



J. Paul Dubé, Ombudsman

BY EMAIL

October 30, 2024

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

Dear members of Council for the City of Hamilton:

Re: Closed meeting complaint

My Office received a complaint about a meeting held by the Selection Committee for Agencies, Boards and Sub-Committees (the “Selection Committee”) of the City of Hamilton (the “City”) on October 24, 2023. The complaint raised a concern that during interviews with applicants for the Hamilton Municipal Heritage Committee (the “Heritage Committee”), the Selection Committee also discussed changing the Heritage Committee’s composition and terms of reference. The complaint alleged that this portion of the discussion did not fit within any of the open meeting exceptions under the *Municipal Act, 2001* (the “Act”).¹

For the reasons set out below, I have determined that the City of Hamilton did not contravene the Act’s open meeting requirements on October 24, 2023, as the Selection Committee’s discussion about changing the Heritage Committee’s terms of reference could not have been parsed from the general discussion about the applicants.

Ombudsman’s role and authority

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. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own. My Office is the closed meeting investigator for the City of Hamilton.

¹ SO 2001, c 25, s 1.

483 Bay Street, 10th Floor, South Tower / 483, rue Bay, 10^e étage, Tour sud
Toronto, ON M5G 2C9

Tel./Tél. : 416-586-3300 Facsimile/Télécopieur : 416-586-3485 TTY/ATS : 1-866-411-4211

www.ombudsman.on.ca

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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.

The Ontario Ombudsman also has the authority to conduct impartial reviews and investigations of hundreds of public sector bodies. This includes municipalities, local boards, and municipally-controlled corporations, as well as provincial government organizations, publicly funded universities, and school boards. In addition, the Ombudsman's mandate includes reviewing complaints about the services provided by children's aid societies and residential licensees, and the provision of French language services under the *French Language Services Act*. Read more about the bodies within our jurisdiction here: www.ombudsman.on.ca/have-a-complaint/who-we-oversee.

Our review

On May 8, 2024, my Office notified the City of our intent to investigate this complaint. We reviewed the open and closed session agendas and minutes, and the open session video recording. We interviewed the five members of the Selection Committee who were present at the meeting, the Legislative Coordinator, who clerked the meeting, and the then-acting City Clerk.

Background

On October 24, 2023, the Selection Committee met at City Hall at 12:00 p.m. At 12:03 p.m., the Selection Committee moved into closed session to discuss "Applicant Interviews for the City of Hamilton's Agencies, Boards and Sub-Committees" under the exception for personal matters about an identifiable individual at section 239(2)(b) of the Act.

In closed session, the Selection Committee interviewed applicants for the Heritage Committee and a related sub-committee. After conducting individual interviews, the Selection Committee discussed their preferred applicants for these two bodies, as well as for others. During this portion of the discussion, a procedural question arose about what the Selection Committee could do if it wanted to recommend a different number of applicants to council than the number required by the Heritage Committee's terms of reference.

The Legislative Coordinator confirmed that under those circumstances, the Selection Committee could recommend that City council amend the terms of reference in open session. Those we spoke to indicated that the discussion about amending the Heritage Committee's terms of reference arose based on the Selection Committee's discussion of the applicants.

The Selection Committee then finished discussing the applicants for the Heritage Committee and other bodies. After directing staff regarding its preferred applicants, the Selection Committee returned to open session at 5:45 p.m.

In open session, the Selection Committee passed a motion directing staff regarding its preferred applicants, and a second motion recommending that City council amend the membership composition in the terms of reference for the Heritage Committee and two other bodies. The Selection Committee adjourned at 5:46 p.m.

