

J. Paul Dubé, Ombudsman

June 20, 2019

Janet Pilon, Acting City Clerk
Hamilton City Hall
71 Main Street West
Hamilton, Ontario L8P 4Y5

Via email

Dear Ms. Pilon:

Re: Report – Office of the Ontario Ombudsman

I have completed my investigation into whether the General Issues Committee for the City of Hamilton held an improper closed meeting on January 16, 2019. Please find the final report enclosed. We ask that you distribute the enclosed report to council.

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

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Ombudsman Report

**Investigation into a complaint about
closed sessions held by the City of
Hamilton on January 16, 2019**

**Paul Dubé
Ombudsman of Ontario
June 2019**

Complaint

- 1 In January 2019, my Office received a complaint about closed sessions held by the General Issues Committee (the “committee”) for the City of Hamilton (the “city”) on January 16, 2019.
- 2 The complaint alleged that during a regular meeting, the committee moved into closed session twice to discuss contributing to a bid by the Hamilton Tiger-Cats (the “Tiger-Cats”) for the 2020 or 2021 Canadian Football League (the “CFL”) Grey Cup championship.

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001*¹ (the “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 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.
- 5 The Ombudsman is the closed meeting investigator for the City of Hamilton.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.

Council procedures

- 7 The city’s procedural by-law (By-law No. 18-270) lists the General Issues Committee as one of six standing committees in the city. The committee is made up of all of council. The procedural by-law states that all meetings of the committee shall be open to the public except as provided by the Act.

¹ SO 2001, c 25.

Investigative process

- 8 On January 31, 2019, we advised the city of our intent to investigate this complaint.
- 9 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 meeting on January 16, 2019. The city audio and video records the open session portions of the committee's meetings. The recording of the open portion of the January 16 meeting was reviewed.
- 10 We interviewed members of council, the clerk, the Acting Director of Culture and Tourism, and the city solicitor.
- 11 My Office received full co-operation in this matter.

Background

The Tiger-Cats' bid for the 2020 or 2021 Grey Cup

- 12 We were told that the Tiger-Cats submitted a bid to the CFL to host the Grey Cup championship in 2020 or 2021. The bidding process is not a public process. Interested teams submit confidential bids to the CFL for consideration. The team awarded the bid acts as the host team for the Grey Cup and facilitates the delivery of the championship game and related festivities.
- 13 We were told that if the Tiger-Cats were awarded the bid, the City of Hamilton, as host city, would be involved in the planning for logistics and provision of city services during the championship. We were told it is a generally accepted practice for a potential host city to bolster a team's chances of being awarded the Grey Cup with financial or in-kind contributions to the team's bid.
- 14 In November 2018, the Tiger-Cats requested that the city provide a contribution to the Tiger-Cats' bid. Staff engaged in negotiations with the Tiger-Cats for the provision of city services, fees, venue rentals, and other city-led programming and community engagement which would make up the city's contribution.

- 15 The recommended contribution by city staff was put together in a confidential staff report (the “report”) and placed on the committee’s January 16 meeting agenda for *in camera* consideration.
- 16 The report outlined the city’s involvement in logistical planning and the provision for city services should the Tiger-Cats be successful, and provided an overview of staff negotiations with the Tiger-Cats to determine an appropriate contribution by the city.
- 17 The report’s recommendations comprised specific contributions by the city for city services, contract staff, and city operating expenses. The report also recommended that the committee permit staff to continue negotiations and enter into any appropriate agreements with the Tiger-Cats to formalize the city’s contribution.

The January 16 meeting

- 18 Before moving into closed session to discuss the report, the committee held a discussion in open session about whether the report should be discussed behind closed doors. This discussion was captured by the city’s audio and video recording of the meeting.
- 19 Councillor Brad Clark stated that a discussion involving the city’s finances would not qualify for *in camera* consideration. Councillors John-Paul Danko, Brenda Johnson, and Sam Merulla also spoke in favour of holding the discussion in public. Mayor Fred Eisenberger said the city should not discuss the contribution in open session because it risked tipping its hand to other bidders.
- 20 Members of the committee questioned staff about the reasons for discussing the report in closed session. The Acting Director of Culture and Tourism (the “acting director”) noted that the discussion should happen in closed session, because a public discussion of the city’s contribution might prejudice the bid process and the city’s future negotiating position for other large-scale events. She stated that the city’s practice is to maintain confidentiality around investment in major events to avoid “[setting] a bar for event organizers of what the city’s tolerance is for investment.” The acting director explained that in her experience, when the city negotiates in public, other competitors are able to use that information to outbid the city.

- 21 However, staff also indicated that in most cases, the city ultimately releases financial information relating to contributions to large-scale events. The committee was told that in the event that the Tiger-Cats' bid was successful, the city would ultimately report publicly on the amount of its contribution to the bid.

The closed session discussions

- 22 At 3:25 p.m., the Committee moved into closed session to receive legal advice from the city's solicitor on whether or not the report qualified for *in camera* consideration.
- 23 The committee passed the following resolution prior to closing the meeting:
- Hosting Grey Cup - November 2020 or 201 (PED18234(a)) (City Wide) (Item 14.2) - 239(2)(f) Advice that is subject to solicitor-client privilege
- 24 The closed session minutes indicate that the city solicitor provided legal advice to the committee about if the report was appropriate for *in camera* consideration and answered the committee's questions.
- 25 We were told by most council members that after receiving legal advice *in camera*, they were generally satisfied that the topic was appropriate for closed session consideration.
- 26 The committee subsequently moved into closed session a second time at 6:25 p.m. to consider the report and to discuss the city's contribution to the Tiger-Cats' bid. Councillors Johnson and Clark voted against moving into closed session. This closed session lasted one hour.
- 27 The committee passed the following resolution prior to closing the meeting:
- That Committee move into Closed Session, respecting Item 14.2, pursuant To Section 8.1, Sub-sections (f), (j) and (k) of the City's Procedural By-law 18-270;and, Section 239(2), Sub-sections (f), (j) and (k) of the *Ontario Municipal Act, 2001*.
- 28 The closed session minutes state that staff presented the report and answered the committee's questions.
- 29 We were told that, overall, the committee was excited for the opportunity to act as Grey Cup host city and the potential benefits for the city if the Tiger-Cats' bid was successful.

- 30 The deputy clerk told my Office that the committee's discussion focused on the city's financial contribution to the Tiger-Cats' bid. Members of council asked staff questions about particulars contained in the report. The acting director told my Office that she answered questions about staff negotiations with the Tiger-Cats and what would happen if the committee did not approve the recommended contribution. According to the acting director, in that event, staff would return to the negotiating table with the Tiger-Cats based on what the committee was prepared to contribute.
- 31 Ultimately, the committee accepted staff's recommendations and reported out that it had directed staff to coordinate with the Tiger-Cats for all requirements for hosting the Grey Cup. The financial component of the contribution was kept confidential.

Analysis

Applicability of the "advice subject to solicitor-client privilege" exception

- 32 The committee cited the exception for advice subject to solicitor-client privilege found in section 239(2)(f) of the Act when it moved into both closed sessions.
- 33 The exception for advice subject to solicitor-client privilege covers discussions that include communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential. The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure. My Office has found in the past that the exception can only be used where legal advice or related communication actually exists.²

First closed session

- 34 Our interviews indicate that during its first closed session, the committee received and discussed legal advice from the city's solicitor regarding the appropriateness of discussing the report and the city's contribution to the Tiger-Cats' bid in closed session. The committee asked the solicitor questions and discussed her advice.

² Timmins (City of) (Re), 2017 ONOMBUD 4 (CanLII), <<http://canlii.ca/t/h4rwt>>

35 Accordingly, the committee's discussion fit within the exception for solicitor-client privilege.

Second closed session

36 The committee cited the solicitor-client privilege exception when it moved into closed session for the second time.

37 In order for the exception to apply, legal advice must actually be received and discussed during the closed session.³ In this case, based on my Office's interviews and the closed session minutes, it does not appear that the solicitor provided legal advice during the second closed session. Accordingly, the discussion does not fit within the exception for advice subject to solicitor-client privilege.

Applicability of the "information belonging to the municipality" exception

38 Four new open meeting exceptions came into force on January 1, 2018, as part of the *Modernizing of Ontario's Municipal Legislation Act, 2017*. The exception for information belonging to the municipality is found in subsection 239(2)(j) of the Act. It allows for a meeting to be closed if the subject matter being considered is:

a trade secret or scientific, technical, commercial or financial information that belongs to the municipality or local board and has monetary value or potential monetary value.

39 The committee cited this exception when it moved into the second closed session.

40 This is the first meeting my Office has investigated under this exception.

41 When reviewing the parameters of the open meeting exceptions, my Office has often considered the case law of the Information and Privacy Commissioner (the IPC). These decisions are not binding on my Office; however, they are often informative with respect to the applicability of the open meeting exceptions in the Act.

³ *Ibid.*

- 42 In the context of information and privacy legislation, government institutions may refuse to disclose records that include information belonging to an institution.⁴ The IPC has found that the purpose of this exemption is to protect the interests of government, economic or otherwise, and it is generally intended to protect commercially viable information to the same extent that valuable third party information is protected.⁵ The protection is class-based, in that the exemption is concerned with the type of information and its inherent value, rather than the consequences if the information is disclosed.⁶ The IPC has found that there is no requirement to consider whether disclosure of the information may cause harm.
- 43 The IPC established a three-part test to determine if an institution can refuse to disclose a record on the basis that it contains information belonging to the institution. The institution must show that the information contained in the record:
1. is a trade secret, or financial, commercial, scientific or technical information;
 2. belongs to the institution; and
 3. has monetary value or potential monetary value.⁷
- 44 The first part of the test examines whether the information qualifies as a trade secret, financial information, commercial information, scientific information, or technical information.
- 45 The IPC has found that trade secrets include, but are not limited to:
- a formula, pattern, compilation, program, method, technique, or process, or information contained or embodied in a product, device or mechanism which:
- (i) is, or may be used in a trade or business,
 - (ii) is not generally known in that trade or business,
 - (iii) has economic value from not being generally known, and

⁴ *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M56, s 11(a) and *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31, s 18(1).

⁵ *Enwin Utilities Ltd (Re)*, 2014 CanLII 73020 (ON IPC), <<http://canlii.ca/t/gfjz1>>.

⁶ *South Bruce Peninsula (Town) (Re)*, 2010 CanLII 38706 (ON IPC), <<http://canlii.ca/t/2bkqp>>.

⁷ See e.g. *Etobicoke (City) (Re)*, 1994 CanLII 6973 (ON IPC), <<http://canlii.ca/t/1rmhh>>. Endorsed by the Divisional Court in *Corporation of the Town of Arnprior v Information and Privacy Commissioner of Ontario*, 2016 ONSC 2904 (CanLII), <<http://canlii.ca/t/gpqlx>> at para. 42.

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁸

The IPC has found that financial information is information that relates to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting methods, pricing practices, profit and loss data, overhead, and operating costs.⁹

- 46 The second part of the test considers whether or not the information belongs to the institution. According to the IPC, information belongs to the institution if it is owned by that institution in the sense that the institution has a proprietary interest in the information in a traditional property sense, or in the sense that the “law would recognize a substantial interest in protecting the information from misappropriation by another party.”¹⁰
- 47 The third part of the test requires that the information have monetary value, either real or potential. According to the IPC, the term “monetary value” requires that the information itself have intrinsic value, such that disclosure would deprive the institution of that monetary value. The fact that an institution had to pay to create a record does not mean that the information in that record has monetary value.¹¹ Nor does the fact, on its own, that the information has been kept confidential.¹²
- 48 In the open meeting context, the exception for information belonging to the municipality will apply where the *in camera* discussion was about:
1. A trade secret, or financial, commercial, scientific or technical information;
 2. that belongs to the municipality or local board; and
 3. has monetary value or potential monetary value.

⁸ *Etobicoke Board of Education (Re)*, 1992 CanLII 4261 (ON IPC), <http://canlii.ca/t/1rmlv>; see also *Ontario (Natural Resources) (Re)*, 2002 CanLII 46412 (ON IPC), <http://canlii.ca/t/1r3jv>.

⁹ *Ontario (Natural Resources) (Re)*, 2002 CanLII 46410 (ON IPC), <<http://canlii.ca/t/1r3js>>

¹⁰ *Ontario Lottery Corporation (Re)*, 2000 CanLII 20949 (ON IPC), <http://canlii.ca/t/1rd0x> at para. 34.

¹¹ *Metropolitan Separate School Board (Re)*, 1995 CanLII 6783 (ON IPC), <<http://canlii.ca/t/1rhzw>>; see also *Etobicoke (City) (Re)*, 1994 CanLII 6973 (ON IPC), <<http://canlii.ca/t/1rmhh>>.

