



December 28, 2011

Ms. Rose Caterini, City Clerk
City of Hamilton
77 James St. North
P.O. Box 2040, LCD1
Hamilton, ON
L8R 2K3

Dear Ms. Caterini,

RE: Our File No. 242820-001

I am writing further to our conversation of December 12, 2011 regarding the results of the Ombudsman's preliminary review of a complaint received regarding the June 27 General Issues Committee (the Committee) meeting. Specifically, the complaint alleged that the Committee improperly discussed the dissolution of the Board of Directors of Hamilton Entertainment Convention Facilities Inc. (HECFI) while in camera.

As part of our Office's review, we spoke with you as well as certain members of Council. We also reviewed relevant sections of the Municipal Act, 2001 (the Act) and the City's Procedure By-law (10-053), as well as the meeting materials for the June 27 meeting.

We understand that Hamilton Entertainment Convention Facilities Inc. is a corporation that was established to manage three City-owned entertainment venues, namely Hamilton Place, Copps Coliseum, and The Hamilton Convention Centre. The City established a Board of Directors for HECFI (the HECFI Board), with the authority to supervise management of the Corporation.

The complaint to our Office alleged that on June 27 the Committee proceeded in camera under the "personal matters about an identifiable individual" exception (s. 239(2)(b) of the Act) and improperly voted behind closed doors to dissolve the HECFI Board, and replace it with Council members.

The open session minutes indicate that the Committee proceeded into closed session under the "potential litigation" and "personal matters about an identifiable individual" exceptions. Only the discussion that took place under the "personal matters" exception



pertained to the HECFI Board. Under this exception, the Committee discussed an independent review of HECFI Operations, conducted by KPMG consulting. The meeting materials prepared by KPMG were included in our Office's review.

According to the closed session minutes, "the Committee discussed the takeover of the HECFI Board and how the messaging should be delivered; not about the Board members but rather about the organization and the need to get it back on track for the taxpayers of the City." The Mayor requested that new Councillors be appointed to the Board in lieu of the current Council representatives. The Committee agreed, "that HECFI is moving in a new direction, and the fact that the City is recommending to be the interim Board of Directors has nothing to do with the performance of the current employees. The organization is at a crossroads and there is a need to take control to facilitate to a new reality." Those we interviewed confirmed the discussions did not pertain to the performance of individual Board members, but were of a more general nature.

Two Council members advised our Office that there was discussion during the closed session about which Council members would serve on the new Board; however none of the Council members with whom we spoke recalled a vote pertaining to the HECFI Board being taken in camera. The closed session minutes also do not indicate that a vote was taken in camera.

When the Committee reconvened into open session it passed a motion dealing with several issues regarding the HECFI Board, including:

- That the Board of Directors be stood down
- That the number of directors be set at five, on an interim basis
- That five members of Council, including the Mayor, be appointed to be directors.

Analysis

On June 27 the Committee discussed the HECFI Board in camera under the "personal matters about an identifiable individual" exception. It appears that these discussions were not about Board members in their individual capacity, but about the Board in general.

When we spoke on December 12 we discussed that the Act does not define "personal matters", and this phrase as it applies to the Municipal Act has not been judicially considered. However, the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA) contains a similar phrase - "personal information" - which both the Information and Privacy Commissioner and the Courts have considered. While the definition of "personal information" in MFIPPA does not dictate how the phrase "personal matters" in the Municipal Act should be interpreted, it does provide a useful reference point.



A decision of the Information and Privacy Commissioner (Order MO-2204; (Town of Aylmer) (June 22, 2007) noted that in order to qualify as personal information, the information “must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be ‘about’ the individual.” This decision also stated that information relating to an individual in a professional, official or business capacity, “may still qualify as personal information if the information reveals something of a personal nature about the individual.”

The information provided to our Office indicates that the June 27 discussions were not about the HECFI Board members in their personal capacity; rather, the discussions were general in nature, and related to the Board as a whole. As such, it does not appear that the discussions were properly closed to the public under the “personal matters about an identifiable individual” exception.

We also noted that the exceptions outlined in s. 239(2) of the Act are discretionary, and that the Ombudsman is of the view that these exceptions should be interpreted narrowly and applied prudently, given the principles of openness, transparency and accountability, which the open meeting provisions promote.

You expressed general agreement with the findings and comments made by our Office, and agreed to share them with Council publicly. We ask that you notify us when you have had the opportunity to do so. We will also be providing the complainant with the outcome of our review.

I would also like to take this opportunity to thank you for the cooperation our Office received during this review.

Sincerely,

Michelle Bird
Ombudsman Ontario