

BY EMAIL

November 11, 2022

The City of Niagara Falls
c/o Mayor Jim Diodati
4310 Queen Street, P.O. 1023
Niagara Falls, ON L2E 6X5

Dear Council for the City of Niagara Falls,

Re: Closed meeting complaint

My Office received a complaint alleging that council for the City of Niagara Falls (the “City”) held a closed session on April 12, 2022 that did not comply with the requirements in the *Municipal Act, 2001*. Specifically, the complaint alleged that the City turned off the camera that was broadcasting the council meeting after staff requested a brief break during the meeting in order to prepare a response to a question asked by the Mayor. The complaint expressed concern that council may have held a closed meeting during this break while the camera was turned off.

I am writing to share the outcome of my review of this complaint. For the reasons set out below, I have determined that the City complied with the open meeting rules in the *Municipal Act, 2001*¹ (the “Act”).

Ombudsman’s role and authority

As of January 1, 2008, the Act gives anyone 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. My Office is the closed meeting investigator for the City of Niagara Falls.

¹ SO 2001, c 25.



My 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.

Review

My Office reviewed the open and closed meeting materials, including the agendas and minutes, as well as the video recording of the open meeting. We also spoke with the Clerk and Mayor.

Council met for a regular council meeting at 4:00 p.m. on April 12, 2022. The meeting was livestreamed on YouTube, as has been the City's practice since 2017, as well as being open to the public to attend in person.

After discussing various other matters for approximately 1 hour and 15 minutes, council began to discuss regulating cannabis growing facilities. While debating this topic, someone off-screen from the video recording asked council to take a break for a staff discussion. The Mayor replied that council would take a recess in order for staff to caucus. The camera broadcasting the council meeting was then turned off for approximately 25 minutes, although the broadcast continued. During this 25-minute period, a message on the screen stated, "council is taking a short recess." Upon the resumption of the video feed, the City's Chief Administrative Officer advised council that staff had caucused and felt it was appropriate for council to receive legal advice *in camera*. Council then passed a resolution to receive legal advice *in camera*.

The complaint alleged that council might have held an illegal closed meeting during the 25-minute period when the camera was off. However, the complainant had no further details about what transpired during this period.

In response to inquiries from our Office, the Mayor and Clerk advised that during the 25-minute period, some staff members left council chambers to have a discussion amongst themselves. Members of council and the Clerk remained in council chambers during the staff discussion. We were told that during this period, councillors sat quietly or talked informally amongst themselves, and that there was no group discussion. The Mayor said it was possible that individual councillors may have briefly gone to the bathroom or left to get a snack, and that this would have required going into a different area of the building than where staff were caucusing. We were advised that no decisions were made by council during this time and that any discussions were informal in nature and did not relate to municipal business.

Analysis

Section 238(1) of the *Municipal Act, 2001* sets out two requirements for a gathering to come within the definition of a meeting, and thus be subject to the Act's open meeting rules. Specifically, the definition provides that:

“meeting” means any regular, special or other meeting of a council, of a local board or of a committee of either of them, where,

- (a) a quorum of members is present, and
- (b) members discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

A quorum of council members was present during the 25-minute period, as council remained in chambers. In such circumstances, it is necessary to assess whether the councillors dealt with any matter in a way that materially advanced council's business or decision-making. In a report to the Village of Casselman, my Office stated:

[...] “materially advances” involves considering the extent to which the discussions at issue moved forward the business of the municipality, based on factual indicators. Discussions, debates or decisions that are intended to lead to specific outcomes or to persuade decision-makers one way or another are likely to “materially advance” the business or decision-making of a council, committee or local board. Mere receipt or exchange of information is unlikely to “materially advance” business or decision-making, as long as there is no attempt to discuss or debate that information as it relates to a specific matter that is or will be before a council, committee or local board.²

Our review indicates that council took a break lasting approximately 25 minutes during the April 12, 2022 meeting. We were advised that during this break, councillors sat quietly or talked informally amongst themselves. We were told that there was no group discussion, and that no decisions were made. Our review indicates that nothing during the 25-minute break moved council business forward or materially advanced the City's business or decision-making. Accordingly, the gathering of council during the 25-minute period was not a “meeting” contrary to the Act.

However, when speaking with our Office, the Clerk acknowledged that the public watching the broadcast would have had no way of knowing what occurred during the break. The Clerk suggested that the City may want to continue to broadcast video of council chambers during breaks during any future meetings, and that the procedure by-law could be amended by council to require this practice. I applaud the City for its commitment to ongoing improvement, and encourage the City to consider adopting this practice to further increase the accountability and transparency of its meeting practices.

² *Casselman (Village of) (Re)*, 2018 ONOMBUD 11 at paras 30-31, online: <<https://canlii.ca/t/hvmtk>>.

Conclusion

My review has determined that council for the City did not contravene the open meeting requirements on April 12, 2022 when council took a break during the meeting in order for staff to caucus.

I would like to thank the City of Niagara Falls for its co-operation during my review. The Clerk confirmed that this letter will be included as correspondence at an upcoming council meeting.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Dubé", written over a large, stylized oval shape.

Paul Dubé
Ombudsman of Ontario

cc: Bill Matson, Clerk, City of Niagara Falls