



October 4, 2019

Via email to the Mayor

Council for the City of Hamilton

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

Dear Members of Council for the City of Hamilton,

Re: Report – Office of the Ontario Ombudsman

I have completed my investigation into whether the City of Hamilton's City Manager Recruitment Steering Committee held improper closed meetings on February 9 and February 23, 2019. 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. In accordance with s. 239.2(12) of the *Municipal Act, 2001*, the City should pass a resolution stating how it intends to address this report.

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,

A handwritten signature in black ink, appearing to read 'J. Paul Dubé', written over a large, light blue circular scribble.

J. Paul Dubé
Ombudsman of Ontario

CC: Andrea Holland



Ombudsman Report

Investigation into complaints about
closed meetings held by
the City of Hamilton
on February 9 and 23, 2019

Paul Dubé
Ombudsman of Ontario
October 2019

Complaint

- 1 My Office received 77 complaints about two meetings held by the City of Hamilton's City Manager Recruitment Steering Committee on February 9 and February 23, 2019. During those meetings, the committee met in closed session to interview candidates for the position of City Manager. The meetings were closed under the "personal matters" exception in the *Municipal Act, 2001*¹ (s. 239(2)(b)).
- 2 Although a large number of complaints, most focused on the same few issues: That the meetings took place approximately 60 kilometres outside of Hamilton, at the White Oaks Resort and Spa in the Town of Niagara-on-the-Lake; that members of the public who tried to attend on February 9 were asked to leave the premises by White Oaks staff; and that the start time of that meeting was changed from 9 a.m. to 8:30 a.m. without sufficient notice to the public. Some complainants also told my Office that the committee denied their requests to speak at the February 9 meeting. One raised concerns about being prevented from hearing any declarations of conflict of interest by committee members.

Ombudsman jurisdiction

- 3 Under the *Municipal Act*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 4 As of January 1, 2008, the Act gives Ontarians 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 investigators. 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.
- 6 In addition, the *Ombudsman Act* provides that our Office has the authority to conduct impartial reviews and investigations of other types of complaints about the administrative conduct of Ontario's public sector organizations, including municipalities.

¹ SO 2001, c 25.

- 7 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's governing procedures were followed.
- 8 Our Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of our open meeting cases.² This searchable repository was created to provide easy access to the Ombudsman's decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of all of our Office's investigations that are cited in this report can be found in the digest.

Committee procedures

- 9 Hamilton's procedural by-law (By-law No. 18-270) lists six standing committees. Although the City Manager Recruitment Steering Committee is not included in that list, the acting city Clerk confirmed to us that provisions of the procedural by-law that refer to standing committees also apply to this committee.
- 10 Section 3.3 and section 5.5(2) of the procedural by-law address the location of council and committee meetings:

3.3 Meetings of Council shall be held in the Council Chambers at City Hall in the City of Hamilton or at such other place within the City of Hamilton as Council may from time to time determine.

5.5(2) In addition to regularly scheduled Standing Committee meetings, a special meeting of a Standing Committee may be scheduled when required, at the call of the Chair, at locations and times to permit convenient access for members of the public most affected by such a matter with at least 48 hours notice, delivering notice in accordance with subsection 3.4(3) and 3.4(4).³

² The digest can be found on our website here: <https://www.ombudsman.on.ca/digest/home>

³ Subsections 3.4(3) and 3.4(4) govern the notice to be given to council members about special meetings of council.

- 11 With respect to notice of committee meetings, section 5.5 provides pre-determined meeting dates and times for the listed standing committees. The City Manager Recruitment Steering Committee is not included in the list. Section 5.5(1)(3) states that:

Advance notice of Committee meetings for the public's information may be found by accessing the Committee and Council Meeting Calendar on the City's website at www.hamilton.ca.

- 12 Under the procedural by-law, delegations by members of the public are permitted at committees. Section 5.11 states that interested persons may make a delegation request and the decision on whether or not to allow them to speak at the meeting is made by the appropriate committee.

Investigative process

- 13 On March 6, 2019, I advised the city that we would investigate the concerns raised by complainants about the meetings of February 9 and 23.
- 14 Members of my Office's Open Meeting Team reviewed relevant portions of the city's by-laws and policies, and the Act. We also reviewed the records from the open and closed sessions of the committee meetings on February 9 and February 23. The committee did not make audio or video recordings of these meetings.
- 15 We interviewed members of the committee, members of council who attended the meetings, the then-acting city Clerk, members of a recruitment firm retained by the city, members of the public, and staff members at White Oaks.
- 16 We also reviewed a cell phone video that captured an interaction between members of the public and White Oaks staff on February 9, 2019.
- 17 My Office received full co-operation in this matter.

Background

The City Manager Recruitment Steering Committee

- 18 In June 2018, Hamilton's then City Manager announced that he was leaving his position. The City Manager is responsible for the general control and management of the government administration and affairs of the city.
- 19 In September 2018, council established the City Manager Recruitment Steering Committee. Its mandate was to recommend the appointment of a new manager by assisting with the recruitment process and interviewing candidates after the October 2018 municipal election, once the newly elected council began its term. The committee's membership was to be comprised of the Mayor and the chairs of the city's standing committees. Staff recommended that a recruitment firm be engaged to assist the city with recruitment by conducting a nationwide search for candidates for the position.
- 20 Once the new term of council began and the chairs of the standing committees were selected, the City Manager Recruitment Steering Committee consisted of Mayor Fred Eisenberger and Councillors Chad Collins, Sam Merulla, Maria Pearson, and Lloyd Ferguson.
- 21 According to the acting city Clerk, this committee was a committee of council, given that all of its members are also members of council, and it reports directly to council. As such, it was subject to the open meeting requirements under the provisions of the *Municipal Act, 2001* and the city's procedural by-law.
- 22 In March 2019, a new City Manager was chosen and announced by the city. The City Manager Recruitment Committee is no longer active, but the concerns raised by these complaints and addressed by my recommendations provide an opportunity for Hamilton and other municipalities to ensure transparency in their practices and procedures in similar situations.

Events leading up to the committee's first meeting

- 23 Staff scheduled three meetings of the committee for February 1, February 9, and February 23, 2019. A recruitment firm was also retained by the city, which initiated the recruitment process and advertised for the City Manager

position. By February 1, 2019, the firm had prepared a short list of candidates.

- 24 On December 16, 2018, Councillor Nrinder Nann wrote an opinion article in a local newspaper, calling for more diversity in the committee's membership.⁴ Councillor Nann noted that there was only one woman on the committee and no people of colour, and that all of the members had served on council prior to the 2018 election, despite one-third of the council being newly elected.
- 25 The agenda for council's meeting on January 23, 2019 included a motion by Councillor Maureen Wilson, urging that a new steering committee be established to recruit the City Manager, and that equity, diversity, and inclusiveness be incorporated into the recruitment process. Consideration of the motion was postponed during this meeting.

Committee meeting on February 1, 2019

- 26 The committee held its first public meeting on February 1, 2019. A recruitment specialist from the recruitment firm was also in attendance.
- 27 We were told that during this meeting, the committee decided to adjust the start time of the upcoming meeting on February 9 from 9 a.m. to 8:30 a.m. in order to accommodate members' schedules.
- 28 The committee also heard from the recruitment specialist about the interview process. We were told that the specialist recommended that the committee hold the interviews in a location separate from the city administration building, in order to maintain the confidentiality of the process and the privacy of candidates. According to the specialist, it is a standard practice to hold interviews for such a position (or a similar position) outside of a municipality's administration building. She told us she recommended White Oaks as a location for the committee's interviews because its layout and busy atmosphere offered privacy for arriving and departing candidates.
- 29 Based on the specialist's advice at the February 1 meeting, the committee decided to hold its candidate interviews during the February 9 and 23 meetings at White Oaks.

⁴ <https://www.thespec.com/opinion-story/9084305-new-city-manager-hiring-demands-diversity/>

- 30 The recruitment specialist told my Office that she had concerns about the privacy and confidentiality of the February 9 and 23 meetings once she became aware of a post on Twitter urging residents to request to delegate at the meeting and offering free transportation by bus. The tweet included a graphic with the following text:

Hamilton City Council meets in Niagara-on-the-Lake?

Sounds confusing? We think so too. On February 9th, the City of Hamilton will be having a meeting to discuss who should be our new City Manager. Where? In Niagara-on-the-Lake, 66 kilometres from Hamilton City Hall itself.

If you agree that this meeting lacks in transparency and is undemocratic, request to delegate and have your voice heard at the meeting!

How to request to delegate? Email clerk@hamilton.ca and cc the Mayor as well as your local Ward Councillors.

How to get there?

Meet us at the Burlington GO station at 7:45 a.m. on Saturday, February 9th (bus will depart at 7:54 a.m.). Bus fare can be covered for all those attending.

- 31 The recruitment specialist told my Office that the confidentiality and privacy of candidates during a recruitment process is paramount, and it was her duty to ensure that the candidates' privacy would be maintained if protesters showed up at the meetings.
- 32 Some of the committee members told us they recalled the acting city Clerk saying that holding the meetings outside of the city administration building was permissible and that the open meeting rules would apply to the meetings.
- 33 The acting Clerk told my Office that after the February 1 meeting, she updated the February 9 meeting start time on the members' electronic calendars, changing it to 8:30 a.m. However, she did not update the public meeting notice on the city's website. This was an oversight, she said. The public meeting notice said the meeting at White Oaks on February 9 would start at 9 a.m. It was not updated by city staff until 7 a.m. on February 7.
- 34 We were told by complainants that the February 9 meeting start time was not updated on all sections of the city's website. For example, the city's

online meeting calendar and committees web page indicated that the meeting would begin at 9 a.m. On February 13, my Office confirmed that the committee's web page still listed the start time of the meeting as 9 a.m. The acting Clerk told us she was unaware that these sections of the city's website were not updated.

General Issues Committee meeting on February 6

- 35 On February 6, during a meeting of the General Issues Committee, Councillor Nann, seconded by Councillor Wilson, introduced a motion to postpone the February 9 and 23 meetings of the City Manager Recruitment Steering Committee. Her motion noted in part that the committee's membership was made up exclusively of incumbent council members and "ought to more accurately reflect both the composition of this term of Council and the demographic makeup of the city's residents." Councillor Nann also called for public delegations on the composition of the committee before any further meetings took place.
- 36 Several members of the public delegated to the General Issues Committee on Councillor Nann's motion, but it was ultimately defeated by a vote of 11 to 3.

Arranging the meetings at White Oaks

- 37 The acting Clerk, the recruitment specialist and the Director of Sales for White Oaks told my Office that the February 9 and February 23 meetings were arranged by the recruitment firm; the city did not participate in organizing or co-ordinating them with White Oaks. However, the acting Clerk told my Office that she spoke to the recruitment specialist over the phone multiple times to facilitate the details for the meetings.
- 38 During one of these conversations, the acting Clerk advised the recruitment specialist that the public would be allowed to attend the open session portions of the meetings. The recruitment specialist also recalled this conversation. The recruitment specialist told us she informed White Oaks staff that members of the public might attend the meetings.
- 39 The Director of Sales for White Oaks told my Office that she did not receive instructions from the recruitment firm to allow members of the public to attend the meeting. In fact, she said she was instructed by another employee of the recruitment firm that the February 9 and 23 meetings were

private, not public, and to direct any members of the public who tried to attend the meetings to leave. She said that prior to the meetings, the recruitment firm raised concerns that people might protest the meetings. In light of these concerns, the firm instructed White Oaks to increase security. The firm told her the meetings were not open to the public and that only committee members and candidates for the City Manager position were permitted to attend (the job candidates would be sent an email telling them where to go at White Oaks). She said the firm's instructions were that any members of the public who showed up to attend the meetings should be directed off the White Oaks property.

The February 9 meeting

- 40 Four members of the public advised my Office that they took public transit to White Oaks to attend the committee's meeting on February 9, 2019. They said they arrived at approximately 9:15 a.m., after the meeting had already started.
- 41 The four were met by a staff person at White Oaks. This interaction was captured by a cell phone video filmed by one of the members of the public that lasts 3 minutes and 23 seconds. It shows the four people waiting in the foyer of White Oaks. The staff person tells them that they cannot attend the meeting because it is a private meeting. A second White Oaks employee arrives and asks whether the four individuals had received an email, explaining that White Oaks staff were told to admit only those who were sent an email (i.e., the candidates for City Manager). One member of the public tells the White Oaks staff that the meeting should be open to the public. The four are told that unless they are staying at White Oaks as guests, they must leave – which they do.
- 42 Ombudsman staff spoke to a journalist who also tried to attend the meeting. The journalist told us he arrived at the meeting room in White Oaks at 8:35 a.m. and was surprised to find the door was closed, as he believed the meeting was scheduled to begin at 9 a.m. At that point, a White Oaks employee approached the journalist and asked him if he had received an email; when he said he had not, the employee asked him to leave and escorted him from the premises. The recruitment firm specialist recalled seeing the journalist in the hallway while the meeting was in closed session at approximately 8:45 a.m.
- 43 The open session minutes for the committee meeting indicate that it began at 8:30 a.m. The five members of the committee – Mayor Eisenberg and

Councillors Collins, Merulla, Pearson and Ferguson – were present, as well as the acting Clerk and the recruitment specialist. Two additional council members, Councillors John-Paul Danko and Maureen Wilson, were also present.

44 In open session, the committee approved the agenda for the meeting and the minutes of the previous meeting. No declarations of conflict of interest were recorded. The acting Clerk told us the open session lasted approximately three minutes. We were told that the door to the meeting room was kept open during this time, and the hallway was checked for would-be spectators. No members of the public were present.

45 The committee then passed a resolution to close the meeting, as follows:

That Committee move into Closed Session respecting Item 4.2, pursuant to Section 8.1, Sub-section (b) of the City's Procedural By-law 18-270, and Section 239(2), Sub-section (b) of the *Ontario Municipal Act, 2001*, as amended, as the subject matter pertains to personal matters about an identifiable individual, including City employees.

46 The closed session minutes indicate that the closed session began at 8:33 a.m. and lasted until 4:36 p.m.

47 We were told by those present that the committee met with candidates and conducted interviews during the closed session. Once all of the interviews were concluded, the committee reviewed the candidates and discussed the interviews, also behind closed doors.

