

**DRAFT COUNCIL POLICY - PROACTIVE DISCLOSURE OF COMPLETED FREEDOM OF
INFORMATION AND PROTECTION OF PRIVACY (FOIP) REQUESTS**

EXECUTIVE SUMMARY

This report responds to Council's direction to develop a Policy on Simultaneous Disclosure of Responses to FOIP Requests.

CITY CLERK'S RECOMMENDATION(S)

That the Priorities and Finance Committee (PFC) recommends that Council:

1. Receive this report for information and file; OR
2. a) Endorse the draft key policy statements previously adopted at the 2016 September 26 Regular Meeting of Council;

b) Reconsider its decision contained in the Minutes of the 2016 May 16 Regular Meeting of Council with respect to the development and implementation of a "Simultaneous Disclosure Policy" for FOIP Requests;

c) Approve a "Proactive Disclosure Policy" for Access to Information FOIP Requests, delaying implementation until funds to implement such a Policy are considered at Council's 2019-2022 Budget deliberations when Council considers the City Clerk's Operating and Capital budgets.

PREVIOUS COUNCIL DIRECTION / POLICY

At its Regular Meeting held 2015 April 27, Council adopted the following motion arising:

" that with respect to Report C2015-0350, the Deputy City Clerk/Returning Officer be requested to report back to Council on the options of releasing all final FOIP documents simultaneously and publicly, no later than 2015 July."

At its Regular Meeting held 2015 July 27, Council adopted the Recommendation contained in C2015-0470 which requested deferral of the report to the 2015 September 28 Regular Meeting of Council.

At its Regular Meeting held 2015 September 28, Council adopted the Recommendations contained in Report C2015-0609 as follows:

1. Direct Administration to prepare key policy statements for FOIP simultaneous disclosure and return to Council no later than May 2016;
2. Direct Administration to report to Council no later than September 2016 with a Council policy, criteria, procedures and resources required to implement simultaneous disclosure for January 2017; and

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3. And further, that Mayor Nenshi be requested to ask the Provincial Government to expedite a decision on simultaneous FOIP disclosure.

At its Regular Meeting held 2016 May 16, Council adopted the Recommendations contained in Report C2016-0260 as follows:

1. "That Council approve the request to defer the report to Council on key policy statements for a Council Policy on Simultaneous Disclosure until the 2016 September 26 Regular Meeting of Council;
2. That Council approve the request to defer the report on the *Council Policy on Simultaneous Disclosure* from 2016 September 26 to no later than March 2017; and
3. That Council approve the request to defer the implementation of the subsequent Council Policy to no later than September 2017."

At its Regular Meeting held 2016 September 26, Council adopted the Recommendations contained in Report C2016-0281 as follows:

1. That Council receive this report and the draft Key Council Policy Statements contained in this report, for information; and
2. That the City Clerk and City Solicitor collaborate on the development of a Council Policy with respect to Simultaneous Disclosure (or Proactive Disclosure) publicly, of responses to Freedom of Information and Protection of Privacy Requests, as discussed in this report, and report back to Council through the Priorities and Finance Committee (PFC) no later than March 2017.

BACKGROUND

In 2015, Council adopted a motion for options of releasing all final FOIP documents simultaneously and publicly.

When this initiative was introduced, the term "simultaneous disclosure of responses to FOIP Requests" was based on the title used by BC Ferry Services Inc (BC Ferries) as referenced in the Council session. BC Ferries was investigated by the Office of the Information and Privacy Commissioner (OIPC) / British Columbia (BC) with respect to the "simultaneous disclosures" of completed FOIP Requests. Based on the findings and recommendations of the OIPC/BC, it was recommended to review the practice of "simultaneous disclosure" against the general practice of "Proactive Disclosure". The term and practices of proactive disclosure references the notion of publicly disclosing the information or "public disclosure".

The Council Policy- *Proactive Disclosure of Completed FOIP Requests* (see Attachment 1) was drafted for Council consideration in alignment with the OIPC (Alberta) guidelines on proactive disclosures in Alberta (see Attachment 4) and considered other jurisdiction's business practices on proactive disclosures of completed FOIP requests.

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INVESTIGATION: ALTERNATIVES AND ANALYSIS

"Proactive disclosure" is an approved process to publish routine disclosures and, in reference to FOIP Requests, to make completed FOIP Request summaries and disclosure packages available to the public. This practice is similar to posting travel expenses, for example.

