

J. Paul Dubé, Ombudsman

September 22, 2017

Mayor Fred Eisenberger

Hamilton City Hall
2nd floor - 71 Main Street West
Hamilton, Ontario L8P 4Y5

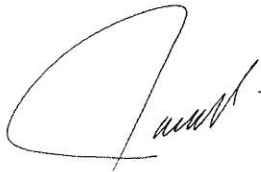
Dear Mayor Eisenberger,

Re: Report – Office of the Ontario Ombudsman

I have completed my investigation into whether the City of Hamilton's General Issues Committee held an improper closed meeting on March 23 or 24, 2017. Please find my final report enclosed.

In accordance with section 14.1 (8) of the *Ombudsman Act*, the municipality should make my report available to the public, and we ask that this be done no later than the next council meeting. Pursuant to section 14.1 (9) of the *Ombudsman Act*, I will also post a copy of the report on my website at www.ombudsman.on.ca.

Yours truly,



Paul Dubé
Ombudsman of Ontario

CC: Clerk, Rose Caterini

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Ombudsman Report

**Investigation into a complaint about
meetings held by the City of Hamilton's
General Issues Committee
on March 23 and 24, 2017**

**Paul Dubé
Ontario Ombudsman
September 2017**

Complaint

- 1 My Office received a complaint that the City of Hamilton's General Issues Committee held a meeting that did not comply with the open meeting rules in the *Municipal Act, 2001* (the "Act").
- 2 Under the Act, all meetings of council, local boards, and committees of each of them must be open to the public, unless they fall within prescribed exceptions.
- 3 The complaint alleged that the General Issues Committee discussed funding for certain transit routes known as "school bus extras" during a closed session on either March 23 or 24, 2017, and that the discussion did not fit within any of the exceptions set out in the Act.

Ombudsman jurisdiction

- 4 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 5 The Ombudsman is the closed meeting investigator for the City of Hamilton.

Investigative process

- 6 On April 24, 2017, we notified the city that we would be investigating this complaint.
- 7 My Office obtained and reviewed the agenda and minutes for the open and closed session meetings of the General Issues Committee on March 23 and 24. We were provided with staff reports that were considered in camera and notes prepared by staff. We reviewed the open session video recordings of both meeting days. We interviewed all members of council who were present for the meetings, as well as the Legislative Coordinator who acted as clerk, the City Manager, and the General Manager of Finance and Corporate Services.
- 8 My Office received full co-operation in this matter.

Council procedures

- 9 Hamilton's procedure by-law, 14-300, provides for closed meetings of council and committees, and lists the exceptions to the open meeting rules.
- 10 While it references all other exceptions to the closed meeting rules, the city's by-law does not reflect subsection 239(3)(b) of the Act. That provision requires meetings to be closed when the subject matter being discussed is an investigation respecting the municipality, a local board, or a municipally-controlled corporation by the Ontario Ombudsman, an appointed municipal ombudsman, or an appointed closed meeting investigator.
- 11 The City of Hamilton should ensure that its procedure by-law is updated to reflect the exceptions set out in the *Municipal Act*.

School bus extras

- 12 The City of Hamilton's transit corporation runs additional city buses on certain routes in the morning and evening to help reduce the impact of student ridership associated with McMaster University and Mohawk College. These additional buses are known as "school extras" or "school bus extras."
- 13 A staff report provided to Hamilton's General Issues Committee on March 23, 2017, provides an overview of the school extras service, and includes a chart setting out potential route cancellations. The report does not reference staffing or cuts to staff positions.

Meeting on March 23, 2017

- 14 The City of Hamilton's General Issues Committee, which consists of all members of council, met in open session at 9:30 a.m. on March 23, 2017 in council chambers.
- 15 The meeting began with a presentation by the city's General Manager of Finance and Corporate Services, with respect to proposed budget cuts. The committee then discussed topics listed on the meeting agenda as items 8.2 (transportation for people with disabilities), 8.1 (parking rates), 8.3 (free

transit rides for cyclists), 8.4 (disability identification), and 8.5 (water, wastewater, and stormwater budget).

- 16** Just after 1 p.m., the committee discussed the staff report regarding “school bus extras” (item 8.6) for approximately four minutes.
- 17** The Chair asked whether there was discussion on the report. In answer to a councillor’s question, staff confirmed that the motion before the committee was to receive the report.
- 18** One councillor noted that there were potential revisions to the budget proposed in the report, such as in the table summarizing the savings that the city would get by making cuts to the school extras service. He asked staff to confirm that, if the committee received the report for information, it would not be directing staff to make any changes to the routes.
- 19** Staff answered that, through discussions with the committee over the past several weeks, the idea to cut these bus routes had been put forward as a potential budget reduction, and the report was before the committee to explain the impacts that the cuts would have in the real world. Staff said the report would be referenced during discussions later on in the day about the overall budget. The Legislative Coordinator confirmed that the issue would be discussed as part of item 8.10 (tax supported operating budget).
- 20** The councillor noted that the committee members had just received the school bus extras staff report that day, and would need time to digest it. The committee passed a resolution to receive the report.
- 21** The committee then moved on to discuss other items of business. The school bus extras issue was not mentioned again in open session on March 23.
- 22** At 2:40 p.m., the committee passed a resolution to go in camera, citing the exceptions in subsections 239(2)(b) for personal matters about identifiable individuals, and (c) for acquisition or disposition of land.
- 23** There is no reference to the school bus extras issue, or the staff report on that subject, in the closed session minutes. During interviews, staff and members of council confirmed that the school bus extras issue was not discussed during the closed session on March 23.

Meeting on March 24, 2017

- 24** At 9:30 a.m. on March 24, the General Issues Committee continued its open meeting of March 23, as it had not completed all of the agenda items from the previous day.
- 25** The committee discussed a ward-by-ward update before going in camera at 9:51 a.m. The committee passed a resolution to close the meeting, stating that it would be discussing agenda items 12.2, 12.3, and 12.4, which are listed in the public agenda as follows:
- 12.2: Potential impacts of service reductions – Community and emergency services (Staff report CES17017 – City wide)
- 12.3: 2017 Tax supported operating budget reduction plan (Staff report FCS17001(a) – City wide)
- 12.4: Options for 8 Community Halls (Staff report CES17018 – Wards 4, 11, 12, 14, and 15)
- 26** The committee cited the exception for personal matters about an identifiable individual in 239(2)(b) to discuss items 12.2 and 12.3. It cited the exception for the acquisition or disposition of land in s. 239(2)(c) to discuss item 12.4.
- 27** According to the closed session minutes, staff first answered questions from committee members about item 12.2. The committee then discussed item 12.3, the tax supported operating budget reduction plan, and directed staff to report back at a future meeting regarding certain aspects of the proposed staffing changes.
- 28** The minutes state that the school bus extras issue was raised in camera, but then immediately discontinued:

During the discussion of Report FCS17001(a), respecting the Tax Supported Operating Budget Reduction Plan, Report PW17028, respecting the Potential Impacts of Service Reductions – Public Works [the school bus extras staff report] was referenced, as it was believed to have staffing implications (reductions) that would have been reflected in Report FCS17001(a). Report PW17028 was publicly discussed and received on March 23, 2017 (as Item 8.6).

Staff provided some clarity and Councillors began to ask questions. As the discussions did not appear to be heading to a question directly related to staffing reductions in Public Works, the Clerk cautioned the Committee about the discussion respecting that matter, and the discussion was immediately discontinued.

- 29** There is no audio or video recording of the closed session discussion. Of those interviewed, eight individuals remembered the discussion in camera. Five had little to no memory of the discussion about school bus extras, either in camera or in open session. One individual recalled the subject being discussed, but could not recall if that occurred in open or closed session. Another remembered the matter being discussed at length during the closed session, but later acknowledged that could be incorrect.
- 30** The General Manager of Finance and Corporate Services told us that he included the topic in his list of potential cuts to raise in camera because he assumed that, if the city cut bus routes, there would be associated staffing cuts. Staff told us that the school bus extras issue was raised in error in the closed session.
- 31** One member of the committee remembered asking whether the cuts would impact employees, which led the Legislative Coordinator to inquire with staff responsible for the report. The Legislative Coordinator told us that, after checking with staff, she informed the committee that the matter did not fit within an exception to the closed meeting rules, and the discussion ended.
- 32** Some individuals remembered committee members speaking about the program before staff ended the discussion, but the eight individuals who remembered the discussion all agreed that the entire discussion lasted no longer than a few minutes. This version of events reflects the record of the discussion in the minutes.
- 33** The committee then discussed another agenda item, before returning to open session at noon.
- 34** The school bus extras issue was raised during the open session portion of the meeting. As recorded on the meeting video, when the item was raised, the Chair asked if anyone wished to speak to the report. Councillor Jackson presented a motion, stating:

that [staff] be directed to determine an alternative funding source for the \$200,000 in order to maintain the existing HSR school extra

service, which we had a long discussion about. So I was to move this in open session as per the Clerk's instructions.

- 35 When asked about the reference in his motion to having had a “long discussion” about the subject, the councillor told us that it may have been the wrong choice of words, but that the budget discussions in general had been extensive and included long discussions about the city's transit system.
- 36 Councillors Aidan Johnson, Whitehead, and Green each spoke to the motion. The Chair then called for a vote, which passed unanimously.
- 37 The committee then addressed one further matter, before adjourning the meeting at 3:05 p.m.

Analysis

- 38 As noted in the closed session minutes for March 24, the school bus extras issue was raised and briefly discussed in camera, before staff indicated that the matter was not permitted in closed session and the discussion ended.
- 39 One member of council initially told our Office that the matter was discussed at length in the closed session. However, that version of events did not agree with the accounts of the eight other individuals who remembered the discussion, or with the closed session minutes. The councillor later acknowledge possibly misremembering the meeting.
- 40 The preponderance of evidence indicates that, as reflected in the March 24 minutes, the school bus extras issue was raised in closed session as part of a list of proposed budget cuts. The program was described for a few minutes by staff in answer to questions from the committee, before staff indicated that the matter did not affect any identifiable individuals and did not belong in the closed meeting. At that point, the discussion ended.
- 41 City staff and members of council acknowledged that the school bus extras matter did not fit within any of the exceptions to the closed meeting rules. No identifiable individuals were discussed, and the matter did not involve labour relations or employee negotiations.
- 42 This brief discussion constituted a breach of the *Municipal Act*. I commend the city's Legislative Coordinator for being mindful of the open meeting rules and ending the discussion when she realized the matter did not fit

within an exception. However, I caution the city to take greater care to review individual agenda items before they are raised in camera to determine whether they fit within one or more exceptions to the open meeting rules.

Need for in-camera audio or video recording

- 43** The City of Hamilton has adopted the practice of video recording its open session council and committee meetings. I commend the city for taking this step, as it increases transparency and provides the public with greater access to observe local government in process.
- 44** However, the city does not record closed session meetings.
- 45** As the City of Hamilton does not audio or video record closed meetings of council or committees, my Office was required to interview all members of the committee who were present for the meetings on March 23 and 24, as well as three members of staff. Based on the interviews conducted, we were able to reconstruct the closed session discussion related to the school extras issue. Unfortunately, the accounts provided based on memory were, in some cases, inconsistent. In other cases, individuals told us they had no memory of the discussion.
- 46** Many of those interviewed told us that the two days of budget discussions on March 23 and 24 were intense, busy, and difficult, as the committee had to address a large number of potential staffing cuts. Many members of council indicated that their memory of the school bus extras discussion was impacted by the length and complexity of the meetings.
- 47** I strongly encourage Hamilton to audio or video record all in-camera meetings of council, committees, and local boards. This would assist in ensuring that the city does not stray from legal requirements during closed meetings. It would also provide a clear and accessible record should the meeting be reviewed by a closed meeting investigator, and reduce the impact of an investigation on the city's resources.
- 48** Audio or video recording of closed meetings has already been adopted by a several municipalities in Ontario in the interest of transparency and accountability. They include the Townships of Tiny, Adelaide Metcalfe, and Brudenell, Lyndoch and Raglan; the Towns of Amherstburg, Midland, Wasaga Beach, and Fort Erie; the Municipalities of Central Huron, Meaford, Lambton Shores, and Brighton; and the Cities of Oshawa, Port Colborne, Sault Ste. Marie, Brampton, London, Niagara Falls, Sarnia, and Welland.

Opinion

- 49** The City of Hamilton's General Issues Committee technically contravened the open meeting rules when a matter related to bus routes was raised briefly during a closed meeting on March 24, 2017. Once the committee determined that the issue did not fit within any of the exceptions to the open meeting rules in s. 239 of the *Municipal Act*, it ended the discussion. I commend city staff and council members for being mindful of the open meeting rules during the meeting, but recommend the city exercise greater caution when adding items to a closed session agenda in the future.

Recommendations

- 50** I am making the following recommendations to assist the City of Hamilton in adhering to the open meeting requirements of the Act and to improve its procedures and practices related to meetings of council.

Recommendation 1

All members of council and committees for the City of Hamilton should be vigilant in adhering to their individual and collective obligation to ensure that the municipality complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

The City of Hamilton should take care to review matters before they are added to a closed session agenda to ensure that they fit within the exceptions in section 239 of the *Municipal Act*.

Recommendation 3

The City of Hamilton should audio or video record all closed meetings of council, its local boards, and committees of either of them, to ensure that an accurate record of in camera discussions exists in the interests of accountability.

Report

- 51 The City of Hamilton was given the opportunity to review a preliminary version of this report and provide comments. No comments were received.
- 52 My report should be shared with council for the City of Hamilton. My report should be made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario