Ontario Association of Architects

December 18, 2018

To the Members of the OAA,

Re: City of Toronto Committee of Adjustment Publication of Application Information

Over the past few years, we have heard consistently from some members that they are concerned about the practice of the City of Toronto and some other municipalities in publishing the copyrighted material of architects in its full form as part of providing online access to the content of Committee of Adjustment applications. Members expressing these concerns are worried about the increased risk that results in their copyrighted material being duplicated and used without their consent. These practices raise legitimate and worrisome questions that the OAA is making sincere efforts to understand and address.

I want to update OAA members about the steps that we are taking to address the concerns regarding copyright infringement, the possible fraudulent reproduction of seals or signatures and, as well, the privacy rights of their clients. This has included numerous discussions, correspondence, and a meeting with senior officials at the City of Toronto, including Michael Mizzi, Director, Zoning and Secretary-Treasurer Committee of Adjustment.

In our meeting with Mr. Mizzi, we discussed a report from the Privacy Commissioner of Ontario entitled *Transparency, Privacy and the Internet: Municipal Balancing Acts*. This document clarifies that the public expects access to information online and cites a landmark court decision (*Gombu v. Ontario*) that reaffirms this principle. The Commissioner's report addresses the preferred practice of requiring an individual to request information over the counter, but concludes that "this method of access has become less acceptable to the public," noting that "the days of attending at the municipal clerk's office to obtain a copy of a record are largely gone." According to the Commissioner's report, the courts have noted "that the public expects access to information online. [They have] found that disclosing public records in electronic format makes them easily accessible and does not impact privacy significantly, as the personal information contained in these records is already subject to disclosure" (more on this below).

As well, the Privacy Commissioner made a ruling in Privacy Complaint MC13-67 against the City of Vaughan, which established a principle that is helpful for members to understand. Its ruling considered whether the City had "contravened the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) when making a complainant's personal information available on the Internet in relation to a minor variance application made under the *Planning Act.*" In this ruling, the Commissioner concluded that "the City's decision to disclose the complainant's personal information via the Internet is not in contravention of the Act," further clarifying that they could not "identify any basis that would prohibit information otherwise subject to the Section 32 exceptions [of the MFIPPA] from being disclosed via the internet."

Specifically on the issue of electronic versus paper records, the Privacy Commissioner explained that "[t]he definition of record, as previously noted, includes information recorded in both paper and electronic form." The Privacy Commissioner found that differentiating between a paper and electronic copy was not justifiable, concluding that "the City's decision to disclose the complainant's personal information in electronic format is in compliance with the *Act*" (presumed here to mean the *Planning Act*). The Commissioner noted that "Committees of Adjustment are required to demonstrate accountability via a transparent process that permits individuals to participate, scrutinize and to hold institutions such as the City accountable. As such, making these records available online facilitates this goal in a manner consistent with the Act."

Members need to understand that such rulings and findings reinforce that this is an era of transparency, with governments at the municipal, provincial and federal level all committing to "open government" principles.

For the City of Toronto, open government is "guided by four principles of transparency, participation, accountability and accessibility and supported by three pillars of Open Data, Open Information and Open Engagement." In this same vein, we also know that there are clear expectations outlined in Section 1.0.1 of the *Planning Act*: "Information and material that is required to be provided to a municipality or approval authority under this *Act* shall be made available to the public." Municipalities have interpreted this to mean that all information collected under the *Planning Act* is therefore to be published online.

Some of our members have argued against this interpretation, contesting that Section 1.0.1 does not necessarily require posting all such information online. While the OAA accepts the City's position that information can be posted online we agree with our members that not all of the information needs to be posted and that what is posted should benefit from greater protection from copyright violation and misuse.

Considering all of this, we believe that we should focus our efforts on supporting and advancing recommendations contained within the Privacy Commissioner's report designed to mitigate privacy and copyright violation risks. The Commissioner's report recommends a redaction process, data minimization and technological measures that could include user registration. We have also examined and considered some of the steps being taken by other municipalities. To that end, we have asked the City to consider:

- Implementing a disclaimer or limited use licence that requires a user to agree to the terms to access any files. These terms would include a clear statement that all documents are copyright of the owner.
- Implementing a user registration system so there is a record of who has accessed or downloaded files.
- Removing or obscuring seals/signatures before posting online.
- Focusing on data minimization so the City is asking for (and subsequently sharing) only what is required. This includes not asking for floor plans or only requiring blacked-out floorplans so an owner's privacy is protected.

On the last point, we have asked the City to conduct a review of the whole submission process in a larger sense using the Privacy Commissioner's policy challenge of only asking for what is *required*. The IPCO report identifies questions such as:

- Is any of the requested information, while useful, not necessary?
- Is there a requirement to publish this information?
- Will the information be needed by a member of the public to use the record for its intended purpose?

To municipalities, the Privacy Commissioner has a strict response: "If the information, while useful, is not necessary, then the municipality does not have the authority to collect it." In line with the Commissioner, we have argued the City should not be asking for any information beyond what is strictly required to consider the minor variance application.

We will continue to work with the City and other municipalities on these objectives. In the meantime, we remind members that, as always, they have the avenue of the court system to try to seek an injunction and/or damages if they believe their copyright has been infringed upon. If they suspect their seal has been stolen or misused, we remind members they must report this immediately to the Registrar, Nedra Brown.

It is also important to note that to prevent the theft of seals and to encourage copyright protection and verification of a member's status in good standing with the Association, the OAA has recently adopted an encrypted electronic seal system for members with a three-year implementation timeline.

Thank you again to members for sharing their concerns.

Regards,

John K. Stephenson
OAA, FRAIC
President

cc. Michael Mizzi, Director, Zoning and Secretary-Treasurer Committee of Adjustment