



Ombudsman Report

**Investigation into whether
a Committee of Council for the City of Hamilton held
an illegal meeting on July 25, 2014**

**André Marin
Ombudsman of Ontario
November 2014**

Complaint

- 1 On July 25, 2014, my Office received a complaint from MPP Monique Taylor about a gathering that took place at City Hall between the Mayor and certain members of council for the city of Hamilton, as well as the Ministers of Transportation and Municipal Affairs and Housing.
- 2 According to the complaint, MPP Taylor heard that the Mayor and councillors would be meeting with the ministers and wished to attend. She wrote to the Mayor and Cllrs. Duvall, Merulla, and Powers on July 22, 2014, noting that she was writing to them in their capacity as “members of the Government Relations Committee”, and asked that she be allowed to attend the meeting. She noted that she was interested in hearing what the Minister of Transportation had to say about a proposal for light rail transit (LRT) in Hamilton. The Mayor advised her, via email on July 23, that the gathering with the Ministers was a “closed-door session”, but that she could join the public session immediately following the meeting, during which council members and the ministers would take questions.
- 3 MPP Taylor complained to my Office that the July 25 gathering was a meeting of a committee of council, closed to the public in violation of the open meeting requirements of the *Municipal Act, 2001* (the Act).

Inquiry from Hamilton city staff

- 4 On July 14, 2014, city staff contacted my Office for advice regarding whether the proposed July 25 gathering between the Mayor, council members and provincial ministers was required to be open to the public. As per our normal practice, staff from my Office’s Open Meeting Law Enforcement Team (OMLET) provided Hamilton city staff with general information about our process and how we have reviewed similar open meeting complaints.
- 5 Hamilton city staff were informed that my Office does not give advice in advance on whether a specific meeting must be held in public and that we cannot make pre-determinations regarding whether the city would be in compliance with the *Municipal Act*. Ultimately the decision on whether to hold a meeting in public or not is up to city council.
- 6 Although we can provide general guidance and information on the open meeting requirements, under the *Municipal Act* my Office’s role is clearly limited to investigating complaints about closed meetings and compliance with the Act. Municipalities should seek legal advice if they have more specific questions or concerns about closed meetings.

Ombudsman jurisdiction

- 7 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.
- 8 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has properly closed a meeting to the public. Municipalities 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.
- 9 The Ombudsman is the closed meeting investigator for the city of Hamilton.
- 10 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed. My Office has no jurisdiction to comment on other issues relating to council business such as the city of Hamilton's transit plans or funding for those plans.

Procedure by-law

- 11 Hamilton's procedure by-law (By-law 10-053) defines "committee" as a standing committee, licensing tribunal, selection committee or an advisory committee or task force established by council from time to time. "Standing committee" is defined as, "a committee established by council, comprised entirely of members of council, to carry out duties on an ongoing basis, as specified by council". The Government Relations Contact Team is not listed among Hamilton's standing committees in the procedure by-law.
- 12 Section 8 of the by-law pertains to the open meeting requirements. The definition of "committee" for the purposes of section 8 mirrors the definition of "committee" found in s. 238(1) of the Act. The by-law states that no meeting of council or a committee shall be closed to the public unless the subject matter being considered falls within one of the exceptions to the open meeting requirements.

Investigative process

- 13 On August 13, 2014, after completing a preliminary review, we advised the city that we would be investigating this complaint.

- 14 My Office's Open Meeting Law Enforcement Team reviewed relevant portions of the city's procedure by-law and the Act, and materials pertaining to the July 25 gathering. They spoke with city staff as well as the Mayor and the four councillors who attended the meeting, and one councillor who was invited to the meeting but refused to attend.
- 15 My Office received full co-operation in this matter.
- 16 Municipal elections were held on October 27, 2014. There were some changes to Hamilton's council, including the election of a new mayor. All references to the mayor and council in this report refer to council as it stood at the time of the July 25 gathering.

The Government Relations Contact Team

- 17 Hamilton's Government Relations Contact Team (the Team) was established in 2011. The motion to form the Team stated that it would consist of the Mayor, the Chair of the Fairness to Hamilton Sub-Committee (who, as of the date of the July 25 gathering, was Cllr. Sam Merulla) and the City Manager. Additional city staff or elected officials could be added on an as-required basis, in order to "assist the Mayor in advocating formal city council approved positions to senior levels of government."
- 18 Municipal staff advised my Office that the Team was not intended to be a formal committee or sub-committee of council. A list of Hamilton's committees and sub-committees is available on the city's website¹, and the Team is not included. The Team does not make recommendations to council, or report to committees or to council.
- 19 During interviews, we were advised that the Team was established to ensure that council's approved positions were being accurately conveyed to other levels of government.
- 20 There was significant confusion regarding who was on the Team. While most interviewees agreed that the Mayor and Cllr. Merulla were appointed to the Team, some believed that Cllrs. Powers and Duvall were members, although both councillors denied being on the Team. Cllrs. McHattie and Farr were also mentioned as possible members.
- 21 There was also some confusion regarding when the Team met. Three interviewees advised that the Team had met once before, one advised it had met once or twice, and one advised that it had never held any meetings. We

¹ <http://www.hamilton.ca/CityDepartments/CorporateServices/Clerks/Committees2010-2014.htm>

were unable to obtain consistent information regarding the details of previous Team meetings, if they did occur.

The July 25 gathering

The purpose of the gathering

- 22 Those we interviewed agreed that the purpose of the gathering was to meet the new Minister of Transportation, and to get an answer on how much funding the province would be providing for Hamilton's LRT. The LRT is a proposed 14-kilometre line that would run from McMaster University to Eastgate Square, and would cost approximately \$800 million dollars to build. It has been the subject of much debate among Hamilton city councillors, with some supporting the LRT, and others supporting bus rapid transit (BRT).
- 23 We understood it was important for the city to get an answer from the province on LRT funding because Hamilton council had decided on February 27, 2013 that the city required 100 percent capital funding from the province in order to move ahead with its transit plan. This decision was reaffirmed on May 8, 2013.
- 24 Two interviewees advised that this meeting was in response to a resolution council passed a few months prior, to request the Minister of Transportation provide the city with an update on the LRT file².
- 25 Two other interviewees advised that the gathering was the result of a promise the former Minister of Transportation made prior to the last provincial election to meet with council and discuss funding for the LRT.

Concerns prior to the meeting

- 26 Media reports indicated that the closed-door transit meeting caused some concerns amongst councillors and the public. Cllr. McHattie stated that he was uncomfortable with the Mayor, who was against provincial money being used for the LRT, having the first communication on the issue with the new Minister of Transportation³. Cllr. Merulla publicly stated that he would not attend the meeting, as he believed it should have been open to the public.
- 27 Cllr. Merulla advised our Office that he believed the meeting should have been public because it was being held in response to a public resolution of council to get an update on the LRT file from the provincial government. He noted that

² This motion was passed on April 16, 2014 and is available here: <http://www.hamilton.ca/NR/rdonlyres/1E3C849A-4B00-489D-9D62-8ACEC5506616/0/Apr16GICMinutes14009.pdf>

³ Green, Jeff (2014, July 15). Controversy grows over Hamilton's transit summit with province. *CBC News*: <http://www.cbc.ca/news/canada/hamilton/news/controversy-grows-over-hamilton-s-transit-summit-with-province-1.2707579>

there was no formal report back to council or the public regarding the July 25 meeting, and the information disseminated at the subsequent press conference was vague and contradictory. He described the LRT as a divisive issue in the community, and noted that it is important that both the public and council as a whole have the correct information.

- 28** Many interviewees advised our Office that it was not unusual for mayors or select council members to meet privately with provincial ministers to discuss municipal interests, and that they therefore had no concerns with this gathering.

Organizing the gathering

- 29** We were told that the gathering was organized by the Mayor's Chief of Staff. Emails between the Mayor's Chief of Staff and the Chief of Staff for the Minister of Transportation indicate that the date and time of the gathering were confirmed on July 11. The agenda for the gathering stated that it would begin at 10:00 a.m. in the Mayor's boardroom, and adjourn at 11:30 a.m.

The meeting agenda

- 30** The agenda for the meeting was as follows:
- 10:00 a.m.: Mayor Bratina welcomes guests and introduces Minister McMeekin
 - Minister McMeekin opens up the meeting and introduces Minister Del Duca to the guests
 - Minister Del Duca makes remarks
 - Mayor Bratina will ask Chris Murray (City Manager) to speak on council's transit plan and other transportation priorities to the city
 - Questions for City Manager
 - Minister Del Duca, Minister McMeekin and Mayor open up the table for conversation
 - When discussion closes the Ministers and Mayor go to 2nd floor South Entrance of City Hall for media availability
 - Ministers leave City Hall after media scrum

Who attended the meeting?

