



**Investigation into the closed meeting
held by the City of Niagara Falls
on February 10, 2015**

**Paul Dubé
Ombudsman of Ontario
November 2016**

Complaint

- 1 In July 2016, our Office received a complaint about a meeting held by council for the City of Niagara Falls on February 10, 2015. The complaint alleged that council violated the *Municipal Act, 2001* when it voted in closed session to commit \$10 million towards a proposed partnership with a post-secondary institution. The complainant also indicated that this matter was not included on the meeting agenda and that council did not report back in open session following the vote.

Ombudsman jurisdiction

- 2 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.
- 3 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.
- 4 The Ombudsman is the closed meeting investigator for the City of Niagara Falls.
- 5 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.

Investigative process

- 6 On August 8, 2016, we advised council for the City of Niagara Falls of our intent to investigate this complaint.
- 7 Members of the Open Meeting Law Enforcement Team (OMLET) reviewed the city's procedure by-law and relevant portions of the Act, as well as the meeting notice, minutes, contemporaneous notes made during the meeting, and other related materials. They also reviewed media stories related to the February 10, 2015 meeting and various letters sent by the Mayor and city staff in support of the proposed partnership. They

interviewed all nine members of council, as well as the Clerk and Chief Administrative Officer.

- 8 We received full co-operation in this matter.

Council procedure

- 9 Rule 2 of the city's procedure by-law¹ provides that regular council meetings are held at 6:00 p.m. on the dates set out in a schedule to the by-law, unless otherwise provided by special resolution of council. Under Rule 3, notice of special meetings is to be provided to each member of council at least 48 hours in advance of the meeting, with a list of all items to be dealt with at the meeting. The by-law does not provide for public notice of regular or special council meetings.

- 10 However, according to the city's website, council meetings are held on Tuesday nights and start at 5:00 p.m. in council chambers.² The city's website states that:

Council may have a Closed Meeting preceding the Council meeting, between 4 and 5:00 p.m., in compliance with s. 239(2) of the *Municipal Act*. More information on closed meetings can be found on our Closed Meetings of Council page. Resolutions to go into a Closed Meeting are viewable through the Agenda's [sic] & Minutes link.

- 11 A yearly meeting calendar is provided on the city's website, with a notice that the schedule is subject to change. The website states that council agendas are made available on the city's website by the Thursday prior to each meeting.
- 12 In three previous reports, our Office has identified issues with the city's procedure by-law and recommended that the notice provisions be updated to comply with section 238(2.1) of the *Municipal Act* and to accurately reflect the city's practices.³ Specifically, we recommended that the by-law

¹ City of Niagara Falls, by-law no. 89-155, *A by-law to provide for the Standing Rules of the Council* (19 June 1989), online: <<https://www.niagarafalls.ca/pdf/by-laws/procedural-by-law.pdf>>.

² "Council Meeting Schedule", City of Niagara Falls, online: <<https://www.niagarafalls.ca/city-hall/council/schedule.aspx>>.

³ Ombudsman of Ontario, *Investigation into whether Council for the City of Niagara Falls held an illegal meeting on October 8, 2013* (February 2015) at para 62, online:

<[https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls-\(2\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls-(2).aspx)>;

Ombudsman of Ontario, *Investigation into whether Council for the City of Niagara Falls held an*

be amended to:

- require notice to the public of regular and special council meetings;
- require public posting of agendas for the open and closed sessions of regular and special meetings; and
- reflect council's practice of meeting at 5:00 p.m. for regular council meetings.

13 Council for the City of Niagara Falls should amend its procedure by-law to implement our Office's previous recommendations regarding public notice, posting of agendas, and timing of council meetings.

February 10, 2015 council meeting

14 On February 10, 2015, 4:00 p.m., council for the City of Niagara Falls met for a regular meeting in Committee Room 1. After calling the meeting to order in open session, council immediately resolved to move into closed session to consider a matter:

that falls under the subject matter of 239(c) a proposed acquisition or disposition of lands and 239(f), advice that is subject to solicitor-client [sic], related to 4320 bridge [sic] Street, 4327 Bridge Street and 4601 Park Street.

15 The agenda described the closed session's subject matter in the same way. Each of these addresses corresponds to a city-owned property in downtown Niagara Falls.

16 Although council now audio records its open and closed meetings, the February 10, 2015 meeting occurred before this practice was implemented.

Council's discussion

illegal closed meeting on April 28, 2015 (November 2015) at para 42, online: <[https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls-\(3\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls-(3).aspx)>; and Ombudsman of Ontario, *Investigation into whether Council for the City of Niagara Falls held illegal closed meetings between July 2011 and August 2013 with respect to Marineland* (February 2015) at para 49, online: <<https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls---Park-Protest-.aspx>>

- 17 Once in closed session, the city's Chief Administrative Officer (CAO) reminded council that one of its strategic priorities was to find a post-secondary institution looking to establish a campus in downtown Niagara Falls. The CAO explained that in furtherance of this goal, the city was in contact with a specific post-secondary institution that wished to partner with the city and another private partner to submit an application for federal development funding.
- 18 The CAO indicated that, if the project were to proceed, the city would be expected to contribute up to \$10 million to the project and that this amount could include the value of land, services, or other in-kind contributions. During this explanation, the Mayor and Director of Business Development indicated that, because of the program's application deadline, council needed to provide direction to staff that evening about whether to proceed with the partnership.
- 19 After providing this background, the CAO discussed various city-owned properties in downtown Niagara Falls that could be affected by the proposed partnership. Although the recollection of councillors varied somewhat due to the passage of time, the majority of those we interviewed advised that council's discussion was cursory and high level. They indicated that council discussed the general possibility that the city may have to sell or give specific city properties to the post-secondary institution if the downtown campus development were to proceed. In addition, those we interviewed advised that council briefly considered whether it would be willing to contemplate expropriating a specific property to facilitate the development. These recollections are supported by contemporaneous notes from the meeting, which indicated that council would be provided with details about these properties once the funding application was further along.
- 20 During these discussions, council did not discuss the value of any of the properties, nor the imminent possibility of disposing of them. Rather, the CAO was seeking guidance about whether council would consider selling the city-owned properties and/or expropriating the private property if the funding application were approved at a future date.
- 21 In the course of the meeting, several councillors requested specific information about the post-secondary institution (e.g. its name), draft business plans, impact studies, and return on investment calculations. They indicated that this information would help them make an informed decision about whether to proceed with the proposed partnership. In response, the CAO and Mayor indicated that the post-secondary institution had asked for secrecy to protect its strategic business position. Regarding the other requested documents, councillors were told it was too

early in the process for that type of analysis. However, they were assured that if the partnership were to proceed and the application was granted, this type of information would come before council before council was asked to make any final decision.

- 22** Following this explanation, council proceeded to discuss what type of direction staff was seeking. Some councillors were initially concerned that they were being asked to vote to commit \$10 million without having any details about the development proposal. However, after further discussion, staff clarified that they were not asking council to commit \$10 million during the closed session. Rather, they said they were seeking council's direction to tell the post-secondary institution to proceed with the development funding application. City staff told council that, in the future, it would have a chance to review the specific terms of the development proposal in open session before deciding whether to commit \$10 million to the project.
- 23** One councillor was concerned about this explanation and continued to believe that council was being asked to commit \$10 million during the closed session. In response, staff reiterated the type of direction they were seeking and told council that it would not be obligated to commit any money if it was not satisfied with the ultimate proposal. Following this explanation, council passed a resolution to:

[d]irect staff to indicate to the post-secondary institution, Council's interest in partnering on the funding proposal.

- 24** With one exception, all councillors and staff members told our Office that that they believed this resolution directed staff to contact the post-secondary institution and proceed with the funding application. However, one councillor felt that despite the wording of the resolution, every councillor understood they were voting to commit \$10 million to the development proposal.
- 25** Some individuals told our Office that council specifically discussed whether the subject matter of the meeting was appropriate for in camera consideration. They indicated that, in response, the Clerk told council that it was entitled to discuss property matters during the closed session. In retrospect, however, the Clerk advised our Office that he does not believe the discussion fell within the "acquisition or disposition of land" closed meeting exception. He indicated that the properties were only discussed in a general way and that the majority of council's discussion instead related to the development proposal and whether council was being asked to commit \$10 million in closed session.