48 Most of the committee members told us they were unaware at the time that members of the public had attempted to attend the open session. They learned this later via social media.

49 The recruitment specialist told my Office that it wasn't until the end of the day that she learned about the four members of the public who had tried to attend the meeting that morning.

50 The acting Clerk recalled that late in the morning, when the committee was in closed session, she was alerted by city staff about posts on social media stating that the public had been barred from the meeting. She informed the Mayor that members of the public might be at White Oaks, waiting to attend the meeting. During the committee's lunch break, Mayor Eisenberg went to the front foyer to see if anyone was waiting, but found no one. He also asked the front desk if members of the public had inquired about the

meeting, but was told by White Oaks staff that they were unaware of anyone waiting.

- 51 The committee reported back in open session with a one-line summary of the closed session: “Staff were provided with direction in Closed Session.”
- 52 The committee adjourned the meeting at 4:41 p.m.

After the February 9 meeting

- 53 The member of the public who took the cell phone video capturing the interaction between the four members of the public and White Oaks staff uploaded it to social media. Some council members also made statements on social media and to local news media in response to the controversy surrounding the meeting’s location and the fact that members of the public had been excluded from White Oaks.
- 54 We were told that the recruitment firm contacted the Director of Sales for White Oaks after the February 9 meeting with updated instructions for allowing public attendance at the February 23 meeting. Those instructions clarified that people should be allowed to be present at the open sessions at the beginning and end of the meeting.
- 55 On February 12, the acting Clerk issued a public report, updating council on the recruitment process. The report addressed the February 9 meeting and provided explanations for holding the meeting at White Oaks and changing the start time. The report also notes that White Oaks staff had been instructed to allow members of the public to attend the open portions of the meeting.
- 56 The report states:

In light of some public confusion this past weekend respecting the City Manager Recruitment Steering Committee meeting held Saturday February 9th at White Oaks Conference Centre, Clerks would like to provide clarity with respect to the process for these meetings.
[...]

With respect to public attendance during these meetings, the public is welcome to be present during the open session portion of the meetings. Due to the nature of these meetings, open session

typically only lasts a couple of minutes so that the candidate interviews can begin and the schedule set out for the candidates can be adhered.

...

The location for the City Manager Recruitment Steering Committee meetings was chosen by the executive search firm [...] because it afforded the candidates their privacy, is situated right off a main area highway, is well-equipped to host professional meetings of this nature and profile, and meets the requirement under the *Municipal Act* of hosting the meeting in an adjacent municipality, meaning it is a municipality nearby.

The start time of the Saturday, February 9th meeting was initially set for 9:00 a.m. The meeting start time was later amended to 8:30 a.m. to accommodate the schedules of Steering Committee members and was updated to the City of Hamilton's website the morning of Thursday, February 7th.

The next City Manager Recruitment Steering Committee meeting, when there will be further candidate interviews, will take place Saturday February 23rd at White Oaks Conference Centre at 9:00 a.m. As was the case with this past Saturday's meeting, the meeting will be open in public session, and will move into closed session so that the schedule set out for the candidates can be adhered. At the conclusion of the interviews, the Committee will put forward a motion to move out of camera and wait the prescribed five (5) minutes to allow any media or members of the public to return, after which the Committee will put forward a motion to adjourn.

[...]

Staff at White Oaks Conference Centre were and have been advised of the above process and have been instructed to allow public access to the meeting just prior to, and at, 9:00 a.m. with the understanding that, as was the case this past Saturday, the meeting will very likely be in closed session very shortly after 9:00 a.m., at which time the meeting will be closed to the public [...].

The motion to move out of camera will be at the discretion of the Committee once they have deemed the in camera portion of the meeting concluded.

The February 23 meeting

- 57 The committee met for a second time at White Oaks on February 23, 2019 at 9 a.m. All committee members were present, as well as Councillors Danko and Wilson, the recruitment specialist and the acting city Clerk.
- 58 We were told that members of the public attended the open session portions of the meeting and waited in the White Oaks lounge before the meeting began and during the closed session.
- 59 The open session minutes indicate that the meeting began at 9 a.m. and that the committee approved the meeting agenda and the minutes of the previous meeting. No declarations of conflict of interest were recorded. The committee moved in camera at 9:02 a.m.
- 60 The resolution that was passed to close the meeting was as follows:
- That Committee move into Closed Session respecting Item 4.2, pursuant to Section 8.1, Sub-section (b) of the City's Procedural By-law 18-270, and Section 239(2), Sub-section (b) of the *Ontario Municipal Act, 2001*, as amended, as the subject matter pertains to personal matters about an identifiable individual, including City employees.
- 61 The closed session minutes indicate that it lasted until 4:52 p.m., and that the committee conducted interviews for the position of City Manager during this time. According to those present, the committee conducted interviews and then discussed the candidates.
- 62 After the closed session, members of the public were permitted back into the meeting. The committee reported back in open session with a one-line summary of the closed session: "Staff were provided with direction in Closed Session."
- 63 The committee adjourned the meeting at 4:57 p.m.

