



Ombudsman Report

**Investigation into whether
Council for the City of Niagara Falls
held an illegal meeting on October 8, 2013**

**André Marin
Ombudsman of Ontario
February 2015**

Complaint

- 1 On September 5, 2014, my Office received a complaint about a closed session held on October 8, 2013 by council for the City of Niagara Falls.
- 2 According to the complaint, one portion of the closed session discussed a report entitled “Business Case and Land Capacity for a Downtown Post-Secondary Campus,” under the “acquisition or disposition of land” exception of the *Municipal Act, 2001* (the Act).
- 3 The complaint alleged that the discussion did not relate to the acquisition or disposition of city-owned land, and, accordingly, this portion of the meeting was closed to the public in violation of the open meeting requirements of the Act.

Ombudsman jurisdiction

- 4 Under the Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 5 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.
- 6 The Ombudsman is the closed meeting investigator for the City of Niagara Falls.
- 7 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

Previous complaints

- 8 My Office has previously reviewed closed meeting complaints about the City of Niagara Falls.
- 9 Based on those reviews, we have twice recommended that council ensure closed meeting items be included as part of the publicly available agenda. We made this recommendation with respect to a closed session held on February 26, 2014 to

discuss an employee resignation,¹ and with respect to a review of closed meetings that were held October 3, 2011, December 12, 2011, and January 24, 2012.²

Procedure by-law

- 10** Council meets at 5 p.m. every other Tuesday. The by-law requires resolutions to go in camera to give information about the general nature of the matter to be considered in the closed meeting.
- 11** The Clerk advised my Office that meeting agendas are generally posted on the city's website on the Wednesday or Thursday of the week before the meeting. He said council often relies on the press to publicize upcoming closed sessions, as closed sessions may not be noted in the agenda posted online.

Investigative process

- 12** On October 3, 2014, after completing a preliminary review, my Office advised council that we would be investigating this complaint.
- 13** My Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the city's procedure by-law and the Act, and extensive written material prepared for, and pertaining to, the October 8, 2013 meeting. OMLET staff spoke with city staff as well as the Mayor and a councillor who attended the meeting.
- 14** We received full co-operation in this matter.
- 15** Municipal elections were held on October 27, 2014. The Mayor was re-elected, but there were some changes to council's composition. All references to the Mayor and council in this report refer to council as it stood at the time of the October 8, 2013 meeting.

¹ Available at: <https://ombudsman.on.ca/Files/sitemedia/Images/Reports/Niagara-Falls-closing-letter--Feb-19.pdf>

² Available at: <https://ombudsman.on.ca/Files/sitemedia/Images/Reports/Niagara-Falls-Clerk-letter-April-23.pdf>

The October 8, 2013 meeting

Background

- 16** On January 31, 2011, council passed a resolution approving its strategic priorities. These priorities included pursuing economic development opportunities, such as developing a post-secondary campus in the city's downtown. Staff subsequently began meeting with developers about promoting the downtown for use as a university campus.
- 17** At a closed session on September 11, 2012, council directed staff in the Business Development Department to hire appropriate consultants with respect to attracting universities to downtown Niagara Falls. At this meeting, council was advised that it was important to keep the city's efforts confidential to avoid alerting other communities that were also pursuing campus development opportunities.
- 18** In late September 2013, the Mayor, Chief Administrative Officer (CAO), and Director of Business Development travelled to India and South Korea for economic development purposes. While they were gone, a member of the public who was part of the city's Business Improvement Association (BIA) complained to councillors that he had learned of, but wasn't given access to, a report looking at developing a university in the downtown.
- 19** Certain councillors became concerned about this report. Media outlets reported that council had not approved procuring the report. Once the Mayor and CAO became aware of this situation, they cut their trip short and returned to Niagara Falls. The CAO sent the Clerk an email requesting a closed session during the next regular council meeting to address the concerns about the report. The CAO indicated that the session should be closed because it would include discussions about possible land deals involving city-owned land.

Meeting notice and agenda

- 20** The meeting on October 8, 2013 was a regular council meeting, scheduled to begin at 5 p.m. The agenda for this meeting was posted on the city's website on October 2, 2013. It made no reference to a closed session.
- 21** An agenda package – including a proposed resolution to go in camera on October 8 at 4 p.m., as well as the proposed closed meeting agenda, was distributed to councillors and news media outlets on October 3, 2013.
- 22** The closed meeting agenda noted that three items would be discussed during the closed session. The first two items involved proposed purchases of identified city

lands, and both items indicated that the City Solicitor would speak about the issues. The third item on the agenda was “downtown university,” with the notation that the CAO would speak to the matter.

- 23** My Office did not find evidence that information about the closed session was published in the media ahead of the October 8 session.

Resolution to proceed into closed session

- 24** Before going into closed session, Councillors Joyce Morocco and Bart Maves made a motion, and council then passed a resolution, to go in camera at 4 p.m. to consider matters falling under s. 239(c) of the Act: A proposed or pending acquisition or disposition of lands regarding land to the rear of 3817 Sinnicks Avenue, 6681 Culp Street, and city-owned lands in the downtown (the “downtown university” item).
- 25** The resolution also noted that, because the discussions might be lengthy, council’s regularly scheduled meeting might not commence at 5 p.m., but instead would begin upon conclusion of the closed meeting.

Closed meeting minutes

- 26** The closed meeting minutes provided the names of those in attendance, including all nine members of council and 13 staff members from the Business Development Department and CAO’s office, as well as the location, the 4 p.m. start time, and the 6:55 p.m. conclusion of the meeting.
- 27** The minutes recorded councillors’ recommendations with respect to each item and the action items resulting from each recommendation. In relation to the “downtown university” item, the closed meeting minutes recorded the recommendation that the report be released in open council.
- 28** The minutes did not record any of the substantive discussions that took place, nor did they note any materials that were presented at the closed session.

Discussion at the meeting

- 29** According to the information we obtained, the third item on the closed meeting agenda – “downtown university” – began with a discussion about whether or not the item was appropriate for a closed session. Although some staff and councillors voiced concerns that the report should not be discussed in closed session, the

majority of council determined that it was appropriate to continue hearing the presentation on the report.

- 30** The CAO began a PowerPoint presentation detailing the background to the report, stopping periodically to answer questions. The questions related to council's approval to procure the report, its cost, who received copies, and when it would be "officially" released.
- 31** The CAO provided information to council on the consultants hired by the city. He briefly discussed how the development project might affect properties owned by another local developer.
- 32** Discussions segued into concerns from some councillors about the trip that the Mayor, CAO and Director of Business Development had taken to India and South Korea, including how it was paid for and whether any other parties accompanied them.
- 33** This portion of the discussion became heated. A councillor asked the City Solicitor to provide an opinion as to whether there was "misconduct." Based on the information my Office obtained, the councillor's request was general in nature, not specifying what or who was the focus of the alleged misconduct. The solicitor indicated his preliminary view that there was no misconduct.
- 34** The CAO, with the aid of the PowerPoint presentation, reviewed the chronology of council's approval of the campus development project and the retention of consultants. He explained that the strategy in keeping the campus development priority "under the radar" was to retain a competitive advantage for the city. The CAO confirmed the report's cost and clarified that no memorandum of understanding was in place with any developers or universities.
- 35** The CAO also explained that the trip to India and South Korea had involved continued promotion of the campus development agenda, and clarified that the trip was sponsored by a university in India and a city in South Korea.
- 36** Council concluded the closed session by recommending that the report be publicly released. This action item was brought to open council.
- 37** The minutes of the open meeting on October 8 confirm that a motion was passed to release the report publicly. According to the information my Office received, staff immediately made the report available to the press and members of the public, and it was later published on the city's website.

Analysis

Applicability of the “acquisition/disposition of land” exception

- 38** Under the *Municipal 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)).
- 39** The acquisition or disposition of land exception allows council and/or committees of council to discuss the sale, lease, or purchase of land within a closed session, with the primary purpose being to protect the municipality’s bargaining position in property negotiations.³
- 40** The CAO, who asked that the downtown campus matter be placed on the closed meeting agenda, was concerned that identified lands for sale to or by the city might be discussed. He was also concerned that discussion of the report itself might undermine the city’s competitive advantage in securing a university campus.
- 41** The parceling of certain city-owned lands was referenced in the CAO’s presentation, as reflected in the report, as well as identified by some owners who could be affected. However, the discussions did not address how the properties were to be appraised or sold, and there was no discussion of putting specific properties on the market.⁴ Instead, the focus of the closed meeting was on the procurement of the report and the report’s content.
- 42** The fact that council agreed to publicly disclose the report at the open session immediately following the closed session further indicates that council was not concerned about protecting its bargaining position by holding a closed session to discuss the report.
- 43** Securing a competitive advantage with respect to attracting municipal development is not an identified basis for citing the “acquisition of lands” exception to close a council meeting. As I noted in my recent investigation into closed meetings in the City of Welland:

