

AIRD & BERLIS LLP

Barristers and Solicitors

John Mascarin
Direct: 416.865.7721
E-mail: jmascarin@airdberlis.com

September 27, 2013

Our File No. 116869

Ciaran Buggle, Investigator
Office of the Ontario Ombudsman
Bell Trinity Square
483 Bay Street
10th Floor, South Tower
Toronto, ON M5G 2C9

Wendy Ray, Senior Counsel
Office of the Ontario Ombudsman
Bell Trinity Square
483 Bay Street
10th Floor, South Tower
Toronto, ON M5G 2C9

Dear Mr. Buggle and Ms. Ray:

**Re: City of London Council – Investigation
Preliminary Report (September 2013)
Your File No. 207860-002 et al.**

Further to the above-noted matter, we thank you for the opportunity to review and comment upon your Preliminary Report of the investigation into whether members of Council for the City of London held an improper closed meeting at Billy T's Tap & Grill on February 23, 2013.

Attached is our letter setting out our detailed comments on the Preliminary Report.

Also included herewith are the two (2) copies of the Preliminary Report that you provided to Chris Williams and me pursuant to our signed Undertakings.

We are also returning to you all of the transcripts of interviews of our clients which were very helpful to us in providing our comments.

We had earlier notified all of our clients that were provided with a copy of the Preliminary Report that they were to return their respective copies directly to your office no later than 4:30 p.m. on September 27, 2013.

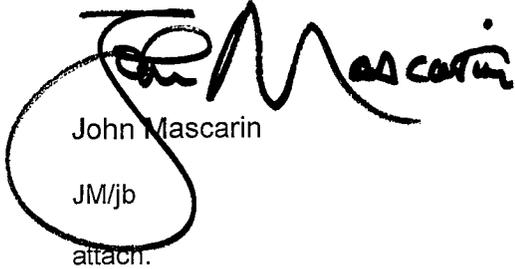
We kindly request that, when available, a copy of the Final Report in respect of the above-noted investigation be provided to us.

September 27, 2013
Page 2

If you or your staff have any questions whatsoever please do not hesitate to contact Chris Williams or me.

Yours truly,

AIRD & BERLIS LLP



John Mascarin
JM/jb
attach.

- c. Mayor Joe Fontana
- Councillor Dale Henderson
- Councillor Stephen Orser
- Councillor Bud Polhill
- Councillor Paul Van Meerbergen
- Councillor Sandy White
- Christopher Williams

15477907.1



AIRD & BERLIS LLP

Barristers and Solicitors

Christopher J. Williams
Direct: 416.865.7745
E-mail: cwilliams@airdberlis.com

John Mascarin
Direct: 416.865.7721
E-mail: jmascarin@airdberlis.com

September 27, 2013

Our File No. 116869

DELIVERED

Mr. André Marin
Ombudsman of Ontario
Bell Trinity Square
483 Bay Street
10th Floor, South Tower
Toronto, ON M5G 2C9

Dear Mr. Marin:

Re: Preliminary Report - Investigation into whether members of Council for the City of London held an improper closed meeting on February 23, 2013

Thank you for providing our clients with the opportunity to provide comments on the Preliminary Report (the "Report") of the investigation into a gathering of various City of London councillors at Billy T's Tap & Grill ("Billy T's") on Saturday February 23, 2013.

We acknowledge the effort of your office in carrying out its work for the investigation. We understand that two teams comprising of four (4) investigators were dispatched to carry out the investigation into the above-noted matter pursuant to s. 239.2 of the *Municipal Act, 2001*.¹ We hope that the comments we provide may be of assistance to you and your investigators in the preparation of the Final Report.

As agreed, we are returning our copies of the Preliminary Report as well as the interview transcripts of our clients that were prepared as part of the investigation.