Analysis

Relevant provisions from the *Municipal Act, 2001*

- 64 Before moving into closed session on February 9 and 23, the committee cited the “personal matters” exception to the open meeting rules, found in section 239(2)(b) of the Act:

A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

(b) personal matters about an identifiable individual, including municipal or local board employees.

- 65 A new definition of “meeting” came into force on January 1, 2018, as part of the *Modernizing of Ontario’s Municipal Legislation Act, 2017*. It states that:

“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.

- 66 With regard to the location of meetings, section 236 of the Act states:

The council of a municipality shall hold its meetings and keep its public offices within the municipality or an adjacent municipality at a place set out in the municipality’s procedure by-law; however, in the case of an emergency, it may hold its meetings and keep its public offices at any convenient location within or outside the municipality.

Applicability of the open meeting rules

- 67 The committee chose to conduct interviews during its meetings on February 9 and 23. The open meeting requirements in the *Municipal Act* apply to these meetings. However, those rules would not have prevented the committee from holding the candidate interviews in private, outside of a formal meeting.

- 68 The February 9 and 23 meetings occurred in phases. Each meeting began with a short open session. After passing a resolution to close the meeting, the committee conducted candidate interviews. After all of the interviews were completed, the committee remained in closed session to discuss the qualifications of the individual candidates, and then provided direction to staff as a result of those discussions. The committee returned to open session to adjourn the meeting.
- 69 In my report on an investigation we conducted of council “information sessions in the Village of Casselman, I considered the new definition of “meeting” and determined that the word must be understood not only in its ordinary sense, but also according to the way it is used and in light of the objectives of the open meeting legislation. With respect to “materially advances,” the test involves considering the extent to which the discussions at issue move the business of the municipality forward, based on factual indicators. As that report states, this refers in particular to:
- discussions, debates or decisions that are intended to lead to specific outcomes or to persuade decision-makers one way or another are likely to “materially advance” the business or decision-making. Mere receipt or exchange of information is unlikely to “materially advance” business or decision-making, as long as there is no attempt to discuss or debate that information as it relates to a specific matter that is or will be before a council, committee or local board.⁵ [emphasis added]
- 70 Actions like voting, reaching an agreement, providing direction or input to staff, and discussing or debating a proposal, course of action or strategy are factual indicators that business or decision-making has materially advanced. On the other hand, merely receiving information does not materially advance business or decision-making.
- 71 In the Village of Casselman report, I found that the staff information sessions did not meet the definition of “meeting,” even though they were attended by a quorum of council, because members of council were not materially advancing business or decision-making. Rather, they were merely receiving information as observers.
- 72 In the present case, the City of Hamilton treated the February 9 and 23 committee meetings as “meetings” according to the Act: Notice of the meetings was provided, agendas were prepared, minutes were taken by the

⁵ Casselman (Village of) (Re), 2018 ONOMBUD 11 (CanLII), at para 31, <<http://canlii.ca/t/hvmtk>>.

acting Clerk, and members were informed that the meetings would be subject to the open meeting rules.

- 73** It is clear that some portions of the meetings did materially advance the business of the committee. For example, the committee approved minutes of previous meetings and provided direction to staff with respect to the recruitment process. In addition, the committee discussed the candidate interviews while in closed session. These are all factual indicators that the business or decision-making of the committee had materially advanced.
- 74** In considering the interviews, which formed the majority of both meetings, I find that the definition of “meeting” was not met. While conducting the interviews, the committee members did not discuss or otherwise deal with a matter in a way that materially advanced the business or decision-making of the committee. The dialogue between the committee and the individual candidates did not materially advance the committee’s business. The open meeting requirements in the Act therefore do not apply to the interview portions of the meetings. The committee could have chosen to conduct the candidate interviews (without any subsequent discussion about the candidates) outside of a formal meeting.
- 75** However, the information that the committee received during the interviews formed the basis of its subsequent discussions about the individual candidates. These discussions did materially advance the business or decision-making of the committee. Therefore, those portions of the closed sessions are subject to the open meeting rules.
- 76** Given that the committee combined both the interviews and the discussion of qualifications on February 9 and 23, the open meeting requirements in the *Municipal Act* applied to both meetings.

