



Ombudsman Report

**Investigation into the closed meeting
held by the Niagara District Airport Commission
on July 14, 2016**

**Paul Dubé
Ombudsman of Ontario
December 2016**

Complaint

- 1 In September 2016, our Office received a complaint about a special meeting held by the Niagara District Airport Commission on July 14, 2016. The complaint alleged that the commission violated the *Municipal Act, 2001* when it discussed airport usage fees in closed session. The complaint also alleged that the commission's resolution to proceed in camera was not sufficiently detailed.

The Niagara District Airport Commission

- 2 The Niagara District Airport Commission is a joint local board responsible for managing the Niagara District Airport on behalf of the three surrounding municipalities: the City of Niagara Falls, the City of St. Catharines, and the Town of Niagara-on-the-Lake.¹
- 3 The commission has nine members. Each municipality appoints one council member and two members of the public. Commissioners serve four-year terms.²

Ombudsman jurisdiction

- 4 Under the *Municipal Act*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 5 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 and local boards may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities and local boards that have not appointed their own.
- 6 The Ombudsman is the closed meeting investigator for the Niagara District Airport Commission.
- 7 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's or local board's procedure by-law have been observed.

¹ *Niagara (District Airport Commission) (Re)*, 2013 ONOMBUD 1 (CanLII) at para 1, online: <<http://canlii.ca/t/gtmh2>>.

² "Airport Commission", Niagara District Airport Commission, online: <<http://www.niagaradistrictairport.ca/airport-commission.php>>.

Investigative process

- 8 On September 22, 2016, we advised the Niagara District Airport Commission of our intent to investigate this complaint.
- 9 Members of the Open Meeting Law Enforcement Team (OMLET) reviewed the commission's procedure by-law and relevant portions of the Act, as well as the agenda, minutes and meeting materials for the meeting in question. They also listened to the audio recording of the July 14, 2016 closed session and spoke with the then commission chair, Airport Manager, and Executive Assistant.
- 10 We received full co-operation in this matter.

Commission procedure

- 11 The commission's procedure by-law³ provides that regular meetings are held on the third Thursday of the month at 5:00 p.m. The by-law also states that the chair may, at any time, call a special meeting with 48 hours' notice. Public notice of all meetings shall be given by posting the schedule of regular meetings on the commission's website. In addition, notices of special meetings must be posted on the website at least 48 hours in advance of the meeting.
- 12 Section 6.1 of the by-law provides that meetings shall be open to the public, subject to various exceptions. The by-law generally reproduces the closed meeting exceptions from the *Municipal Act*. However, the by-law has not been updated to reflect recent amendments to the Act, which mandate that discussions related to ongoing Ombudsman or closed meeting investigations occur in closed session. In addition, the by-law incorrectly indicates that the commission is entitled to proceed in camera if the subject matter being considered is a:

debate as to whether or not an item is properly in closed session or not if in the opinion of the Chair, such discussion would be prejudicial if discussed at an open meeting.⁴

- 13 There is no closed meeting exception in the Act which allows for such discussion to take place in closed session.

³ Niagara District Airport, *Niagara District Airport Commission Procedural by-law* (15 January 2015).

⁴ *Ibid* at s 6.1(1).

- 14 The Niagara District Airport Commission should amend its procedure by-law to ensure that it accurately reflects the *Municipal Act's* closed meeting exceptions.
- 15 Further, section 6.2 of the by-law provides that before proceeding in camera, the commission must resolve in open session to close the meeting to public. The resolution must set out the nature of the subject to be discussed and the statutory reason for closing the session.

July 14, 2016 special meeting

- 16 On July 14, 2016, at 5:00 p.m., the Niagara District Airport Commission met for a special meeting. Notice of the meeting was provided on the commission's website in accordance with its procedure by-law.
- 17 The meeting agenda indicated that "Airport fees" would be considered in camera under the exception for advice subject to solicitor-client privilege in section 239(2)(f) of the Act. At 6:00 p.m., the commission passed a resolution to proceed in camera. In the meeting minutes, the resolution to proceed in camera was formatted as follows:

10.1 Airport Fees...

Therefore be it resolved that, on July 14, 2016 the Niagara District Airport Commission will go into a closed meeting to consider:

s.239(2)(f) of the Municipal Act, 2001.

- 18 At the meeting itself, the former commission chair requested that a member move to enter closed session and advised that the closed session would be to discuss airport fees. However, the former chair did not indicate that the meeting was being closed under the exception for advice subject to solicitor-client privilege. The formal resolution to proceed in camera was not read out and commission members did not have a draft resolution in front of them prior to voting to proceed in camera.

Council's discussion

- 19 Our investigation into the commission's July 14, 2016 meeting was aided by its practice of audio recording each closed session discussion. Recordings are the most accurate record of what was discussed during a closed session, and the practice inspires community trust in the transparency and accountability of local government. Our Office strongly

encourages municipalities and local boards to adopt this best practice and commends the Niagara District Airport Commission for having done so.

- 20** The recording of the commission's meeting indicates that once in closed session, the commission members were asked if they had any questions about a chart of proposed airport fees that had been tentatively negotiated between the airport and a specified airline. The specified airline would be the first airline to operate scheduled passenger service out of the Niagara District Airport and this was the first time that the airport needed to negotiate these types of fees. The proposed fee structure and other supporting documentation was set out in the closed session meeting materials provided to each commission member.
- 21** Various commission members asked clarifying questions about the proposed fees and expressed opinions about whether the fee structure was a good financial deal for the airport. In response to these questions, the Airport Manager discussed the economic effect of the proposed arrangement, as well as various logistical matters that the airport would need to consider before finalizing the agreement. For instance, the commission discussed the need for additional staff and whether there was sufficient money to cover this cost. The commission also discussed various ways that the airport would need to be modified to make it passenger-friendly, such as the addition of clear signage.
- 22** Following this discussion, the commission voted to direct the Airport Manager to finalize the airport fee agreement with the specified airline. The commission also directed the Airport Manager to take steps to ensure that the airport meets the needs of passengers utilizing the scheduled airline service.
- 23** Following these directions, the commission resolved to return to open session at 6:15 p.m.
- 24** When asked why this discussion was appropriate for in camera consideration, the Airport Manager indicated that the discussion about airport fees was related to a legal agreement that the commission's lawyer would eventually be asked to draft. He further indicated that the fee structure could affect other aspects of the agreement (e.g. parking arrangements) between the airport and the specified airline. However, the Airport Manager indicated that the commission's lawyer was not present during the meeting and that during the meeting, the commission was not considering legal advice related to the airport fees or airport improvements.

- 25 The former commission chair, in contrast, emphasized that the Niagara District Airport is run like a business and that businesses need flexibility to discuss ongoing contractual negotiations in private. He noted that regular businesses are not subject to the same openness requirements and scrutiny as the Niagara District Airport. He further noted that the additional fees collected by the airport may enable the airport to hire more staff, which he felt was another reason the matter could be considered in camera.

Analysis

Closed meeting exceptions

“Advice subject to solicitor-client privilege” – s.239(2)(f)

- 26 Section 239(2)(f) of the *Municipal Act* permits a municipality or local board to consider advice that is subject to solicitor-client privilege, including communications necessary for that purpose, in closed session.
- 27 This exception can only be used when advice from a solicitor or related communication actually exists for the commission’s consideration. Communication will only be found to be subject to solicitor-client privilege if it is:
- (a) between a client and his or her solicitor, where the solicitor is acting in a professional capacity;
 - (b) made in relation to the seeking or receiving of legal advice; and
 - (c) intended to be confidential.⁵
- 28 Our review of the July 14, 2016 closed session audio recording and printed meeting materials, as well as our interviews, determined that the commission did not consider any advice subject to solicitor-client privilege. Rather, the discussion related to an ongoing fee negotiation between the airport and a specified airline, in addition to various improvements the airport wished to make in order to accommodate scheduled passenger service. The fact that the airport fees would eventually be incorporated by a lawyer into a contract does not mean that the commission was discussing advice subject to solicitor-client privilege. Accordingly, the commission was not entitled to rely on the “advice subject to solicitor-client privilege” exception of the Act to close its discussion to the public.

⁵ *Solosky v the Queen*, [1980] 1 SCR 821 at 837.

Other closed meeting exceptions

- 29 While speaking with our Office, the former commission chair indicated that he felt the discussion qualified for in camera consideration because the additional fees collected by the airport may enable it to hire another staff person. The recording of the meeting indicates that this was a general discussion about the potential need for additional staff and that no prospective employees were identified during the closed session.
- 30 Our Office has considered whether this portion of the discussion would come within any other closed meeting exceptions, including the “personal matters about an identifiable individual” (section 239(2)(b)) or the “labour relations or employee negotiations” (section 239(2)(d)) closed meeting exceptions. These exceptions, as well as the other exceptions to the *Municipal Act*, do not apply to the commission’s discussion. The commission did not discuss the personal information of any individuals in camera and the general discussion about the possibility of hiring more staff does not come within the “labour relations or employee negotiations” exception.

Sensitive business information and competitive interests

- 31 During the investigation, the former commission chair told our Office he felt it was important for the commission to be able to protect its competitive interests by discussing the airport fee negotiation in closed session. He noted that the fees charged by the airport are not standard, but rather negotiated between the airport and each airline. He indicated that the airport needs to keep the fee structure for each airline confidential in order to protect the airport’s future bargaining position with other airlines.
- 32 As our Office has previously noted, the *Municipal Act* does not contain a general closed meeting exception that allows a municipality or local board to proceed in camera for the purpose of protecting its competitive interests or sensitive business information. However, on November 16, 2016, the Ontario Legislature introduced Bill 68, *Modernizing Ontario’s Municipal Legislation Act, 2016*. If enacted, the bill would amend various pieces of municipal legislation, including the *Municipal Act, 2001*. The amendments to the Act would include four new closed meeting exceptions that would allow a meeting to be closed to a public when the municipality or local board is considering:

- information explicitly supplied in confidence to the municipality or local board by Canada, a province or territory or a Crown agency or any of them;
- a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence to the municipality or local board, which, if disclosed, could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- 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; or
- 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.⁶

33 In total, these proposed exceptions would allow municipalities and local boards to discuss various types of sensitive business information and negotiations in camera. The Niagara District Airport Commission may wish to consider making submissions regarding these proposed amendments to the *Municipal Act* while it is under consideration by the legislature.

Procedural matters

Resolution to proceed in camera

34 Our Office also received a complaint that the commission's resolution to proceed in camera provided insufficient information about the matter the commission intended to discuss. In the meeting minutes, the resolution to proceed in camera was formatted as follows:

10.1 Airport Fees...

Therefore be it resolved that, on July 14, 2016 the Niagara District Airport Commission will go into a closed meeting to consider:

s.239(2)(f) of the Municipal Act, 2001.

35 During the commission's meeting, the former chair indicated that the closed session would be to discuss airport fees. However, he did not

⁶ Bill 68, *Modernizing Ontario's Municipal Legislation Act, 2016*, 2nd Sess, 41st Parl, Ontario, 2016 at s 27.

indicate that the meeting was being closed under the exception for advice subject to solicitor-client privilege. The formal resolution to proceed in camera was not read out and commission members did not have a draft resolution in front of them prior to voting to proceed in camera.

- 36** Both the Act (section 239(4)) and the commission's procedure by-law require that the resolution to proceed in camera include the nature of the subject matter to be considered. As noted by the Court of Appeal in *Farber v. Kingston City*, "the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public".⁷
- 37** In the minutes for the July 14, 2016 commission meeting, the heading for the resolution to proceed in camera indicated that the commission would be discussing "Airport Fees". In addition, the former chair provided this information orally prior to the commission's resolution to proceed in camera. While the description provided during the meeting and in the agenda strikes the appropriate balance between providing general information to the public and protecting the specific reason for proceeding in camera, the information was not contained in the formal resolution. Instead, the resolution merely lists that the commission will be considering "s.239(2)(f) of the Municipal Act, 2001." Further, during the commission's meeting, the former chair did not orally provide information about which exception it was relying on to proceed in camera.
- 38** While the commission clearly intended to provide information to the public about the subject of its in camera discussion, it did so in an informal and incomplete manner. To improve the accountability and transparency of its open meeting practices, the commission should ensure that information about its intended in camera discussion is included within the formal resolution to proceed in camera. Further, the commission should ensure that the formal resolution is read out prior to proceeding into closed session.
- 39** While the *Municipal Act* prescribes various procedural requirements before a meeting can be closed to the public, it is important to remember that these procedural requirements are not a mere formality. Open meeting legislation ensures effective democracy. The Act's provisions are intended to increase the public's confidence in the integrity of local government and ensure that municipal power is exercised in an open and transparent manner.

⁷ *Farber v Kingston City*, [2007] OJ No 919 at 151.

Opinion

- 40 The Niagara District Airport Commission contravened the *Municipal Act, 2001* on July 14, 2016, when it went in camera to discuss ongoing airport fee negotiations and related airport upgrades. This meeting did not fall within the “advice subject to solicitor-client privilege” exception, or any exception, to the *Municipal Act’s* open meeting requirements.
- 41 In addition, the commission violated the requirements of section 239(4)(a) of the Act, as well as its procedure by-law, by failing to state by resolution the general nature of the matters to be considered in camera. However, the public was provided with information about the commission’s intended discussion through the agenda for the July 14, 2016 meeting, as well as through the former chair’s statement prior to the resolution to proceed in camera.

Recommendations

- 42 I make the following recommendations to assist the commission in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of the Niagara District Airport Commission should be vigilant in adhering to their individual and collective obligation to ensure that the commission complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

The Niagara District Airport Commission should ensure that no subject is discussed in closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 3

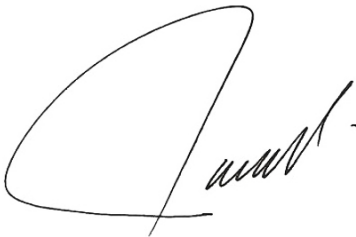
When proceeding in camera, the Niagara District Airport Commission should ensure that information about its intended in camera discussion is contained within the formal resolution to proceed in camera. Further, the commission should ensure that the formal resolution is read out prior to proceeding into closed session.

Recommendation 4

The Niagara District Airport Commission should amend its procedure by-law to accurately reflect the closed meeting exceptions in the *Municipal Act, 2001*.

Report

- 43 The Niagara District Airport Commission was given the opportunity to review a preliminary version of this report and provide comments to our Office. No comments were received.
- 44 My report should be shared with the Niagara District Airport Commission and made available to the public as soon as possible, and no later than the next commission meeting.



Paul Dubé
Ontario Ombudsman