

**BY EMAIL**

November 16, 2023

Council for the City of Hamilton  
C/o Mayor Andrea Horwath  
Hamilton City Hall  
71 Main Street West  
Hamilton, ON L8P 4Y5

Dear Members of Council for the City of Hamilton:

**Re: Report & Letter – Office of the Ontario Ombudsman**

I have completed my investigation into whether the City of Hamilton's General Issues Committee held a meeting on February 6, 2019 that was improperly closed under the *Municipal Act, 2001*. Please find my final report enclosed.

I have also completed my review of a meeting held by the City's Agriculture and Rural Affairs Sub-committee on April 18, 2023. Please find my letter enclosed.

The City's Acting Clerk indicated that my report and letter would be shared with council and made available to the public no later than council's next meeting. At that time, I will also post a copy of the report and letter on my website at [www.ombudsman.on.ca](http://www.ombudsman.on.ca).

Please encourage all members of your committees and local boards to familiarize themselves with the open meeting rules. Our Office has resources available, including our Open Meetings Guide for Municipalities, which can be accessed on our website [here](http://www.ombudsman.on.ca). You can also contact us directly to order copies at [info@ombudsman.on.ca](mailto:info@ombudsman.on.ca).

Yours truly,

A handwritten signature in black ink, appearing to read 'Paul Dubé'.

Paul Dubé  
Ombudsman of Ontario

Cc: Janet Pilon, Acting City Clerk



## **Ombudsman Report**

**Investigation into a complaint about  
a meeting held by the City of Hamilton's  
General Issues Committee  
on February 6, 2019**

**Paul Dubé  
Ombudsman of Ontario**

**November 2023**

## Complaint

- 1 In April 2022, my Office received a complaint about a meeting held several years earlier by the General Issues Committee of the City of Hamilton. The complaint alleged that on February 6, 2019, the Committee breached the open meeting rules under the *Municipal Act, 2001* when it discussed an item referred to on the agenda as “Roads Infrastructure Litigation and Review Assessment (LS19010) (City Wide)” in closed session.
- 2 The complaint arose from a comparison of the agenda for the Committee’s meeting on February 6, 2019 with a document entitled “Overview Document 10: Disclosure of Tradewind Report to Council and Public.” This latter document was made public on April 25, 2022 at the beginning of the public hearings phase of the Red Hill Valley Parkway Inquiry, a judicial investigation conducted pursuant to section 274 of the *Municipal Act, 2001*. That inquiry, which has yet to release its final report, focused in large part on the handling of information in a report that was first made public after the February 6, 2019 meeting.
- 3 The complaint alleged that the February 6, 2019 meeting agenda misrepresented item 14.4 as a single item, while Overview Document 10 describes that it actually related to four separate and lengthy presentations. The complaint also alleged that only some of the topics discussed fit within the exceptions to the open meeting rules.
- 4 For the reasons set out below, I have concluded that the General Issues Committee of the City of Hamilton did not contravene the open meeting requirements under the *Municipal Act, 2001*. This investigation was conducted in my capacity as the closed meeting investigator for the City of Hamilton, and as such, it was focused strictly on the question of whether or not the open meeting requirements were followed, and not on any substantive matters relating to the Red Hill Valley Parkway or the judicial inquiry.

## Ombudsman jurisdiction

- 5 Under the *Municipal Act, 2001*, all meetings of a council, local board, and committee of either must be open to the public, unless they fall within prescribed exceptions.<sup>1</sup>

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<sup>1</sup> SO 2001, c 25, ss 238 and 239.

- 6 As of January 1, 2008, the Act gives anyone 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.
- 7 The Ombudsman is the closed meeting investigator for the City of Hamilton.
- 8 In investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the municipality's governing procedures have been observed.
- 9 My Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. 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 the Ombudsman's previous decisions can be found in the digest: [www.ombudsman.on.ca/digest](http://www.ombudsman.on.ca/digest).