Applicability of the “personal matters” exception

- 77** The committee cited the personal matters exception when it moved into closed session on February 9 and February 23.
- 78** This exception applies to discussions that reveal “personal information about an identifiable individual.” Generally, information that pertains to an individual in their professional capacity does not fit within the personal

matters exception.⁶ However, discussions regarding the hiring of a specific individual, including their employment history and past job performance, fit within the exception.⁷

- 79** In a report on an investigation in the Township of Russell, our Office found that an in-camera discussion about a candidate for the position of deputy clerk fit within the personal matters exception.⁸ During the discussion, council identified the candidate by name and covered the candidate's employment history, job performance and salary information. This qualified as personal information.
- 80** A similar discussion by council for the Town of Amherstburg was also found to fit within the personal matters exception.⁹ In that case, the discussion involved the review of the employment history and qualifications of an individual who was a candidate for town treasurer. Councillors expressed opinions about the individual's suitability for the position.
- 81** In the present case, during the February 9 and February 23 closed sessions the committee conducted interviews and discussed the suitability of individual candidates for Hamilton's City Manager position. This type of discussion includes personal information about the candidates and therefore fits within the "personal matters" exception.

Location of the meetings

- 82** Almost all of the complaints we received noted that the meetings occurred outside of the City of Hamilton. White Oaks is located approximately 60 kilometres outside the city, in the Town of Niagara-on-the-Lake which is separated from the city by the Town of Grimsby, the Town of Lincoln, and the City of St. Catharines. We were told by complainants that White Oaks has limited accessibility by public transit and it would have been more convenient for the public to have the meetings closer to or within Hamilton's borders.
- 83** In her report to council, the acting Clerk indicated that the meeting location was chosen for several reasons, including maintaining the privacy of the

⁶ Letter to the Township of Russell, August 8, 2014, online < <https://www.ombudsman.on.ca/Files/sitemedia/Documents/Russell-Twp-Closing-Letter-FINAL-EN.pdf>>.

⁷ Letter to the City of Elliot Lake, September 8, 2014, online < <https://www.ombudsman.on.ca/Files/sitemedia/Documents/Elliot-Lake-Sept-8-2014.pdf>>.

⁸ Russell (Township of) (Re), 2015 ONOMBUD 29 (CanLII), <http://canlii.ca/t/gtp73>.

⁹ Amherstburg (Town of) (Re), 2015 ONOMBUD 13 (CanLII), <http://canlii.ca/t/gtp5z>.

candidates, ease of accessibility and the nature and profile of the venue. Members of the committee and the recruitment specialist gave us similar reasons for holding the meeting outside of the city administration buildings.

- 84 The acting Clerk also states in her report that White Oaks met the requirements of section 236 of the Act to host the meeting in “an adjacent municipality,” which she says means “a municipality nearby.”
- 85 Unlike other open meeting provisions in the *Municipal Act*, which expressly apply to meetings of councils, local boards, or committees of either of them, section 236 does not refer to local boards or committees of council. When section 236 is given a plain and ordinary interpretation, it does not apply to meetings of a committee.
- 86 In a 2014 report on a closed meeting investigation in the City of Burlington,¹⁰ Local Authority Services considered the application of section 236 to a meeting of council outside of city hall. The closed meeting investigator found that section 236 contains requirements regarding where meetings of council can be held.
- 87 Unlike councils, some types of committees may require flexibility in their meeting locations for a variety of reasons. For example, it is not unusual for more than one municipality to form joint committees to address shared issues. It would not be possible for committees that are made up of members from several municipalities to satisfy the requirements of section 236 when holding meetings.
- 88 In this case, the meetings at issue are meetings of a committee. Therefore, section 236 does not apply to the February 9 or February 23 meetings.
- 89 Section 5.5(2) of the city’s procedural by-law states that special meetings of standing committees may be called by the chair “at locations and times to permit convenient access for members of the public most affected by such a matter.” As noted in Paragraph 8, this section applies to all committees, not just standing committees.
- 90 However, Section 5.5(2) of the procedural by-law does not apply to the February 9 and 23 meetings. We were told by the city that these should be considered regularly scheduled meetings, not special meetings. There is no indication that they were special meetings called by the chair of the committee.

¹⁰ http://www.agavel.com/?page_id=28

- 91 It is evident that the recruitment process was a topic of intense public interest. The public was deeply engaged in the city's selection of a qualified City Manager and understandably participated in the process by attending public meetings and making delegations. However, the *Municipal Act* allows parts of the recruitment process to take place outside of the public spotlight. Interviews and the committee's review and discussion of qualifications involve inherently personal information about the candidates. The general public interest in this part of the recruitment process is minimal. Most hiring interviews take place in private for good reason – potential applicants would be much less likely to apply to a job where their privacy could not be protected. In order to avoid deterring prospective applicants and to attract the best candidates, the city has a practical and legitimate interest in maintaining confidentiality during the recruitment process.
- 92 In this case, the committee and the hiring process were already under public scrutiny. In light of this and in order to maintain the integrity of the recruitment process, the committee held the interviews at a suitable location outside of the city. It is unrealistic for members of the public to have access to the candidate interviews and committee's discussions involving candidates' qualifications.
- 93 The committee did not violate the *Municipal Act* or the city's procedural by-law by holding the February 9 and 23 meetings at White Oaks.