I must emphasize again that council cannot bring a matter in camera simply because it is considered sensitive or confidential or potentially against the city’s interests to discuss it publicly. Matters can only be

³ Ombudsman of Ontario’s review of a May 23, 2013 closed meeting in the Town of Ajax, available at <https://ombudsman.on.ca/Resources/Reports/Town-of-Ajax.aspx>

⁴ For similar findings, see Ombudsman of Ontario, *Property and Propriety*: Investigation into multiple closed meetings by Council for the City of Welland, from June 2012 to May 2014, available at <https://ombudsman.on.ca/Resources/Reports/City-of-Welland.aspx>

discussed in camera if they fit squarely within the exceptions to the open meeting requirements.⁵

- 44** Given that the purpose of the closed session was to discuss the report, and that council did not discuss the acquisition or disposition of city lands with a view to protecting the city's bargaining position in property negotiations, I conclude that this discussion did not fit within the "acquisition/disposition of land" exception that was cited to close the meeting.

Applicability of the "personal matters" or "solicitor/client privilege" exceptions

- 45** Some of those we interviewed suggested that discussions of possible "misconduct" on the part of municipal staff and officials might constitute "personal information" for the purposes of s. 239(2)(c). I also considered whether the "solicitor-client privilege" (s. 239(2)(f)) exception to the open meeting laws applied to the October 8, 2013 discussions.
- 46** The Act does not define "personal matters." As discussed in my recent report on a meeting of the Municipality of Whitestone in February 2014,⁶ when reviewing the parameters of the open meeting exceptions, I often consider the case law of the Office of the Information and Privacy Commissioner (the IPC), although it is not binding on our Office.
- 47** IPC Order MO-2204 noted that, in order to qualify as "personal information," the information must be about an individual in his or her personal capacity, rather than their professional, official or business capacity.⁷ However, information relating to an individual in their professional, official or business capacity may still qualify as personal information if the information reveals something of a personal nature about the individual.
- 48** Based on the information my Office collected, particularly from those witnesses with the best recollection of the October 8 meeting, the discussions did not diverge into topics that were "inherently personal in nature,"⁸ such as an employee's performance or an investigation into his or her conduct.⁹

⁵ Available at: <https://ombudsman.on.ca/Resources/Reports/City-of-Welland.aspx>

⁶ Available at: <http://www.ombudsman.on.ca/Resources/Reports/Municipality-of-Whitestone.aspx>

⁷ Order MO-2204, Town of Aylmer) (June 22, 2007)

⁸ IPC Order PO-2225, Appeal PA-020089-1, Ontario Rental Housing Tribunal, discussing the distinction between personal and business/professional information.

⁹ *Supra* note 7.

- 49** Although the tone of the councillors in questioning the CAO was heated, any questions raised with respect to “misconduct” were generalized in nature. Their inquiries and the subsequent discussion were focused on collecting facts related to the procurement of the report, the report’s contents, and collateral issues, such as the trip to South Korea and India.
- 50** My conclusion that the discussions did not rise to the level of disclosing personal information is further bolstered by the fact that questions and concerns about procuring the report were already a matter of public record. The *Niagara Falls Review* had already quoted a councillor saying that council had “never voted” to approve a study on the potential of a post-secondary campus in the downtown.”¹⁰
- 51** Accordingly, the questions about whether the CAO, the Mayor, and the Director of Business Development had complied with their professional obligations, with respect to the report and the trip, were limited to actions taken in their professional capacities. The subject matter of these discussions did not qualify as personal for the purposes of s. 239(2)(c) of the Act.
- 52** My Office also considered whether the “advice that is subject to solicitor-client privilege” exception in s. 239(2)(f) of the Act could have been cited to exempt the City Solicitor’s input on whether the downtown campus item could be discussed in closed session, as well as on the alleged “misconduct” issue.
- 53** While I concluded that both items could have been discussed in camera, the legal advice provided was, at best, minimal. Furthermore, this would not have been an issue had the meeting proceeded in open session in accordance with the Act.

Notice to the public

- 54** Notice of the 5 p.m. regular council meeting was provided to council and the public, but did not indicate that there would be a closed session at 4 p.m.
- 55** The Clerk told us that council relies on the press to publicize upcoming closed meetings; however, there is no evidence that this occurred for the October 8, 2013 closed meeting.
- 56** Although council and some media outlets had received the meeting agenda materials and had advance notice of the closed meeting start time and agenda, the public did not. The public was not present to hear the resolution to go in camera, which was announced prior to the closed session at 4 p.m. Accordingly, the public did not receive notice of the closed session.

¹⁰ Ray Spiteri, *Niagara Falls Review* “Councillor questions way university study handled”, available online at: <http://www.niagarafallsreview.ca/2013/10/03/councillor-questions-way-university-study-handled>.

- 57** My recent report regarding the Township of Black River-Matheson,¹¹ and my previous report regarding the Township of Leeds and Thousand Islands (TLTI),¹² identified that the failure to provide notice of a closed session constitutes a violation of the Act. As I stated in the TLTI report, p. 22:

Municipalities are required to issue procedure by-laws that provide for public notice of meetings. If notice of a meeting is not given, whether contrary to a procedure by-law or because the procedure by-law is inherently deficient, it naturally follows that the meeting itself was held in violation of the Act.

- 58** Given that the public was denied notice of the closed meeting, council's closed session on October 8, 2013 violated the Act.

Procedure by-law

- 59** As we have previously recommended to council for the City of Niagara Falls, and according to s. 238(2) of the Act, council's procedure-by law should be amended to explicitly provide for notice of meetings to the public.
- 60** The city confirmed that, with the new council term, it has implemented measures to better publicize closed sessions, including ensuring that resolutions to go into closed session before regular council meetings are posted online, and no longer relying solely on the media to publicize closed meetings.

Opinion

- 61** My investigation established that the discussion of the "downtown university" item should not have happened during a closed session; it was therefore an illegal meeting. The entire October 8, 2013 closed session was also in violation of the open meeting requirements of the Act because public notice of closed session was not provided.

¹¹ Available at: <https://ombudsman.on.ca/Resources/Reports/Township-of-Black-River-Matheson.aspx>

¹² Available at: https://ombudsman.on.ca/Files/sitemedia/Images/Reports/TLTI-Nov13-Final-EN_1.pdf

Recommendations

62 Although the makeup of council has changed since the municipal elections on October 27, 2014, my recommendations apply equally to the newly elected council, and I trust it will follow up on them in the new term.

Recommendation 1

The City of Niagara Falls should amend its procedure by-law to explicitly provide for notice to the public of regular and special meetings.

Recommendation 2

The City of Niagara Falls should amend its procedure by-law to require that the agenda for open and closed sessions be publicly posted in advance of a regular or special meeting.

Recommendation 3

All members of Council for the City of Niagara Falls should ensure that all items for discussion in a closed session are permitted under the exceptions in the Act.

Recommendation 4

The City of Niagara Falls should improve its written record of its meetings, and, consistent with s. 239(7) of the Act, a written record of a closed meeting should ideally include reference to:

- where the meeting took place;
- when the meeting started and adjourned;
- who chaired the meeting;
- who was in attendance, with specific reference to the clerk or other designated official responsible for recording the meeting;
- whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
- a detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered;
- any motions, including who introduced the motion and seconders; and
- all votes taken, and all directions given.

Recommendation 5

In the interests of transparency and accountability, the City of Niagara Falls should record audio and/or video of all meetings, open or closed, and store such recordings in a confidential and secure fashion for future reference.

Report

- 63** OMLET staff spoke with the Clerk, CAO, and Mayor on January 20, 2015 to provide an overview of these findings and to give council an opportunity to comment.
- 64** The CAO and the Mayor expressed disagreement with my Office's findings with respect to the legality of the closed meeting. Specifically, they maintain that the meeting was properly closed because it addressed personal information about an individual and the acquisition or disposition of land. Their comments were taken into account in preparing this report.
- 65** 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