



Ombudsman Report

**Investigation into a complaint about
a closed meeting held by the City of Timmins
on December 19, 2016**

**Paul Dubé
Ombudsman of Ontario
April 2017**

Complaint

- 1 In January 2017, my Office received a complaint about a closed meeting held by the City of Timmins on December 19, 2016.
- 2 The complaint alleged that the city held a closed meeting that did not fit within the closed meeting exception for “acquisition or disposition of land” in section 239(2)(c) of the *Municipal Act, 2001* (the “Act”). At this meeting, council met with a member of the executive of Northern College (the ‘college’s representative’) to discuss a proposed agreement with the college to develop an Integrated Emergency Services Complex in the city.

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001*, 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 Timmins.
- 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. 2016-7914) states that all meetings shall be open to the public except as provided by section 239 of the Act.

Investigative process

- 8 On January 19, 2017, we advised the municipality of our intent to investigate this complaint.

- 9 Members of my Office's staff 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 December 19, 2016.
- 10 We interviewed members of council, the clerk, and the college's representative who was present at the closed meeting.
- 11 My Office received full co-operation in this matter.

Background

The Integrated Emergency Services Complex

- 12 In 2013, the city agreed to support a plan to establish an Integrated Emergency Services Complex in partnership with Northern College. The facility, located on the college's Timmins campus, would house a functioning fire hall and a campus for the college's emergency services educational program.
- 13 The college's representative at the December 19, 2016 meeting advised us that the college has been engaged in discussions with the city to enter into a formal agreement for the complex. Over the course of several months, the college proposed various types of ownership structures to council. In December 2016, the city advised the college that it was seeking an ownership model instead of a leasing space in the complex from the college.
- 14 According to the college's representative, construction on the complex needs to begin by the spring of 2017 in order to meet funding deadlines.

The December 19 closed meeting

- 15 On December 19, 2016 during a regular meeting, council proceeded into closed session under the acquisition or disposition of land exception found in subsection 239(2)(c) of the Act. The resolution to proceed in camera only referenced the exception, with no other information about the matter to be discussed in closed session. According to the clerk, the purpose of the closed meeting was to present council with information about a new ownership model (which the city calls a "condominium proposal") for the

Integrated Emergency Services Complex. Under such a proposal, the city would acquire title to parts of the complex such as the fire hall.

- 16 The clerk, a number of staff, and all of council except then-Councillor André Grzela were present during the closed session. The college's representative, an architect retained to design the complex, and the city's solicitor were also present.
- 17 The college's representative met with council during the first portion of the closed meeting. He provided council with information about the condominium proposal and spoke about the urgency from the college's perspective for council to come to a decision. He also responded to questions from council. After responding to questions, Mayor Steven Black asked the college's representative to leave the room.
- 18 Following the deputation of the college's representative, council continued to discuss the project and the city's position on the condominium proposal. Staff provided additional information to council about the condominium proposal and other financial considerations for the project.
- 19 The city's solicitor was present during the closed session but did not provide any legal advice to council during the meeting.
- 20 Following the closed session, council passed the following resolution in public:

“BE IT RESOLVED THAT Council does hereby approve entering into a condominium proposal with Northern College for an Integrated Service Facility with a maximum cost of \$2 million.”

Analysis

Applicability of the “acquisition or disposition of land” exception

- 21 The city cited the “acquisition or disposition of land” exception when it moved into closed session to discuss the Integrated Emergency Services Complex on December 19, 2016.
- 22 Under the Act, council is permitted to discuss matters pertaining to a proposed or pending acquisition or disposition of land by the municipality or local board in closed session (s. 239(2)(c)).

- 23 The acquisition or disposition of land exception is intended to protect a municipality's bargaining position and financial interests during a pending or proposed land transaction by allowing in camera discussions related to the negotiation.¹ For example, under the exception, during a negotiation, a municipality can discuss an offer to purchase or sell municipal property without the effect of increasing the market value of the property or alerting the other party to the amount at which the municipality is willing to buy or sell.
- 24 My Office has found that the exception applies to discussions where the municipality is acquiring or disposing of property interests other than an ownership interest like lease agreements and easements.²
- 25 The exception does not apply to general or high level discussions about land where the municipality is not engaged in negotiations to acquire or dispose of land.³ Speculative discussion about future land transactions the municipality may carry out does not engage the protections of the acquisition or disposition of land exception because there is no bargaining position to protect.
- 26 Similarly, the acquisition or disposition of land exception does not protect matters that the municipality considers sensitive, confidential or potentially against the interests of the municipality to discuss in public unless the discussion fits squarely within the exception.⁴
- 27 If the other party to a land transaction (or its representatives) is present during an in camera discussion about the land transaction, the discussion is

¹ See *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information*, Toronto: The Committee, July 1984; S. Makush & J. Jackson, *Freedom of Information in Local Government in Ontario*, Toronto: Commission on Freedom of Information and Individual Privacy, 1979, as cited in Final Order MO-2468-F, *Re: City of Toronto*, [2009] O.I.P.C. No. 171.

² Ombudsman of Ontario, *Investigation into whether Council for City of Port Colborne held illegal closed meetings on March 8, 2010, January 27, 2014, and December 8, 2014* (November 2015), online: <https://www.ombudsman.on.ca/Resources/Reports/City-of-Port-Colborne.aspx>

³ Ombudsman of Ontario, *Investigation into the closed meeting held by the City of Niagara Falls on February 10, 2015* (November 2016), online: [https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls-\(4\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls-(4).aspx)

⁴ Ombudsman of Ontario, *Investigation into whether Council for the City of Niagara Falls held an illegal meeting on October 8, 2013* (February 2015), online: [https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls-\(2\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls-(2).aspx)

disqualified from the acquisition or disposition of land exception.⁵ As stated above, the rationale for the acquisition or disposition of land is to ensure that the municipality's bargaining position is not divulged to the very party the municipality is dealing with. Therefore, by having discussions in the presence of the party the municipality is negotiating with, the protection offered by the exception is eliminated.

- 28 The closed meeting investigator for the City of Markham has made similar findings. In its 2013 report, it stated:

“We do not believe that it is a proper interpretation of section 239(2)(c) that a council can negotiate behind closed doors with the very corporate entities (or their personal representatives) with which they wish to enter into a long term lease. There is no provision in the *Municipal Act* that allows a council to negotiate behind closed doors with third parties.”⁶

- 29 In this case, council discussed a proposed or pending land transaction with Northern College in closed session. The negotiations with Northern College were ongoing and had advanced to the point where council was considering approving entering into an agreement with the college for the Integrated Emergency Services Complex.

- 30 The college's representative was present during the first portion of the closed meeting on December 19, 2016. He provided council with information about the proposed land deal between the college and the municipality for the Integrated Emergency Services Complex and participated in a discussion with council about the land deal before leaving the meeting. Northern College is the other party to the agreement to develop the complex. Accordingly, the portion of the closed meeting during which the college's representative was present does not fit within the acquisition or disposition of land exception.

⁵ Letter from Ombudsman of Ontario to Town of Orangeville (January 24, 2014), online: <https://www.ombudsman.on.ca/Files/sitemedia/Documents/Comms-Review--Orangeville-Sept-9-mtg-closing-letter-Jan-20-2014.pdf>

⁶ Local Authority Services, *Report to the Corporation of the City of Markham Regarding The Investigation Of The Meeting Of The Markham Sports, Entertainment And Culture Centre Sub-Committee* (February 2013) at pg 6, online: <<http://www.agavel.com/wp-content/uploads/2013/09/Markham-Investigation-Report-November-2013-final-.docx>>.

- 31 After the college’s representative left the closed meeting, council continued to discuss the Integrated Emergency Services Complex and the municipality’s position on the condominium proposal. This portion of the closed meeting fit within the acquisition or disposition of land exception.
- 32 Based on the interviews we conducted with council and the college’s representative, it appears that council has been directly involved in the negotiations for the Integrated Emergency Services Complex agreement. However, permitting the college’s representatives to appear before council in a closed session disqualified that portion of the meeting from the acquisition or disposition of land exception. A closed session may have been permitted under different circumstances. For example, had a confidential staff report been presented to council communicating the facts and options related to the acquisition of land from Northern College, it would have been appropriate to discuss it in a closed session.

Procedural matters

Resolution to proceed in camera

- 33 Subsection 239(4) of the Act requires that the resolution to proceed in camera include the general nature of the subject matter to be considered. The city’s procedure by-law has equivalent requirements.
- 34 The Court of Appeal in *Farber v. Kingston (City)* stated that:
- the resolution to go into closed session 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.⁷
- 35 My Office has also recommended that councils provide more substantive detail in resolutions authorizing closed sessions. For instance, in our Office’s 2015 review of closed meetings in the Municipality of South Huron, we noted that council’s resolution “should provide a brief description of the subject matter to be considered in closed session”.⁸

⁷ *Farber v. Kingston (City)*, 2007 ONCA 173 at para 21.

⁸ Ombudsman of Ontario, *Investigation into closed meetings held by council for the Municipality of South Huron* (February 2015) at para 58, online: https://www.ombudsman.on.ca/Files/sitemedia/files/SouthHuronFinal_2015.pdf

- 36 In this case, the council's resolution to proceed in camera on December 19, 2016 only referenced the exception, without providing meaningful information to the public about the issue to be discussed in camera.

Opinion

- 37 Council for the City of Timmins contravened the *Municipal Act, 2001* and the city's procedure by-law when it discussed the Integrated Emergency Services Complex agreement in the presence of a representative from Northern College on December 19, 2016 in closed session. That portion of the closed session discussion did not fit within the exception cited under the Act for acquisition or disposition of land.
- 38 The portion of the closed session discussion after the college's representative left the meeting fits within the acquisition or disposition of land exception.

Recommendations

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

Recommendation 1

All members of council for the City of Timmins 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 Timmins 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

When discussing matters under the acquisition or disposition of land exception, the City of Timmins should ensure that the other party or its representatives are not present in the closed session.

Recommendation 4

The City of Timmins 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.

Report

- 40 The City of Timmins was given the opportunity to review a preliminary version of this report and provide comments. Any comments received were considered in the preparation of this final report.
- 41 My report should be shared with council for the City of Timmins and should be made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario