



Ombudsman Report

**Investigation into whether
the City of Hamilton held an illegal meeting on
December 10, 2014**

**André Marin
Ombudsman of Ontario
April 2015**

Complaint

- 1 On December 16, 2014, my Office received a complaint about a December 10, 2014 closed session held by Hamilton’s General Issues Committee (the Committee), which is made up of all of council.
- 2 According to the complaint, the Committee went in camera to discuss facility space needs for the Hamilton Police Service. The complaint alleged that the discussions that took place during the closed session did not fit within any exception found in the *Municipal Act, 2001* (the Act).

Ombudsman jurisdiction

- 3 Under the Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 4 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.
- 5 The Ombudsman is the closed meeting investigator for the city of Hamilton.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

Procedure by-law

- 7 Hamilton’s Procedure By-law (By-law 14-300) defines “committee” as a Standing Committee, Licensing Tribunal, Selection Committee or an Advisory Committee or Task Force established by council from time to time. “Standing Committee” is defined as, “a Committee established by Council, comprised entirely of Members of Council, to carry out duties on an ongoing basis, as specified by Council”. The General Issues Committee is a standing committee.
- 8 Section 8 of the by-law pertains to the open meeting requirements. The by-law states that no meeting of council or a committee shall be closed to the public unless the subject matter being considered falls within one of the exceptions to the open meeting requirements.

Investigative process

- 9** My Office’s Open Meeting Law Enforcement Team reviewed relevant portions of the city’s procedure by-law and the Act, and materials pertaining to the December 10 meeting. They spoke with city staff as well as staff from the Police Services Board.
- 10** My Office received full co-operation in this matter.

The December 10 meeting

- 11** The December 10 General Issues Committee meeting began at 9:30 a.m. in council chambers. Notice was provided on the municipal meeting calendar and the agenda was posted in advance on the municipality’s website.
- 12** According to the agenda, the Committee would be proceeding in camera to discuss four matters, including a confidential appendix to the capital expenditure report. This discussion was closed to the public under two exceptions: A proposed or pending acquisition or disposition of land by the municipality or local board (s. 239(2)(c) of the Act) and a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act (s. 239(2)(g) of the Act).
- 13** The Committee passed a resolution to proceed in camera at 10:27 a.m. for the reasons outlined in the agenda. Present in camera were all members of council except one, ten members of city staff, and one staff member from the Hamilton Police Services Board.
- 14** According to the closed session minutes, while in camera council first considered “2015 Capital Expenditure Report – Facilities Space needs”. This item formed the basis for the complaint to our Office.
- 15** Our Office was provided with both a public report and a confidential appendix relating to this item. There was no information in the closed session minutes regarding the substance of the discussion. The minutes simply state, “For disposition of this matter, refer to Item (h)(ii) in the public Minutes.”
- 16** The public report, which was prepared by staff of the Hamilton Police Services Board, recommended that the city’s contribution of \$5 million for the construction of a new Investigative Services Division facility for Hamilton Police Services be approved contingent on Hamilton Police Services obtaining the remaining funding

from the federal and provincial levels of government. The report also recommended that Appendix A to the report regarding the space needs for the facility remain confidential until such time as the real estate transactions were finalized.

- 17** The confidential appendix was a report prepared for the Chair and members of the Hamilton Police Services Board by the Acting Chief of Police. It included information about an outstanding parcel of land that the city had to purchase on behalf of the Police Services Board before moving forward with the project, including the maximum price the city was willing to pay. City staff advised our Office that this information was only discussed in closed session, as the city did not want to compromise its bargaining position when purchasing the land.
- 18** City staff also advised that the “matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act” exception was cited, as the Police Services Board had previously discussed this matter in closed session at their own meetings, which were closed to the public under the *Police Services Act*.
- 19** We were advised that there was minimal discussion of this matter in closed session. The Committee reviewed the report and decided more information was required.
- 20** In open session, the Committee voted that the report be tabled until such time as the Hamilton Police Service could provide a more comprehensive closed session presentation during the 2015 budget process. This presentation subsequently took place on January 28 in open session.

