



Nov. 5, 2020

Council for the City of Hamilton
Hamilton City Hall
2nd floor – 71 Main Street West
Hamilton, Ontario
L8P 4Y5

Sent by email to mayor@hamilton.ca

Dear Council:

Re: Closed meeting complaint

My Office received a complaint about a meeting held by the General Issues Committee (the “committee”) for the City of Hamilton (the “city”) on August 10, 2020, alleging that it violated the *Municipal Act’s* (the “Act”) open meeting requirements. The complainant alleged that the committee’s *in camera* discussion about potential events that may take place in the city in 2022 or 2023 did not fit within the Act’s closed meeting exceptions. The complainant also alleged that the committee failed to adequately describe the matter to be discussed in the resolution to proceed into closed session.

I am writing to advise that my review has determined that the meeting in question did not violate the Act’s open meeting rules, and that the committee was entitled to go into closed session on August 10, 2020 to discuss plans to negotiate for events that may take place within the city in the future.

Ombudsman jurisdiction

Under the *Municipal Act, 2001*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions. 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. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own. The Ombudsman is the closed meeting investigator for the City of Hamilton. In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's governing procedures have been observed.

To assist municipal councils, staff, and citizens, we have developed an online digest of open meeting decisions that contains summaries of the Ombudsman's open meeting cases. This searchable repository was created to provide easy access to the Ombudsman's past 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 a matter should or may be discussed in closed session, as well as issues related to open meeting procedure. Summaries of many of the Ombudsman's previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Review

My Office reviewed the relevant meeting agenda, open and closed session minutes and other closed session materials provided by the city. We also spoke with the Clerk and Legislative Coordinator.

Application of the "negotiations" exception

The complaint we received alleged that the committee's discussion about events that may take place in the city in 2022 or 2023 did not fit within the cited closed meeting exception for negotiations. The complainant told our Office that the city had finalized its negotiations and entered into contracts for the events and, therefore, the discussion did not fit within the negotiations exception.

Section 239(2)(k) of the Act allows for a meeting to be closed if the subject matter being considered is about plans or instructions that are intended to be applied to current or future negotiations conducted by or on behalf of the municipality. The purpose of this exception is to allow a municipality to protect information that could undermine its bargaining position or give another party an unfair advantage over the municipality during an ongoing negotiation. In order for the exception to apply, the municipality must show that:

1. The *in camera* discussion was about positions, plans, procedures, criteria, or instructions;
2. The positions, plans, procedures, criteria, or instructions are intended to be applied to negotiations;
3. The negotiations are being carried on currently, or will be carried on in future; and
4. The negotiations are being conducted by or on behalf of the municipality.¹

The open session minutes indicate that while *in camera* the committee received a confidential staff report entitled “Potential for Major Events in 2022 and 2023”. Our review of the closed meeting minutes indicated that the committee’s *in camera* discussion focused on the city’s plans to negotiate for the major events. The Clerk and Legislative Coordinator confirmed that the negotiations between the city and other parties is ongoing, and the committee discussed these ongoing negotiations. After returning to open session, the committee reported out that it had provided direction to staff with respect to the negotiations.

My review indicates that on August 10, 2020, the committee was discussing plans regarding ongoing negotiations for events that might take place in the city in the future. Accordingly, this discussion was permissible under section 239(2)(k) of the Act.

Resolution to proceed into closed session

In addition, the complainant alleged that the committee’s resolution to proceed into closed session did not provide the public with sufficient information regarding the discussion about potential events.

The open session minutes of the August 10 meeting state:

That Committee move into Closed Session respecting Items 13.2 to 13.4, pursuant to ... Section 239(2), Sub-sections (e), (f), and (k) of the *Ontario Municipal Act, 2001*, as amended, as the subject matters pertain to litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board; advice that is subject to solicitor-client privilege, including communications necessary for that purpose; and, a position, plan,

¹ [St. Catharines \(City of\) \(Re\)](#), 2019 ONOMBUD 1, online.

procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.

Item 13.2 of the meeting minutes is titled “Potential for Major Events in 2022 and 2023 (PED20071) (City Wide)”. The major events in question are not named or identified in further detail.

Section 239(4) of the Act provides that before moving into closed session, a municipality must state by resolution in open session that a closed meeting will be held, and state the general nature of the matter to be considered at the closed meeting. In *Farber v. Kingston (City)*², the Ontario Court of Appeal determined that the resolution to go into a closed meeting should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public. My Office has also recommended that councils provide more substantive detail in resolutions authorizing closed sessions.³

We were told by the Clerk and Legislative Coordinator that it is the city’s practice to keep information about events that could be held in the city confidential until negotiations are completed. We were told that providing additional details, such as the name of the event, could compromise the city’s bargaining position or give another party an unfair advantage over the city during negotiations.

In this case, the resolution to proceed into closed session did not identify the potential events. However, the resolution does provide some public information about the nature of the subject matter to be considered, namely, the timeframe for the events (2022 or 2023) and the reference number of the confidential staff report.

Accordingly, I am satisfied that the resolution to proceed *in camera* was sufficiently descriptive to provide information to the public without undermining the reason for excluding the public.

As a best practice, I would encourage the city to indicate in its resolutions which closed meeting exception it relies on for each matter discussed in closed session. In this case, the committee cited three closed meeting exceptions from the Act in its resolution to proceed *in camera* to discuss two matters: The exceptions for litigation or potential litigation (s. 239(2)(e)), advice subject to solicitor-client privilege (s. 239(2)(f)), and plans or instructions for negotiations (s. 239(2)(k)). According to the open session

² *Farber v. Kingston (City)*, 2007 ONCA 173, online.

³ *Niagara (District Airport Commission) (Re)*, 2016 ONOMBUD 22, online.

minutes, the resolution to proceed *in camera* did not specify which closed meeting exception related to which closed session matter. However, the meeting agenda did specify which exception related to each matter.

While the Act does not require the committee to specifically indicate which exception it intends to rely on for each matter discussed in closed session, I have encouraged other municipalities to consider this a best practice. I encourage the City of Hamilton to adopt this practice to enhance the accountability and transparency of its meetings.

I would like to thank the city for its cooperation during our review. The Mayor confirmed that this letter would be included as correspondence at an upcoming council meeting.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Dubé". The signature is fluid and cursive, with a large loop at the beginning and a trailing flourish.

Paul Dubé
Ombudsman of Ontario

Cc: City Clerk Andrea Holland, Andrea.Holland@hamilton.ca
Deputy City Clerk Janet Pilon, Janet.Pilon@hamilton.ca