

January 22, 2019

Dear TVT Councillors,

I have been following the Township's budget talks through correspondence with public attendees and members of Council. I understand that your Clerk, Amanada Mabo, claims that she is overworked--particularly due to the large volume of MFIPPA (*Municipal Freedom of Information and Privacy Protection Act*) information requests she has to deal with---and that Ms. Mabo has requested that Council add a full-time deputy clerk at a cost of \$73,000 a year.

I disagree with the request for an assistant, for the following reasons:

1. **Ms. Mabo has been exercising the powers of an MFIPPA 'Head' unlawfully. It would be perverse to hire an assistant to allow her to continue to act unlawfully.**

Here are the relevant facts:

- In the absence of a by-law governing the administration of MFIPPA, the entire Council is automatically designated as "Head", or decision-making body. The Act states:

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

and

**3 (3)** *If no person is designated as head under this section, the head shall be, a. the council, in the case of a municipality[.]*

- In 2014, TVT enacted by-law 2014-011. This by-law designates the Reeve as "Head.". Thus, from December 4th 2018 onward, Brian Campbell is TVT's MFIPPA "Head." Prior to this, Keith Kerr was MFIPPA "Head."
- By-law 2014-011 also states that the powers of the "Head" are **delegated** to the Clerk. Thus, the Clerk claims that By-law 2014-011 authorizes her to act as if she had plenary powers as the *de facto* Head.
- By-law 2014-011's delegation of powers was, however, *ultra vires* (ie outside of Council's powers, and therefore unlawful). Section 49(1) of MFIPPA states that only the designated Head may delegate any of the authority placed by a by-law in his or her hands. The power to delegate this cannot lawfully be exercised by the Council. The Act states:

**49 (1)** *A **head** may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution or another institution*

*subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.*

**(emphasis is mine)**

It is clear that that the framers of the Act had a reason for saying that only a Head has authority to “delegate a power of duty vested in the head,” thereby removing from the hands of any municipal council the authority to make such delegations of power. I submit to you that the reason for allowing such narrowly-defined delegations of power was to allow staff members to carry out specific functions, subject to the direct oversight of the Head. The reason why the Legislature denied municipal councils a general power to delegate all MFIPPA powers to any public servant was to prevent precisely what Ms. Mabo has been doing for the past nine months:

- acting without any meaningful oversight or authority from the elected officials who are her nominal superiors;
- withholding knowledge of her decisions from elected officials; and
- running up substantial bills (including lawyer’s bills, and her own salaried time) without any elected official even being aware that this is going on.

In short, Ms Mabo does not now have, and never has had, the power to use these delegated powers. As the Act makes clear, only Reeve Campbell---in his capacity as Head---can delegate these powers to Ms. Mabo or to anybody else. (He would have to do so in writing.) Ms. Mabo was perhaps unaware that she has been acting unlawfully. However, now that she is aware, it is her legal obligation to suspend doing any further work on MFIPPA-related matters unless expressly instructed to do so, in writing, by the Reeve. If she does otherwise, she will be knowingly and wilfully violating the law.

**Suggested Actions:**

- Council should instruct Ms. Mabo to obey the law, now that she is aware what the law states.
- The Reeve should instruct Ms. Mabo to turn all MFIPPA-related materials over to him at once.
- Council should review By-law 2014-011, and consider amending it to bring it into conformity with provincial law.

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2. **Ms Mabo’s extra work-load has been generated entirely by the fact that she is putting an enormous number of hours into blocking a single taxpayer’s requests for records. I know this, because I am that taxpayer.** My wife and I are responsible for at least ten MFIPPA requests. Ms. Mabo has done everything possible to block access to this information. As far as I know, other than the MFIPPA requests initiated by my wife and me, Ms. Mabo has virtually no MFIPPA-related workload at all.

**Suggested Action:** Council should ask Ms. Mabo for a complete list of all MFIPPA requests currently on her desk, and who initiated them?

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3. **Releasing a record requested under MFIPPA takes almost no time---but blocking a request can consume hundreds of hours.** So it's significant for Council to know that Ms. Mabo has been fighting to withhold virtually all the requested information.

