



## **Ombudsman Report**

**Investigation into a closed meeting held  
by council for the City of Niagara Falls  
on November 17, 2020**

**Paul Dubé  
Ombudsman of Ontario  
March 2022**

## Complaint

- 1 My Office received a complaint about a closed meeting held by council for the City of Niagara Falls (the “City”) to discuss the process for establishing a Chief Administrative Officer (CAO) recruitment sub-committee (the “sub-committee”). We determined that this discussion took place on November 17, 2020.
- 2 The complaint alleged that council’s *in camera* discussion did not fall within any of the prescribed exceptions in the *Municipal Act, 2001* (the “Act”).<sup>1</sup>

## Ombudsman jurisdiction

- 3 Under the Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within one of the prescribed exceptions.
- 4 As of January 1, 2008, the Act gives anyone the right to request an investigation into whether a municipality or local board has complied with the Act in closing a meeting to the public. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own investigator to review complaints about whether the municipality or a local board has complied with the open meeting rules.
- 5 The Ombudsman is the closed meeting investigator for the City of Niagara Falls.
- 6 When investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the applicable procedure by-law have been observed.
- 7 Our Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman’s decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of the Ombudsman’s previous decisions can be found in the digest: [www.ombudsman.on.ca/digest](http://www.ombudsman.on.ca/digest).

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<sup>1</sup> SO 2001, c 25, s 239(2).

## Investigative process

- 8 We received a complaint about a closed meeting held by council for the City of Niagara Falls to discuss the process for establishing a CAO recruitment sub-committee.
- 9 We reviewed the City's procedure by-law and relevant portions of the Act. Additionally, we reviewed meeting records, including agendas and minutes from June 2020 to January 2021, and audio recordings of the November 17, 2020 and January 19, 2021 council meetings.
- 10 My Office also reviewed the City's 2021 human resources (HR) report to learn more about when the sub-committee may have been formed and spoke with all nine members of council, the Clerk, and the HR Director.
- 11 Our review determined that the discussion took place on November 17, 2020 and we advised the City of our intent to investigate.
- 12 We received full co-operation in this matter.

## Procedure by-law

- 13 The City's procedure by-law (No. 2019-04) states that all meetings shall be open to the public except as provided in section 239 of the *Municipal Act, 2001*.
- 14 The by-law also provides that all *in camera* items shall be discussed in a closed meeting prior to the regular council meeting, and that prior to proceeding *in camera*, council shall pass a resolution in open session to convene a closed meeting.
- 15 The by-law requires that the resolution state the general nature of the matter(s) to be considered during the closed meeting, and that council consider only those items contained in the resolution while meeting in closed session.
- 16 The City has adopted the best practice of recording all closed sessions, as well as broadcasting open council meetings live on YouTube, Facebook and on a local TV station. I commend the City for implementing this practice, as the recordings greatly assisted my Office during this investigation.

## Formation of the CAO recruitment sub-committee

- 17 The purpose of the sub-committee was to advise a retained search firm on the development of desired requirements, qualifications and competencies for the CAO position; review position advertisements and postings; assess applicant resumes; and develop a candidate short list, to be recommended to council as a whole.
- 18 Sub-committee members were announced at the open meeting of council on January 19, 2021. As captured by the video recording for that meeting, two members of council indicated they were unaware of the requirement to express an interest in serving as a member of the sub-committee prior to the meeting. In response, the Mayor indicated that the sub-committee had already been discussed “a couple of times” *in camera*. Another member of council confirmed having discussed the matter “sometime in the fall.”
- 19 The Clerk indicated to our Office that the only meetings prior to January 19, 2021 at which council may have discussed the sub-committee occurred on June 23, 2020 and November 17, 2020.
- 20 Only the November 17, 2020 meeting occurred “in the fall,” as specified by the councillor during the January 19, 2021 meeting.
- 21 My Office found no evidence to suggest that the process for forming the sub-committee or its membership was discussed by council prior to November 17, 2020.
- 22 Further, there was no evidence that a quorum of council came together to discuss sub-committee membership between November 17, 2020 and January 19, 2021. Based on the information we reviewed, we determined on a balance of probabilities that the discussion about forming the sub-committee took place on November 17, 2020.

## November 17, 2020 *in camera* session of council

- 23 Due to the COVID-19 pandemic and the closure of City Hall, the public could not attend the November 17, 2020 meeting in person. The agenda for the meeting indicated that it would be broadcast on the City’s YouTube channel, Facebook page, and on a local TV station.

- 24** The agenda posted online also included a link to a proposed resolution, not yet passed by council. The resolution indicated that council would hold a closed meeting prior to its regularly scheduled meeting to discuss two topics: (i) a proposed or pending acquisition or disposition of land by the municipality and (ii) labour relations involving a bargaining update. The complaint received by our Office did not reference the first item.

The closed session minutes indicate that the meeting was called to order at 3:00 p.m. and a resolution was passed to proceed into closed session. There was no public access to this portion of the meeting and it was not broadcast in any fashion.

- 25** Once in closed session, staff provided council with a presentation regarding the CAO recruitment process.
- 26** Those we spoke with told us that during the closed meeting, council discussed the proposed mandate of the sub-committee, the number of members, past and proposed screening processes, and the anticipated number of interviews to be conducted. One member of council shared an anecdote relating to his experience with a recruitment process in another municipality. No decisions about the composition of the sub-committee were made at this meeting.
- 27** Council then passed a motion to rise from closed session at 4:17 p.m.
- 28** Interviewees told us that the Mayor instructed councillors to express to him in writing their interest in being on the sub-committee. However, this instruction was not captured on the audio recording of the meeting and we did not receive any evidence confirming the timing of the Mayor's statement.
- 29** As one councillor explained during his interview, "oftentimes discussion amongst councillors continues after the close of the meeting and things do not get captured on the recording."
- 30** We were told that council convened in chambers for the open portion of the meeting 20 to 30 minutes later, at which time a live broadcast commenced. Some members of council participated virtually from home for this portion of the meeting.

## Analysis

### Applicability of the exception for labour relations or employee negotiations

- 31 Under the Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within a prescribed exception pursuant to the provisions of s. 239 of the Act. The City's procedure by-law reiterates this point.
- 32 On November 17, 2020, council relied upon s. 239(2)(d) of the Act to discuss the CAO recruitment process.
- 33 Under s. 239(2)(d) of the Act, a meeting or part of a meeting may be closed to the public if the subject matter being considered involves labour relations or employee negotiations.
- 34 The exception for labour relations refers to discussions about the collective relationship between an employer and its employees.<sup>2</sup> The purpose of the exception is to protect discussions relating to the relationship between the two.<sup>3</sup>
- 35 The phrase "labour relations" is interpreted expansively to include matters involving unionized or non-unionized staff, as well as remuneration outside of traditional employment arrangements.<sup>4</sup> The exception allows for discussion of qualifications,<sup>5</sup> terms of employment<sup>6</sup> and compensation<sup>7</sup> relating to specific employees. It also allows for discussion of changes to staffing, workload and roles of particular employees.<sup>8</sup> Staff performance, conduct and discipline may come within the exception,<sup>9</sup> as may discussions involving hiring or terminating an employee.<sup>10</sup>

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<sup>2</sup> *Whitestone (Municipality of) (Re)*, 2014 ONOMBUD 8, online: <<https://canlii.ca/t/gtmj0>>.

<sup>3</sup> *The Nation (Municipality of) (Re)*, 2019 ONOMBUD 4, online: <<https://canlii.ca/t/j2b4c>>.

<sup>4</sup> *Black River-Matheson (Township of) (Re)*, 2015 ONOMBUD 2, online: <<https://canlii.ca/t/gtp6f>>.

<sup>5</sup> *Baldwin (Township of) (Re)*, 2014 ONOMBUD 10, online: <<https://canlii.ca/t/gtmh6>>.

<sup>6</sup> *Leeds and the Thousand Islands (Township of) (Re)*, 2013 ONOMBUD 4, online: <<https://canlii.ca/t/gtmhn>>.

<sup>7</sup> Ombudsman Ontario, *Letter to Ombudsman to the Township of Bonfield*, 2013, online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2013/township-of-bonfield-en>>.

<sup>8</sup> *Welland (City of) (Re)*, 2014 ONOMBUD 7, online: <<https://canlii.ca/t/gtmhx>>; *Burk's Falls / Armour (Village of / Township)*, 2015 ONOMBUD 26, online: <<https://canlii.ca/t/gtp6w>>.

<sup>9</sup> *South Huron (Municipality of) (Re)*, 2015 ONOMBUD 6, online: <<https://canlii.ca/t/gtp80>>.

<sup>10</sup> *Amherstburg (Town of)*, 2015 ONOMBUD 33, online: <<https://canlii.ca/t/gtp7d>>.

- 36 As explained in our 2014 report for the Town of Amherstburg, in cases where council's discussion does not focus on a specific individual, but instead moves into discussion about a recruitment process generally, it will not fit within the exception for labour relations.<sup>11</sup> In that case, council discussed the process it would follow in order to recruit and hire a CAO.
- 37 The City of Niagara Falls council discussion on November 17, 2020 focused on the nature and role of a proposed staff position and overall recruitment process. No employees were discussed. Accordingly, the closed meeting discussion did not fit within the exception for labour relations.
- 38 The closed meeting discussion did not fit within any of the other exceptions contained in the Act and should have occurred in open session.