Analysis

The acquisition or disposition of land exception

- 21** On December 10 the General Issues Committee considered a report in camera, which contained information regarding a property the city was considering obtaining, including a potential purchase price.
- 22** The purpose of s. 239(2)(c) of the Act is to protect a municipality’s bargaining position when acquiring or disposing of land¹. In this case, it is understandable that the city would not want the price they were willing to pay for the land in question to be revealed to the public. Accordingly, the discussion fit within this exception.

¹ See, for example, IPC Order MO-2485-F, Toronto (City) (Re), 2009 CanLII 60399 (ON IPC)

The matter under another act exception

- 23** The city also closed the December 10 discussion under the “matter under another act” exception, as the same subject matter had been discussed in closed session by Hamilton’s Police Services Board, under the *Police Services Act*.
- 24** Section 35(3) of the *Police Services Act* states that meetings must be open to the public subject to two exceptions:
- (4) The board may exclude the public from all or part of a meeting or hearing if it is of the opinion that,
- (a) matters involving public security may be disclosed and, having regard to the circumstances, the desirability of avoiding their disclosure in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public; or
 - (b) intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public.
- 25** Although my Office does not have jurisdiction to review closed meetings of Police Services Boards, which are specifically excluded from the definition of “local boards” in the *Municipal Act*, OMLET staff spoke with staff at the Hamilton Police Services Board for the purpose of evaluating the “matter under another act” exception, as it applied to the December 10 General Issues Committee meeting.
- 26** Staff with the Police Services Board advised that the new facility was discussed in camera by the Board. They believed the matter fit within the “intimate personal/financial matters” exception found in section 35(4)(b) of the *Police Services Act*, as there was an outstanding property that would potentially be acquired for the project. Since the city would be making the purchase, the Police Services Board considered the purchase to be an “intimate financial matter” involving the finances of the city.
- 27** Normally, discussion of the budget for an investigative services facility would not qualify for in camera discussion. In the circumstances however, given that the discussion focused on the purchase of a specific property that was required to move the project forward, I am satisfied that the city's reliance on s. 239(2)(g) was justified.

Procedural issues

Meeting record

- 28** In accordance with s. 239(7) of the Act, a municipality is required to record, without note or comment, all resolutions, decisions, and other proceedings at its meetings. While the Act prohibits notes or comments from being included in the official record, this does not mean that the subjects discussed at a meeting should not be referred to. In the case of the December 10 General Issues Committee meeting, the minutes state that the issue of the Capital Expenditure Report was disposed of in open session, but do not provide any information about the closed session discussions. Generally, the various substantive and procedural items that were discussed at a closed meeting should be recorded.
- 29** A record of a closed meeting should include reference to:
- 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 documents considered;
 - any motions, including who introduced the motion and seconders;
 - all votes taken, and all directions given.
- 30** As noted in my 2011-2012 Annual Report on open meetings, I also strongly encourage municipalities to make audio or video recordings of council proceedings. This provides the most clear, accessible record for closed meeting investigators to review, and assists in ensuring that officials do not stray from the legal requirements during closed meetings. The city of Hamilton considered this practice in 2013, and at the time council rejected the idea.
- 31** More and more municipalities are opting to digitally record closed sessions for the sake of accuracy. These include the Townships of Tiny, Madawaska Valley and McMurrich/Monteith, the Town of Midland, the Municipality of Lambton Shores, and the Cities of Oshawa and Welland. I encourage Hamilton's council to reconsider its stance on audio recording closed meetings.

Opinion

- 32** My investigation found that Hamilton’s General Issues Committee did not contravene the Act when it closed a portion of its December 10, 2014 meeting to the public under the “acquisition or disposition of land” and “a matter under another act” exceptions.
- 33** I am making the following recommendations, which I hope will assist council to improve its closed meeting practices.

Recommendations

Recommendation 1

The council for the City of Hamilton should keep complete, detailed and accurate records of all matters discussed during closed meetings.

Recommendation 2

The City of Hamilton should implement a practice of audio or video recording its closed sessions.

Report

- 34** OMLET staff spoke with the Mayor and city staff, including the clerk, on April 13, 2015 to provide an overview of these findings, and to give the city an opportunity to comment. Any comments received were taken into account in preparing this report.
- 35** 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.



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