## Investigative process

- 10 My Office reviewed the materials for the Committee's February 6, 2019 open meeting, including the agenda, agenda addendum, minutes and relevant portions of the video recording of the meeting. We also reviewed the closed meeting materials, including the minutes, staff reports prepared for the purposes of the closed meeting, handwritten staff notes from the closed session, as well as a transcription of those notes, and redacted and unredacted copies of a confidential *in camera* PowerPoint presentation. We also reviewed relevant documents from the Red Hill Valley Parkway Inquiry.
- 11 In addition, we spoke with several people who were present at the closed meeting, including the former Mayor of Hamilton, the former City Solicitor, the then Deputy City Solicitor, external legal counsel, the City Auditor/Auditor General, and the former Legislative Coordinator from the Clerk's office.
- 12 We advised the City of our intent to investigate this complaint. My Office received full co-operation in this matter.

## February 6, 2019 meeting

- 13 The meeting of the General Issues Committee began at 9:30 a.m. and finished at 10:35 p.m. on February 6, 2019.
- 14 According to the video recording, the Committee voted to move *in camera* shortly before 4 p.m. to discuss, amongst other matters, item 14.4, which was identified on the agenda as a “Roads Infrastructure Litigation and Review Assessment” with an associated staff report, LS19010. The agenda also made clear that in closing the meeting to the public to discuss item 14.4, the Committee was relying on the exceptions for personal matters about an identifiable individual, litigation or potential litigation affecting the municipality, and advice that is subject to solicitor-client privilege.
- 15 However, the resolution to move *in camera* referred only to the agenda item numbers to be discussed in closed session (items 14.2 to 14.4), as well as the exceptions of the Act being relied upon for the discussion of all three items. The resolution did not include a general description of each of the topics for discussion, nor did it identify which of the exceptions applied to which agenda items.
- 16 The closed meeting lasted from 4:03 p.m. until 10:03 p.m. Council members and staff were present, along with the City’s internal and external legal counsel.
- 17 The City of Hamilton does not audio or video record its closed meetings. The February 6, 2019 closed meeting minutes do not capture the content of the discussion that took place over the six hours the Committee was in closed session. With respect to item 14.4, the minutes state only that staff provided an overview of report LS19010 and answered questions from Committee members, and that external legal counsel provided legal advice and answered the Committee’s questions as well.
- 18 My Office was told that the discussion in closed session related to a consultant’s report from November 20, 2013 – now publicly known as the “Tradewind report” – that found that there were low levels of friction on the Red Hill Valley Parkway.
- 19 The Committee discussed the report and received related legal advice during the closed session.

- 20** In addition to the Committee receiving the staff report relating to item 14.4, there was a confidential PowerPoint presentation during the closed session, entitled “Red Hill Valley Parkway Pavement & Safety Concerns.” It consisted of four parts, and was delivered by four different presenters:
- Part 1: Timeline and Technical Concerns, presented by the then General Manager of Public Works;
  - Part 2: Value for Money & Audit, presented by the City’s Director of Audit Services and Auditor General;
  - Part 3: Legal Considerations, presented by the then City Solicitor; and
  - Part 4: Communications Strategy, presented by the then Director of Strategic Partnerships & Communications.
- 21** Based on the documents we reviewed and our discussions with individuals who were present at the meeting, staff provided information to council regarding the Tradewind report. Legal advice was provided and discussed. The Committee also discussed the conduct of a specific individual.
- 22** According to the video of the meeting, open session resumed at 10:13 p.m. Nothing was reported back in open session about the closed meeting discussion related to item 14.4. However, the Committee voted to keep LS19010, the staff report associated with item 14.4, confidential.
- 23** After the Committee passed several resolutions, the then Interim City Manager read to members from a draft media release in which city staff apologized to City council and the general public “for how this matter has come to their attention.” The media release, which was then made public immediately after the meeting, spoke to actions the City would be taking with respect to the Red Hill Valley Parkway in response to the Tradewind report – including lowering the speed limit, expediting resurfacing, increasing police presence, and asking motorists to use caution. It also announced that the City’s Auditor General would conduct an investigation. The Tradewind report was attached to the media release.
- 24** Shortly after the reading of the media release, the Committee adjourned the meeting.

## Analysis

### Exception for advice subject to solicitor-client privilege

- 25** The exception for advice subject to solicitor-client privilege under section 239(2)(f) of the Act applies to discussions between a municipality and its solicitor in seeking or receiving legal advice that is intended to be confidential, and includes communications for that purpose.<sup>2</sup> The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.
- 26** Both internal and external legal counsel were present in closed session on February 6, 2019 and gave advice to the Committee regarding the Tradewind report.
- 27** The complaint to my Office did not allege that Part 3 of the PowerPoint presentation, delivered to the Committee by legal counsel, shouldn't have been discussed in closed session. Rather, it alleged that not all of the three other parts of the presentation, which were delivered by city staff, should have been discussed in closed session.
- 28** My Office has previously found that information provided to council in closed session by someone who is not a lawyer may nevertheless fit within the solicitor-client privilege exception, if the information is received in relation to council seeking legal guidance or it is necessary in order for council to meaningfully discuss the issues with legal counsel.<sup>3</sup> For example, in a 2021 report to the Town of Pelham, I found that financial information presented to council by its Treasurer fit within the exception because it was necessary to explore the issues fully with the Town's lawyers, who were present in the closed meeting.<sup>4</sup>
- 29** In the present case, witnesses told my Office that all four parts of the PowerPoint presentation were "tied to the same issue," had "legal ramifications", and were "wrapped together" with the Tradewind report and the legal advice being given to council. We were told all four parts were necessary to provide context to the Committee in order for it to receive the City solicitor's report LS19010 and associated legal advice. Accordingly, I find that all parts of the PowerPoint presentation and the related

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<sup>2</sup> *Amherstburg (Town of) (Re)*, 2022 ONOMBUD 11 at para 26 [*Amherstburg*], online: <<https://canlii.ca/t/jr5rc>>.

<sup>3</sup> *Pelham (Town of) (Re)*, 2018 ONOMBUD 4, online: <<https://canlii.ca/t/hvmtr>>; and *Temagami (Municipality of) (Re)*, 2021 ONOMBUD 3, online: <<https://canlii.ca/t/jcxs0>>.

<sup>4</sup> *Pelham (Town of) (Re)*, 2018 ONOMBUD 4 at paras 39-43, online: <<https://canlii.ca/t/hvmtr>>.

explanations shared by staff were necessary in order for the Committee to receive, understand, and discuss the legal advice provided by counsel during the closed meeting.

- 30** As a result, I find that all of the discussion during the session fit within the exception for advice subject to solicitor-client privilege.

### Exception for litigation or potential litigation

- 31** My Office has determined that the litigation or potential litigation exception under section 239(2)(e) is reserved for circumstances where the subject matter is either related to ongoing litigation or involves a reasonable prospect of litigation.<sup>5</sup> With respect to potential litigation, in order for the exception to apply, there must be more than a remote possibility or a suspicion that litigation could arise, although it need not be a certainty.<sup>6</sup> Council must believe there is a reasonable prospect of litigation and must use the closed meeting to explore that prospect in some way.<sup>7</sup>
- 32** In this case, the Committee received information and advice during the closed session from internal and external legal counsel about the Tradewind report and its impact on existing ongoing litigation involving the City. We were told it also heard from counsel and discussed related potential future litigation that was more than a mere possibility.
- 33** Accordingly, the Committee's discussion relating to Part 3 of the PowerPoint presentation fit within the litigation or potential litigation exception.

### Exception for personal matters about an identifiable individual

- 34** The personal matters exception found in section 239(2)(b) of the Act applies to discussions that reveal personal information about an identifiable individual. My Office has previously found that information that pertains to an individual in their professional capacity will not normally fit within the

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<sup>5</sup> See e.g. Letter from the Ontario Ombudsman to the City of Timmins (May 9, 2017) at 2, online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2017/city-of-timmins-2>>; and *Grey Bruce Health Unit (Re)*, 2023 ONOMBUD 6 at paras 38-39, online: <<https://canlii.ca/t/jw7tk>>.