Resolution to proceed *in camera* on November 17, 2020 provided an inaccurate description of matters to be discussed

- 39 Before moving into a closed session, a municipality, local board, or committee must state by resolution in open session that a closed meeting will be held and describe the general nature of the matter to be considered at the closed meeting.<sup>12</sup> Section 9.5 of the City's procedure by-law reiterates this point.
- 40 The description of the issue to be discussed in closed session should be provided in a way that maximizes the information available to the public while not undermining the reason for its exclusion.<sup>13</sup>
- 41 Council's resolution to proceed into closed session on November 17, 2020 indicated that council would meet *in camera* prior to the scheduled meeting to consider "matters dealing with labour relations involving a bargaining update."
- 42 Whereas the resolution referred to a "bargaining update," in reality, council discussed the formation of the sub-committee. Council's description did not reflect the nature of the subject discussed *in camera*, as required by the open meeting rules.

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<sup>11</sup> *Amherstburg (Town of) (Re)*, 2014 ONOMBUD 12, online: <<https://canlii.ca/t/gtmhb>>.

<sup>12</sup> *Municipal Act*, s. 239(4).

<sup>13</sup> *Farber v. Kingston (City)*, 2007 ONCA 173.

Passage of the resolution to proceed *in camera* was not observable by the public

- 43 During the course of our review, we noted that although the proposed resolution to go *in camera* was published in advance of the November 17, 2020 meeting, the public was not able to observe the portion of the meeting when council passed the resolution. The public was not able to access the in-person meeting room, and this part of the meeting was not broadcast in any fashion.
- 44 Pursuant to section 239(4) of the Act, members of the public are entitled to observe council pass a resolution that states the general nature of the topics to be discussed *in camera* prior to holding a closed session.
- 45 The Ombudsman issued a report that addressed this issue to the City of Niagara Falls in July 2021.<sup>14</sup> The City has since confirmed that it has taken steps to rectify the issue. I commend the City for its responsiveness.

## Opinion

- 46 Our investigation confirmed that council for the City of Niagara Falls contravened the *Municipal Act, 2001* on November 17, 2020, as the closed session discussion about a CAO recruitment process did not fit within any exception to the open meeting rules.
- 47 Council for the City of Niagara Falls failed to describe the subject to be discussed in closed session in its resolution to proceed *in camera* on November 17, 2020.
- 48 Council for the City of Niagara Falls further contravened the Act when it passed a resolution to go *in camera* during a portion of the meeting that was effectively closed to the public, as the public was unable to attend in person or observe a live broadcast. As noted above, the City has since amended its practices to address this issue.
- 49 As a best practice, council for the City of Niagara Falls should take care to ensure that discussions relating to council business occur during formal meetings so that they are reflected in the minutes and audio recordings.

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<sup>14</sup> *Niagara Falls (City of) (Re)*, 2021 ONOMBUD 13, online: <<https://canlii.ca/t/jgvlg>>.

## Recommendations

- 50 I make the following recommendations to assist the City of Niagara Falls in fulfilling its obligations under the Act and enhancing the transparency of its meetings:

### Recommendation 1

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

### Recommendation 2

**Council for the City of Niagara Falls should ensure that only matters which fall within one of the exceptions under s. 239(2) of the *Municipal Act, 2001* are discussed while in closed session.**

### Recommendation 3

**Council for the City of Niagara Falls should ensure that the description of the issue(s) to be discussed in closed session be provided in an accurate manner that maximizes the information available to the public while not undermining the reason for its exclusion.**

### Recommendation 4

**Council for the City of Niagara Falls should ensure that its resolutions to proceed *in camera* are passed during open session, recorded in the meeting minutes, and captured by the live broadcast.**

## Report

- 51 Council for the City of Niagara Falls was provided with the opportunity to review a preliminary version of this report and provide comments. Given the ongoing COVID-19 pandemic, some adjustments were made to the normal preliminary review process to reflect the City's remote meeting practices. We thank council and staff for their co-operation and flexibility. All comments received were considered in the preparation of this final report.
- 52 In response to a preliminary version of this report, the City submitted that it needed to discuss its plans for CAO recruitment *in camera*, as the information was sensitive and could have compromised its competitive position with respect to other municipalities. Although there may have been a desire to maintain confidentiality in order to protect various interests of the City, I must

emphasize 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.

- 53 Matters can only be discussed *in camera* if they fit squarely within the exceptions to the open meeting requirements. The Legislature, in its enactment and occasional amendments to the *Municipal Act, 2001* has not created an exception that authorizes meeting *in camera* for the purposes cited by the City. As noted above, the discussion in closed session did not fit within any of the exceptions contained in the Act and should have occurred in open session.
- 54 This report will be published on my Office's website and the City of Niagara Falls should also make this report available to the public. In accordance with s. 239.2(12) of the *Municipal Act, 2001*, council is required to pass a resolution stating how it intends to address this report.



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Paul Dubé  
Ombudsman of Ontario