- 31** The Mayor's Chief of Staff told us that which councillors were to attend the meeting was determined in consultation with the Mayor and was based on each individual's membership on the Team or their experience and/or their interest in the rapid transit issue.
- 32** The following people attended the meeting:

- Mayor Bob Bratina
- Cllr. Russ Powers
- Cllr. Brad Clark
- Cllr. Scott Duvall
- Cllr. Brian McHattie
- Minister Ted McMeekin (MPP for Ancaster-Dundas-Flamborough-Westdale, and Minister of Municipal Affairs and Housing)
- Minister Steven Del Duca (MPP for Vaughan, and Minister of Transportation)
- Three ministerial staff
- Four members of city staff:
 - Chris Murray, City Manager
 - Mike Kirkopoulos, Director of Communications
 - Don Hull, City Director of Transit/Transportation
 - Peggy Chapman, Mayor’s Chief of Staff

33 Cllr. Merulla was also invited to the meeting but advised that he did not attend as he felt that the meeting should be open to the public.

Discussion at the meeting

- 34** The information provided to my Office about what was discussed was fairly consistent among the people we interviewed. During interviews, councillors advised that they discussed Hamilton’s “Rapid Ready” transit plan and Hamilton’s expectations regarding LRT funding, as well as made some general “small talk”. All agreed that the discussions pertained to decisions Hamilton council had already made, rather than matters that would be on upcoming council agendas.
- 35** There were limited notes taken during the gathering. The notes we received indicated that the discussions included transit challenges Hamilton was facing, and an update the ministers received about the city’s transit plan.
- 36** The City Manager’s office circulated an email to council and staff on August 1 to provide an overview of what was discussed on July 25. This email stated that the purpose of the meeting was to discuss transportation priorities and plans for the city. It noted that during the meeting, the City Manager provided an overview of the city’s strategic plan and the “Rapid Ready” report. A number of councillors made it clear that if there were anything less than 100 percent capital funding for the LRT, council would potentially look to reconsider the matter. Minister Del Duca committed to direct Metrolinx and MTO staff to meet with the city as soon as possible to clarify outstanding issues.

After the meeting

- 37** There was a public press conference held after the meeting. Minister Del Duca advised the media that information he received from Hamilton council members and staff about the city’s transit needs would be relayed to his staff and representatives of Metrolinx. He told the media that he supported 100 percent of the capital construction costs for additional rapid transit, but that he was “not in a position to make an announcement today. Today was an exercise in coming here to hear directly [from politicians].⁴”
- 38** Media reports also noted that councillors who spoke to the press after the July 25 gathering appeared to have differing opinions of what occurred. Cllr. Clark stated that he did not hear much new information from the Minister of Transportation, and that it was made clear that Hamilton had more work to do to make its case for a rapid transit project. Cllr. McHattie advised that it was a positive meeting, and that the Minister seemed to think Hamilton had “done enough to take the next step”⁵. One blogger noted, “Of course, if the meeting was open to the public, we would not have had to try and piece together what was said based on the impressions of people who were in attendance⁶.”

Analysis

Is the Government Relations Contact Team a committee of council?

- 39** Based on the information provided to my Office, the Government Relations Contact Team was established to “assist the Mayor in advocating formal city council approved positions to senior levels of government.”
- 40** My Office received inconsistent information regarding who is on this Team. According to the motion to form the Team in 2011, the permanent members of the Team are the Mayor, the City Manager, and Cllr. Merulla (as the chair of the Fairness to Hamilton Sub-Committee), with additional staff or councillors on an as-needed basis.

⁴ Werner, Kevin (July 25, 2014). Transportation Minister Steven Del Duca Leaves Hamilton councillors with more questions than answers after LRT funding meeting. *Hamilton Community News*: <http://www.hamiltonnews.com/news/transport-minister-steven-del-duca-leaves-hamilton-councillors-with-more-questions-than-answers-after-lrt-funding-meeting/>

⁵ Van Dongen, Matthew (July 25, 2014). Province not ready to commit to \$811-million Hamilton LRT. *The Hamilton Spectator*: <http://www.thespec.com/news-story/4690566-province-not-ready-to-commit-to-811-million-hamilton-lrt/>

⁶ McGreal, Ryan (July 25, 2014). No LRT Funding Announcement After Meeting with Minister Del Duca. *Raise the Hammer*: https://www.raisethehammer.org/article/2251/no_lrt_funding_announcement_after_meeting_with_minister_del_duca

- 41** Section 238(1) of the Act defines “committee” as “any advisory or other committee, subcommittee or similar entity of which at least 50 per cent of the members are also members of one or more councils or local boards.”
- 42** The Team is made up of at least 50 percent council members. I am satisfied, however, from my review of the evidence that the Government Relations Contact Team was not functioning as an advisory or other committee of council or similar entity. The Team did not serve the role of a committee that is charged with making recommendations to council on items of council business in order to inform council decision-making. Rather, it appears that the role of the Team was to bring council-approved positions to the attention of other government officials. The Team does not have its own authority to make decisions or provide recommendations, but rather advances positions the city has already decided upon.
- 43** The Team, as of July 25, 2014, did not appear to be functioning as a committee for the purpose of the open meeting requirements.

Was the July 25 gathering a “meeting” for the purpose of the open meeting requirements?

- 44** The *Municipal Act, 2001* defines a “meeting” as “any regular, special or other meeting of a council, of a local board or of a committee of either of them.”⁷ This definition is circular and not particularly helpful in determining whether a meeting has actually occurred.
- 45** In a 2008 report,⁸ through review of the relevant case law and keeping in mind the underlying objectives of open meeting legislation, I developed a working definition of “meeting” to assist in the interpretation of the definition contained in the Act:

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.⁹

⁷ s. 238(1)

⁸ Ombudsman of Ontario, *Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 25, 2008), online:

http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2_2.pdf.

⁹ *Ibid* at paras 54-60.

- 46** This definition remains consistent with leading interpretations of the open meetings law and reinforces the right of the public to observe municipal government in process.¹⁰
- 47** The information provided to my Office during this investigation indicates that the July 25 gathering involved five of Hamilton’s 16 council members meeting with two provincial ministers. The purpose of the meeting was for representatives of Hamilton council to make clear council’s position regarding LRT funding and the city’s transit needs. Although there was an intention to influence provincial decision-making, the meeting was not a municipal decision-making exercise, or an attempt to lay the groundwork for future council decision-making.
- 48** As such, the July 25 gathering was not a meeting subject to the open meeting requirements of the *Municipal Act, 2001*.

Conclusion

The meeting

- 49** My investigation found that the July 25, 2014 gathering was not a meeting of council, or of a committee of council, subject to the open meeting requirements. Accordingly, holding the meeting behind closed doors did not violate the *Municipal Act, 2001*.

The Government Relations Contact Team

- 50** Although I have found that Hamilton’s Government Relations Contact Team is not a committee of council for the purpose of the open meeting requirements, council should consider clarifying the membership of this Team and its role and authority. There appears to be significant confusion amongst council, staff, and the public regarding the composition of the group and the group’s overall purpose, as well as its role during the July 25 meeting.
- 51** Given the fact that the group has been charged with the important role of liaising with upper levels of government, it is not surprising that the public – and the rest of council – would have a significant interest in its activities. Further clarity regarding the group’s purpose, as well as formal reporting back to council, could have avoided much of the confusion and speculation in this case.

¹⁰ *London (City) v. RSJ Holdings Inc.*, [2007] 2 S.C.R. 588, 2007 SCC 29 at para. 32; *Southam Inc. v. Ottawa (City)* (1991), 5 O.R. (3d) 726 (Ont. Div. Ct.) at paras. 12-18; *Southam Inc. v. Hamilton-Wentworth Economic Development Committee* (1988), 66 O.R. (2d) 213 (Ont. C.A.) at paras. 9-12

Recommendation

52 Accordingly, I am making the following recommendation:

The city of Hamilton should clarify the membership, role and authority of the Government Relations Contact Team, and consider having the Team report back to council publicly after a gathering.

Report

53 OMLET staff spoke with Hamilton's Clerk, Deputy Clerk, and Director of Communications, as well as Cllr. Duvall on November 26, 2014 to provide an overview of these findings, and to give the city an opportunity to comment. Any comments received were taken into account in preparing this report.

54 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.



André Marin
Ombudsman of Ontario