<sup>6</sup> *Ibid.*

<sup>7</sup> *West Lincoln (Township of) (Re)*, 2015 ONOMBUD 34 at para 36, <<https://canlii.ca/t/gtp7g>>; and *Carleton Place (Town of) (Re)*, 2017 ONOMBUD 18 at para 26, online: <<https://canlii.ca/t/hqsph>>.



personal matters exception.<sup>8</sup> However, information about a person in their professional capacity may still fit within this exception if it reveals something personal about them or it relates to scrutiny of their conduct.<sup>9</sup>

- 35 For example, in a 2022 report to the City of Brockville, I found that council's discussion about an employee's performance in their role, during which council expressed opinions about the employee's conduct, fit within the exception for personal matters about an identifiable individual.<sup>10</sup> Similarly, in a 2022 report to the Town of Amherstburg, I found that council's discussion of three employees – all of whom were identified by name – and their job performance fit within the exception.<sup>11</sup>
- 36 In the present case, my Office was told that the Committee specifically discussed an individual staff member, who was identified by name. The discussion involved scrutiny of the individual's conduct in their role. Handwritten notes taken by staff during the meeting reflect this discussion, and indicate that the individual was discussed throughout the closed session.
- 37 Accordingly, the Committee's discussion fit within the exception for personal matters about an identifiable individual.

## Procedural matters

### Agenda and resolution

- 38 Item 14.4 on the Committee's February 6, 2019 open meeting agenda was identified as a "Roads Infrastructure Litigation and Review Assessment" with a related staff report, LS19010. In April 2022, the Red Hill Valley Parkway Inquiry released "Overview Document 10," which included a detailed description of each of the four parts of the confidential PowerPoint presentation that was delivered during the February 6, 2019 closed session. The discrepancy between the agenda description of item 14.4 and that contained in Overview Document 10 prompted the complaint to my Office, which alleged that item 14.4 was misrepresented on the agenda.

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<sup>8</sup> *Lanark Highlands (Township of) (Re)*, 2018 ONOMBUD 1, online: <<https://canlii.ca/t/hvmtf>>.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Brockville (City of) (Re)*, 2022 ONOMBUD 12, online: <<https://canlii.ca/t/jrhjr>>.

<sup>11</sup> *Amherstburg*, *supra* note 2.

- 39** Although the Act does not require municipalities to provide advance notice of the specific matters to be discussed in closed session, as a best practice, an agenda should accurately reflect the matters intended to be discussed at a meeting, including in closed session. I encourage the City to adopt this best practice. Had it provided additional information about the planned discussion on its agenda, it may have prevented the complaint to my Office.
- 40** Furthermore, it is a statutory requirement under section 239(4) of the Act that, before holding a closed meeting, council must state by resolution “the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting.” In *Farber v. Kingston*, the Ontario Court of Appeal noted that a 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 proceeding into closed session.<sup>12</sup>
- 41** In this case, the resolution passed by the Committee to go into closed session cited the agenda item numbers to be discussed and the closed meeting exceptions the Committee was relying on to exclude the public from its discussion of the three items. It did not specify which exceptions related to which agenda items.
- 42** I described very similar circumstances in a November 2020 letter to the City of Hamilton, in which I found that the General Issues Committee’s resolution to proceed *in camera* was sufficiently descriptive to provide information to the public without undermining the reason for going into closed session.<sup>13</sup> Nevertheless, I encouraged the City, as a best practice, to indicate in its resolutions which closed meeting exceptions it was relying upon in relation to each specific matter to be discussed behind closed doors.<sup>14</sup>
- 43** Despite my suggestion, the City has not adopted this best practice. I strongly encourage it to do so. Stating the closed meeting exception(s) being relied upon in relation to each subject matter in the resolution will help the public understand council’s reasons for going behind closed doors, thereby enhancing transparency and accountability.

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<sup>12</sup> *Farber v. Kingston (City)*, 2007 ONCA 173 at para 21, online: <<https://canlii.ca/t/1qtzl>>.

<sup>13</sup> Letter from the Ontario Ombudsman to the City of Hamilton (November 5, 2020), online: <<https://www.ombudsman.on.ca/resources/reports,-cases-and-submissions/municipal-meetings/2020/city-of-hamilton>>.

<sup>14</sup> *Ibid* at 4-5.

44 Finally, while the agenda in this case provided some information about the nature of the subject matter to be considered in closed session under item 14.4, as well as the number of the confidential staff report, the resolution itself simply referred to the agenda item number. I have previously encouraged municipalities to ensure that not only the meeting agenda but also the resolution to proceed behind closed doors include a description of the topics to be discussed.<sup>15</sup>

45 In future, I encourage the City to adopt this best practice as well.

### Adequacy of record keeping

46 Under section 239(7) of the Act, councils, local boards, and committees of either of them are required to keep a record, without note or comment, of all resolutions, decisions and other proceedings at its meetings. This requirement applies to both open and closed sessions.

47 My Office has previously recommended that the record of a closed meeting include the following:

- Where the meeting took place;
- When the meeting started and adjourned;
- Who chaired the meeting;
- Who was in attendance, with specific reference to the Clerk or other designated official responsible for recording the meeting;
- Whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
- A detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered;
- Any motions, including who introduced the motion and seconders;
- All votes taken, and all directions given.<sup>16</sup>

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<sup>15</sup> See Letter from the Ontario Ombudsman to the City of Welland (January 9, 2020) at 3, online: <<https://www.ombudsman.on.ca/resources/reports,-cases-and-submissions/municipal-meetings/2020/city-of-welland>>; Letter from the Ontario Ombudsman to the City of Pickering (August 31, 2022) at 4, online: <<https://www.ombudsman.on.ca/resources/reports,-cases-and-submissions/municipal-meetings/2022/city-of-pickering>>.

<sup>16</sup> *Amherstburg*, *supra* note 2 at para 55.

- 48 While minutes are not intended to be a verbatim transcript of the discussion at a meeting, the substance of the discussion should be recorded.
- 49 In the present case, the closed meeting minutes from February 6, 2019 do not capture the substance of the nearly six-hour discussion.
- 50 There are several problems with this. First, it undermines the public's ability to feel confident that matters were appropriately discussed in closed session and that the requirements of the Act and the municipality's by-laws were followed. Second, it leaves the Committee without a record to consult in future should it wish to understand how an issue was considered or a decision reached. Finally, it hinders my Office's ability to investigate a closed meeting complaint.
- 51 There was also no audio or video recording of the February 6, 2019 meeting to assist in our investigation, despite my Office's 2017 recommendation to the City of Hamilton that it adopt the practice of audio or video recording its closed meetings.<sup>17</sup> Although most of those we interviewed recalled this meeting to some extent, they could not provide details of the discussion, given how many years had passed. Moreover, the accounts provided were not always consistent with one another.
- 52 I strongly encourage all municipalities, local boards and committees of either of them to make audio or video recordings of all meetings, both open and closed. This provides the most clear and accessible record for closed meeting investigators to review and assists in ensuring that officials do not stray from the legal requirements during closed session. In this case, an audio or video recording of the February 6, 2019 closed meeting would have greatly assisted my Office's investigation.
- 53 In future, the City should ensure that its minutes provide an accurate record of the Committee's discussions, including by providing a description of the substantive and procedural matters discussed *in camera*. I once again strongly encourage the City to adopt the practice of making audio or video recordings of all meetings, including closed meetings.

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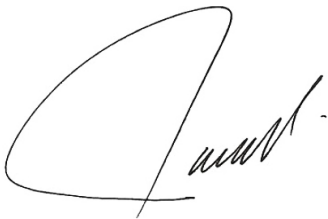
<sup>17</sup> *Hamilton (City of) (Re)*, 2017 ONOMBUD 16, online: <<https://canlii.ca/t/hqspc>>.

## Opinion

- 54 The City of Hamilton's General Issues Committee did not contravene the open meeting requirements on February 6, 2019 when it met in closed session to discuss the November 20, 2013 Tradewind report. Nevertheless, to enhance the transparency of its open meetings, I encourage the City to adopt the following best practices:
- 55 I encourage it to provide accurate information in its agendas about the matters intended to be discussed at meetings, including in closed session.
- 56 I urge the City to provide a general description of the topics to be discussed during closed session in the resolution to proceed *in camera* – and not just in the meeting agenda. The resolution should also indicate which specific closed meeting exceptions are being relied upon in relation to each matter to be discussed *in camera*.
- 57 Finally, I encourage the City to ensure its minutes provide a complete and accurate record of closed meeting discussions, and to adopt the best practice of making audio or video recordings of all meetings, including closed meetings.

## Report

- 58 Council for the City of Hamilton was given the opportunity to review a preliminary version of this report and provide comments to my Office. No comments were received.
- 59 The City's Acting Clerk indicated that my report would be shared with council and made available to the public at the next council meeting.



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**Paul Dubé**  
Ombudsman of Ontario