

J. Paul Dubé, Ombudsman

February 21, 2019

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

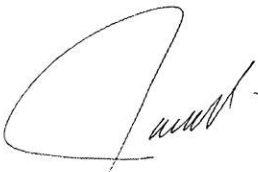
Dear Mayor Eisenberger,

Re: Report – Office of the Ontario Ombudsman

I have completed my investigation into whether, prior to a June 26, 2018 meeting of the Governance Review Committee, members of council held a meeting over email that did not comply with the open meeting rules in the *Municipal Act, 2001*, and whether the city's General Issues Committee held a meeting that did not comply with the open meeting rules on July 9, 2018. Please find my final report enclosed.

I ask that the City of Hamilton make this report public. Once the city has made the report public, I will post a copy of the report on my website at www.ombudsman.on.ca.

Yours truly,



Paul Dubé
Ombudsman of Ontario

CC: Janet Pilon

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Ombudsman Report

**Investigation into complaints about emails
exchanged by members of council
for the City of Hamilton
between June 7 and June 26, 2018
and a meeting of the General Issues Committee
on July 9, 2018**

**Paul Dubé
Ontario Ombudsman
February 2019**

Complaint

- 1 My Office received a complaint that members of council for the City of Hamilton exchanged emails between June 7 and June 26, 2018 that did not comply with the open meeting rules in the *Municipal Act, 2001* (the “Act”).
- 2 The complaint stemmed from a comment made by a member of council during an open meeting of the city’s Governance Review Sub-Committee on June 26, 2018. During a discussion about filling a council vacancy, the council member said he had seen an email from the Mayor about appointing a particular individual to the seat. The complaint alleged that council members contravened the open meeting rules by using email to discuss how to fill the vacant council seat.
- 3 We also received a complaint alleging that there were discussions about filling the vacant council seat during a closed meeting of the city’s General Issues Committee on July 9, 2018. The complaint alleged that these discussions did not fit within any of the exceptions to the open meeting rules, and that a vote by council during that closed meeting did not comply with the rules in the Act.
- 4 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.

Ombudsman jurisdiction

- 5 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.
- 6 The Ombudsman is the closed meeting investigator for the City of Hamilton.

Investigative process

- 7 On July 16, 2018, we notified the city that we would be investigating this complaint.
- 8 The City of Hamilton’s Ward 7 council seat became vacant after a member of council was elected to the provincial legislature on June 7, 2018. My Office obtained and reviewed all emails exchanged by members of council about the Ward 7 vacancy between June 7 and June 26, when a discussion over email was referenced in an open committee meeting. We reviewed the meeting materials

and meeting video for the June 26, 2018 meeting of the city's Governance Review Sub-Committee, and spoke with city staff and members of council.

- 9 We obtained and reviewed the agenda and minutes for the July 9, 2018 open and closed session meetings of the General Issues Committee, as well as a confidential report considered by the committee. We spoke with city staff and members of council who were present during the meeting.
- 10 My Office received full co-operation in this matter.

Ward 7 council vacancy

- 11 The city's councillor for Ward 7 resigned her seat on council when she was elected as an MPP in the June 7, 2018 provincial election. The *Municipal Act, 2001* provides that, within 60 days of a vacancy being declared, council must either appoint a new councillor or pass a by-law to call a by-election.
- 12 On June 13, 2018, city council referred a proposed application process to fill the Ward 7 seat to the Governance Review Sub-Committee for discussion.
- 13 At a June 26, 2018 meeting of the City of Hamilton's Governance Review Sub-Committee, a committee member stated:

...I think **I saw an email from the Mayor** that former councillor, who served I believe nine years, three three-year terms... in that very ward, who knows the ward well and according to the mayor was prepared to... for an appointment on the clear understanding that he would not be running in the October election.
- 14 The committee considered two processes available to make an appointment: Council could appoint a qualified person on their consent, or invite applications for the position. Given the proximity of the next municipal election – scheduled for October 22, 2018 – the committee recommended that the Mayor send a letter to the Minister of Municipal Affairs and Housing asking for an exemption from the requirement to fill the vacancy. If no exemption was granted, council would have to take action on the vacancy by August 25, 2018.
- 15 At a council meeting on June 27, council declared the Ward 7 seat vacant and directed the Mayor to send the letter to the Minister. That day, the Mayor wrote to the Minister, asking him to grant the city an exemption from the requirement in s. 263(1) of the Act with respect to filling the council vacancy.