Introduction

We have carefully reviewed the Report and transcripts with our clients who were present at the gathering at Billy T's. We have also reviewed the case law and authorities cited in the Report. In making our comments, we note that other than transcripts of our clients' interviews, we were not provided with any other evidence from your office.

¹ S.O. 2001, c. 25, as amended.

While we have a number of comments, they may be summarized into the four following observations:

1. The Report correctly concludes that the gathering of the councillors who are members of Council as well as the Civic Works Committee, the Corporate Services Committee and the Planning and Environment Committee acted in compliance with their obligations under the *Municipal Act, 2001* and did not hold any improper meetings;
2. The Report's working definition of "meeting" is overly broad and is not supported by the established jurisprudence. We have serious concerns with regard to the test for determining whether a meeting has been held and as applied in the Report;
3. The Report's findings as to the credibility of the councillors are inappropriate, inaccurate and are not supported in any of the evidence; and
4. The Report incorrectly concludes that the Investment and Economic Prosperity Committee ("IEPC") held a meeting contrary to the *Municipal Act, 2001*.

It is our position that no improper meetings were held at Billy T's on February 23, 2013. While the Report exonerates the councillors present at the restaurant as members of Council and three City committees, the Report nonetheless concludes that an improper meeting was held by one committee, the IEPC. It is our submission that such a conclusion is unfounded based on the evidence as set out in the Report.

Our reasons for each of our four comments are set out in detail below.

Analysis

1. Findings of No Meeting

The Report determines that council members representing four City committees were present and had quorum at Billy T's restaurant on February 23, 2013. As listed in the Report at Paragraph 29, the committees present were the Civic Works Committee, the Corporate Services Committee, the Planning and Environment Committee and the IEPC. Six councillors and the Mayor were in attendance but this number did not constitute a quorum of Council.

The Report examines four alleged discussions to determine whether a meeting or meetings took place at the restaurant. At Paragraphs 52 through 62, the four discussion topics are set out as: Budget Strategy, Trillium Foundation Grant, the Highway 401 Interchanges and the McCormick Property. These alleged discussions concerned matters of potential interest to various committees or to Council itself.

As noted above, the Report correctly determines that there was no meeting or meetings with respect to three of the four committees of which the councillors in attendance were members. The Report also concludes that Council did not hold a meeting. Accordingly, the outcome of the investigation is that Council and every committee present – other than

the IEPC – acted in compliance with the open meeting obligations under the *Municipal Act, 2001*.

Save for the conclusion with respect to the IEPC (which will be commented in greater detail below), we are in complete agreement with the determinations that the councillors complied with their statutory open meeting requirements and concur that there is a valid evidentiary basis for these conclusions.

2. Definition of “Meeting”

As an investigator appointed under s. 239.1 of the *Municipal Act, 2001*, your role in conducting an investigation is to determine whether a municipality has acted in compliance with the open meeting requirement under the statute. Crucial to this exercise is an understanding of the definition of “meeting” as it relates to the *Municipal Act, 2001*. The Report asserts at Paragraph 17 that to constitute a meeting:

Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.

We note that the definition adopted is not the statutory definition contained in s. 238 of the *Municipal Act, 2001* nor is it a direct quote or a proper extrapolation from any judicial pronouncements. Indeed, it is acknowledged at Paragraph 17 that the above-quoted definition is a “working definition” of your own formulation. We expressly do not agree with your statement in Paragraph 18 that the working definition is “consistent with leading interpretations of the open meeting concept.”

In fact, it is our position that your adopted definition is overly broad and is not at all supported by the established case law. If accepted, the working definition would impose an unworkable standard whereby the mere mention of anything to do with a council or committee matter could potentially fall within the ambit of “doing the groundwork necessary.” Such a standard is unwarranted and, in our view, unnecessary with respect to ensuring that the important principles of openness, transparency and accountability in local governmental decision-making are met. Indeed, we have reviewed the cases cited in the Report for the definition of “meeting” and find that the working definition that has been adopted establishes a very different standard for what constitutes a meeting than what is set out in established jurisprudence.

