



Ombudsman Report

**Investigation into whether
Council for the City of Niagara Falls
held illegal closed meetings
between July 2011 and August 2013
with respect to Marineland**

“Park Protest”

**André Marin
Ombudsman of Ontario
February 2015**

Complaints

- 1 On October 23, 2014, my Office received a complaint that council for the City of Niagara Falls held a number of closed meetings with respect to the local Marineland theme park, with the intent of limiting public protests outside the park.
- 2 Marineland is an aquarium and theme park that has come under fire in recent years due to allegations of mistreatment of some animals in its care.¹ The complaint was the subject of a press release from an animal defence group that regularly protests Marineland.²

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001*, 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 My Office is the closed meeting investigator for the City of Niagara Falls.
- 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.

¹ See for example: CBC News, “Marineland’s killer whale is ill, animal rights group says” (August 1, 2014) <<http://www.cbc.ca/news/canada/toronto/marineland-s-killer-whale-is-ill-animal-rights-group-says-1.2725870>>; Tony Ricciuto, “End of the season protest at Marineland” *Niagara Falls Review* (October 12, 2014) <<http://www.niagarafallsreview.ca/2014/10/12/end-of-the-season-protest-at-marineland>>.

² Marineland Animal Defense, “Marineland Animal Defense Files Ombudsman Complaint Against Niagara Falls City Council” (October 23, 2014) <<http://marinelandanimaldefense.com/2014/10/23/press-release-marineland-animal-defense-files-ombudsman-complaint-against-niagara-falls-city-council/>>.

The 2014 municipal election

- 7 The municipal election was held on October 27, 2014. The Mayor was re-elected, three new councillors were elected, and five councillors were re-elected.
- 8 In this report, all mentions of the Mayor and council refer to those who were in office at the time of the meetings relevant to the complaint (i.e., between July 2011 and August 2013).

Investigative process

- 9 Members of my Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the city's procedure by-law and the Act, as well as the resolutions, agendas and minutes of open and closed meetings at which Marineland was discussed. They also reviewed information relating to other meetings between council members and city staff relating to Marineland. The information reviewed came from the materials the complainant provided to our office, from the Clerk, and from the city's website.
- 10 My Office received full co-operation in this matter.

Council procedure

- 11 The City of Niagara Falls' procedure by-law (89-155, as amended) contemplates that regular council meetings are held at 6 p.m. on the dates set out in a schedule to the by-law, unless otherwise provided by special resolution of council.
- 12 According to the city's website, council meetings are held on Tuesday nights and start at 5 p.m. A calendar of meetings for the year is provided on the site, with a notice that the schedule is subject to change. The website also states that agendas for each Tuesday meeting are posted there on the previous Thursday.
- 13 Notice of special meetings is to be provided to each member of council at least 48 hours in advance, with a list of all items to be dealt with.
- 14 While the *Municipal Act* does not specify how notice of meetings must be provided to the public, it does state that every municipality must pass a procedure by-law that provides for public notice of meetings.³ The City of Niagara Falls'

³ s 238(2.1).

procedure by-law does not contain provisions related specifically to notice to the public of special meetings.

- 15** Under the heading “Proceedings in Committee of the Whole,” the procedure by-law provides that before holding a closed session, a motion is required, stating that a closed meeting is to be held and the general nature of the matter(s) to be considered.
- 16** 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*.” It goes on to say that resolutions to go into a closed meeting are appended to the agendas and minutes of meetings.
- 17** In discussions with the Clerk with respect to the city’s procedure by-law, my Office was informed that the Clerk will update the by-law in the near future in order to better reflect current council practice, as reflected by the information available on the city’s website.

Meetings regarding Marineland

Four open sessions and one closed

- 18** Proposals with respect to city land around Marineland were discussed at formal council meetings on five occasions, four of them in open session and one in closed session.
- 19** In open session at the meeting of April 24, 2012, a proposal from Marineland to lease city land “to enable beautification efforts at their entrance and exit” was referred by council to staff for consideration. The proposal had been received in correspondence dated April 18, 2012, from the owner of Marineland. It included site drawings and a request for assistance with respect to the necessary approvals from the regional municipality. It also included a request that the proposal be expedited to allow for planting as soon as possible.
- 20** On May 29, 2012, a closed session of the Committee of the Whole was held. The agenda for the public meeting on this day shows that a closed session was to be held after the open session. The resolution to close the meeting was appended to the agenda, as follows:

...THAT on May 29, 2012 Niagara Falls Council will go into a closed meeting to consider matters that fall under the subject

matter of 239(2)(a) security of the property of the municipality, 239(2)(b) personal matters about an identifiable individual, and 239(2)(f), advice that is subject to solicitor-client privilege related to properties at 7657 Portage Road and City owned lands on Sherk Road.

- 21** The Marineland proposal was discussed under the solicitor-client privilege exception as it related to “properties at 7657 Portage Road.” The other exceptions listed in the resolution and the Sherk Road matter did not relate to Marineland.
- 22** The public minutes of the Committee of the Whole state, under “Adjournment”: “[O]n the Motion of Councillor Morocco, seconded by Councillor Maves that the meeting be adjourned at 4:30 and Council move In Camera.”
- 23** The minutes of the closed session indicate that all councillors were present, as were 10 city staff, including the Clerk and the City Solicitor. A report prepared by the solicitor relating to Marineland’s offer to lease city property was discussed. The minutes show that a resolution was passed to direct staff to publish public notices with respect to the intended disposition of the land and to prepare a lease agreement for future council consideration, with one councillor opposing the motion.
- 24** Council reported back publicly once it came out of the closed session. The open meeting minutes reproduce the closed session resolution that was appended to the agenda of the Committee of the Whole meeting, as above.
- 25** In open session at its meeting on June 12, 2012, council discussed a by-law “to execute a lease between the Corporation of the City of Niagara Falls and Marineland of Canada Inc. for the specified area.” Members of the public were given an opportunity to voice their concerns. They stated that the lease was an attempt to prevent peaceful protest; that council should defer the matter until more information was available about who would control utilities on the leased land; that the beautification rationale for the lease was questionable; and, that a lease was unnecessary as a licence was sufficient to allow for beautification projects. A representative for Marineland spoke, stating that the lease was only for a portion of the frontage owned by the city, that access to utilities would not be affected, and that the other concerns raised were irrelevant, as council has no jurisdiction over Marineland’s practices. The motion to execute the lease agreement passed, with two councilors opposed.
- 26** In open session at its meeting on July 9, 2013, council discussed a request (dated June 20, 2013) from Marineland’s counsel for additional leased land and traffic

signals at the park entrance. It outlined safety concerns relating to the proximity of pedestrians and vehicles at the entrance to Marineland, especially when pedestrians seek to approach the vehicles. It stated that Marineland would cover the installation costs of the traffic signal. The letter also requested lease agreements for additional parcels of land on the same terms as the previous lease in order to provide a safety buffer between vehicles and pedestrians. Finally, it asked that council expedite consideration of these requests. Marineland's counsel spoke at the meeting. Council voted to direct staff "to move forward on the traffic light request and ... come back with the proposed leases for consideration at the next meeting," with two councillors opposed.

- 27** In open session at its meeting on August 13, 2013, council received a staff report on the lease agreements (prepared in the wake of the direction on July 9). The report cites concerns about safety at Marineland and the orderly operation of the WEGO bus stop.⁴ The report states: "If Council elects to lease the subject parcels of land to Marineland, the public will not enjoy a right of passage over them during the term of the Lease." Council also received correspondence from two individuals who opposed the city's actions. Marineland's counsel spoke at the meeting about the need for the property. Members of the public raised various concerns, including that the leases created an unsafe environment for pedestrians and were an attempt to thwart protests, that no evidence of confrontations between protesters and the public existed, and that the "beautification" purpose of the prior lease was not demonstrated. Council approved the lease agreements for additional parcels of land on the same terms as the lease of June 12, 2012, with two councillors opposed.

Analysis of the closed session

- 28** The portion of the meeting of May 29, 2012 in relation to Marineland was closed in accordance with section 239 of the *Municipal Act*. The resolution to go into a closed session cited the exception that permits a meeting to be closed to receive advice that is subject to solicitor-client privilege.⁵
- 29** 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)

⁴ WEGO is a local transit service that connects visitors to various Niagara Falls attractions.

⁵ para 239(1)(f).

made in relation to the seeking or receiving of legal advice; and (c) intended to be confidential.⁶

- 30** The meeting involved discussing the advice of the city’s solicitor with respect to the lease proposal from Marineland, and therefore fell within the closed meeting exception for advice that is subject to solicitor-client privilege.
- 31** Given the nature of the report, the closed session may have been further justified under the “acquisition and disposition of land” exception, as well as the “solicitor-client privilege” exception. In my Office’s review of a meeting of the Township of Billings in April 2010, I found that a lease agreement may be discussed in camera under the acquisition and disposition of land exception.⁷
- 32** The *Municipal Act* prohibits voting during a closed session unless the vote is for a procedural matter, or for giving directions to staff.⁸ The vote taken during the closed session was in order to provide direction to staff and was therefore permissible under the Act.

“Operational meetings” involving members of council

- 33** Several meetings with respect to Marineland were held between various council members, city staff and representatives from the Niagara Regional Police, as well as from Marineland.
- 34** City staff informed my Office that such meetings among staff and stakeholders are common to allow for the exploration of issues raised by constituents. They consider these to be “operational meetings”. I have adopted this term for the purposes of this report.
- 35** My Office confirmed that four operational meetings took place, as follows:
1. July 29, 2011: Mayor Diodati, Councillor Thomson, a representative from the Niagara Regional Police, and the owner of Marineland were present;
 2. October, 6, 2011: Mayor Diodati, Councillors Thomson and Kerrio, the Clerk and four other staff members, representatives from Niagara Regional Police, the owner of Marineland, and the head of security of Marineland were present.

⁶ *Solosky v. the Queen*, [1980] 1 S.C.R. 821 at p. 837.

⁷ Letter of July 7, 2010.

⁸ s 239(5),(6)(b).

3. March 28, 2012: Mayor Diodati, Councillor Thomson, the Clerk and the Chief Administrative Officer were present.
4. June 18, 2013: Mayor Diodati, Councillor Thomson, staff members, representatives from Niagara Regional Police, the owner of Marineland, and Marineland's solicitor were present.

- 36** One other operational meeting was referred to in the documentation we reviewed. It was to have been held on March 19, 2012, with the Mayor, the Clerk and the Chief Administrative Officer. The Clerk informed our Office that he was away that day and that the meeting was rescheduled to March 28, 2012, as indicated above.
- 37** According to the documentation, the meetings on October 6, 2011 and June 13, 2013 took place in a committee room at City Hall. The two others were in the Mayor's office. All were convened in order to discuss the concerns of Marineland about protests outside the park, and to explore the options available to respond to them, including the possibility of lease agreements with the city.
- 38** The first three of the operational meetings took place before the April 18, 2012 proposal from Marineland. The operational meeting of June 18, 2013 was followed two days later by the letter from Marineland's counsel that was discussed at the July 9, 2013 council meeting.

Analysis of the operational meetings

- 39** The *Municipal Act, 2001* defines a "meeting" as "any regular, special or other meeting of a council, of a local board or of a committee of either of them."⁹ This definition is circular and not particularly helpful in determining whether a meeting has actually occurred.
- 40** In a 2008 report,¹⁰ through review of the relevant case law and keeping in mind the underlying objectives of open meeting legislation, I developed a working definition of "meeting" to assist in applying the law:

Members of council (or a committee) must come together for
the purpose of exercising the power or authority of the council

⁹ s 238(1).

¹⁰ Ombudsman of Ontario, *Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 25, 2008), online: http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2_2.pdf.

(or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.

- 41** This definition remains consistent with leading interpretations of the open meetings law and reinforces the right of the public to observe municipal government in process.
- 42** When determining if a meeting has occurred, the concept of a legal quorum is an important consideration. Alone, it is not conclusive, but having a quorum means a sufficient number of members are present to legally transact business. It is obvious that once a gathering constitutes a quorum of a council or committee, the opportunity and risk of those individuals collectively exercising their authority increases.
- 43** In the present case, out of nine council members, only two or three attended the operational meetings discussed above, far from the 50 percent of council members required for legal quorum. Furthermore, our investigation did not substantiate that any council decision-making took place or that the groundwork for future decisions was laid.
- 44** It should be noted that the *Municipal Act, 2001* does not prohibit members of council, committees and local boards from ever discussing city business outside of a formal meeting. It is expected that some informal conversations about municipal business will take place amongst individual members of such bodies. As I observed in a past report involving the council for the City of London:

It is a healthy thing in a democracy for government officials to share information informally before making policy decisions. I agree that to expect council members never to talk to one another outside of a public meeting is unrealistic and would have the effect of unnecessarily chilling speech.¹¹

- 45** The Niagara Falls council members who attended the operational meetings were not coming together for the purpose of exercising the power or authority of council. Accordingly, the meetings did not constitute meetings for the purposes of the *Municipal Act*. Council did ultimately deal with Marineland's proposal for a lease agreement, but this issue was not on the agenda until formal proposals were brought to council, after the informal discussions took place. The proposals were considered in open session of council or, in the case of the meeting on May 29,

¹¹ Ombudsman of Ontario, *In the Back Room: Investigation into whether members of Council for the City of London held an improper closed meeting on February 23, 2013* (October 2013), online: https://ombudsman.on.ca/Files/sitemedia/Images/Reports/London_BT_Final-EN_1.pdf

2012, in a session that was closed in accordance with the requirements of the *Municipal Act*.

Opinion

- 46** The closed session of May 29, 2012 was justified under the exception for advice that is subject to solicitor-client privilege, under section 239(2)(f) of the *Municipal Act, 2001*.
- 47** The operational meetings of July 29, 2011, October 6, 2011, March 28, 2012 and June 18, 2013 did not constitute meetings for the purposes of the open meeting provisions of the *Municipal Act, 2001*.
- 48** Under the circumstances, it is my opinion that the closed session of council and these operational meetings did not violate the open meeting provisions of the *Municipal Act, 2001*.
- 49** However, I am making two recommendations to improve the City of Niagara Falls' procedure by-law.

Recommendations

Recommendation 1

The City of Niagara Falls should amend its procedure by-law to reflect council's practice of meeting at 5 p.m. as opposed to 6 p.m.

Recommendation 2

The City of Niagara Falls should amend its procedure by-law to explicitly provide for notice to the public of special meetings.

Report

- 50** Staff from my Office spoke with the Mayor and the Clerk on February 19, 2015, to provide an overview of these findings, and to give the city an opportunity to comment. Their response was taken into account in preparing this report.
- 51** This 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.



André Marin
Ombudsman of Ontario