- 16 On July 19, the Minister responded by letter, stating that he does not have the discretion to grant an exemption from the requirement to fill the vacancy, as providing such an exemption would require a legislative change.
- 17 At its August 17, 2018 meeting, council appointed the individual mentioned during the June 26 committee meeting to the Ward 7 seat for the remainder of the council term.

Emails exchanged regarding the Ward 7 vacancy

- 18 The complaint to my Office alleged that council held an improperly closed meeting over email regarding the vacant Ward 7 seat prior to the June 26 meeting of the city's Governance Review Sub-Committee.
- 19 Council members and staff provided us with all emails about the Ward 7 vacancy sent or received by council members between June 7 and June 26, 2018.
- 20 On June 11, the Clerk sent an email to senior staff and all members of council setting out information in the *Municipal Act* respecting vacant seats. One member of council responded to all recipients to say that he believed the person appointed to fill the seat should not be permitted to run in the October election. The Clerk responded to all that she did not believe council could restrict someone from running in an election, but that she would look into the matter and respond.
- 21 On June 13, the Mayor sent an email to 14 of the 15 members of council. He stated that, given the need to fill the vacant seat, he had heard the name of a former member of council as a possible interim councillor. The Mayor wrote that the individual would be an excellent choice, given his experience, and that it was his understanding that the individual would not be running in the October election. The Mayor asked councillors to let him know their thoughts and whether anyone else had indicated an interest in filling the vacancy, stating, "...let's get this resolved as soon as possible."
- 22 Two minutes after the Mayor sent his email, one member of council responded to the group that he felt the individual would be a good choice.
- 23 No further emails were exchanged amongst the council members regarding the vacant seat. No consensus was reached over email regarding a candidate to fill the vacancy.

Analysis

- 24 In order to review this complaint, I first considered whether an exchange of emails can be considered a meeting subject to the open meeting rules.
- 25 The open meeting rules apply only to “meetings” of a council, a local board, or a committee of either of them. The definition of “meeting” in s. 238 of the *Municipal Act, 2001* was changed by Bill 68, *Modernizing Ontario’s Municipal Legislation Act, 2017*. As of January 1, 2018, the Act includes the following definition of meeting:
- “meeting” means any regular, special or other meeting of a council, of a local board or of a committee of either of them, where,
- (a) a quorum of members **is present**, and
- (b) members discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the council, local board or committee. [emphasis added]
- 26 Quorum has always been an important factor in determining whether or not a meeting has occurred. The former definition of meeting did not require that members be present in order to form quorum, which meant that a majority of members coming together over email or telephone could form a quorum for the purposes of the open meeting rules.
- 27 The amended definition of meeting specifies that a quorum of members must be **present** in order for a meeting to occur. The words “is present,” when given a plain and ordinary interpretation, mean that someone is physically present in a particular place.
- 28 When the change to the definition of meeting was first proposed in Bill 68, the Ombudsman submitted to the Legislative Assembly’s Standing Committee on Social Policy that the proposed definition of meeting would not capture meetings held over email or telephone, thus insulating them from scrutiny.¹ No amendment to the definition in the bill was made.
- 29 Black’s Law Dictionary defines “present” as:
1. Now existing; at hand <a present right to property>.
 2. Being considered; now under discussion <the present appeal does not deal with that issue>.
 3. In attendance; not elsewhere <all present voted for him>.

¹ Hansard, Standing Committee on Social Policy, April 11, 2017.