The real workload—which takes many, many hours---occurs when a 'Designated MFIPPA Head' like Ms. Mabo chooses to withhold a record. If the citizen who has requested the documents then files an appeal with Ontario's Information Commissioner, Ms. Mabo is compelled to collate and list every single withheld record. This complete list must be submitted to the Commissioner, along with a separate legal rationale for each withheld record. This has, I assume, taken dozens of hours of work so far, and it would appear that it has involved many very expensive consultations with your lawyers at Cunningham Swan, who have had to read every single withheld record and point to a legal rationale for withholding that particular item.

To give you some idea of the work-load involved in withholding the documents associated with just two MFIPPA requests (MFIPPA 2018-02 & MFIPPA 2018-05), take a look at the attached photographs of the "Index of Records" which Ms Mabo was ordered, by the Information Commissioner's office, to produce. For these two requests alone, Ms. Mabo withheld, in whole or in part, 112 records. As you can see from the right-hand column of the index, she was required to provide a legal rationale for every single one of the 112 records.

**Suggested Actions:**

- Council should ask Ms. Mabo to provide a breakdown of her MFIPPA-related hours, categorized by number of hours assembling the records, vs. hours spent on the following: consulting with lawyers to find rationales for withholding documents, preparing reports to the Information Commissioner, etc.?
- Council should instruct Ms. Mabo to provide it with the bills from Cunningham Swan for the work needed to prepare this Index of Records---and also, all other legal bills so far, for other MFIPPA requests in 2018-2019.

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4. **No elected official ever authorized Ms. Mabo to withhold hundreds of records, and to start running up these huge hours of work.** Ms. Mabo decided on her own, without consulting any currently-serving elected person, to withhold hundreds of documents. She is under no legal obligation to withhold the vast majority of these documents, and is therefore choosing, at her own sole discretion (or else at the direction of her superior, CAO Larry Donaldson), to withhold all of this information---and to work all these extra hours.

To give an idea just how many records are being withheld, which could be released at once if Ms. Mabo were not blocking their release, consider this: For MFIPPA requests 2018-02 / 2018-05, she is withholding 112 records (80% of all records held by TVT, in which Blueberry Creek is discussed). Of these, only six are being withheld because Ms. Mabo is

required to withhold them for privacy reasons. The other 106 are being withheld because the township's MFIPPA "head" may do so, at her or her own discretion.

**Suggested Action:** Inform Ms. Mabo that she ought not to keep any specific record secret, without the approval of elected officials (either the Reeve, who is the actual MFIPPA "Head" by law, or Council as a whole).

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5. **Ms. Mabo may be in a conflict of interest, in examining these records at all.** All the records I am seeking relate to evidence that senior TVT staff acted improperly or without proper Council authorization, in the following three areas:
- o I believe it may be the case that TVT staff may have acted in violation of their professional obligations by inventing an insincere claim that Blueberry Creek is violating TVT zoning law, and that this was done in order to divert attention from the fact that they are liable for the costs associated with having erroneously issued Building Permit 2017-15.
  - o I believe it may be the case that TVT staff may have acted inappropriately, including, in the case of one senior staff member, lying to Integrity Commissioner John Ewart, during the course of Mr. Ewart's investigation into whether Judy Farrell violated the Code of Conduct.
  - o I believe that staff may have engaged in unjustifiable claims for overtime hours---amounting to something in the neighbourhood of 40 hours in the case of your CAO.

If Council were to examine these records, Council might well conclude that it is not in the public interest to fight to keep this information secret. Council might further conclude, as I have, that Ms Mabo is in a conflict of interest, which she ought to have declared, in choosing to withhold records that might reveal improper behaviour on the part of the CAO who is conducting her own performance review.

**Suggested Council Action:** Inform Ms. Mabo that you have concerns that she may have a conflict of interest, which requires her---in order not to fall afoul of her own Code of Conduct---to recuse herself from any of the MFIPPA requests currently on her desk in which the requested records may contain evidence of staff misconduct (such proactive recusal would be required even if the Head were to delegate to Ms. Mabo any responsibilities related to these particular MFIPPA requests).

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I hope that the above-noted thoughts will prove useful to Council in its deliberations---and I hope that these arguments will convince you that it would be very unwise to spend taxpayers' money on an assistant for Ms. Mabo.

Sincerely,

Scott Reid