Analysis

The Selection Committee cited the open meeting exception for personal matters about an identifiable individual at section 239(2)(b) of the Act in its resolution to move into closed session. The exception for personal matters applies to discussions that reveal personal information about an identifiable individual. My Office has found that in order to qualify as personal information, it must be reasonable to expect that an individual could be identified if the information were disclosed publicly.²

Generally, information that pertains to an individual in their professional capacity will not fit within the exception for personal matters. However, in some cases information about a person in their professional capacity may still fit within the exception if it reveals something personal or relates to scrutiny of an individual's conduct.³ My Office has previously found that discussions about applicants for volunteer committee positions and the applicants' suitability for serving on a committee fit within this exception.⁴

In this case, the Selection Committee interviewed applicants to the Heritage Committee and a related sub-committee and discussed their qualifications and suitability to serve on these bodies. This portion of the discussion included personal matters about identifiable individuals and fit within the open meeting exception for personal matters.

² *Amherstburg (Town of) (Re)*, 2022 ONOMBUD 11 at para 19, online: <<https://canlii.ca/t/jr5rc>>; *Nipissing (Township of) (Re)*, 2023 ONOMBUD 2 at para 22, online: <<https://canlii.ca/t/jv6ch>>.

³ *South Huron (Municipality of) (Re)*, 2015 ONOMBUD 6 at para 31, online: <<https://canlii.ca/t/gtp80>>.

⁴ *Bracebridge (Town of) (Re)*, 2015 ONOMBUD 10 at paras 36, 40–41, online: <<https://canlii.ca/t/gtp5r>>.

However, in addition to discussing individual applicants, the Selection Committee also discussed amending the terms of reference for the Heritage Committee. This type of discussion would not usually fall within the exception for personal matters, as discussing the composition of a committee does not reveal anything personal about identifiable individuals. Our investigation also did not identify any other open meeting exceptions that would permit this discussion *in camera*.

Parsing the discussion

As a discussion about changing a committee's terms of reference would not normally fit within any of the Act's open meeting exceptions, we considered whether it could have been parsed out into open session.

The Divisional Court has found that it is not realistic to expect municipal councils to parse their discussions between open and closed sessions where it would "detract from free, open and uninterrupted discussion."⁵ My Office has found that matters that would not usually fit within an exception can sometimes be discussed in closed session if the matters relate to a discussion on a single topic, and if splitting the information would require unrealistic interruption to the conversation.⁶ However, if the discussion can be separated, in this case, the Selection Committee would have been expected to return to open session for those parts of the discussion that did not fit within any open meeting exception.⁷

In this case, several Selection Committee members explained that the discussion about whether to change the number of Heritage Committee members arose after the interviews, once the Selection Committee found that the number of applicants they wanted to recommend to council did not match the number required in the Heritage Committee's terms of reference. They explained that the discussion was intrinsically linked to the Selection Committee's discussion of the applicants they wished to recommend to council.

I am satisfied that on this occasion, it would not have been realistic for the Selection Committee to separate its discussion about amending the Heritage Committee's terms of reference from its broader discussion about the applicants. Accordingly, the entire discussion fit within the exception for personal matters.

⁵ *St. Catharines (City) v IPCO*, 2011 ONSC 2346 at para 42, online: <<https://canlii.ca/t/fkqfr>>.

⁶ *Springwater (Township of) (Re)*, 2024 ONOMBUD 8 at para 42, online: <<https://canlii.ca/t/k4z7w>>.

⁷ *Leeds and the Thousand Islands (Township of) (Re)*, 2022 ONOMBUD 5 at para 54, online: <<https://canlii.ca/t/jnkk9>>.

Conclusion

My investigation has determined that the Selection Committee for Agencies, Boards and Sub-Committees of the City of Hamilton did not contravene the open meeting rules in the *Municipal Act, 2001* on October 24, 2023.

All members of committees in the City are encouraged to familiarize themselves with the open meeting rules. My Office has resources available, including our Open Meeting Guide for Municipalities, which can be accessed on our website here. You can also contact us directly to order copies at info@ombudsman.on.ca.

I would like to thank the City of Hamilton for its co-operation during my investigation. The City Clerk has confirmed that this letter will be included as correspondence at an upcoming council meeting.

Sincerely,

A handwritten signature in black ink, appearing to read 'Paul Dubé', written over a large, light-colored oval shape.

Paul Dubé
Ombudsman of Ontario

cc: Matthew Trennum, City Clerk, City of Hamilton