OIPC / BC defines proactive disclosure as follows;

"Proactive disclosure" refers to steps public bodies take to provide information to the public on their own accord, as opposed to providing information only when responding to a freedom of information request.¹

Similar terminology and practices are currently applied in the following Council policies;

Disclosure Policy for Members of Council (CC044)
Posting Councillor Ward Budgets and Expenses Policy (CC027)

The proposed Council Policy applies to FOIP Requests for general information only. Personal information and third party confidential business information withheld under the FOIP Act will not be disclosed. (see Attachment 2) The quality assurance governed by the City Clerk's FOIP policy framework will apply a rigorous and robust review of all records to ensure that information is protected from inadvertent disclosure. This review protects the integrity of the FOIP process, protects personal information and third party confidential business information, ensures public trust and confidence in the process and protects the reputation of the City of Calgary.

Under the proposed Council Policy, the public will be able to search and download completed General FOIP Request summaries and disclosure packages directly on The City of Calgary's website.

The FOIP Coordinator recommends that;

the terminology reflect the common business practice of "proactive disclosure" and therefore, amend the Council Policy title by removing "simultaneous" and replace it with "proactive disclosure"; and,

the summaries and disclosure packages of the completed Access to Information FOIP Requests be delayed by 30 days after the FOIP disclosure package is submitted to the Applicant. The 30 day delay is a common practice with The City of Vancouver with respect to disclosing completed FOIP Requests, and aligns with the 30 day timeline outlined in the Council Policy - *Disclosure Policy for Members of Council (CC044)*.

¹ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F11-02*

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DRAFT KEY POLICY STATEMENTS (Adopted by Council, 2016 September 26):

- “The City of Calgary strives to be transparent and accountable and seeks ways to increase openness to demonstrate commitment to these objectives (through proactive disclosure).
- Records released in response to general information FOIP requests will be published on Calgary.ca.
- Records release will be undertaken in such a way that will meet The City's obligations under *The Freedom of Information and Protection of Privacy Act* (the Act) to balance openness with the necessity to protect personal and confidential business information of third parties.
- As the Act requires a balance between openness and protecting necessary third party information, all records will be reviewed prior to publishing publicly on Calgary.ca and the necessary third party information removed.”

Stakeholder Engagement, Research and Communication

Members of Administration in the Law Department and the City Clerk's Office were consulted.

In September 2016, the FOIP Coordinator consulted with Service Alberta. There was no indication that, the Government of Alberta was ready to legislate proactive disclosure.

In November 2016, the FOIP Coordinator met with the OIPC (Calgary Office) on several matters related to the FOIP activities including this initiative. During this informal meeting, the OIPC apprised the FOIP Coordinator of OIPC publications related to proactive disclosure for guidance. (see Attachment 4)

Throughout Q1 2017, consultations with the Mayor's Office, and individual Councillors who indicated interest in the topic, were completed.

The Council Policy was drafted based on the consultations, research and the guidance from the OIPC guidelines. This included consultation with BC Ferries and the City of Vancouver.

Strategic Alignment

“Proactive Disclosure” is aligned with Council Policy (CC039): *Transparency and Accountability Policy* and with the Action Plan 2015-2018, W7.2, Promote public access to information and strengthen The City's culture of proactive disclosure by providing advice, education, and training.

In response to the City Auditor FOIP Audit Recommendation # 5:

“The FOIP Coordinator improve processes to view final release documents including inviting BUs to view the final release documents (with the option to decline) before the documents are released”

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A commitment was included in the Management Action Plan to meet this recommendation by including this Council Policy and referencing the Action Plan 2015-2018 W7.2 Priority (proactive disclosure).

Social, Environmental, Economic (External)

In terms of a social assessment, the City Clerk's FOIP promotes proactive disclosure or routine disclosure throughout the City of Calgary. In addition to the Council Quarterly Reports on the FOIP activities on routine disclosures, there is a common business trend in the municipalities, provinces and federal jurisdictions to publish summaries and disclosure packages of completed FOIP Requests. By sharing publicly, this leads to a better informed public and contributes to a culture of openness at The City of Calgary. Evidence of posting records through the practices of proactive disclosure (routine disclosures) are identified throughout the City of Calgary, such as the posting of the Subdivision & Development Appeal Board (SDAB) decisions on their website. (City Clerk's – Quasi-Judicial Boards (QJB)).

No direct environmental impacts have been identified. However, posting information electronically contributes to a "greener" environment.

The goal of making records public through proactive disclosures contributes to cost saving in processing the requests for information and limiting the number of formal FOIP Requests thereby, contributing to fiscal responsibility within the City of Calgary.

Financial Capacity

\$186,446.21 (estimate)

There is a requirement to create a new Full-Time Equivalent (FTE) position in the City Clerk's FOIP Division at a class D Exempt group and level. This position would be required to coordinate and manage the coordination of, quality assurance and posting of the summaries and disclosure packages within the 30 day period. This would consist approximately \$104,501 and \$21,945.21 (fringe). (Salary Range from \$70,196 to \$104,501)

For the management of the website and content management, the estimated fee to create a new website, webpage, ongoing content upgrades and maintenance is assessed at approximately \$60,000.

There will be an impact to the current human resources in the FOIP Office should this policy be implemented without additional resources. Currently, the FOIP Office would have difficulty to adequately support this new Council Policy.

Should Council adopt this Policy, it is recommended that the Budget to operationalize the initiative be deferred to the 2019-2022 Budget process.

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With respect to the development of the website and the posting of the summaries and disclosure packages, assistance from Customer Services and Communications would be leveraged as much as possible and a micro-website on calgary.ca would be developed to remain within the current fiscal restraints.

Current and Future Capital Budget:

Capital funds are not required to initiate this program.

Risk Assessment

“Simultaneous Disclosure” – Not Recommended

In the OIPC BC *Investigation Report* F11-02, Media Associations i.e. Canadian Community Newspapers Association, Canadian Press, The Vancouver Sun, raised concerns regarding the impacts to their investigative journalism practices and competitive media environment. The media argued that, “simultaneous disclosure” of FOIP summaries and disclosure packages to the media limited the ability of modern journalistic institutions to be “society’s antennae” on the actions of government and public bodies. Reference was made to the *Charter of Rights and Freedoms* in conjunction with the guarantee of freedom of expression for journalists.

In September 2016, an article was published in the Calgary Sun titled “*City council's document dump' proposal aims to muzzle critical media scrutiny*”. Similar issues were raised by the media in the BC Ferries OIPC Investigation.

Based on the 2016 FOIP statistics related to FOIP Requests, the requests from the media remains the lowest (12% in 2016). Even with the 30 day delay in publishing the summary and the disclosure package, this initiative may continue to be controversial.

Proactive Disclosure - Recommended

In the absence of formal direction from the Province of Alberta, Service Alberta, The City of Calgary would be the first municipality in Alberta to implement a *Council Policy on Proactive Disclosure of Completed FOIP Requests* for general information and publish completed FOIP Request summaries and disclosure packages online. Without the Province of Alberta’s formal policy on this matter, The City may be at risk of proceeding with this initiative without the guidance from the Province.

Inadvertent disclosure of personal information or confidential business information.

Due to the nature of proactive disclosures, there is a risk that personal information or confidential business information would not be appropriate to disclose proactively. There is a risk that the quality assurance review conducted by the FOIP Office may not identify this information.

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Risk of violating confidentiality agreements

The City often enters into agreements containing confidentiality clauses that commit the City to protect confidential business information, including contracts, reports and other documents. These clauses typically allow the City to release this confidential information when it is required by law to do so. However, in a proactive disclosure, The City is not under any legal obligation to disclose this information. There is a risk that the quality assurance review conducted by the FOIP Office would not identify all of the information subject to these broad confidentiality provisions, as it could require a detailed review of contractual provisions. Proactively disclosing this information would potentially breach these confidentiality provisions, resulting in liability for The City.

Violation of Copyright

Many reports and other records held by The City are subject to copyright protections. The City is typically protected from violating another person's copyright if it is required by law to disclose the document. However, in a proactive disclosure, The City is not under any legal obligation to disclose this information. Proactively disclosing this information would potentially violate a third party's copyright to documents held by The City, resulting in liability for The City.

Risk of not Approving the Policy

There have been open discussions about this policy and this initiative. To not approve this policy or initiative needless of the rational, may impact the commitment of the City of Calgary in proceeding with such an undertaking.

By not approving this policy, the City of Calgary may be seen as acting contrary to the principles of openness and transparency including its own policy on transparency. This may impact the Strategic Alignment of Council Policy (CC039): Transparency and Accountability Policy and with the Action Plan 2015-2018, W7.2, Promote public access to information and strengthen The City's culture of proactive disclosure.

REASON(S) FOR RECOMMENDATION(S):

Should Council approve the Council Policy, it is recommended that implementation not occur until such time as sufficient funds are secured to ensure the highest level of oversight over the quality assurance within the disclosure process.

ATTACHMENT(S)

1. Proposed draft Council Policy – Proactive Disclosure of Completed FOIP Requests;
2. Process Flow Chart – Proactive Disclosure of Completed FOIP Requests;
3. Sample City of Calgary Proactive Disclosure of Completed FOIP Requests webpage & summary/disclosure package;

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4. Access Impact Assessment Guidelines for Proactive Disclosure, OIPC (Alberta) September 2016;
5. Draft Council Policy – Proactive Disclosure of Completed FOIP Requests (PowerPoint).