



Ombudsman Report

**Investigation into a complaint about
a closed meeting held by the City of
St. Catharines on June 25, 2018**

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Ombudsman of Ontario
February 2019**

Complaint

- 1 In August 2018, my Office received a complaint about a closed meeting held by council for the City of St. Catharines (the “city”) on June 25, 2018.
- 2 The complaint alleged that during the meeting, council held an illegal closed session to discuss a proposed staff position.

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001*¹ (the “Act”), all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 4 As of January 1, 2008, the Act gives citizens 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.
- 5 The Ombudsman is the closed meeting investigator for the City of St. Catharines.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.

Council procedures

- 7 The city’s procedure by-law (by-law no. 2015-170 as amended by by-law 2016-207) states that all meetings shall be open to the public except as provided by the Act. Prior to proceeding in camera, council and any committees must state by resolution the fact of holding a closed meeting and the general nature of the subject matter to be considered.

Investigative process

- 8 On September 18, 2018, we advised the city of our intent to investigate this complaint.

¹ SO 2001, c 25.

- 9 Members of my Office’s open meeting team reviewed relevant portions of the city’s by-laws and policies, and the Act. We also reviewed the records from the open and closed sessions of the council meeting on June 25 and the records from a council meeting on June 11, 2018. The city audio and video records its open sessions. The recording of the open portion of the June 25 meeting was reviewed.
- 10 We interviewed members of council, the clerk, and the city solicitor.
- 11 My Office received full co-operation in this matter.

Background

The June 25 closed meeting

- 12 During a June 25, 2018 regular meeting, council moved into closed session. The open session minutes do not record the resolution to move in camera, although the audio and video recording of the meeting captures the oral motion to proceed in camera. However, the oral motion did not include a general description of the items to be discussed in closed session, nor did it cite the open meeting exceptions that council relied on to move in camera.
- 13 According to the June 25 meeting agenda, there were four items to be discussed in closed session. One of the items was “economic development personnel matter – government relations”. The agenda noted that the labour relations and negotiations exceptions found in subsection 239(2)(d) and 239(2)(k) of the Act applied to this item.
- 14 All members of council, except for Councillor Mark Elliot, were present, as well as the clerk, the city solicitor, and several staff members.
- 15 We were told that the purpose of the discussion about the “economic development personnel matter” was for council to receive and consider a confidential staff report on the feasibility and functionality of adding a Government Relations Adviser position to the city’s administration. The report provided council with financial information related to the proposed position and data from other municipalities with a similar staff position. The staff report was presented to council by the Director of Economic Development and Government Relations.

- 16 According to those we interviewed, after the staff report had been presented, council discussed the nature and role of the position and debated the necessity of such a position within the city's administration. Some council members recalled pointing out that individual council members' connections with Members of Provincial Parliament could be used to foster relationships with the provincial government. Other members of council recalled discussing if the position could "pay for itself" through successful grant applications on the city's behalf.
- 17 Council also discussed employment details about the position, including salary, moving expenses, and length of the contract. We were told that the Mayor, the CAO, and the Director of Economic Development and Government Relations answered questions posed by council members.
- 18 We were also told that at one point during the discussion, there were brief, high-level references to certain municipal projects that could potentially become part of the new government relations adviser's portfolio of responsibilities, as this person would be advancing the interests of the city with the provincial government.
- 19 The city solicitor was present during the closed session, however, she did not provide any legal advice.
- 20 After the closed session, council passed the following resolution in public:

That Council approve the requested addition of a Government Relations Adviser position to the Economic Development and Government Relations Division; and

That Council direct the requested Government Relations Adviser position be funded through the Tax Stabilization Reserve Fund for 2018, and added to the budget for 2019.

Analysis

Applicability of the "labour relations" exception

- 21 The city cited the labour relations exception when it moved into closed session to discuss the proposed government relations adviser position.
- 22 Under the Act, council is permitted to discuss matters pertaining to labour relations or employee negotiations (s. 239(2)(d)) in closed session.

- 23** According to the Ontario Court of Appeal, the meaning of “labour relations” can extend to the relations and conditions of work beyond those related to collective bargaining.² The Information and Privacy Commissioner has found that the term “labour relations” refers to the collective bargaining relationship between an institution and its employees.
- 24** In a previous report to the Township of Baldwin, my Office found that the purpose of the labour relations exception is to protect discussions relating to the relationship between a municipality and its employees. Discussions surrounding the hiring process in which specific individual candidates are discussed can also fit within the labour relations exception.³
- 25** In this case, the discussion did not pertain to the relationship between the municipality and its employees, nor did the conversation include reference to specific individuals who might be hired as government relations adviser. Rather, the in-camera discussion focused on the nature and role of a proposed staff position. The position’s general responsibilities and duties, salary, contract length, and other employment details were discussed. The staff report provided financial information related to the proposed position and data from other municipalities with a similar staff position.
- 26** Accordingly, the council’s closed session discussion did not fit within the labour relations exception.

Applicability of the “negotiations” exception

- 27** Four new open meeting exceptions came into force on January 1, 2018, as part of the *Modernizing of Ontario’s Municipal Legislation Act, 2017*. Section 239(2)(k) provides for a meeting to be closed if the subject matter being considered is:

a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.

- 28** This is the first meeting my office has investigated under this exception.
- 29** When reviewing the parameters of the open meeting exceptions, my Office has often considered the case law of the Information and Privacy

² *Ontario (Minister of Health & Long-Term Care) v. Ontario (Assistant Information & Privacy Commissioner)* 2003 CarswellOnt 4071, [2003] O.J. No. 4123, 126 A.C.W.S. (3d) 185, 178 O.A.C. 171. See also IPC Order PO-3311 (2014); and IPC Order PO-3311 (2014).

³ *Baldwin (Township of) (Re)*, 2014 ONOMBUD 10 (Canlii);

Commissioner (the IPC). These decisions are not binding on my office; however, they are often informative with respect to the applicability of the open meeting exceptions in the Act.

- 30** In the context of information and privacy legislation, government institutions may refuse to disclose records that would reveal their intentions with respect to ongoing or future negotiations.⁴ The IPC has found that the purpose of this exemption is to protect information that could undermine the government's bargaining position or give the public an unfair advantage over the government.⁵
- 31** The IPC established a four-part test to determine whether an institution can refuse to disclose a record because it contains information related to negotiations carried on by the institution.⁶ The institution must show that:
1. the record contains positions, plans, procedures, criteria or instructions;
 2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations;
 3. the negotiations are being carried on currently, or will be carried on in future; and
 4. the negotiations are being conducted by or on behalf of the institution.
- 32** In a 2002 decision that was upheld on appeal to the Divisional Court, the IPC determined that in order to satisfy the first part of the test, there must be "some evidence that a course of action or manner of proceeding is "pre-determined", that is, there is some organized structure or definition given to the course to be taken."⁷ The IPC found that a "plan" is "a formulated and especially detailed method by which a thing is to be done; a design, or scheme." With respect to positions, procedures, criteria, and instructions, the Commissioner found that these terms "are similarly referable to pre-determined courses of action or ways of proceeding."
- 33** In the present case, it does not appear that the city's closed session discussion included any positions, plans, procedures or criteria to be applied to current or future negotiations by the city. The city told my Office

⁴ *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M56, s 11(e); *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31, s 18(1).

⁵ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980).

⁶ IPC, Order M-92, Town (Ajax) (Re), 1993 CanLII 5077 (ON IPC); see also IPC, Order PO-3570, Office of the Public Guardian and Trustee (Re), 2016 CanLII 4760 (ON IPC).

⁷ Order PO-2034, Ontario (Community and Social Services) (Re), 2002 CanLII 46436 (ON IPC).

that the negotiations exception applied to the June 25 closed session because council's discussion about hiring a government relations adviser involved determining how the city will negotiate with the province in future, and the impact the change in provincial government might have on current municipal-provincial projects.

- 34** However, it is evident from my Office's interviews that the discussion focused on determining the role and nature of a new staff position, rather than specifically formulating a detailed course of action with respect to current or future negotiations with the provincial government. In addition, council's discussion did not involve any information that could potentially undermine the city's bargaining position with the province.
- 35** It is clear that the closed session discussion on June 25 was about a new staff role aimed at developing the city's strategies to engage with different levels of government. The discussion did not include a position, plan, criteria or instruction to be applied by the city in its current or future negotiations with those levels of government.
- 36** Accordingly, council's closed session discussion did not fit within the negotiations exception.

Procedural matters: Minutes and resolution to proceed in camera

- 37** In order to exclude the public from a meeting, council must pass a resolution closing the meeting. Under the open meeting rules, the resolution must state the fact of the closed meeting and the general nature of the topic to be discussed.⁸ In *Farber v. Kingston*, the Ontario Court of Appeal emphasized that the resolution 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.⁹ The city's procedure by-law also requires that prior to proceeding in camera, council must state by resolution the fact of holding a closed meeting and the general nature of the subject matter to be considered.

⁸ *Municipal Act, 2001* s. s 239(4)

⁹ *Farber v. Kingston*, 2007 ONCA 173.

- 38 Subsection 239(7) of the Act requires municipalities to “record without note or comment all resolutions, decisions and other proceedings at a meeting of the body, whether it is closed to the public or not.” Minutes should include a detailed description of the substantive and procedural matters discussed, including any motions introduced during the meeting.
- 39 The open session minutes for the June 25 meeting failed to record the resolution to move in camera, although the audio and video recording of the meeting captured the oral motion. However, the oral motion did not include a general description of the matters to be discussed or the exceptions that applied to the in-camera discussions.

Opinion

- 40 Council for the City of St. Catharines violated the *Municipal Act, 2001* on June 25, 2018 when it discussed a proposed staff position, government relations adviser, in closed session. The discussion did not fit within the exceptions cited under the *Municipal Act, 2001* for “labour relations” and “negotiations.”
- 41 Council for the City of St. Catharines contravened the requirements of section 239(4)(a) of the *Municipal Act, 2001*, and its procedure by-law by failing to state by resolution the general nature of the matters to be considered in camera.

Recommendations

- 42 I make the following recommendations to assist council in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of council for the City of St. Catharines should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

The City of St. Catharines 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.

Recommendation 3

The City of St. Catharines 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.

Recommendation 4

The City of St. Catharines should ensure that it creates a complete record of all meetings, both open and closed.

Report

- 43 The city was given the opportunity to review a preliminary version of this report and provided comments to our office. No comments were received.
- 44 My report should be shared with council and made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario