

BY EMAIL

March 3, 2023

Council for the City of Greater Sudbury
c/o Mayor Paul Lefebvre
P.O. Box 5000 Stn. A
200 Brady Street
Sudbury, ON P3A 5P3

Dear Members of Council for the City of Greater Sudbury:

Re: Closed meeting complaint

My Office received a complaint regarding a closed meeting held by council for the City of Greater Sudbury (the “City”) on July 12, 2022. The complaint raised concerns that a discussion in closed session about a proposed project to build an event centre did not fit within any of the exceptions to the open meeting rules in the *Municipal Act, 2001* (the “Act”).¹

I am writing to share the outcome of my review of this complaint. For the reasons set out below, I have determined that the City complied with the open meeting rules when it held a discussion of the proposed project for an event centre in closed session.

Ombudsman’s role and authority

As of January 1, 2008, the Act gives anyone 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. My Office is the closed meeting investigator for the City of Greater Sudbury.

¹ SO 2001, c 25.

My Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman's 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 certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of the Ombudsman's previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Review

My Office reviewed the July 12, 2022 open and closed meeting materials, including the agendas, minutes, and the slides from a presentation given in closed session. We also reviewed the video recording of portions of the open session and spoke with the City Solicitor and Clerk.²

Background

The City had recently completed a request for proposals process related to the design and construction of an event centre in Greater Sudbury. The City had received two bids, and staff identified a preferred bidder. Staff had then prepared a public report for council's consideration containing high-level information about the preferred bid.

July 12, 2022 meeting

Council met in council chambers at 12:30 p.m. on July 12, 2022.

Shortly after the meeting was called to order, council resolved to add an item to the closed session agenda regarding the event centre project.

Council resolved to close the meeting at 12:35 p.m. For the discussion related to the event centre project, council relied on the exceptions in the Act at section 239(2)(i) for information supplied in confidence by a third party and section 239(2)(f) for advice subject to solicitor-client privilege.

² "City Solicitor and Clerk" is the title of one City staff member.



During the *in camera* discussion, City staff gave a presentation to council containing information about the two bids for the event centre project, including details supplied to the City by the bidders. After the presentation, council asked questions and received advice from the City Solicitor and Clerk, and the Deputy City Solicitor regarding the project.

Council recessed at 3:01 p.m. and reconvened in open session at 3:20 p.m. After conducting other business, council discussed the event centre project, passing several resolutions related to it. Council adjourned at 6:38 p.m.

Analysis

Applicability of the exception for information supplied in confidence by a third party

My Office was told that during the closed session, staff gave a presentation to council with further information beyond what was shared in the public report about the bids, including the confidential and detailed contents of both bids. Additionally, in response to questions from council members about the public report, staff provided more information than was made publicly available.

Under section 239(2)(i) of the Act, a municipal council may go into closed session to discuss:

a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence to the municipality or local board, which, if disclosed, could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

The exception requires that the discussion be about information that:

- Falls into one of the listed types: trade secret, scientific, technical, commercial, financial, or labour relations information;
- Was supplied confidentially, whether explicitly or implicitly, to the municipality by a third party; and
- If disclosed, could reasonably be expected to cause harm, either by prejudicing significantly the competitive position or interfering significantly with the contractual or other negotiations of a person, group of persons or organization.

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In this case, staff gave a presentation to council that included detailed commercial and financial information relating to two project bids for the event centre. We were told that the information was provided by the third-party bidders in confidence and was proprietary.

Although the open session materials contained some high-level information about the preferred bid, the information presented in closed session had not been made public. We were told that the public disclosure of the bid details would have compromised the ability of the bidders to advance negotiations with the City as part of the bidding process. We were also told that if those details were made public, the competitive positions of the bidders could be affected on similar projects in future.

Council discussed commercial and financial information contained in the confidential bids submitted by the third-party bidders, which, if disclosed, could prejudice significantly their competitive positions or interfere significantly with their contractual or other negotiations. This portion of the meeting fit within the open meeting exception for information supplied in confidence by a third party.

Applicability of the exception for solicitor-client privilege

My Office was told that following the staff presentation on the two bids, council received legal advice regarding the project.

Under section 239(2)(f) of the Act, a meeting or part of a meeting may be closed to the public if the discussion includes communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential.³ The purpose of this exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.

The City Solicitor and Clerk and the Deputy City Solicitor were both present during the closed session. My Office was told that the City Solicitor and Clerk and the Deputy City Solicitor answered questions from council and provided legal advice about the project.

This portion of the closed session meeting fit within the exception to the open meeting rules for advice subject to solicitor-client privilege.

³ *Hamilton (City of) (Re)*, 2019 ONOMBUD 3 at para 33, online: <<https://canlii.ca/t/j2b49>>.



Conclusion

My review has determined that council's closed session discussion on July 12, 2022 regarding the event centre project fit within the exceptions to the open meeting rules for information supplied in confidence by a third party and for solicitor-client privilege under sections 239(2)(i) and (f) of the *Municipal Act, 2001*.

I would like to thank the City of Greater Sudbury for its co-operation during my review. The City Solicitor and Clerk confirmed that this letter will be included as correspondence at an upcoming council meeting.

Sincerely,



Paul Dubé
Ombudsman of Ontario

cc: Eric Labelle, City Solicitor and Clerk, City of Greater Sudbury

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