



“The ABCs of Education and Training”

**Investigation into
City of Oshawa
Development Services Committee
Special Meeting of May 22, 2008**

**André Marin
Ombudsman of Ontario**

March 23, 2009

Complaint

- 1 On June 11, 2008, we received a complaint alleging that the Development Services Committee of the City of Oshawa had improperly held a closed special meeting on May 22, 2008, for the purpose of education, which should have been held in open session.

Ombudsman Jurisdiction

- 2 Under the *Municipal Act, 2001*, municipalities are required to pass by-laws setting out the rules of procedure for meetings. The law requires public notice of meetings, and that all meetings be open to the public, unless they fall within prescribed exceptions.
- 3 As of January 1, 2008, changes to the *Municipal Act, 2001* gave citizens the right to request an investigation into whether a municipality has properly closed 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.
- 4 On December 17, 2007, the City of Oshawa resolved not to appoint a closed meeting investigator and to have the Ombudsman perform closed meeting investigations.
- 5 In investigating closed meeting complaints, our Office considers whether the meeting was closed in accordance with the provisions of the Act, and the relevant municipal procedure by-law.

Council Meeting Procedures

- 6 The City of Oshawa's By-Law 126-75 sets out the procedures to be followed in connection with meetings of council and its committees. Special meetings can be called by the Mayor or upon receipt of a petition of the majority of members of council.
- 7 However, the by-law specifically provides that its procedural requirements do not apply to an "education session." For the purpose of the by-law, "education session" means the attendance of members of council at a given time and place for the purpose of receiving information in respect of which:
 - (a) no business of Council or the Corporation is transacted, no votes, decisions, by-laws or resolutions are made or adopted, no recommendations are made for action by Council or any Committee, and no action taken in the course of or in

furtherance of Council or Committee decision-making with respect to any specific matter of Council or Committee business; and

(b) the Education Session is not adjourned to or from any meeting of the Council or a Committee.

- 8 While the definition of “education session” in the by-law is quite broad, the by-law also sets out the requirement that meetings must be held in open session unless they come within prescribed exceptions. The by-law essentially mirrors the exceptions established by the *Municipal Act, 2001*, including s.239(3.1), which provides in the case of committee meetings that they may be closed to the public if held for the purpose of educating or training the members, provided no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the committee.
- 9 The by-law requires that before a closed meeting is held, a resolution must be passed stating the fact that a closed meeting is to be held and giving the general nature of the matter to be considered at the meeting. It also provides that notice to the public of education sessions and all special council and standing committee meetings is to be given by posting a notice on the city’s website as soon as practicable after the delivery of the notice to members of council, which is to take place no less than 24 hours in advance of the meeting.

Investigative Process

- 10 On June 27, 2008, following preliminary inquiries, the City of Oshawa was notified that our Office would investigate a complaint about the closed special meeting of the Development Services Committee held on May 22, 2008.
- 11 During the course of our investigation, we interviewed three members of the Development Services Committee. A fourth member was not formally interviewed, as he had not attended the special meeting, and a fifth was not interviewed as he advised that although he was at the May 22, 2008 “education session” initially, he left shortly after it began. We also received information from another councillor, who was not on the committee, but who had attended the May 22, 2008 meeting. In addition, we interviewed the Mayor, the Commissioner of Development Services, the current and a former committee co-ordinator, as well as two of the three officials from Northwood Recycling, who had given the presentation to the committee on May 22nd.
- 12 We obtained and reviewed documents from the municipality, including minutes, agendas, and correspondence. We also obtained and reviewed a discussion paper distributed by Northwood Recycling at the May 22, 2008 education session.
- 13 The City of Oshawa co-operated fully during the investigation.

Investigative Findings

- 14** Oshawa’s Development Services Committee is a standing committee of Oshawa council, responsible for “providing advice and recommendations to Council resulting from the operations of Land Use and Transportation Planning, Buildings Examination and Inspection, City Property Management Services, Engineering and Construction, Oshawa Municipal Airport Operation and Development and Real Estate.” It is comprised of five members of council. The Mayor acts as an ex-officio member.
- 15** During the course of our investigation, city officials explained that local residents had complained to the city as well as the Ministry of the Environment regarding odours from Northwood Recycling’s composting operation. In turn, Northwood Recycling officials explained that the company was concerned that the “odour issue,” combined with potential rezoning of lands surrounding the facility to “commercial,” might negatively impact the company’s future development plans. Northwood Recycling had met previously with individual members of council to discuss these issues. However, it later proposed that a meeting take place with the committee to explain the steps the company was taking to resolve the odour problem and to share its long-term development plans with the committee. The company was also interested in learning from the committee about whether the city’s land use plans were compatible with the company’s future plans. Northwood Recycling specifically requested that the meeting be held in private because it intended to discuss sensitive technological information, and it didn’t want to risk this information being made public. Northwood Recycling received no instructions from city officials beforehand concerning the scope of the information that it would be able to provide to the committee during the closed session.
- 16** In accordance with the committee’s practice, a special meeting was scheduled after all the committee members were polled and agreed to a meeting. One councillor who was not a member of the committee had objected to the closed session. He advised us that he generally prefers that meetings be held publicly. A number of council members we interviewed indicated that they could not recall a similar meeting being held in closed session in the past. We were advised that if a business wishes to discuss business plans, it would normally do so in open session.
- 17** Notice of the meeting was posted to the city’s website in advance of the meeting. The notice indicated that an education session would be held concerning “Skip Ambrose [the owner of Northwood Recycling] – Compost Facility and Potential Future Development on Thornton Road North.” The committee met at 1 p.m. on May 22, 2008, for a regularly scheduled open session. Five members of the committee attended that session, although one departed early. When the open meeting recessed at 2:34 p.m., the committee moved to another room for the scheduled education session with Northwood Recycling.

- 18** The education session began at 2:40 p.m. with only two members of the committee in attendance. The former committee co-ordinator explained to our investigators that the chair decided to begin the meeting without waiting for others to arrive. This is reflected in the minutes. The former co-ordinator told us that the committee didn't pass a resolution before the meeting, since there were insufficient members present to form a quorum. Shortly after the meeting started, two more members of the committee entered, and one of those originally in attendance left. One member of the committee and the Mayor were absent for the entire session. Three councillors and seven municipal staff also attended the meeting. Three representatives of Northwood Recycling conducted the presentation. The meeting ended at 3:25 p.m.
- 19** The minutes prepared for the May 22, 2008 education session contain no information whatsoever regarding the subjects discussed or the nature of the discussion. The minutes only record that a delegation addressed the committee concerning the Northwood Recycling compost facility and information about the attendees, who entered and left the meeting, the timing of events, and the motions that concluded the session.
- 20** In interviews with our investigators, those in attendance at the meeting confirmed that two main issues were discussed: The odour from the facility and what was being done to correct it, and rezoning of lands in the vicinity of the facility. Northwood Recycling's representative also discussed the history of the facility and spoke of the plans for future development. During the presentation, the Northwood Recycling representatives made it clear to the committee that the city's practice of rezoning lands in the area as "commercial" would not be compatible with the facility's future plans. They indicated that with the support of the city, they would be willing to relocate. By all accounts, committee members did not respond to this suggestion and asked very few questions throughout the presentation.
- 21** A discussion paper prepared by Northwood Recycling was distributed during the meeting, outlining the company's planning history, current operations and future development plans. In terms of future development, the paper addressed the fact that Northwood Recycling had purchased land with the expectation of relocating to another site, and that the site currently lacked the support of the city. It said "the increasing trend for waste diversion, as mandated by the Province, will continue to put greater pressure on municipalities to find suitable locations to process these materials," and noted that Northwood Recycling was well positioned to address this trend. It questioned whether city staff and councillors supported the company's current location or preferred it to relocate.
- 22** None of the members of council we interviewed could provide a clear and definitive answer as to why the meeting had been closed to the public. Some suggested that this might have been due to the potential for discussion of legal issues and possible litigation by the company against the city. However, this was highly speculative, no specifics were given, and the only exception to the open meeting requirements that the committee had relied on related to the meeting being for an "educational purpose." It was also suggested

that the meeting was closed because of discussion of proprietary information concerning the company's technology, and alternatively, because the Ministry of Environment's initiatives with respect to odours might be discussed. However, none of these subjects come within the exceptions set out in the *Municipal Act, 2001* allowing a closed meeting to take place. One councillor justified the discussion in this format because it gave councillors an opportunity, without raising public expectations, to "let their hair down... and talk about issues without looking over their shoulder and wondering what will appear in the press the next day..."

Analysis of Findings

Notice of Closed Meeting

- 23** The City of Oshawa did provide notice of the May 22, 2008 closed session in accordance with its by-law and the *Municipal Act, 2001*. However, the information in the notice was somewhat cryptic. While the Act does not set out the content of the notice to be issued, the more information provided by a municipality about the subject of a closed educational session, the less likely that it will attract censure. Given the reference in the notice of the May 22, 2008 closed meeting to the compost facility, which had been the subject of recent local complaints, combined with the reference to "potential future development" in the community, it is not surprising that the notice gave rise to public concern.

Resolution to Enter Closed Session

- 24** Oshawa's procedure by-law requires that a resolution be passed before a closed meeting is held, stating that the meeting will be held and the general nature of the matter to be considered. The *Municipal Act, 2001* actually goes further when it comes to education and training sessions. Where such sessions are to be held, a committee must state by resolution the fact that a closed meeting will be held for the purpose of education or training, the general nature of the subject matter and it must also specifically refer to the fact that the meeting will be closed under s. 239(3.1) of the *Municipal Act, 2001*.
- 25** The former co-ordinator suggested that the committee was not able to pass a resolution since it didn't have the requisite quorum present at the outset of the meeting. However, this does not excuse the committee's conduct. It is clear that a resolution is required. In addition, it is insufficient for a committee to pass a resolution while it is already meeting in closed session. Consistent with the Act, the resolution must be made in a meeting that is open to the public and in advance of the closed meeting, which the resolution authorizes.
- 26** While the committee gave public notice of the May 22, 2008 closed meeting, it contravened its by-law and the Act when it failed to issue a formal public resolution in the

prescribed form. Accordingly, the May 22, 2008 “education session” took place without legal authority.

- 27** The requirement to issue a resolution authorizing a closed meeting is not a mere technicality. The procedure was established by the Legislature to ensure greater openness, transparency and accountability of local government. Given the public interest in holding committee meetings open to the public, committee members must take any decision to close a meeting seriously and observe the formalities. The resolution requirement emphasizes the significance of a decision to exclude the public from a meeting. The public is entitled to observe that a committee has properly and fully stated its intent to enter into closed session and provided sufficient information to justify it doing so.

Education and Training

- 28** Provided the procedural requirements have been met, committees are entitled under the City of Oshawa’s by-law and the *Municipal Act, 2001* to hold closed meetings for the purpose of educating or training members, as long as no member discusses or otherwise deals with any matter in a way that materially advances the business or decisions-making of the committee (s.239(3.1)). However, in this case, even if the committee had complied with the *Municipal Act, 2001* and properly resolved to go into closed session, the scope of the May 22, 2008 in-camera session appears to have expanded well beyond what is contemplated by the phrase “education or training.” While the wording of this exception is certainly capable of broad interpretation, consistent with the public interest and remedial nature of the open meeting requirements, any exceptions must be narrowly construed.
- 29** While there are an infinite number of topics that could potentially form the subject of an education session, it must be clear that the purpose of such a meeting relates to education only. Any attempt to rely on this exception must be carefully scrutinized. A municipality cannot simply circumvent the open meeting law by characterizing a subject normally considered in open session as “educational.” If the committee doors are closed on the basis that an education session is taking place, other topics that are not strictly educational in nature cannot be discussed.
- 30** Given citizens’ concerns about odours emanating from the composting facility, the committee would have been wise to avoid holding any meeting with the company in closed session. It is understandable that this meeting drew suspicion and resulted in a complaint to my office.
- 31** While it is conceivable that information about the composting facility’s history and the methods used to reduce odours could be considered to have been provided for the purpose of education, it is evident that the company had its own agenda and “non-educational” motives for meeting with the committee. Northwood Recycling was concerned about the impact of municipal planning on its operations, and was looking for some assurance from the committee regarding its future expansion plans. It is difficult to see how the discussion

of potential rezoning of land surrounding the compost facility, its possible relocation, and the company's future business plans could be justified as being "educational" in nature. One of the primary purposes, if not the primary purpose, of Northwood meeting with the committee was to attempt to influence the course of municipal planning decisions relating to zoning. This purpose is more accurately characterized as a "lobbying" effort on Northwood's part rather than an attempt at educating the committee, and evidence of this is corroborated by both the discussion paper distributed by the company to the meeting attendees as well as by the witness accounts concerning the content of the presentation. This is the very type of conduct that municipalities should scrupulously avoid occurring in a closed committee meeting.

- 32** While there might be cases when a municipal council or committee needs to consider sensitive financial, technological or scientific information for the purpose of educating its members, and a closed session might be a reasonable approach, caution should be exercised in such circumstances. Councils and committees should avoid using closed education sessions as opportunities to consider information that will form the basis for their future decision-making, unless they otherwise come within the exceptions to the open meeting requirements and are properly authorized on that basis. In addition, even if such an education session is held, this does not mean that all non-confidential information and documents directly or indirectly related to the topic should likewise be considered and discussed in the absence of the public and kept confidential.
- 33** When municipalities selectively open committee doors and let outside presenters in for "educational or training purposes," there is a danger that inappropriate information may end up being disclosed. To mitigate this risk, municipalities should ensure before a closed education or training session is held that the permissible scope of the meeting is made clear to any presenters, and that any documentary materials are vetted in advance to confirm that they are consistent with the purpose of the meeting.

Minutes

- 34** In accordance with the *Municipal Act, 2001*, the committee was required to record all resolutions, decisions and other proceedings at the meeting without note or comment (s.239(7)). Unfortunately, the minutes for the May 22, 2008 meeting contain no meaningful information regarding its substance. The admonition not to include notes or comments does not mean that no information regarding the subjects discussed at a meeting should be recorded. The requirement to keep a meeting record should be interpreted in a manner that is consistent with the intent of the open meeting provisions, which are directed at enhancing the openness, transparency and accountability of municipal government. While extraneous notes and comments not germane to the actual proceedings of a committee should be excluded, the minutes should reflect what actually transpired, including the general nature of the subjects discussed. The minutes could easily have identified the areas covered during the presentation without disclosing any sensitive "trade

secrets.” Under the circumstances, it could be argued that the committee’s minutes failed to satisfy the Act’s minimum standard for recording proceedings.

- 35** The existence of an accurate record of all closed sessions containing sufficient detail to confirm what transpired is an important safeguard to ensure that the open meeting requirements have been observed and that only permissible topics have been considered in the absence of the public.

Opinion

- 36** The Development Services Committee clearly contravened its own by-law and the *Municipal Act, 2001* on May 22, 2008 when it failed to resolve to enter into a closed education session in accordance with the Act, and considered issues in the session that did not relate to the purpose of educating the committee. While much of the committee meeting could be characterized as educational in nature, the subject of Northwood Recycling’s future plans and zoning concerns was clearly not educational in nature and should not have been discussed in closed session. The committee’s record of the proceedings was also unnecessarily sparse.
- 37** All council members have an individual and collective responsibility to ensure that the requirements of the open meeting law are observed. The Development Services Committee did not carefully consider and regulate the scope of information presented in the session, nor did it take steps to ensure that the procedural requirements mandated by the law had been met.
- 38** Accordingly, I am making a number of recommendations to address its failure to strictly comply with the open meeting requirements, as well as best practices, which I believe if implemented will assist the City of Oshawa to conduct its meetings more openly and transparently in future.

Recommendations

Recommendation 1

The City of Oshawa should ensure that in future no subject is discussed in a closed education or training session unless:

- (a) It is clear that the presentation or discussion is only for the purpose of education or training;

- (b) All material prepared by presenters and trainers is vetted in advance to ensure it contains only educational or training information and presenters and trainers are instructed that they can only present or discuss information for the purpose of education or training;
- (c) The appropriate resolution is made in advance in open public session, authorizing the subject to be discussed in a closed education or training session, including reference to the specific exception in the *Municipal Act, 2001*; and
- (d) The subject has been generally described with as much specificity as possible so as to maximize the information available to the public without undermining the reason why the matter is being dealt with in camera.

Recommendation 2

The City of Oshawa should amend its procedure by-law to ensure that the requirement for a resolution in advance of an education or training session reflects the procedural requirements set out in the *Municipal Act, 2001*, including reference to the specific exception of the Act relied on to close the session.

Recommendation 3

The City of Oshawa should ensure that minutes of closed sessions provide an accurate and meaningful record of the proceedings, including sufficient details to identify the subjects that were discussed and the nature of the discussion.

Recommendation 4

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

Response of the Council of the City of Oshawa

- 39** On February 17, 2009, the Mayor responded to my preliminary findings, analysis, opinion and recommendations. He acknowledged the “procedural irregularity” regarding the failure of the committee to properly resolve to commence its special meeting on May 22, 2008 in closed session. He stressed that the council understood the importance of issuing a resolution prior to the commencement of any in camera session, and stated that on this one occasion, the committee’s failure to do so was an “innocent oversight.”
- 40** Although the Mayor accepted that the committee should have issued a proper resolution, he disagreed with a number of my conclusions.

- 41** The Mayor was of the view that the committee had not otherwise acted inappropriately with respect to Northwood Recycling’s presentation, and asked that I delete recommendations 1(a) and (b). He suggested “the critical element of an education session is that no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council or committee.” While this is indeed an important consideration in determining whether an education or training session has been properly held, it is equally important to establish that the session was held only for education or training purposes. In this case, while there was no evidence that the committee had dealt with any matter in a way that materially advanced the business or decision-making of the council or committee, the fact remains that a portion of the meeting content went beyond the scope of education, and into the realm of lobbying the committee regarding future zoning plans. Committee members did not engage in a discussion of this aspect of the presentation, but they also made no attempt to stop it from taking place. The committee’s responsibility extended beyond passivity. Through their silence, committee members permitted the presentation to stray outside the permissible bounds.
- 42** The Mayor noted that neither the *Municipal Act, 2001* nor the city’s procedure by-law limit the number of topics that could potentially form the subject of an education session. However, discussing business plans and trying to influence committee members about future zoning is not an educational exercise, and it is not transformed into one merely because it takes place within the context of a session that generally comes within the educational and training exception. Under the circumstances, I believe my conclusion and recommendation in this regard are justified.
- 43** With respect to recommendation 2, in which I call for the city’s procedure by-law to be amended to reflect the procedural requirements set out in the *Municipal Act, 2001* relating to resolutions concerning education and training sessions, the Mayor has noted that the statutory requirement to refer to s.239(3.1) of the Act within the resolution, applies irrespective of the by-law. He suggested that it was therefore unnecessary for the by-law to be amended to implement this particular requirement, although he indicated that he had asked staff to consider the issue. In my view, the city should encourage compliance with the law, and incorporating the specific legislative requirements would go some way to assist it in avoiding situations where the proper procedure is not followed.
- 44** The Mayor also took issue with my findings relating to the minutes kept of the May 22, 2008 special meeting and Recommendation 3. The Mayor commented that the Act does not require meeting minutes to include notes or comments respecting the substance of any discussion related to a resolution, decision or proceeding. He stated that the committee minutes for the meeting were consistent with staff’s recollection, they identified the general nature of the subject discussed, what actually transpired and met the standard required by the *Municipal Act, 2001*. I remain of the view that the minutes of the May 22 meeting are so generic that they provide no useful information about what was actually discussed. Preparing minutes that are devoid of detail in this manner does little to instill public confidence that council or a committee has acted appropriately. I believe that by

adopting more open record-keeping practices, the city and the public will benefit, as there will be less cause for speculation, conjecture and complaint about the content of closed meetings.

- 45** The new closed meeting investigative regime has ushered in an increased need for municipalities to act proactively and educate themselves about the open meeting requirements, including the new education and training exception. I recognize that considerable learning will continue as the content of the open meetings law is fleshed out through the investigative process. I urge Oshawa council to approach my recommendations in the spirit in which they were intended. My goal was to assist the city in embracing the principles of openness, transparency and accountability that underlie the open meeting requirements. My recommendations are aimed at ensuring that the city not only complies with its legal obligations in future, but that it also strives to implement best practices for the conduct of its meetings. With this in mind, I encourage the City of Oshawa to adopt all of my recommendations.

Report

- 46** The City of Oshawa council will be required to make my final report on this matter public in accordance with s.14(2.6) of the *Ombudsman Act*.



André Marin
Ombudsman of Ontario