



Ombudsman Report

**Investigation into whether
the Long Term Care Task Force
for the Region of Niagara
held an illegally closed meeting
on May 13, 2015**

**Barbara Finlay
Acting Ombudsman of Ontario
November 2015**

Complaint

- 1** In June 2015, my Office received a complaint about the inaugural meeting of the Long Term Care Task Force for the Region of Niagara. The complaint alleged that the task force met in private on May 13, 2015, contrary to the open meeting provisions of the *Municipal Act, 2001* (the Act). The complaint also alleged that there was no public notice of the meeting and that neither the meeting agenda nor the minutes were made public.

Ombudsman jurisdiction

- 2** Under the 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** Our Office is the closed meeting investigator for the Region of Niagara.
- 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 31, 2015, our Office advised council for the region of our intent to investigate this complaint.
- 7** Members of our Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the region's procedure by-law and the Act. They also reviewed the task force's Terms of Reference, as well as relevant meeting agendas, minutes, and materials. They spoke with the region's Director of Procurement and Strategic Acquisitions, the Clerk, and the Chief Administrative Officer (CAO).
- 8** Our Office received full co-operation in this matter.

Council procedure

- 9** The region’s procedure by-law¹ relies on several interwoven terms to define what constitutes a committee. Section 1.1 provides that:

“Committee” means any Standing, Ad Hoc, Steering or Advisory Committee, Sub-Committee or board and any other similar group composed of individuals appointed by Council, or similar entity established by Council and composed of Members.

- 10** An “Advisory Committee” is defined as:

any board, commission or committee established by Council, other than a Standing Committee, which has at least one (1) Member appointed from Council. The member(s) appointed by Council may be Member(s), staff of the Region, and/or member(s) of the public.

- 11** And lastly, an “Ad Hoc Committee” is defined as:

an Advisory Committee of specified duration, established by Council to undertake the review of a special issue or short term project. Such a Committee shall be governed by clear terms of reference including a clause indicating when the Committee will cease to exist.

- 12** Section 1.1(g) of the by-law defines “meeting” as “any regular, special, committee or other meeting of Council”.

- 13** Sections 9.1 to 9.4 of the by-law provide that “[e]xcept as otherwise provided in this Section, all Meetings shall be open to the public” and accurately reproduce the closed meeting exceptions from the *Municipal Act*. These sections, in combination with the by-law’s definition of “meeting”, require that “committees” as defined by the by-law comply with the by-law’s open meeting provisions.

- 14** Section 10.1 of the by-law states that the Clerk shall provide public notice of all council and committee meetings. This notice is provided by a posting on the region’s website which includes the place, date and time of the meeting, as well as the meeting agenda.

¹ The Regional Municipality of Niagara, by-law no. 120-2010, *A by-law to govern the calling, place and proceedings of the meetings of council and its committees* (24 September 2010), online: <<https://www.niagararegion.ca/government/bylaws/pdf/Procedural-By-law.pdf>>.

Council's creation of the task force

- 15** In open session on March 26, 2015, the Niagara regional council voted to establish the Long Term Care Task Force. The purpose of the task force was to consider the issue of alternative service delivery in the context of long-term care homes. The task force was to be governed by the Terms of Reference in Report CAO 5-2015.
- 16** The Terms of Reference adopted by regional council stated that the task force would be composed of:
- 4 regional council representatives;
 - 2 external representatives (individuals with “industry knowledge”); and
 - 3 regional staff members with relevant expertise.
- 17** After adopting these Terms of Reference, regional council nominated various regional councillors to the task force. However, instead of four councillors as envisioned by the Terms of Reference, five councillors were appointed to the task force. Regional council did not amend the Terms of Reference to reflect that a fifth councillor had been appointed. This created an inconsistency between the approved Terms of Reference, which contemplated four regional council representatives, and the resolutions of council, which appointed five regional councillors.

Inaugural task force meeting on May 13, 2015

- 18** The Long Term Care Task Force met on May 13, 2015 in a committee room at the Niagara Region’s headquarters. The public was not notified of the meeting and neither the agenda nor minutes of the meeting were made public.
- 19** The Terms of Reference approved by regional council indicated that the task force consisted of four regional council representatives, two external representatives with industry knowledge, and three regional staff members. However, the meeting minutes from May 13 indicated that the task force, as it met that day, was comprised of five regional council representatives and five staff members. No external representatives were in attendance or listed as task force members.
- 20** As its third matter of business, the task force discussed the purpose and composition of the task force. As part of this discussion, the task force decided to ask three external representatives/industry experts to join the task force. The original Terms of Reference had contemplated having two external representatives.

In addition, two extra staff members, for a total of five, were asked to join the task force. The original Terms of Reference had contemplated only three regional staff members. The task force recognized that these membership changes required a change to the Terms of Reference and amended them accordingly.

- 21** The remainder of the subjects discussed by the task force at the inaugural meeting were of an introductory and/or administrative nature. Because the task force did not believe it was subject to any open meeting requirements, it did not resolve to move into closed session for any of its discussion.

The amended Terms of Reference

- 22** The task force summarized the changes to its Terms of Reference in Report CAO 13-2015, which included the new Terms of Reference for approval by the regional council. The Terms of Reference defined membership on the task force as follows:

- 5 regional councillors;
- 3 members of the public (industry experts); and
- 5 regional staff members.

- 23** The revised Terms of Reference also contained other changes. For instance, the revised Terms of Reference alternate between using the terms “committee” and “task force”, while the previous Terms of Reference consistently used the term “task force”. In addition, a new section was added stating that meetings “are not public” and that “[m]embers should keep matters of the committee strictly confidential”. Other sections were added to define the roles and responsibilities of task force members and the task force’s reporting structure.

- 24** The Director of Procurement and Strategic Acquisition indicated that these changes were made so that the Terms of Reference would be consistent with the template provided by the Clerk’s office. He said that the Terms of Reference alternate between using the terms “committee” and “task force” because the language was taken from the standard template and not modified appropriately. He had been made aware of this inconsistency previously, but decided not to go through the formal amendment process.

- 25** Regional council approved the new Terms of Reference on June 11, 2015. In addition, regional council formally appointed the three industry experts identified by the task force.

Analysis

- 26** To determine if the task force’s meeting was illegally closed to the public, it is necessary to determine if the task force constitutes a “committee” under the *Municipal Act* or under the region’s procedure by-law.

“Committee” under the *Municipal Act*

- 27** Under the *Municipal Act*, committees of municipal councils are required to comply with the open meeting provisions of the Act. For the purpose of these provisions, a committee is defined as:

any advisory or other committee, subcommittee or similar entity of which at least 50 percent of the members are also members of one or more councils or local boards.²

The *Municipal Act* does not specify how the composition of a committee is to be determined for the purpose of this definition.

- 28** In their interviews, the Clerk and the Director of Procurement and Strategic Acquisitions suggested that the Terms of Reference approved by council conclusively define the composition of the task force.
- 29** Instead of focusing on form over substance, a practical, common sense approach must be used to determine the composition of a committee. This analysis is guided by, but not limited to, the formal Terms of Reference approved by council and must take into account the actual membership of the committee as it operates on a practical basis.
- 30** Treating a committee’s terms of reference as the only determining factor in whether the committee is subject to the open meeting requirements of the *Municipal Act* could obviously lead to absurd results which are not reflective of reality, particularly if, as was the case here, more council members act as members of the committee than the terms of reference provide for.
- 31** In this case, the meeting minutes and resolutions of council each indicated that on May 13 the committee met with five council members and five non-council members. Therefore, 50 percent of the task force members were also members of one or more councils or local boards and the Act’s definition of “committee” was

² *Municipal Act, 2001*, SO 2001, c25, s. 238(1).

satisfied. Accordingly, the task force as it met on that day was subject to the Act's open meeting requirements. The task force violated these requirements by failing to provide public notice of the task force's meeting and to observe the Act's requirements for closing a meeting to the public. Further, even if the proper closed meeting procedure had been followed, the administrative and introductory information discussed by the task force would not have fallen within any of the closed meeting exceptions in the *Municipal Act*.

“Committee” under the procedure by-law

- 32** In addition to being subject to the Act's open meeting requirements, the task force was also subject to the open meeting requirements under the region's procedure by-law when it met on May 13, 2015.
- 33** The region's procedure by-law defines a “committee” as:
- any Standing, Ad Hoc, Steering or Advisory Committee, Sub-Committee or board and **any other similar group composed of individuals appointed by Council**, or similar entity established by Council and composed of Members. [Emphasis added.]
- 34** This broad definition includes a catchall phrase – “any other similar group composed of individuals appointed by Council”. This wording encompasses a task force established by council and composed of members appointed by council, such as the Long Term Care Task Force. The fact that the role and function of the task force is similar to that of a committee as defined in the procedure by-law is also evidenced by the fact that the task force modelled its Terms of Reference on the template used by the regional Clerk for committees of council.
- 35** If council did not intend for alternatively structured groups such as the task force to be subject to the procedure by-law, it should have clarified this in its procedure by-law.
- 36** In 2010, Local Authority Services (LAS) determined that a committee of the Town of Niagara-on-the-Lake fell outside the definition of “committee” in the *Municipal Act* but was nonetheless required to hold open meetings because of the town's procedure by-law.³ In the report, LAS noted that the definition of committee in the procedure by-law was more inclusive than that in the *Municipal Act*. Because the

³ Local Authority Services, *A Report to the council of the Town of Niagara-on-the-Lake* (August 2010), online: <http://www.agavel.com/wp-content/uploads/2013/09/NOTL_Investigation_Report_Aug_25_2010_Final_08_07_11.doc>.

committee fell within the definition established in the procedure by-law, LAS concluded that the committee was required to comply with open meeting requirements despite being composed of fewer than 50 percent members of council.

- 37** Similarly, our Office concluded in 2013 that a municipality’s procedure by-law may impose open meeting requirements on a committee even if the committee does not meet the composition requirements of a “committee” under the *Municipal Act*.⁴
- 38** As of March 26, 2015, council had established a task force and appointed five council members to it. Whether it is referred to as a committee or task force, the body met the definition of “committee” in the region’s procedure by-law. Accordingly, it needed to comply with the by-law’s open meeting provisions.
- 39** Section 9.1 of the by-law states that, subject to closed meeting exceptions, “all meetings shall be open to the public”. A meeting is defined as “any regular, special, **committee** or other meeting of Council” [emphasis added]. Section 10.1 requires the region to provide public notice of “all meetings of Council and Committee”.
- 40** The task force, therefore, contravened the procedure by-law’s open meeting requirements on May 13 by failing to provide public notice of its meeting and to follow the proper procedures to close the meeting to the public.
- 41** These procedural obligations were not extinguished by the changes to the committee’s composition. Unlike the *Municipal Act*, the procedure by-law’s definition of “committee” does not rely on a threshold of councillor membership to determine whether the group constitutes a “committee”.

Opinion

- 42** The inaugural meeting of the Long Term Care Task Force on May 13, 2015 contravened the open meeting provisions of the *Municipal Act, 2001* and the region’s procedure by-law. Notice of the meeting was not provided, no procedure was followed to close the meeting to the public, and, even if this procedure had been followed, the task force’s discussion did not fall within any of the closed meeting exceptions.

⁴ Letter from Ombudsman of Ontario to the City of Sault Ste. Marie (13 May 2013) at 3, online: <<http://www.ombudsman.on.ca/Files/sitemedia/Images/Newsroom/Sault-Ste--Marie-letter-May-13.pdf>>.

43 Following the changes to the task force’s composition in June 2015, the task force no longer met the definition of “committee” under the *Municipal Act, 2001* and was therefore not subject to the Act’s open meeting requirements. However, the task force continued to meet the broader definition of “committee” under the region’s procedure by-law and remained subject to the by-law’s open meeting provisions.

Recommendations

44 I make the following recommendations to assist the region in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of the Long Term Care Task Force for the Region of Niagara should be vigilant in adhering to their individual and collective obligation to ensure that the task force complies with its responsibilities under the *Municipal Act, 2001* and the region’s procedure by-law.

Recommendation 2

The Long Term Care Task Force should ensure that notice of its meetings is provided to the public in advance, in accordance with the region’s procedure by-law.

Recommendation 3

The Long Term Care Task Force 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, in accordance with the region’s procedure by-law.

Recommendation 4

The Long Term Care Task Force should make its May 13 meeting minutes available to the public. If they exist, the meeting minutes from other meetings of the Long Term Care Task Force should also be made public.

Report

45 OMLET staff spoke with the CAO, Clerk, and Director of Procurement and Strategic Acquisitions on November 19, 2015 to provide an overview of these findings and to give them an opportunity to comment. Their comments were considered in preparing this report.

- 46** My report should be shared with council for the Region of Niagara and made available to the public as soon as possible, and no later than the next council meeting.



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