Notice of the February 9 meeting

- 94 Many of the complaints we received noted that the committee failed to provide adequate notice that the start time of the February 9 meeting had changed from 9 a.m. to 8:30 a.m.
- 95 Under the *Municipal Act*, every municipality and local board must pass a procedural by-law which governs the calling, place and proceedings of meetings.¹¹ The Act also requires municipalities to include a public notice requirement in their procedural by-laws, but does not specify what the public notice requirement should be.
- 96 The city's procedural by-law provides a regular meeting schedule for the six standing committees, but not other committees, including the City Manager Recruitment Steering Committee. According to the city, the committee's regular meetings were scheduled by the Clerk with the committee's approval.

¹¹ *Municipal Act, 2001*, RSO 1990 s 238(2)

- 97** Section 5.5(2) of the city's procedural by-law states that special meetings of committees require at least 48 hours' notice. Section 5.5(3) directs the public to the city's online meeting calendar for advance notice of committee meetings. The procedural by-law is otherwise silent on the minimum notice required prior to a regular meeting of a committee. Section 5.5(2) does not apply, as neither of the meetings in question was a special meeting of the committee.
- 98** The city should update its procedural by-law to clarify how meetings of committees, other than the six enumerated standing committees, are scheduled. The procedural by-law should also be updated to include notice requirements for regular committee meetings.
- 99** The public notice of the February 9 meeting posted on the city's website initially gave the start time as 9 a.m. According to the acting Clerk, the committee decided on February 1 to change this. While the new start time was added to the committee members' calendars, the acting Clerk forgot to adjust it on the public notice. The public notice was eventually changed at 7:30 a.m., February 7.
- 100** Complainants also noted that the new start time was not changed on every section of the city's website. Our Office confirmed that on February 13, the committee's web page still listed the start time of the February 9 meeting as 9 a.m. The acting Clerk told us she was unaware that these parts of the website were not updated.
- 101** The public notice for the February 9 meeting was updated 49 hours before meeting was scheduled. Although the technical requirements of the procedural by-law were met, I am concerned that the city did not update the meeting time on all areas of its website. In future, the city should take care to ensure that any changes to notice of a meeting are reflected in all relevant areas of the website.

Public attendance at the February 9 meeting

- 102** We also received complaints that White Oaks staff denied members of the public and a journalist entrance to the open portions of the February 9 committee meeting.
- 103** My investigation determined that White Oaks staff did indeed prevent members of the public and a journalist from attending the open portions of

the February 9 meeting. This was the result of a breakdown in communication between the city, the recruitment firm, and White Oaks staff.

- 104** Prior to the meeting, the city, through the acting Clerk, conveyed to the recruitment firm that the public was entitled to attend the open portions of the meeting. The recruitment firm, concerned about protest activity and protecting candidate confidentiality during the interviews, unilaterally instructed White Oaks staff that the meetings were private and that any members of the public who showed up should be directed off of the property. These instructions were followed by White Oaks staff on February 9. The recruitment firm failed to convey to White Oaks staff what they had been told by the city – that portions of the meeting must be open to the public. The city had no direct communication with White Oaks staff.
- 105** The city relied on the recruitment firm to manage access to the meeting. The city attempted to convey appropriate instructions for opening the meeting to the public, but failed to ensure that the instructions were passed on to the White Oaks staff or followed. Ultimately, it is the city's responsibility to ensure that the meetings of council and its committees comply with the open meeting rules and legislation.
- 106** In a 2016 meeting in the City of London investigated by my Office,¹² members of the public were asked to leave a council meeting due to a security disruption. The doors to the city hall were locked while the public waited outside. Once the disruption was resolved and the meeting resumed, security staff were instructed to unlock the doors, but they failed to carry out the instructions and the public remained locked out of the building. My Office found that although the city did not intentionally prohibit members of the public from attending the meeting, it was nonetheless in violation of the open meeting rules while the doors remained locked. It is the city's obligation to ensure that the public can freely observe all open meetings of council and committees.
- 107** In fact, in between the two meetings discussed in this report, council for the City of Hamilton held a meeting on February 13, 2019 that went into the wee hours of February 14, and a member of the public found the doors locked at 1:30 a.m. This was during a closed session, and city staff quickly

¹²

<https://www.canlii.org/en/on/onombud/doc/2016/2016onombud4/2016onombud4.html?searchUrl=Hash=AAAAAQAlb21idWRzbWFuIG9udGFyaW8gY2I0eSBvZiBsb25kb24gMjAxNgAAAAAB&resultIndex=9>

unlocked the doors to allow the person in (the open session resumed at about 2:50 a.m.) As I noted in my July 4, 2019 letter to the city, outlining my review of this and an incident involving a committee meeting in April, the city has recognized the importance of making meetings accessible to the public, and put in place a formal written procedure to ensure the doors are unlocked for all meetings, at all times of day.¹³