In *Southam Inc. v. Ottawa (City)*,² which is relied upon as an authority for the working definition, Justice Farley of the Ontario General Division outlined that, in assessing whether a meeting is taking place, it is not sufficient that a matter be discussed or dealt with but that it be “materially” advanced toward a decision. As Farley J. wrote:

² [1991] O.J. No. 3659, 5 O.R. (3d) 726 (Ont. Gen. Div.).

Clearly, it is not a question of whether all or any of the ritual trappings of a formal meeting of council are observed The key would appear to be whether the councillors are requested to attend (or do, in fact, attend without summons) a function at which matters which would ordinarily form the basis of Council's business are dealt with in such a way as to move them materially along the way in the overall spectrum of a Council decision. In other words, is the public being deprived of the opportunity to observe a material part of the decision-making process?³ [emphasis added]

The requirement of material advancement is completely absent from your working definition. Instead, the working definition sets the threshold at "doing the groundwork necessary" for council or committee to exercise power or authority. It is our position that materially advancing a matter constitutes substantive action, such as the members agreeing to support a vote in a certain way or to agreeing to take certain collective engagement in the future by establishing a process.

In contrast, "doing the groundwork" potentially encompasses any discussion or mention of a matter however remotely related to council or committee business, regardless of whether that matter is actually materially moved along as a result. This is evident in Paragraph 85 where the Report concludes that an improper closed meeting crystallized as soon as certain "information" was exchanged:

Once a quorum of the committee was present, and a topic of committee business discussed, the gathering was caught by the open meeting requirements of the *Municipal Act*.

Absent from this analysis is anything to do with whether the discussion advanced council or committee business as is required under the test in *Southam Inc. v. Ottawa (City)*. The conclusion in the Report, given the adopted working definition, is that once a mention of a matter arises, the open meeting rule has been breached. Such a definition of meeting constitutes a significant departure from the standard set out in jurisprudence. It establishes a threshold that is much lower than what has been accepted in the established case law. Moreover, it is a definition that will inextricably lead to a finding of a contravention of the open meeting rule no matter how innocent or innocuous the comment.

We acknowledge the authority of the Ombudsman to undertake and conduct an investigation pursuant to s. 239.1 of the *Municipal Act, 2001*. However, the engagement as an investigator in the matter is to assess compliance with the open meeting requirement as it is set out in the statute. The correct standard of analysis is one based on a proper reading of the *Municipal Act, 2001*.

We submit that it is not the role of an investigator under s. 239.1 to devise a definition of meeting that is "more practical." The task of an investigator is to assess whether the requirements of the statute have been complied with. It is our submission that having

³ *ibid.* at para. 12.

formulated and imported a definition of "meeting" that is not supported in law, the conclusions set out in the Report do not provide a correct answer to the very issue that was being investigated.

We submit that the Report's conclusion that a meeting took place with respect to the IEPC is improper because it is not based on the correct legal test or common sense. It is our view that a proper analysis would have assessed whether any collective discussions amongst the members present took place and whether those discussions resulted in a material advancement of any matters that would ordinarily form the business of a council or committee meeting.

The Report should be amended, and the analysis revised, to reflect the standard of material advancement in assessing whether a meeting of the councillors had taken place at Billy T's.

3. IEPC - A Meeting?

Based on our close review of the facts as set out in the Report and in the transcripts provided of the councillors' interrogations, it is impossible to conclude that the IEPC held a meeting at Billy T's on February 23, 2013. The Report concluded that the councillors did not hold a meeting as Council or as any of the other three committees for which there was quorum present on at the gathering at Billy T's. Although the facts are indistinguishable, the Report nevertheless concludes at Paragraph 84 that "discussions" in relation to the Trillium Foundation Grant resulted in an improper closed meeting of the IEPC. We categorically reject this conclusion.

The basis for our position is that none of the evidence establishes that any of the alleged discussions materially advanced the business of the IEPC. Furthermore, none of the evidence shows that any of the alleged discussions materially advanced the business of Council, which is the body that ultimately made a decision related to the Trillium Foundation Grant at a later time.

There is substantial evidence in the Report that militates against the conclusion that an improper closed meeting of the IEPC took place. We ask you to consider:

- Councillor White was not invited to the alleged meeting. At most, she knew that Councillors Polhill and Van Meerbergen might be at the restaurant for lunch;
- Councillor White is not a member of the IEPC;
- Councillor White raised the matter of the Trillium Foundation Grant;
- Quorum for the IEPC is four (4) councillors;
- Only two (2) members of the IEPC were told of the Trillium Foundation Grant by Councillor White;
- There is no evidence as to how many members of the IEPC were actually collectively present during any of the alleged discussions of the Trillium Foundation Grant;

- The IEPC never dealt with the Trillium Foundation Grant; it was Council that later made a decision on the matter;
- There was no quorum of Council when mention of the Trillium Foundation Grant occurred.

To conclude on the facts as clearly set out in the Report that a meeting of IEPC took place at Billy T's is tantamount to determining a meeting may manifest itself through the actions of someone who is external to the committee. Councillor White is not a member of the IEPC. Her attendance at the gathering was not planned. Yet the Report suggests that her actions in showing up and mentioning having secured the Trillium Foundation Grant in the presence of only two (2) IEPC members elevated the gathering into an improper closed meeting of the IEPC.

A review of the evidence in the transcripts of Councillors White, Swan, Polhill and Mayor Fontana reveal that the Trillium Foundation Grant was not discussed in a material way or, we would submit, even in any manner that laid the groundwork for any future decision or action, or by a quorum of IEPC.⁴ The evidence is clear that Councillor White told two councillors at various points in time during the gathering at Billy T's that she had obtained funding from the Province of Ontario and that she was happy about it. There was no announcement; there was no collective statement; and there is nothing in any of the transcripts describing any discussion of strategy, eliciting vote support or next steps with respect to the Trillium Foundation Grant. It does not appear that Councillor White even believed there were any next steps. In fact, Councillor White who was not a member of the IEPC, did not know whether the IEPC had any role with respect to the Trillium Foundation Grant.

Councillor Swan is the Chair of IEPC. He was clear and consistent in his responses to interview questions from your Office that the extent of Councillor White's communication on the Trillium Foundation Grant was a mention that she had received funding. Councillor Swan does not indicate that there was any "announcement" to the councillors. Councillor Swan was not even clear as to which project the Trillium Foundation Grant related to. The conversation between Councillor Swan and Councillor White was brief, involved a number of matters and no one else participated in it.

Likewise, Mayor Fontana's interview transcript indicates that Councillor White mentioned the Trillium Foundation Grant in relation to her meeting with a representative of a local multicultural group and nothing further. This conversation took place only between Mayor Fontana and Councillor White. Similarly, Councillor Polhill gave testimony that he recalled Councillor White telling him she had received the Trillium Foundation Grant but that she did not discuss what the funding related to.

⁴ Table 2 in the Report sets out that the Trillium Foundation Grant was only "discussed" by two members of IEPC and the Report makes it clear that it was Councillor White (not a member of the IEPC) who initiated mention that she had secured the funding. The Trillium Foundation Grant was not even overhead as a topic by three councillors present at Billy T's.

An application of the definition of meeting using the test from *Southam Inc. v. Ottawa (City)* would take into account whether there was a material advancement of the Trillium Foundation Grant as a result of the discussions that took place. Based on the facts in the Report and the transcripts we have reviewed, there is simply no evidence that any of the alleged discussions had any material impact or advancement whatsoever.