¹² Orders P-1281 and PO-2166.

Was the discussion about a trade secret or financial, commercial, scientific or technical information?

- 49 In the present case, the city told my Office that the information contained in the report was a trade secret. The information included details about how the city allocates funding to large-scale events like the Grey Cup. According to the city, its approach to funding is a trade secret and is applied to other large-scale events within the city.
- 50 The information contained in the report does not qualify as a trade secret. We received no information that would indicate that the City's approach to allocating funding is used in trade or business, is not generally known, or if this information has economic value. In addition, contrary to the acting director's opinion that the city's financial contributions of this nature remain confidential to protect the funding approach, we were told that the city has publicly released financial information related to funding large-scale events in the past.
- 51 The city's contribution qualifies as financial information because it relates to the expenditure, use and distribution of money by the city. The report contained specific financial data related to how the city's contribution would be distributed and allocated to the Tiger-Cats.

Does the information belong to the municipality?

- 52 The second part of the test requires that the information discussed in closed session belong to the municipality or local board. In this case, the information regarding the city's contribution belongs to the city because it was prepared by city staff. There is no indication that the city does not have a proprietary interest in the information.

Does the information have monetary value or potential monetary value?

- 53 The third part of the test requires that the information have monetary value, either real or potential, such that disclosure would deprive the municipality or local board of that monetary value.
- 54 It is important to note that whether or not the municipality or local board would suffer harm from the disclosure of the information is not relevant to determining if the information has monetary value.

- 55** In a case involving Ontario Power Generation (“OPG”)¹³, the IPC found that spreadsheets with cost estimates belonging to OPG did not have monetary value. OPG argued that if the spreadsheets were disclosed, its ability to secure future contracts would be adversely impacted and it would be deprived of the opportunity to negotiate with bidders for the most favourable pricing. The IPC rejected this argument and found that while the OPG could suffer harm that results from the disclosure of the spreadsheets, disclosure would not deprive the OPG of the spreadsheets’ monetary value, if any. That is, the fact that disclosure of the spreadsheets could adversely affect the OPG’s ability to secure contracts in the future does not mean that the information at issue also has an intrinsic or monetary value.
- 56** The IPC relied on the OPG case to find that records relating to a request for proposals for student transportation do not have monetary value.¹⁴ In that case, the Thunder Bay Catholic District School Board sought to prevent the disclosure of records including evaluators’ comments, scoring, and pricing information of responses to the request for proposal. The IPC found that those records do not have intrinsic monetary value and that the school board’s arguments against disclosure related to the harms that will result from disclosure, not whether disclosure of the information would deprive the school board of its monetary value.
- 57** In another case involving the Municipality of Chatham-Kent, the IPC found that records relating to alternative ambulance and fire service delivery models do not have monetary value.¹⁵ The municipality argued that it developed the delivery models with the intent to sell the delivery models to other municipalities or ambulance service delivery companies. The IPC found that the delivery models were specific to the municipality and did not reveal details of ambulance or fire services. As such, the information had no monetary value.
- 58** In the present case, the city told my Office that monetary value exists in the report because if the amount of the city’s contribution is disclosed it will negatively impact the city’s competitive position as a potential host city for the Grey Cup and other large-scale events in future. The city explained that if the information is made public, other municipalities and football teams also bidding for the 2020 or 2021 Grey Cup could outbid the Tiger-Cats. In addition, future large-scale events would be negatively impacted on the same basis.

¹³ 2016 CanLII 46208 (ON IPC)

¹⁴ 2017 CanLII 78367 (ON IPC)

¹⁵ 2018 CanLII 74219 (ON IPC)

- 59 I do not agree and find that the third part of the test is not satisfied. The city's position does not address whether or not the information at issue has monetary value. Rather, the city focuses on the harm of the disclosure – that is, the potential loss of economic benefits and revenue for the city. The IPC has consistently found that the fact that the disclosure would adversely affect an institution's ability to secure contracts in the future does not mean that the information has an intrinsic monetary value. There is no indication that the information contained in the report has any monetary value, nor is there any indication that disclosure of the information would deprive the city of its monetary value.
- 60 Accordingly, the closed session discussion does not fit within the exception for information belonging to the municipality.

Applicability of the “negotiations” exception

- 61 The new exception for negotiations is found in subsection 239(2)(k) of the Act and provides for a meeting to be closed if the subject matter being considered is:
- a position, plan, 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.
- 62 The committee cited this exception when it moved into the second closed session.
- 63 In a recent report to the City of St. Catharines, my Office considered the new negotiations exception and reviewed the case law of the IPC.¹⁶ As I have previously stated, these decisions are helpful with respect to the applicability of the open meeting exceptions. In that case, my Office found that the purpose of the exception is to protect information that could undermine a municipality or local board's bargaining position or give the public an unfair advantage over the municipality or local board. In order for the exception to apply, the municipality or local board 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

¹⁶ *St. Catharines (City of) (Re)*, 2019 ONOMBUD 1 (CanLII), <<http://canlii.ca/t/hxrk5>>

4. the negotiations are being conducted by or on behalf of the municipality or local board.

- 64 We were told that in November 2018 city staff began confidential negotiations with the Tiger-Cats to determine a satisfactory contribution by the city to the Tiger-Cats' bid. The negotiations focused on determining an appropriate role and responsibilities for the city based on the Tiger-Cats' concept for the 2020 or 2021 Grey Cup. According to the acting director, if the Tiger-Cats were successful, the city would experience economic benefits from increased tourism and a boost to the city's profile as host city. The Tiger-Cats would benefit from the infusion of city services to their bid which would otherwise be unavailable or come at a direct cost to the team.

Was the discussion about positions, plans, procedures, criteria or instructions?

- 65 In a 2002 decision, the IPC determined that in order to satisfy the first part of the test, there must be "some evidence that a course of action or manner of proceeding is "pre-determined", that is, there is some organized structure or definition given to the course to be taken." ¹⁷ The IPC found that a "plan" is "a formulated and especially detailed method by which a thing is to be done; a design, or scheme." With respect to positions, procedures, criteria, and instructions, the Commissioner found that these terms "are similarly referable to pre-determined courses of action or ways of proceeding."
- 66 The *in camera* discussion fits within the definition of a plan. During the January 16 closed session, we were told that staff sought direction from the committee on how to proceed in negotiations with the Tiger-Cats. We were told by staff that the committee discussed staff's recommended contribution to the Tiger-Cats' bid and other options for proceeding with the city's contribution.

Are the positions, plans, procedures, criteria or instructions intended to be applied to negotiations?

- 67 This part of the test is satisfied. The committee approved the recommended contribution and directed staff to proceed via certain steps with respect to the negotiations with the Tiger-Cats. These steps are contained in the direction to staff passed during the closed session and include formalizing the city's contribution in an agreement with the Tiger-Cats.

¹⁷ *Ontario (Ministry of Community and Social Services) v. Cropley*, 2004 CanLII 11694 (ON SCDC).

Are the negotiations being carried on currently or will be carried on in the future?

68 This part of the test is satisfied. At the time of the January 16 meeting, city staff were engaged in negotiations with the Tiger-Cats.

Are the negotiations being conducted by or on behalf of the municipality?

69 This part of the test is satisfied. Staff conduct the negotiations with the Tiger-Cats on behalf of the city.

70 The four-part test for the negotiations exception is satisfied. While *in camera*, the committee formulated a plan and directed staff with respect to the city's ongoing negotiations with the Tiger-Cats to participate and contribute to the Tiger-Cats' bid for the 2020 or 2021 Grey Cup.

71 Accordingly, the *in camera* discussion fit within the negotiations exception.

72 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 if a matter should or may be discussed in closed session, as well as issues related to open meeting procedure. Summaries of all the Ombudsman's previous decisions cited in this report can be found in the digest.

Opinion

73 The General Issues Committee for the City of Hamilton did not violate the *Municipal Act, 2001* on January 16, 2019 when it discussed the city's contribution to the Hamilton Tiger-Cats' bid for the 2020 or 2021 Grey Cup in two closed sessions. The first closed session fit within the exception for advice subject to solicitor-client privilege. While the second *in camera* discussion did not fit within the exceptions for advice subject to solicitor-client privilege or information belonging to the municipality, the discussion fit within the exception for negotiations.

Report

- 74 The city was given the opportunity to review a preliminary version of this report and provided comments to our office.
- 75 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