean to ascribe any sort of motivations or sort of you know what I mean. It's just that we keep hearing about that department in disarray, it's chaos, it's so systemic that nobody really has a good handle on the range there. Is this an instance of that in your view?
EISENBERGER:
Well, look you could make that conclusion I suppose. I mean your right you're making changes in that department for all the right reasons. One of them is there is a lack of understanding it seems of what is actually going on day to day in the Building Department or any other department in that whole operation quite frankly. So ya that's cause for concern and it could be very well that And now so it really talks about the whole reporting mechanism and whether or not there is an efficient, clear and transparent mechanism from the bottom to the top. So, as you know there is a reorganization proposed. Now kind of elevated to be in charge and the very reason for that is to get a handle on what the heck is going on and fix it. Now, is also, if it's also hoped that has an understanding of where potentially the problems lay are and what some of the fixes are. has also been part of the reorganization plan so it's hoped that we can get to the bottom of what's going on in this department as a whole. It's certainly concerning and the thing that we need to do is take steps to fix. I think those steps are being made now we need to have and others do the follow up steps in terms of the reorganization is terms of getting a clearer picture of where we are. This is certainly one element of that it's disconcerting to have one answer come through and saying you know what this in an abhorrent and you know if Steve's accurate in his reporting and I have no question to doubt that, then obviously that statement might not be true. This is off the record now?

DRESCHEL:
Ya, absolutely.

EISENBERGER:
So, you know, but I don't know that. I need the staff to sit down with me and tell me what's going on here, what is it that's fallen through the cracks, if anything and then what's to fix.

DRESCHEL:
Do you have a sense of the timeline for that piece of the operational review of the Building Department?

EISENBERGER:
Ah, no I don't off the top of my head no.
DRESCHEL:
Presumably it's sooner rather than later?

EISENBERGER:
Well I would think so ya given the issues. I'm sure their working on it as we speak. The question is can you fix it overnight, probably night, sounds like it's systemic. And you know it may not be all staffing issues. May be there are more people doing more building without permits than we're aware and may be their not quantified, I don't know. I really don't know and I hate not knowing. But we need to find out and then we need to fix cause it's a real problem.

DRESCHEL:
Has...

EISENBERGER:
Not that I'm aware but I expect it's imminent.

DRESCHEL:
You do? Like eh...

EISENBERGER:
'Ya, ya.

DRESCHEL:
The next day or so?

EISENBERGER:
Well, yes I think the time line was roughly a week or there abouts so we're in that time frame.

DRESCHEL:
Okay then fair enough. Listen, this is sort of a dicey area it's all touching upon the same them. I'm told, I'm assuming you read the piece I wrote about taking over the stuff with... I subsequently heard, I can't identify whom but from more than one source that you know somebody has given you the wrong message and this is where it gets dicey because it's about confidentiality. But they tell me, a couple of people have told me that in the meeting with the auditor... Now, listen let me give you the complete lay of the land. I'm subsequently told also confidentially, also by someone else who was in the room that that's not the case. So are you can appreciate I feel like
someone's using me or trying to use me, you know. What's the...

EISENBERGER:
I'm just trying to remember what's public and what isn't. The recommendations, you're aware of those, right?

DRESCHEL:
Yes. Exactly.

EISENBERGER:
Kind of fixed recommendations.

DRESCHEL:
And again I've been told that at least 14 of those at least 14, I've been told by more than one. Again, I've also been told by more than one that no, they don't. What that they didn't come out an in camera meeting you know what I mean so...

EISENBERGER:
(Sigh) Ummm, you know what, it's a tough one because...look I'll give you what I know off the record.

DRESCHEL:
Okay.

EISENBERGER:
Just in a general sense and I'll give it you the way it was told to me.

DRESCHEL:
Okay.

EISENBERGER:
The question was asked of the auditor of

DRESCHEL:
Right.

EISENBERGER:
I think her answer to that questions was,

DRESCHEL:
Fred.

EISENBERGER:
...it was that small percentage that.

DRESCHEL:
So, and here again where it gets tricky because you can appreciate that some of the discussion that's going on amongst your fellow members of council.

EISENBERGER:
Are we still off the record?

DRESCHEL:
Ya absolutely. This whole thing is since we said.

EISENBERGER:
You know what it's just the bottom line.