Even when applied against the working definition of "meeting" as adopted in the Report, the evidence presented establishes that a meeting of the IEPC did not take place. At most, Councillor White mentioned in a general way that she had secured some funding to only three councillors at different times. No groundwork was laid for the exercise, or even the potential exercise, of any power or authority of the IEPC in relation to the Trillium Foundation Grant. A mere exchange of information, contrary to what the Report concludes, does not materially advance nor lay the groundwork necessary for IEPC to exercise its power and authority.

It is our submission that regardless of whether the definition of "meeting" from the established case law or from working definition from the Report is used, the proper conclusion on the facts is that no meeting of the IEPC took place.

4. Unfounded Credibility Findings

We acknowledge that the Report provides a generally accurate recital of the facts based on our individual meetings with six of the seven councillors who were present at Billy T's, our attendance at the second round of interviews with six of these seven councillors and our review of the transcripts. In particular, we agree entirely with the description of events as provided in Paragraph 50 of the Report:

Accounts of what was discussed at the backroom gathering vary. The participants gave a series of confusing and conflicting accounts to our investigators, maintaining that they carried out separate and parallel conversations on various topics, including personal matters and city-related items, discussed only in a general way. All seven denied discussing city business as a group.

However, we note that many facts are missing from the Report. We further note that the Report makes improper findings as to the credibility and motivation of the individuals involved that are not supported by the evidence. The most dramatic example of this occurs at Paragraph 81 where the Report reaches conclusions as to the overall credibility and motives of the councillors involved:

The explanations provided by the council members are permeated with implausibility and lack credibility. It is both deeply disappointing and deeply concerning that although they were in public at Billy T's, they made deliberate and calculated attempts (individually and in concert) to conceal their behaviour from the public.

The language employed above is simply not appropriate – it is not correct based on the facts and appears to be utilized only for the purposes of embarrassment or ridicule. Similar inflammatory wording sprinkled throughout the Report appears similarly intended

to elicit strong visceral reactions (for example, Paragraph 80 alone makes reference to: "defies common sense"; "lacks credibility"; "congregate behind a closed door in the back room") against the members of council.

Moreover, the conclusion at Paragraph 81 (quoted above) is itself not credible and is not supported at all in the factual record. The Report concludes that of all the committees with members present at Billy T's in the late morning and early afternoon of February 23, 2013, only one committee – the IEPC – engaged in conduct that amounted to a meeting. This alleged meeting was precipitated by the remarks of Councillor White in relation to Trillium Foundation Grant, yet the Report describes Councillor White (at Paragraph 72) as the one attendee who was "not involved in any of the admitted pre-arranged meetings of council colleagues" at the restaurant.

We cannot reconcile the conclusion that the gathering was purposeful and planned when it is accepted as fact that Councillor White was not invited, and it was Councillor White who ultimately elevated the gathering at Billy T's into a meeting on a matter that was not on any planned business of the IEPC, which itself was a committee that Councillor White was not a member. Furthermore, the conclusion that, as a whole, the councillors in attendance made "deliberate and calculated" efforts to hide their behaviour from the public does not follow from the evidence.

Indeed, it defies common sense that councillors, in seeking to hold a supposedly secret closed-door meeting, would convene at a busy public restaurant over lunch on a Saturday morning and afternoon in view of restaurant patrons and staff.

Other Considerations

The Reports notes at Paragraph 6 that our firm objected to the jurisdiction of the Office of the Ombudsman to investigate the complaints regarding the gathering at Billy T's. Our issue at the time related to publicity generated by the Office of the Ombudsman concerning the investigation. Our concern related to the potential impact the publicity could have upon the overall integrity of the investigative process. We would like to clarify that we have no dispute with respect to statutory authority of the Office of the Ombudsman to conduct an investigation into this matter pursuant to s. 239.1 of the *Municipal Act, 2001*.

We also find it very interesting that the Report seeks to utilize statements made by Mayor Fontana at the gathering for the purpose of imputing improper conduct of the councillors. At Paragraph 82 it is noted that "the Mayor found it necessary to remind the group not to talk about the budget or city business, as it was a social gathering." In our view, any statements made by Mayor Fontana indicate that he was cognizant of his open meeting obligations. Mayor Fontana diligently reminded the councillors in attendance not to discuss the city budget or any city business. We fail to see how such evidence supports an adverse conclusion as to the motives of Mayor Fontana. To the contrary, it suggests a recognition of the rules and a desire to see them followed fully by the councillors. Imputing improper motives to Mayor Fontana's statements is completely unfounded and wholly inappropriate.

A Chilling Effect

Our firm acts for a large number of municipalities across Ontario. A consistent concern in municipal governance is the difficulty of attracting viable, responsible and meritorious ordinary citizens to run for municipal office. A recurring theme is the perceived notion that the rules governing how elected officials are to conduct themselves in their personal life, businesses, during elections and at council are arduous and unforgiving. While these rules are predicated on enhancing open, transparent and accountable local governance, when misinterpreted and misapplied they serve to undermine democracy as more and more worthwhile candidates are discouraged from seeking office.

The Ombudsman has stated in many previous occasions and reports something that is repeated at Paragraph 21 of the Report:

To be clear, the *Municipal Act, 2001* does not create an absolute prohibition against members of council discussing city business outside chambers. It is a healthy thing in a democracy for government officials to share information informally before making policy decisions. I agree that to expect council members never to talk to one another outside of a public meeting is unrealistic and would have the effect of unnecessarily chilling speech.

And yet the findings and conclusions in the Report itself undermine the very statements set out above.

Conclusions

The conclusions in the Report are not trivial. The restrictive and chilling implications of the conclusions in the Report will only serve to further discourage public participation in municipal governance. Discourse and debate are hallmarks of a democratic society. A certain type must occur in a public forum; other types may occur in a more private forum. There is no outright ban on councillors talking privately to each other about the issues affecting their communities (as noted in the Report). Councillors are not expected to maintain absolute silence outside of the council chambers. We note that freedom of peaceful assembly and freedom of association are fundamental rights available to everyone under the *Canadian Charter of Rights and Freedoms*. Should our law adopt a standard of conduct such as the one adopted in your Report, it would amount to a serious stifling of discourse and debate across the Province of Ontario and potentially in other jurisdictions as well.

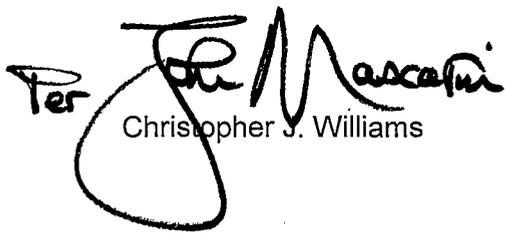
At its core, the Report applies a fundamentally flawed analysis. The Report is based on a definition of "meeting" for the purposes of the *Municipal Act, 2001* that is much broader than what is set out in the statute or in the case law. It is our position that the gathering of the councillors at Billy T's on February 23, 2013 was indeed, as each and every councillor who was present indicated, a social gathering – nothing more. No illegal meetings took place on February 23, 2013. The Report largely confirms this, except for the alleged meeting of the IEPC, which the Report wrongly concludes constituted an illegal meeting. We believe that had the proper legal analysis been applied, the Report would share our

conclusion that no meetings took place at Billy T's. We request that the Report be amended accordingly.

As we agreed with the Preliminary Report, we will not disclose this letter to anyone outside of our client group until your Final Report is released. If you have any questions regarding these comments, please do not hesitate to contact either of us.

Yours truly,

AIRD & BERLIS LLP


Christopher J. Williams


John Mascarin

- c. Mayor Joe Fontana
- Councillor Dale Henderson
- Councillor Stephen Orser
- Councillor Bud Polhill
- Councillor Joseph Swan
- Councillor Paul Van Meerbergen
- Councillor Sandy White

15448807.3

