



ONTARIO'S WATCHDOG  
CHIEN DE GARDE DE L'ONTARIO

January 13, 2012

Ms. Rose Caterini, City Clerk  
Ms. Mary Gallagher, Manager – Legislative Services/Deputy City Clerk  
Mr. Peter Barkwell, City Solicitor  
City of Hamilton  
77 James St. North  
P.O. Box 2040, LCD1  
Hamilton, ON  
L8R 2K3

Re: City Solicitor's Report LS12001

I am writing further to the above-noted report issued by Hamilton's City Solicitor in response to my office's findings, set out in three separate letters with respect to complaints about closed municipal meetings.

The results of my office's review of the individual complaints and the basis for our findings are clearly set out in the letters which were received publicly by Hamilton City Council on December 15, 2010 and on January 11, 2012. I am writing to respond to the issues raised in the City Solicitor's secrecy advice to council concerning our investigative process.

The *Ombudsman Act* has been in force since 1975. Over the past 36 years, the Ombudsman's operations have evolved to reflect best practices in complaints resolution. Closed meeting complaints are treated similarly to other complaints addressed by our office – and we handle more than 14,000 complaints per year. Whenever possible, attempts are made to resolve matters through communication with the parties, without resort to formal investigation. It has been our experience that the expeditious resolution of complaints in this manner benefits all involved. This approach has been overwhelmingly welcomed by the hundreds of organizations coming under Ombudsman scrutiny, including municipalities in closed meeting cases.

In fact, resolving complaints in a low-key, informal manner has, since the establishment of the first parliamentary Ombudsman in Sweden in 1809, been the bread and butter of Ombudsman operations worldwide. It provides for a cost-effective, expeditious and non-adversarial means of resolving maladministration.

Letter of November 12, 2010

On November 12, 2010, a member of my Office's Open Meetings Law Enforcement Team wrote to the Coordinator, Committee of the Whole/Council (now the Deputy City Clerk) concerning a complaint received about in camera meetings held by the Advisory Group to the Facilitation Process for the Pan American Games. The City Solicitor discusses this letter at page 6 of his report.

Consistent with our standard practice, a teleconference was held on November 10, 2010 with the Coordinator to review the results of our review and our preliminary findings. These findings were based on evidence provided to us by Hamilton city staff in response to our request for any information that might be relevant to this complaint. During this meeting, the Coordinator indicated agreement with our findings, as well as a willingness to share them with council. The November 12, 2010 letter was subsequently made available as a public attachment to the December 15, 2010 council agenda. At no time whatsoever did city staff or the City Solicitor raise any objections with my office regarding our process. In fact, my office was not aware that any concerns existed until January 11, 2012, after the City Solicitor issued his report and recommended that it be made public, more than a year later.

Letter of December 28, 2011 regarding McMaster University Proposal

The City Solicitor also takes issue with a letter dated December 28, 2011, from my office to the City Clerk, relating to an item concerning McMaster University and some lands of the Board of Education, considered by the General Issues Committee in closed session on June 27, 2011.

The City Solicitor notes that the letter fails to refer to the fact that during the June 27, 2011 session, council had under consideration an offer for the city to lease real estate as part of the project proposal. He suggested that this omission resulted in council being portrayed unfairly. He also criticized the fact that we did not expressly acknowledge that leasing of real estate qualifies under the *Municipal Act* for discussion in closed session, but instead emphasized the fact that during the course of the meeting, council strayed from matters covered by that exception.

As the letter indicates, a teleconference was held on December 12, 2011 with the City Clerk to discuss my office's preliminary findings. These findings were based on information provided to us by city staff and members of council, including the Mayor. The Clerk expressed agreement with our findings and comments, which were later reflected in the letter. At no time was my office advised by city staff or the City Solicitor of any concern about our process.

Letter of December 28, 2011 regarding HECFI

Finally, the City Solicitor references a second letter from my Office to the City Clerk dated December 28, 2011, this one concerning a complaint that council's General Issues Committee improperly considered the Hamilton Entertainment Convention Facilities Inc. in closed session also on June 27, 2011.

In the case of this letter, the City Solicitor objects to the fact that it does not note that a significant portion of the in camera session involved receiving and reviewing legal advice. He also alleges that it was wrong for my office to characterize the discussion as being held in camera for the purpose of considering "identifiable individuals."

It is important to clarify why my office focused on the question of whether or not discussion of this item was permissible under the closed meeting exception for consideration of "personal matters about an identifiable individual," and not the exception relating to "advice that is subject to solicitor-client privilege, including communications necessary for that purpose." The answer is quite simple: It was council that used the "personal matters" exception in its resolution authorizing discussion of this subject in closed session.

In light of this information, I find it quite incredible, even shocking, that the City Solicitor in his report writes that he "discovered an issue overlooked by the Ombudsman's office," and then identifies the oversight he "discovered" as a failure to consider an error in drafting the resolution to go into closed session. He maintains, well after the fact, that the resolution should have indicated that the discussion would involve consideration of solicitor-client advice relating to the HECFI. Even if that were the case, in my view, failure to properly identify an exception in the resolution authorizing a closed session renders discussion of an item improper. However, in this case there was ample information to conclude that it was council's intent to justify consideration of this matter under the "personal matters" exception.

The City Solicitor also disagrees with my office's interpretation of the "personal matters" exception. Consistent with the remedial nature of the open meeting provisions, I interpret exceptions allowing for closed meetings narrowly and with a view to ensuring maximum transparency.

Our preliminary findings in this case were also reviewed and discussed during the December 12, 2011 teleconference with the City Clerk. At that time, the Clerk expressed agreement with the findings and comments, and agreed to share them with Council publicly. At no time was my office advised by city staff or the City Solicitor of any concern with respect to our process.

Going Forward

To date, Hamilton city staff have been very co-operative and open with my office, with a view to resolving closed meeting complaints expeditiously. I trust that this respectful and effective relationship will continue.

Hamilton city council has also been open and receptive to my office's findings and recommendations and I applaud council's willingness to acknowledge opportunities to continue to improve upon its commitment to openness and transparency.

Municipalities always have the option of retaining their own closed meeting investigator. However, the Office of the Ontario Ombudsman is able to provide independent, credible and impartial investigation of closed meeting complaints, free of charge to complainants and municipalities.

We welcome constructive discussion about our process and encourage municipalities to raise any concerns they have with our office directly and as they arise.

Yours truly,



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André Marin  
Ontario Ombudsman

c.c. Hon. Kathleen Wynne, Minister of Municipal Affairs and Housing