Return to open session and report back

- 26 At 5:00 p.m., council resolved to return to open session. Once in open session, council passed a public resolution directing staff to proceed with the funding application and to investigate possible partnerships related to that program. In their interviews, councillors indicated that this resolution was intended to provide the public with general information about the direction that council had previously provided in camera.
- 27 The council meeting adjourned at 8:10 p.m.

The Mayor's February 12, 2015 letter

- 28 During the course of this investigation, our Office was provided with a letter signed by the Mayor and addressed to the development funding program discussed during the February meeting. The letter has been referenced and quoted from in several media reports regarding the February 10, 2015 meeting.⁴ The letter was dated February 12, 2015 – two days after the council meeting – and stated in part that:

On behalf of the Council of the City of Niagara Falls, I am pleased to provide the City's endorsement and full support for [the development funding application]. **The Niagara Falls City Council has committed \$10 million to the project** over the 4 year period as a partner in this initiative consisting of **\$8.5 million in financial support and \$1.5 million of in-kind contributions** as further detailed in the proposal. [emphasis added]

- 29 When asked about the apparent contradiction between the letter and council's direction to staff, the Mayor said that the letter was intended to be persuasive and that it did not reflect council's decision during the meeting. He said that the development funding program would not have taken the application seriously if the letter did not say that council had committed \$10 million to the proposal. The Mayor indicated that he had written similar letters when applying for other types of development funding, and that in each of those instances, council understood that it was not committing any money during the application stage.

⁴ For instance: Ray Spiteri, "Council misled over Ryerson plan: Ioannoni", *Niagara Falls Review* (27 June 2016), online: <<http://www.niagarafallsreview.ca/2016/06/27/council-misled-over-ryerson-plan-ioannoni>>.

Analysis

Closed meeting exceptions

“Acquisition or disposition of land” – s.239(2)(c)

- 30** Council relied on the “acquisition or disposition of land” exception in section 239(2)(c) to discuss whether the city wished to apply for development funding in partnership with an unnamed post-secondary institution.
- 31** The acquisition or disposition of land exception allows council to discuss the sale, lease, or purchase of land within a closed session, with the primary purpose being to protect the municipality’s bargaining position in property negotiations.⁵
- 32** Previously, our Office analyzed the scope of this exception in the context of a very similar closed meeting held by council for the City of Niagara Falls.⁶ In that meeting, council discussed a consultant’s report related to the possibility of establishing a downtown campus in partnership with a post-secondary institution. During the meeting, council referenced certain city-owned and private properties that could be affected if a downtown campus were to be established. However, the discussions did not address how the properties were to be appraised or sold, and there was no discussion about putting specific properties on the market.
- 33** In our Office’s February 2015 report, we determined that council’s discussion did not fall within the “acquisition or disposition of land” exception, or any exception, to the Act’s open meeting requirements. Our Office based this conclusion on the fact that:

council did not discuss the acquisition or disposition of city lands with a view to protecting the city’s bargaining position in property negotiations.⁷

⁵ Letter from Ombudsman of Ontario to Town of Ajax (28 March 2014), online: <<http://www.ombudsman.on.ca/Files/sitemedia/Documents/Ajax-Closing-Letter---May-23-13--final.pdf>>.

⁶ Ombudsman of Ontario, *Investigation into whether Council for the City of Niagara Falls held an illegal meeting on October 8, 2013* (February 2015) at para 62, online:

<[https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls-\(2\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls-(2).aspx)>;

⁷ *Ibid* at para 44.

- 34** Unfortunately, this finding was shared with council for the City of Niagara Falls after the February 10, 2015 meeting had already occurred.⁸ Accordingly, council was unaware of the report’s conclusions when it once again relied on the “acquisition or disposition of land exception” to discuss matters related to the proposed downtown development.
- 35** During the February 10, 2015 in camera meeting, council discussed whether it wished to pursue development funding in partnership with an unnamed post-secondary institution. As part of that discussion, council was told that the city may have to contribute \$10 million to the project and that certain city-owned properties may be included as part of that contribution. In addition, council briefly discussed the possibility of expropriating a certain piece of private property if the development were to proceed. These discussions were high level and general because council did not have any details about the post-secondary institution and did not know whether the funding proposal would be granted. Council did not have appraisal information for the properties, was taking no practical steps to sell them, and was not engaged in negotiations to dispose of the properties. Accordingly, council was not entitled to rely on the “acquisition or disposition of land” exception to close its discussion to the public.

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

- 36** Council’s resolution to proceed in camera also cited the closed meeting exception for “advice subject to solicitor-client privilege” under section 239(2)(f) of the Act. This exception can only be used when 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.⁹
- 37** While the City Solicitor was present during the February 10, 2015 meeting, those with the best recollection of the meeting said that he did not provide any legal advice or participate in the discussion. When asked why this exception was included in the resolution to proceed in camera, the Clerk

⁸ The Ombudsman’s report was on the March 10, 2015 council agenda, online: <<https://docs.niagarafalls.ca/weblink/0/doc/735474/Page1.aspx>>.

⁹ *Solosky v the Queen*, [1980] 1 SCR 821 at 837.

indicated that he often cites it because he knows the City Solicitor will be present and that legal advice may be provided.

- 38 In this case, however, the solicitor did not communicate legal advice to council during the February 10, 2015 meeting. Consequently, council was not entitled to rely on the “advice subject to solicitor-client privilege” exception.

Sensitive business information and competitive interests

- 39 During the course of our investigation, many of those we interviewed said they felt it was important that council be able to protect its competitive interests by discussing the development funding application in closed session. They also indicated that the post-secondary institution specifically asked the city to keep the proposal confidential because the institution’s development strategy was sensitive business information.

- 40 As our Office has previously noted, the *Municipal Act* does not contain a general closed meeting exception that allows a municipality to proceed in camera for the purpose of protecting its competitive interest or sensitive business information. The Ministry of Municipal Affairs is currently conducting a legislation review that includes a review of the *Municipal Act*. While the Ministry is no longer accepting comments about the Act, the City of Niagara Falls may consider raising this matter should draft legislation be introduced.

Procedural matters

Notice of council’s discussion

- 41 We received a complaint that the February 10, 2015 meeting agenda did not contain notice of council’s intended discussion. The complainant felt that the description provided on the meeting agenda was insufficient because it said council would be discussing a matter:

that falls under the subject matter of 239(c) a proposed acquisition or disposition of lands and 239(f), advice that is subject to solicitor-client [sic], related to 4320 bridge [sic] Street, 4327 Bridge Street and 4601 Park Street.

- 42 Each property listed in this resolution was briefly discussed by council during the in camera meeting.

- 43 As noted in our Office's May 2016 report regarding a closed meeting in Norfolk County, the Act does not specify the content of the meeting notice that must be given to the public.¹⁰ However, section 238(2.1) of the Act requires that a municipality provide for public notice of its meetings in its procedure by-law. There is no provision in the Act that requires a municipality to provide advance notice of the individual matters that will be discussed in closed session.
- 44 In accordance with its regular practice, the city provided notice of the February 10, 2015 meeting on its annual meeting calendar. In addition, the agenda was posted on the city's website the Thursday prior to the meeting. While the city's procedure by-law does not currently reflect these notice practices and should be updated, the Act does not require that council provide additional information about the specific matters it intends to discuss in camera.

Council's direction to staff – s.239(6)

- 45 We also received a complaint that council improperly voted in camera to commit \$10 million towards the proposed partnership with the post-secondary institution.
- 46 Under section 239(6) of the Act, council may only vote in closed session if:
- (a) Subsection (2) or (3) [the Act's closed meeting exceptions] permits or requires the meeting to be closed to the public; and
 - (b) the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board.
- 47 As noted in our October 2015 report regarding a closed meeting in the Municipality of Brighton, this exception allows a council to preserve the confidential nature of the closed meeting while nonetheless giving effect to council's decisions through directions to staff.¹¹

¹⁰ Ombudsman of Ontario, *Investigation into the closed meeting held by Norfolk County's council-in-committee on December 1, 2015* (May 2016) at para 40, online: <<https://www.ombudsman.on.ca/Resources/Reports/Norfolk-County.aspx>>.

¹¹ Ombudsman of Ontario, *Investigation into the Municipality of Brighton's alleged violation of the Municipal Act, 2001* (October 2015) at para 34, online: <[https://www.ombudsman.on.ca/Resources/Reports/Municipality-of-Brighton-\(2015\).aspx](https://www.ombudsman.on.ca/Resources/Reports/Municipality-of-Brighton-(2015).aspx)>.

- 48 During the February 10, 2015 closed session, council voted to pass a resolution:

[directing] staff to indicate to the post-secondary institution, Council's interest in partnering on the funding proposal.

- 49 Given our finding that the subject matter of the meeting did not fall within any of the enumerated exceptions contained in the *Municipal Act*, council was not permitted to vote on any resolution, including this direction to staff, in closed session.

Report back following closed session

- 50 We received a further complaint that council failed to report back publicly following its in camera discussion on February 10, 2015.
- 51 Numerous closed meeting investigators, including our Office, have recommended that municipalities adopt the best practice of reporting back.¹² In a 2009 report regarding closed meetings in the County of Essex, Local Authority Services recommended that councils “report...in a general way, what happened at the closed session”.¹³ Similarly, Douglas R. Wallace noted in his 2009 investigation into closed meetings in the City of Ottawa that council should report in open session the fact that council had met in camera, the matters which were considered, and that no votes were taken other than to give directions to staff or to deal with procedural matters.¹⁴
- 52 The open meeting minutes from February 10, 2015 indicate that, following the in camera discussion, council passed a resolution in open session authorizing staff to take certain actions related to the development funding application. In their interviews, councillors indicated that this resolution was intended to provide the public with information about the direction that council had provided to staff in camera. Accordingly, our review indicates

¹² Ombudsman of Ontario, *Investigation into whether council for the Municipality of Magnetawan held illegal closed meetings* (June 2015) at para 54, online:

<http://www.ombudsman.on.ca/Files/sitemedia/files/FinalReport-Magnetawan_2015.pdf>.

¹³ Local Authority Services, *A Report to the corporation of the County of Essex* (September 2009) at 17, online: <http://www.agavel.com/wp-content/uploads/2013/09/Essex_County_Report_Sep_18_Final.doc>.

¹⁴ Douglas R Wallace, *Report to the council of the City of Ottawa*, online: <<http://ottawa.ca/en/city-hall/accountability-and-transparency/accountability-framework/december-19-2008-january-6-2009>>.

that council reported back in a general way about what occurred in the closed session.

Opinion

- 53** Council for the City of Niagara Falls contravened the *Municipal Act, 2001* on February 10, 2015, when it went in camera to discuss whether the city should partner with a post-secondary institution to apply for development funding.
- 54** During the meeting, council discussed the financial contribution that would be expected from the city if the project were to proceed, as well as various properties where the development could be located. These discussions were preliminary and high level because council had limited details about the proposal and did not know whether the funding application would be accepted. Council did not consider how the properties were to be appraised or sold, and the city was not engaged in negotiations to dispose of the properties. This meeting did not fall within the “acquisition or disposition of land” exception, or any exception, to the *Municipal Act’s* open meeting requirements. Further, because the meeting was not permitted to be closed to the public under the *Municipal Act*, council was not entitled to vote in closed session on a resolution directing staff to proceed with the partnership.

Recommendations

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

Recommendation 1

All members of council for the City of Niagara Falls 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 procedure by-law.

Recommendation 2

Council for the City of Niagara Falls 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

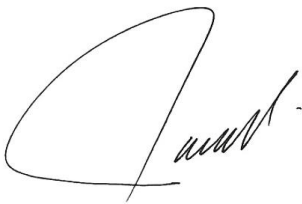
Council for the City of Niagara Falls should ensure that its in camera votes comply with section 239(6) of the *Municipal Act, 2001*.

Recommendation 4

Council for the City of Niagara Falls should amend its procedure by-law to implement our Office's previous recommendations regarding public notice, posting of agendas, and timing of council meetings.

Report

- 56 Council for the City of Niagara Falls was given the opportunity to review a preliminary version of this report and provide comments to our Office. No comments were received.
- 57 My report should be shared with council for the City of Niagara Falls and made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ontario Ombudsman