- 108** In this case, the City of Hamilton relied on the recruitment firm to arrange every aspect of the meetings at White Oaks. Even though the city had no direct communication with White Oaks staff, it is not absolved of its obligation to ensure the meeting met the open meeting requirements. In the end, the public was denied access to a meeting that the city was required by law to keep open. Municipalities must be aware that by using a third party to control access to meetings, they run the risk of being held responsible if the third party's actions result in the meeting being improperly closed to the public.
- 109** I acknowledge that the city took corrective action after the February 9 meeting to ensure that the next meeting on February 23 was open to the public. The acting Clerk's report made it clear that members of the public would be allowed to attend the open portions of the meeting, and White Oaks provided access to a lounge area for the public to wait in while the meeting was closed.

Delegations

- 110** Two complainants told my Office that they asked to make a delegation during the February 9 committee meeting, but were refused by the acting Clerk. They raised concerns that these refusals violated the city's delegation policy.
- 111** In her response to their requests, the acting Clerk advised them that the committee would not hear delegations at the February 9 meeting. She offered them the options of requesting a delegation at an upcoming General Issues Committee meeting or providing their comments in writing for inclusion at the February 13 council meeting.
- 112** Section 5.11 of the city's procedural by-law contains the procedures for requesting delegations before standing committees. It states that interested

¹³ <https://www.ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Municipal-Meetings/Ontario-Ombudsman-review-Hamilton-July-2019.pdf>

persons may make a delegation request and the appropriate committee decides whether or not to grant it.

- 113** In her report to council, the acting Clerk noted that the City Manager Recruitment Steering Committee did not receive delegations during its meetings, but members of the public could request delegations before the General Issues Committee.
- 114** The city's decision to refuse the delegation requests does not violate the delegation policy contained in the procedural by-law. Under that policy, the committee has the discretion to refuse to hear delegations. Further, it is not unusual for a committee tasked with recruitment to refuse public delegations. Although the complainants might have preferred to make delegations directly to the committee, the city provided them with two alternatives, delegating before the General Issues Committee or providing their comments in writing to council.

Declarations of conflict of interest

- 115** One complaint to my Office raised concerns related to the committee's declarations of conflict of interest. Specifically, the complaint alleged that the February 9 and 23 meetings were arranged at White Oaks in order to prevent the public from observing any declarations of conflict of interest by committee members.
- 116** Under the *Municipal Conflict of Interest Act*¹⁴, council members must disclose whether they have a pecuniary interest in any matter under consideration at a meeting. These disclosures must be recorded in the minutes of the meeting. New requirements in the *Municipal Conflict of Interest Act* also require that members file a written statement of any disclosures with the clerk. The effect of a disclosure is that, with limited exceptions, the member cannot take part in any discussion or vote on any matter in which he or she has a conflict of interest.
- 117** The open session minutes of both the February 9 and February 23 meetings do not record any declarations of conflict of interest by committee members. The available evidence therefore does not support this complaint.

¹⁴ R.S.O. 1990, c. M.50.

Opinion

- 118 The City Manager Recruitment Steering Committee did not violate the *Municipal Act, 2001* on February 9 and 23, 2019 when it met in closed session under the personal matters exception. However, members of the public were prevented from attending the open portions of the February 9 meeting. Based on this evidence, I find the February 9 meeting was illegally closed to the public.
- 119 I recognize that the city took steps to correct its failure to adhere to the open meeting rules and ensured that the subsequent committee meeting on February 23 remained open to the public.
- 120 The location of the meetings at White Oaks Resort and Spa was permissible under the *Municipal Act, 2001* and did not violate the city's procedural by-law.
- 121 The change in the start time of the February 9 meeting did not violate the city's procedural by-law. However, the city failed to ensure that the meeting start time was updated on the city's online meeting calendar. In future, the city should take steps to ensure that meeting times and locations are updated on every relevant section of the city's website. The city should also clarify its procedural by-law with respect to notice for all committee meetings.
- 122 The committee did not violate the city's delegation policy by refusing to permit members of the public to delegate during the February 9, 2019 meeting.

Recommendations

- 123 I make the following recommendations to assist council in fulfilling its obligations under the Act and enhancing the transparency of its meetings:

Recommendation 1

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

Recommendation 2

The City of Hamilton should ensure that the public has access to and can observe all open meetings of council and committees, including those that occur outside of their usual locations.

Recommendation 3

The City of Hamilton should update its procedural by-law to provide notice for all committee meetings, in addition to those of its standing committees.

Report

- 124** Council for the City of Hamilton was given the opportunity to review a preliminary version of this report and provide comments to our Office. All comments received were considered in the preparation of this final report.
- 125** This report will be published on my Office's website, and should be made public by the City of Hamilton as well. In accordance with s.239.2(12) of the *Municipal Act, 2001*, council should pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario