



Ombudsman Report

**Investigation into a complaint about
closed meetings held by the City of Timmins
on August 8 and August 29, 2016**

**Paul Dubé
Ombudsman of Ontario
January 2017**

Complaint

- 1 In September 2016, my Office received a complaint about two closed meetings held by the City of Timmins on August 8 and 29, 2016.
- 2 The complaint alleged that the city held illegal closed meetings to discuss plans for the city's Canada Day celebrations in 2017 ("Canada Day 150 celebrations"). The complaint also alleged that the city improperly provided direction to the mayor during the closed sessions.

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 complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator. 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 Timmins.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's governing procedures have been observed.

Council procedures

- 7 The city's procedure by-law (by-law no. 2007-6570) was repealed and replaced by by-law 2016-7914 on October 3, 2016. Since the closed meetings occurred prior to the enactment of by-law 2016-7914, the by-law no. 2007-6570 (the "procedure by-law") was in effect at the time of the meeting.
- 8 The procedure by-law states that all meetings shall be open to the public except as provided in section 239 of the Act. Prior to proceeding in camera,

council must state by resolution the fact of holding a closed meeting and the general nature of the subject matter to be considered.

- 9 The procedure by-law also prevents the closure of a meeting to the public during the taking of a vote, except where the meeting is required to be closed under the procedure by-law or the Act, and the vote is for a procedural matter or for giving directions or instructions to municipal staff or persons retained by the municipality.

Investigative process

- 10 On October 17, 2016, after conducting a preliminary review, we advised the municipality of our intent to investigate this complaint.
- 11 Members of my Office's staff reviewed relevant portions of the city's by-laws and policies, and the Act. We reviewed the minutes of the closed meetings on August 8 and 29, 2016.
- 12 The clerk, the Chief Administrative Officer ("CAO") and members of council who were present at the closed meeting were interviewed by my Office.
- 13 My Office received full co-operation in this matter.

Background

The August 8 closed meeting

- 14 On August 8, council proceeded into closed session under the advice subject to solicitor-client privilege found in subsection 239(2)(f) of the Act. The resolution to proceed in camera only referenced the advice subject to solicitor-client privilege exception with no other information about the matter to be discussed in closed session. According to the closed meeting minutes, council discussed two items in camera. The second item was the Canada Day 150 celebrations.
- 15 All of council, the clerk and a number of staff were present during the in camera session. The city's solicitors were not present during the discussion about the Canada Day 150 celebrations.

- 16 During the in camera discussion about the Canada Day 150 celebrations, the mayor informed council that an international fireworks competition was interested in holding its 2017 competition in the city. The mayor also informed council that he was contacted by a promoter for a major entertainer who was interested in performing in the city. The mayor put forward a preliminary concept of a festival coinciding with the city's Canada Day 150 celebrations during which the international fireworks competition and a concert by the major entertainer would occur.
- 17 According to the mayor, the purpose of the in camera meeting was to determine if council had an appetite to pursue the event before he engaged in further discussions with the fireworks competition and the major entertainer.
- 18 Following the discussion, council reached a verbal consensus to direct the mayor to continue to pursue the discussions with the fireworks competition and the major entertainer.
- 19 The CAO recalled meeting with the city's solicitors on August 8, 2016 to discuss the Canada Day 150 celebrations. However, according to the members of council who were interviewed, council did not discuss any written or oral advice from the city's solicitor during the closed meeting. The clerk told my Office that he was not aware the city's solicitors had been contacted prior to the closed meeting. The mayor told my Office that the city's solicitors were contacted at some point, but he could not recall whether legal advice was discussed by council during the closed session.
- 20 After the closed session finished, council continued its meeting in open session.

The August 29 closed meeting

- 21 On August 29, the Committee of the Whole met in closed session under the litigation or potential litigation, acquisition/disposition of land, and advice subject to solicitor-client privilege exceptions. The resolution to proceed in camera only referenced the cited exceptions with no other information about the matters to be discussed in closed session. According to the closed meeting minutes, council discussed four items in camera. The fourth item was the Canada Day 150 celebrations.
- 22 Although it is not clear from the resolution to proceed in camera, the clerk confirmed that the Committee of the Whole discussed the Canada Day 150 celebrations under the advice subject to solicitor-client privilege exception.

- 23 All of council (except for Councillor Joe Campbell), the clerk, the CAO and a number of staff were present during the in camera session. The city's solicitors were not present during the meeting.
- 24 During the meeting, the Committee of the Whole reviewed a copy of a draft contract between the city and the major entertainer. The CAO conveyed legal advice he obtained from the city's lawyer on the draft contract and with respect to the concept of a festival generally. The mayor also provided a brief update on the city's negotiations with the major entertainer and an estimated budget based on his discussions with the major entertainer's representatives.
- 25 Following the discussion, the mayor sought the direction of the Committee of the Whole to negotiate a lower cost for the concert. The Committee of the Whole provided this direction by verbal consensus. The closed meeting minutes do not capture the Committee's vote and direction to the mayor.

Analysis

- 26 The City cited the "advice subject to solicitor-client privilege" exception when it moved into closed session to discuss the Canada Day 150 celebrations on August 8 and 29.
- 27 Subsection 239(2)(f) of the Act permits closed session discussions where advice from a solicitor or related communication is considered by council.¹
- 28 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.² Therefore, the advice subject to solicitor-client privilege exception can only be used when advice from a solicitor or related communication actually exists for consideration by council or committee.

¹ Ombudsman of Ontario, "Municipal Government by Stealth" Investigation into Council of the Township of Emo Closed Meeting of April 8, 2008 (January 2009), online: <https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/emofinaleng.pdf>.

² Ombudsman of Ontario, *Investigation into whether the City of London's Strategic Priorities and Policy Committee held an illegal meeting on March 2, 2015* (June 2015), online: <https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/Final-Report---London-June-2015-linked.pdf>.

- 29 My Office has found that it is not necessary that the lawyer providing advice be present during the meeting, as long as the legal advice received is being conveyed.³

August 8 closed session

- 30 During the August 8 closed session, council did not discuss any legal advice about the Canada Day 150 celebrations. Although the CAO had met with the city's solicitors regarding the Canada Day 150 celebrations on the same day, any legal advice that was obtained by the CAO was not conveyed to council at the closed session.
- 31 Accordingly, the discussion on August 8 did not fit within the exception in s. 239(2)(f) for advice subject to solicitor-client privilege.

August 29 closed session

- 32 After the August 8 meeting, the CAO sought legal advice from the city's lawyer regarding the draft contract for a performance by the major entertainer as part of the Canada Day 150 celebrations, and on the concept of a festival generally.
- 33 During the August 29 closed session, the CAO conveyed the legal advice to the Committee of the Whole. Council discussed the legal advice and relied on this while reviewing the draft contract.
- 34 Accordingly, the discussion on August 29 fit within the exception in s. 239(2)(f) for advice subject to solicitor-client privilege.

Directions to the mayor during the closed sessions

- 35 The Act only permits voting in closed session in limited circumstances for procedural matters or for giving directions to municipal employees or officers. Section 239(6) of the Act states:

³ Letter from Ombudsman of Ontario to Norfolk County (May 2016), online: https://www.ombudsman.on.ca/Files/sitemedia/Documents/ClosingLetter_NorfolkCountyMay2016_formatted_accessible.pdf.

Exception

(6) Despite section 244, a meeting may be closed to the public during a vote if,

- (a) subsection (2) or (3) 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.

- 36** Section 225 of the Act designates the head of council (the mayor) as the chief executive officer of the corporation and lists enumerated duties of the head. In the past, my Office has found that a vote taken in camera to direct the mayor was permissible under section 239(6).⁴
- 37** On August 8, council directed the mayor to continue to pursue discussions with the fireworks competition and the major entertainer in furtherance of the Canada Day 150 celebrations. I have already found that council's discussions regarding the Canada Day 150 celebrations on August 8 did not fit within the cited exception. Therefore, council was not permitted to vote in closed session. Accordingly, council's direction to the mayor contravened the Act.
- 38** On August 29, the Committee of the Whole directed the mayor to continue to negotiate with the major entertainer. This direction was not captured by the in camera meeting minutes. The in camera discussions of the Committee of the Whole on August 29 properly fit within the advice subject to solicitor-client privilege exception. Accordingly, the direction to the mayor was permissible under the Act.

Procedural matters

- 39** Our investigation also revealed some procedural issues with the city's closed meeting practices.

⁴ Letter from the Office of the Ombudsman to the City of Greater Sudbury (February 14, 2013), online: <https://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Sudbury-closing-letter-Feb-14-accessible.pdf>

Closed meeting record

- 40 When voting in closed session, council should clearly identify the item, formally vote on it, and record the outcome in the closed session meeting minutes.

Resolution to proceed in camera

- 41 Subsection 239(4) of the Act requires that the resolution to proceed in camera include the general nature of the subject matter to be considered. The city's procedure by-law has equivalent requirements.
- 42 The Court of Appeal in *Farber v. Kingston (City)*⁵ stated that:
- 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.
- 43 My Office has also recommended that councils provide more substantive detail in resolutions authorizing closed sessions. For instance, in our Office's 2015 review of closed meetings in the Municipality of South Huron, we noted that council's resolution "should provide a brief description of the subject matter to be considered in closed session".⁶
- 44 In this case, the city's resolutions to proceed in camera on August 8 and 29 failed to provide meaningful information to the public about the issues that would be discussed in camera. In addition, the resolution did not specify which closed meeting exception was intended to apply to each item on the closed meeting agenda.

Opinion

- 45 Council for the City of Timmins contravened the *Municipal Act, 2001* and the city's procedure by-law when it discussed the Canada Day 150 celebrations on August 8, 2016 in closed session. These discussions did not fit within the exception cited under the Act for advice subject to solicitor-client privilege.

⁵ *Farber v. Kingston (City)*, 2007 ONCA 173 at para 21.

⁶ Ombudsman of Ontario, *Investigation into closed meetings held by council for the Municipality of South Huron* (February 2015) at para 58, https://www.ombudsman.on.ca/Files/sitemedia/files/SouthHuronFinal_2015.pdf

- 46 Further, because the meeting was not permitted to be closed to the public under the *Municipal Act, 2001*, council was not permitted under the Act to provide direction to the mayor during the meeting to pursue discussions with the fireworks competition and the major entertainer.
- 47 The Committee of the Whole for the City of Timmins did not contravene the *Municipal Act, 2001* and the city's procedure by-law when it discussed legal advice received regarding the Canada Day 150 celebrations on August 29, 2016 in closed session pursuant to the exception for solicitor client privilege. Given that the Committee's closed session discussion was permitted under the Act, the related direction to the mayor during that meeting was also permissible under the Act.

Recommendations

- 48 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 Timmins 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

The City of Timmins 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

The City of Timmins should ensure that its in camera votes comply with section 239(6) of the *Municipal Act, 2001*.

Recommendation 4

The City of Timmins should ensure that its resolutions to proceed in camera 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.

Report

- 49 The City of Timmins was given the opportunity to review a preliminary version of this report and provide comments. Any comments received were considered in the preparation of this final report.
- 50 My report should be shared with council for the City of Timmins and should be made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario