



Toronto, April 14, 2020

Council for the City of Niagara Falls
4310 Queen Street
Niagara Falls, ON
L2E 6X5

Sent via email

Dear Council:

Re: Closed meeting complaint investigation

My Office received two complaints regarding a closed session discussion held by council for the City of Niagara Falls (the City) on July 29, 2019. The complaints alleged that council's discussion did not fit within the *Municipal Act's* (the Act's) closed meeting exceptions and that council improperly voted while in closed session.

I am writing to advise that my investigation has determined that council's closed session discussion on July 29, 2019, came within the Act's closed meeting exception for information supplied in confidence by another level of government and did not contravene the Act's in camera voting prohibition. However, the municipality should ensure that its resolutions to enter closed session provide sufficient information about the subject matter of council's intended discussion.

.../2

Closed meeting investigator

As of January 1, 2008, the *Municipal Act* gives citizens the right to request an investigation into whether a municipality or its local boards have complied with the Act in closing a meeting to the public.¹

Municipalities and local boards 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. The Ombudsman is the closed meeting investigator for the City of Niagara Falls.

To assist municipal councils, staff, and citizens we have developed an online digest of open meeting decisions that contains summaries of the Ombudsman's open meeting cases. This searchable repository was created to provide interested parties with easy access to the Ombudsman's past decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether a matter should or may be discussed in closed session, as well as issues related to open meeting procedure. Summaries of all previous Ombudsman decisions may be consulted in the digest at www.ombudsman.on.ca/digest.

Review

On March 2, 2020, my Office informed the City of our intent to investigate this complaint. We reviewed a recording of the closed session discussion, meeting minutes from the open and closed session, correspondence between the City and the federal government, a legal opinion obtained by City regarding the open meeting rules, and other related meeting materials. We also spoke with the Mayor and Clerk, who assisted in the preparations for the meeting but did not attend due to a planned absence.

July 29, 2019 special meeting

On July 29, 2019 at 4:00 pm, council convened a special meeting of council in council chambers. According to the meeting notice posted online, the purpose of the special meeting was to "provide direction to staff related to a federal contribution agreement" and the urgency of the meeting "related to an upcoming funding deadline."

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¹ *Municipal Act*, SO 2001, c 25, s 239.1.

After appointing an Acting City Clerk due to the regular Clerk's planned absence, council resolved to go in camera under the closed meeting exception in section 239(2) (h) of the Act for "information explicitly supplied in confidence to the municipality or local board by Canada, a province or territory or a Crown agency of any of them." The resolution did not provide additional information about the matter to be discussed.

Once in closed session, council discussed a specific, multi-partner development proposal and reviewed a report and other materials related to the proposal. Council's discussion related to information that the federal government had supplied to the municipality and explicitly asked to be kept confidential. The recording indicates that councillors had prepared numerous, detailed questions for municipal staff about the proposal and its funding arrangement. After receiving responses to these questions, council voted to provide directions to staff and an officer of the municipality related to the proposal.

After passing this motion, a member of council raised a concern that some of the information supplied to them in confidence by the federal government had been improperly disclosed. According to the recording, council discussed the possibility that this disclosure would jeopardize the development proposal because of the importance the federal government placed on confidentiality. Following this discussion, council passed a resolution directing staff regarding this matter.

After passing this resolution, council returned to open session and adjourned the meeting at 5:14 pm.

Analysis

Information supplied in confidence

Section 239(2) (h) of the Act allows a municipal council to discuss information explicitly supplied to it in confidence by another level of government. This does not include discussions where the municipality determines the matter should be confidential, rather than the other level of government. Our investigation confirmed that the federal government explicitly, in writing, supplied information to the City in confidence regarding a specific development and funding proposal. Accordingly, the discussions related to this information were permissible for closed session consideration.

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Voting in closed session

Section 239(5) of the Act generally prohibits municipal councils from voting in closed session. However, section 239(6) provides two exceptions to this rule and allows in camera voting if the vote is for a procedural matter or for “giving direction or instructions to officers, employees or agents of the municipality.” My investigation confirmed that each of the votes that occurred in closed session was for a procedural matter or for providing direction to municipal staff and officers.

Resolution to proceed in camera

Section 239(4) of the Act provides that before moving into a closed session, a municipality must state by resolution in open session that a closed meeting will be held, and state the general nature of the matter to be considered at the closed meeting. In *Farber v Kingston (City)* (2007 ONCA 173), the Ontario Court of Appeal determined that the resolution to go into a closed meeting 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. My Office has also recommended that councils provide more substantive detail in resolutions authorizing closed sessions.²

While the City provided detailed information about its intended discussion in the notice of special meeting posted on its website, this same information was not included in the resolution to move in camera. Instead, the resolution merely provided the section of the *Municipal Act* that council relied on to close its meeting to the public. When asked about this, the Clerk acknowledged the importance of providing information of council’s intended discussion in the resolution to proceed in camera, and that the resolution in this case was vague. He indicated that while he was responsible for providing notice of the special meeting, he did not prepare the resolution or attend the meeting because of a preplanned absence.

In future, the City 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.

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² *Niagara (District Airport Commission) (Re)*, 2016 ONOMBUD 22.

Conclusion

I would like to thank the City for its co-operation during my investigation. You indicated to us that this letter would be included as correspondence at the next council meeting.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Dubé". The signature is fluid and cursive, with a large initial "P" and "D".

Paul Dubé
Ontario Ombudsman

cc: Mayor Diodati, jdiodati@niagarafalls.ca