DRESCHEL:
And the answer would have been from whom on that then?

EISENBERGER:
DRESCHEL:
Okay, okay that helps tremendously and sort of framing it. Fred and I appreciate the confidence recognizing of course what was on and what was off.

EISENBERGER:
Yep.

DRESCHEL:
Anything else you want to add on the subject?

EISENBERGER:
No, no we're good. As I said I need to sit down with staff and get an understanding and I just haven't had the opportunity. Not been here today. Busy and I need to sit down with them and get a clear picture of what their interpretation is.

DRESCHEL:
Is back tomorrow?

EISENBERGER:
I believe so.

DRESCHEL:
Okay, fair enough then. I appreciate it.

EISENBERGER:
Okay.
Okay, you take care.

EISENBERGER:
Bye-bye.

DRESCHL:
Bye-bye.

EISENBERGER:
Okay.
HAMILTON, ON: 25 June 2008

MEDIA STATEMENT

I am aware that a transcript of a taped private phone conversation with Andrew Dreschel of the Hamilton Spectator stolen from my office has been circulated and given to a media outlet. I am also aware that there is some question as to whether I have broken Council’s Code of Conduct for having this “off the record” unpublished conversation with this reporter. It is my belief that I have contravened the Council’s Code of Conduct.

Let me state I have never willfully leaked or released a private and confidential document verbally or otherwise to any member of the media for express purpose of broadcast. I have on occasion had “off the record” conversations with members of the media to provide context or to correct misinformation.

In that light, I have provided a copy of the transcript I received to the City solicitor, and will ask Council tonight during the “Statements by Members” of Council portion of the meeting, to instruct the City solicitor to review this transcript and report back to Council and the community as soon as possible. I take full responsibility and encourage staff and Council to recommend appropriate remedy or action as required.

I have no reason to believe that Mr. Dreschel or anyone at the Hamilton Spectator released this private taped conversation and have every reason to believe it was stolen from my office. However, no one currently working in my office is suspected in any way.

Given all that, I will ask the Chief of the Hamilton Police to launch an investigation to determine who has stolen my personal and city property.

Media Contact:
Media and Communication Officer
Mayor’s Office, 905-546-4106

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APPENDIX 9

PRESS REPORTS

Excerpts from press reports, under the bylines stated, which appeared in The Hamilton Spectator on their respective dates:

REFERENCE TO SEVEN ARTICLES FROM THE HAMILTON SPECTATOR HAVE BEEN DELETED FROM THIS APPENDIX
APPENDIX 10

May 16, 2007
Drip, drip

Hamilton City Hall is a notoriously leaky ship when it comes to confidential information. As a reporter, of course, I love it. I depend on leaks to tell the public about the city’s business happening behind closed doors. But I also know it’s against council’s code of conduct to release confidential information. Andrew Dreschel wrote about the double-edged sword this week.

Apparently Mayor Fred Eisenberger wasn’t too pleased to see another leak in today’s Spec about . Here’s the confidential email he sent to council today:

The leaked information in today’s Spectator article is yet another example of a Council member (or members) stepping way over the line, displaying a blatant lack of integrity. The leak is a clear breach of the Code of Conduct for Members of Council, which we have all sworn to uphold through taking an oath as elected municipal representatives.

As we are all well aware, leaks of confidential information shared during in-camera sessions of Council are in contravention of the code, particularly information concerning personnel matters. This act is completely inappropriate and totally unacceptable. It besmirches both the image and reputation of Council, and does absolutely nothing to assist us in proceeding with the day to day business of running City Hall. More importantly, such acts continue to seriously harm the reputations of city staff needlessly and show a complete lack of sensitivity to all staff, causing more damage to both morale and Council’s relationship with staff.

Ironically, citizen appointments to the Accountability and Transparency Sub-Committee will come before Council tonight for approval. At this point, the issue of the latest leak of confidential information cannot be advanced until Council has dealt with the appointment of an Integrity Commissioner. As Chair of Council, I am calling for a stop to such despicable behaviour, and I urge all members of Council, once again, to respect the Code of Conduct and to display proper decorum inside and outside of Council Chambers.

Fred Eisenberger
Mayor

http://hallmarks.thespec.com/2007/05/drip_drip.html

8/13/2008