- 30 Of these three meanings, the third is the one that is most readily applied to councillors attending a meeting.
- 31 Further, the definition of “quorum” generally implies the physical presence of members of a body. The *Municipal Act* does not define quorum, but Black’s Law Dictionary provides that “quorum” means:
- The minimum number of members (usu. A majority of all the members) who must **be present** for a deliberative assembly to legally transact business. [Emphasis added]
- 32 A plain language reading of the words “is present,” along with the applicable definitions and related definitions in other statutes, suggests that the meaning of the provision does not include meetings where members are not physically present. As the definition of “meeting” now requires a quorum of members to be present, an exchange of email by a majority of members of a body cannot be considered a quorum for the purposes of the definition of “meeting.”
- 33 Accordingly, emails exchanged by members of council for the City of Hamilton regarding the Ward 7 vacant seat in June 2018 did not constitute a meeting and were not subject to the open meeting rules.
- 34 Although emails and other remote forms of communication are no longer subject to the open meeting rules, municipalities should continue to strive for transparency and openness, regardless of the medium used to communicate. The open meeting rules exist to bolster the public’s confidence in the integrity of local government and ensure that municipal power is exercised in a transparent and accountable manner. The spirit of the open meeting rules calls for discussions that advance council business or decision-making to take place in public, and not over email out of the public eye.
- 35 Municipal councils can only act through by-law or resolution passed during a meeting, and the change to the definition of meeting confirms that a quorum of members must be physically present in order for a meeting to take place. Any exchange wherein council votes, reaches consensus, provides direction or input to staff, or discusses or debates a proposal, course of action, or strategy should be reserved for official meetings of a council, local board, or committee. Offline discussions involving a quorum of members, including over email, should be limited to exchanging information or matters unrelated to municipal business.

Meeting on July 9, 2018

- 36 The City of Hamilton’s General Issues Committee met in open session at 9:30 a.m. on July 9, 2018, in council chambers.

- 37** The committee passed a resolution to go in camera to discuss items including “Ward 7 vacant seat.” The resolution to close the meeting indicated that this matter was being discussed in camera pursuant to the exceptions for personal matters about an identifiable individual, litigation or potential litigation, and advice subject to solicitor client privilege.
- 38** While in camera, council received and discussed legal advice from the City Solicitor, including a written report. The closed session minutes indicate that the solicitor gave an overview of the report, provided legal advice, and answered the committee’s questions with respect to the vacant council seat.
- 39** According to the meeting record, and the members of council and city staff we spoke to in the course of this investigation, the committee did not vote with respect to the vacant council seat during the closed session.
- 40** The committee returned to open session and voted that the Ward 7 vacancy matter remain confidential. The Deputy Mayor advised the public that council had written to the Minister of Municipal Affairs regarding the vacant seat, and that there were two staff members working in the Ward 7 office to address any public inquiries.

Analysis

- 41** The exception in s. 239(2)(f) of the Act permits council or a committee to discuss advice subject to solicitor-client privilege in camera. In order for this exception to apply, legal advice must be communicated between a client and their solicitor, and must be intended to remain confidential.²
- 42** During the closed meeting on July 9, the City Solicitor provided the committee with legal advice regarding the Ward 7 vacant seat. The discussion fit within the exception for advice subject to solicitor-client privilege. Accordingly, I need not consider the applicability of the other exceptions cited by the committee.
- 43** The complaint to my Office also alleged that council improperly voted regarding the Ward 7 vacancy during the closed meeting on July 9. The closed session minutes indicate that no vote was taken regarding the vacant seat during the closed meeting. City staff and members of council confirmed that no vote was taken or decision made by council regarding the vacant seat during the July 9 closed meeting.

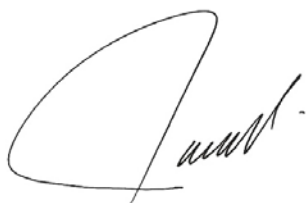
² *Solosky v. The Queen*, [1980] 1 S.C.R. 821.

Opinion

- 44 Members of council for the City of Hamilton did not contravene the open meeting rules in the *Municipal Act, 2001* when they exchanged emails regarding a vacant council seat in June 2018.
- 45 The new definition of “meeting” in the Act requires that a quorum be present, such that an exchange of emails cannot be considered a meeting subject to the open meeting rules. In the interest of openness and transparency, municipal councils should continue to avoid conducting business outside of a formal meeting.
- 46 The City of Hamilton’s General Issues Committee did not contravene the open meeting rules when it discussed advice subject to solicitor-client privilege in camera on July 9, 2018. The committee did not vote regarding the Ward 7 vacancy in camera on July 9; it did not contravene the voting provisions in the *Municipal Act, 2001*.

Report

- 47 Ombudsman staff reviewed a preliminary version of this report with the Mayor, Clerk, and City Solicitor on February 15, 2019, and provided the opportunity to comment. No comments were received.
- 48 My report should be shared with council and made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario