



Ombudsman Report

**Investigation into whether the City of London's
Strategic Priorities and Policy Committee
held an illegal meeting
on March 2, 2015**

**André Marin
Ombudsman of Ontario
June 2015**

Complaint

- 1 On March 3, 2015, my Office received a complaint about a closed meeting held on March 2, 2015 by the Strategic Priorities and Policy Committee [“the committee”] for the City of London.
- 2 The meeting was closed under the “proposed or pending acquisition or disposition of land” exception in subsection 239(2)(c) of the *Municipal Act, 2001*, and under the “advice that is subject to solicitor-client privilege” exception in subsection 239(2)(f).
- 3 According to the complainant, the committee’s in camera discussion of development proposals for a decommissioned hospital site should have been held in open session.

Ombudsman jurisdiction

- 4 Under the *Municipal Act, 2001* [the 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 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.
- 6 The Ombudsman is the closed meeting investigator for the City of London.
- 7 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s procedure by-law have been observed.

The 2014 municipal election

- 8 The municipal election was held on October 27, 2014. Only four members of the previous council were re-elected. The mayor and 14 councillors were sworn in on December 1, 2014.

Previous complaints

- 9 Since 2011, our Office has received more than 80 complaints about the City of London,¹ including complaints about closed meetings held by London's Strategic Priorities and Policy Committee.
- 10 On January 31, 2014, the committee discussed "labour relations" issues with respect to the city's firefighters at a closed meeting. I did not find evidence that council members made decisions or took votes that were not permitted in the closed session.
- 11 On February 7, 2014, the committee held a closed session to discuss "acquisition or disposition of land". I determined that this meeting was closed appropriately, but noted that the meeting record was incomplete, and recommended council keep a complete, detailed record of discussion in closed session, and consider audio or video recording its closed meetings.

Investigative process

- 12 After completing a preliminary review, my Office advised the City of London that we would be investigating this complaint on May 22, 2015.
- 13 My Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the city's procedural by-law and the Act, relevant agendas, minutes, and committee reports, and the supporting documents related to the March 2 meeting. They spoke with the City Clerk and the Managing Director, Planning and City Planner.
- 14 My Office received full co-operation in this matter.

¹ See e.g. "Investigation into whether the City of London held an improper closed meeting at Harmony Grand Buffet" (August 2012), online: <<http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/LondonAugust2012-EN.pdf>>; Report: "In the Back Room" (October 2013), online: <https://ombudsman.on.ca/Files/sitemedia/Images/Reports/London_BT_Final-EN_1.pdf>; Report: "Turning Tables" (September 2014), online: <<https://ombudsman.on.ca/Resources/Reports/City-of-London-%285%29.aspx>>.

Background: The Committee

- 15 Section 238(1) defines “committee” as “any advisory or other committee, subcommittee or similar entity of which at least 50 per cent of the members are also members of one or more councils or local boards”.
- 16 The Strategic Priorities and Policy Committee is a standing committee comprised of the mayor and all 14 members of council. Accordingly, it constitutes a committee for the purposes of the open meeting provisions of the *Municipal Act, 2001*.
- 17 According to London’s procedure by-law (No. A-45), the committee’s mandate includes strategic planning, economic strategies, initiatives, and capital budgets.

Background: The Old Victoria Hospital Lands

- 18 The City of London is currently planning for the redevelopment of a five-hectare parcel of land known as the Old Victoria Hospital Lands, which the city acquired in 1866 to build its first hospital.²
- 19 The city is undertaking a two-stage process to sell the lands to a developer. The first stage involves seeking proposals through a Request for Expressions of Interest process.³ The Expressions of Interest contain proposals to purchase and develop the land, with information provided by the proponents to demonstrate how they qualify to do so. Once qualified applicants are identified, the second stage will involve seeking more detailed information through a Request for Proposals (RFP) process. Once a developer is selected, the lands will be sold and developed according to the chosen proposal.

² City of London, Old Victoria Hospital Lands, Secondary Plan (3 June 2013), online: <<http://www.london.ca/business/Planning-Development/secondary-plans/Documents/June-20-2013-Old-VictoriaHospitalLands-SecondaryPlanDraft-BT.pdf>>.

³ “City seeks developers for Old Victoria Hospital Lands” (22 October 2014), online: <<http://www.london.ca/newsroom/Pages/Old-Victoria-Hospital.aspx>>.

The March 2 committee meeting

- 20** The committee met on March 2, 2015. The committee voted to proceed in camera at 6:19 p.m. to discuss advice subject to solicitor-client privilege and matters of acquisition or disposition of land. The open session reconvened at 7:45 p.m., there was a recess, and the closed session resumed from 9:42 p.m. to 10:59 p.m.
- 21** All members of the committee were present during the closed session, as well as: the Deputy City Clerk; the City Manager; three staff from the City Solicitor's office; the Managing Director, Development and Compliance Services and Chief Building Official; the Division Manager, Realty Services; the Managing Director, Corporate Services and City Treasurer and Chief Financial Officer; the Managing Director, Planning and City Planner; and four other staff from the planning department.
- 22** During the closed session, the committee considered confidential legal advice with respect to decommissioning the Old Victoria Hospital Lands (also called the South Street Campus). The substance of the discussion was redacted from the committee report my Office received in accordance with solicitor-client privilege. Privilege is maintained by section 19(5) of the *Ombudsman Act*:
- Every person has the same privileges in relation to the giving of information, the answering of questions, and the production of documents and things as witnesses have in any court.
- 23** The committee also heard from the City Planner, who reviewed the Expressions of Interest received by the city from proponents interested in purchasing the land for redevelopment. He told the committee how staff had evaluated each of the Expressions of Interest and explained staff's recommendations for moving forward to the Request for Proposal stage of the disposition process.
- 24** The committee was provided with background information about the project as context for the review of the Expressions of Interest. The background information was provided in a document that had already been made publicly available. It was not discussed at the meeting.

Analysis

Applicability of the “solicitor-client privilege” exception

- 25** My office considered whether the exception for “advice that is subject to solicitor-client privilege, including communications necessary for that purpose” in s. 239(2)(f) of the Act applied to the discussions held in closed session.
- 26** This exception can only be used when some advice from a solicitor or related communication actually exists for council’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.⁴
- 27** According to the committee report and the Clerk, the committee discussed legal advice received from the municipality’s solicitor with respect to the process to decommission the Old Victoria Hospital Lands. Accordingly, the discussion fit within the exception in s. 239(2)(f).

Applicability of the “acquisition or disposition of land” exception

- 28** My office also considered whether the discussion fit within the exception in subsection 239(2)(c) of the Act, “acquisition or disposition of land by the municipality or local board”.
- 29** As I noted in my review of a closed meeting held by council for the City of Oshawa in March 2013, the exception for discussions of acquisition or disposition of land is discretionary. A review of the relevant case law suggests that the primary purpose of the exception is to protect a municipality’s bargaining position in property negotiations.⁵

⁴ *Solosky v. the Queen*, [1980] 1 S.C.R. 821 at p. 837.

⁵ See *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information*, Toronto: The Committee, July 1984; S. Makush & J. Jackson, *Freedom of Information in Local Government in Ontario*, Toronto: Commission on Freedom of Information and Individual Privacy, 1979, as cited in Final Order MO-2468-F, *Re: City of Toronto*, [2009] O.I.P.C. No. 171.

- 30** In Order MO-3073, the Information and Privacy Commissioner found that the Niagara District Airport Commission was authorized to hold a meeting under the “acquisition or disposition of land” exception to consider applications received in an RFP process to lease municipally-owned land.
- 31** The Ontario Superior Court of Justice has found that it is unrealistic to expect members of municipal council to parse their in camera discussion of an acquisition or disposition of land to exclude references to other options being considered or history or background information.⁶
- 32** The committee’s discussion under this exception was limited to a review by the City Planner of staff’s evaluations of the Expressions of Interest received from proponents hoping to develop the Old Victoria Hospital Lands.
- 33** In addition to the material presented to the committee about staff’s evaluation of the Expressions of Interest, the committee was provided with background information about the project. The background documentation was not discussed during the meeting. The City Planner told us that, because so many members of the committee were newly-elected councillors, the information was provided as background and context for the Expressions of Interest.
- 34** The City Planner explained that it was essential to hold the March 2 discussions in camera in order to protect the city’s bargaining position in negotiations related to the land sale.
- 35** Accordingly, the discussion in camera fit within the “acquisition or disposition of land” exception in the Act.

Opinion

- 36** Our investigation established that the March 2 in camera meeting of London’s Strategic Priorities and Policy Committee did not violate the open meeting requirements of the *Municipal Act, 2001*.

Report

- 37** OMLET staff spoke with the Mayor, Clerk, City Planner, and a city solicitor on June 8, 2015 to provide an overview of these findings and to give the municipality an opportunity to comment. Their comments were taken into account in preparing this report.

⁶ *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*, [2011] O.J. No. 1320, 2011 ONSC 2346 at para. 42.

38 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.



André Marin
Ombudsman of Ontario