



**Investigation into the closed meeting
held by the City of Oshawa
on December 17, 2015**

**Paul Dubé
Ombudsman of Ontario
July 2016**

Complaint

- 1 Our Office received four complaints about a meeting held by council for the City of Oshawa on December 17, 2015. Each complaint alleged that council's meeting with the Oshawa Power and Utilities Corporation on that date did not come within the closed meeting exception in the *Municipal Act, 2001* for "education and training" sessions.

Ombudsman jurisdiction

- 2 Under the *Municipal Act*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 3 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.
- 4 The Ombudsman is the closed meeting investigator for the City of Oshawa.
- 5 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's procedure by-law have been observed.

Investigative process

- 6 On January 18, 2016, we advised council for the City of Oshawa of our intent to investigate these complaints.
- 7 Members of the Open Meeting Law Enforcement Team (OMLET) reviewed the city's procedure by-law and relevant portions of the Act, as well as the meeting notice and meeting minutes. They listened to the audio recording of the meeting and reviewed a PowerPoint that was presented to council. They also interviewed the Clerk and Mayor.
- 8 We received full co-operation in this matter.

Council procedure

- 9 Section 10(1.3) of the city's by-law¹ requires that the city provide notice of education sessions and special meetings by posting a notice on the city's website once the agenda is delivered to council members. Agendas must be delivered to council members no less than 24 hours prior to the start of the meeting (section 10(1)). Special notice provisions exist when council is considering or deciding upon any matter that requires a capital expenditure exceeding \$500,000 (section 10(1.1)).
- 10 Section 3A(1) of the by-law specifically states that the procedural requirements of the by-law do not apply to an "education session" that falls within the definition set out in the by-law. For the purposes of the by-law, an "education session" means:
- the attendance of members of Council at a given time and place for the purpose of receiving information in respect of which:
- a) no business of the Council or of the Corporation is transacted, no votes, decisions, by-laws or resolutions are made or adopted, no recommendations are made for action by Council or any Committee, and no action taken in the course of or in furtherance of Council or Committee decision-making with respect to any specific matter of Council or Committee business; and,
- b) the Education Session is not adjourned to or from any meeting of the Council or a Committee. (section 3A(2)(a-b))
- 11 While the by-law's definition of "education session" is broad, section 11A(1) requires that all meetings be open to the public, subject to the listed exceptions. The by-law generally reproduces the closed meeting exceptions from the *Municipal Act*. However, the by-law has not been updated to mandate that discussions related to ongoing ombudsman or closed meeting investigations occur in closed session, as required under section 239(3)(b) of the Act. In addition, the by-law fails to include a mandatory closed meeting exception for council's consideration of requests under the *Municipal Freedom of Information and Protection of*

¹ City of Oshawa, by-law 126-75, *Being a by-law to regulate the proceedings of Council* (29 September 2015), online: <<http://www.oshawa.ca/uploads/16/ProceduralBy-law126-75.pdf>>.

Privacy Act. The City of Oshawa should amend its procedure by-law to appropriately reflect the *Municipal Act's* closed meeting exceptions.

- 12 Lastly, section 11A(2) of the by-law provides that, before proceeding in camera, council shall state by resolution (i) the fact that a closed meeting is to be held and (ii) the general nature of the matter to be considered.

OPUC, Veridian, and Whitby Hydro

- 13 Oshawa Power and Utilities Corporation (OPUC) is the holding company of four subsidiary corporations involved in energy distribution, telecom ventures, clean power generation and solar energy generation. The City of Oshawa is the sole shareholder of OPUC. OPUC, in turn, owns the shares of each subsidiary.
- 14 Veridian Corporation (Veridian) owns and operates Veridian Connections, a subsidiary company that distributes electricity, generates power and provides energy services. Veridian is jointly owned by the City of Belleville, the Municipality of Clarington, the Town of Ajax, and the City of Pickering.
- 15 Whitby Hydro Energy Corporation (Whitby Hydro) is a holding company wholly owned by the Town of Whitby. It contains two subsidiary corporations – Whitby Hydro Electric Corporation and Whitby Hydro Energy Services. Whitby Hydro Electric Corporation delivers electricity to
- 16 On April 28, 2016, Veridian, OPUC, and Whitby Hydro announced that a memorandum of understanding had been signed by each corporation to explore the potential benefits and feasibility of a merger.² The corporations indicated that the purpose of the memorandum of understanding was to set in motion an “exploratory phase” to identify potential benefits of consolidation.

² “Veridian Corporation, Oshawa Power and Utilities Corporation and Whitby Hydro Energy Corporation to Explore Benefits of Consolidation”, Veridian Corporation (28 April 2016), online: <<http://learnmore.veridian.on.ca/updates/explore-benefits-of-consolidation>>.

December 17, 2015 council meeting

- 17 On December 17, 2015, at 9:00 a.m., council for the City of Oshawa met in council chambers for a special meeting. Notice of the meeting was provided in accordance with the city's procedure by-law.
- 18 Prior to proceeding in camera, the Mayor advised that the meeting had been called so that council could receive education and training from OPUC regarding the local distribution company trends in Ontario. Oshawa's City Solicitor provided the definition and criteria for an education and training session under the *Municipal Act*. He discussed the purpose of the exception and advised councillors there were "practical ways" to ensure that the Act's criteria were met. Specifically, he advised that there should be no discussion amongst the councillors at the meeting. He said that the only thing that should happen was the presentation provided by OPUC, questions from councillors to the presenters, and answers to the questions from the presenters.
- 19 Following this explanation, Councillor Amy England asked whether the training could be held in open session and suggested that the presentation would be educational for the public. The City Solicitor advised that the decision to go into closed session was a political question, but that the opportunity existed for a closed education and training session. He advised that council had a duty to decide whether to go into closed session. In response, the Mayor indicated that the presenter had requested that the presentation occur in closed session.
- 20 Councillor England remained dissatisfied with these responses and argued against the motion to proceed in camera. She also requested a recorded vote. Ultimately, two of nine councillors – Councillor England and Councillor Dan Carter – voted against proceeding in camera. Councillor John Neal abstained from the vote and closed session after declaring a conflict of interest. Councillor Bob Chapman was absent from the meeting.
- 21 Ultimately, council resolved at 9:11 a.m. that:

pursuant to subsection 239(3.1) of the *Municipal Act, 2001*, as amended this meeting be closed to the public in order to receive education and training from Oshawa Power and Utilities Corporation concerning the current local distribution company trends in Ontario.
- 22 The notice for the meeting described the meeting's subject matter in the same way.

Presentation overview – merger discussions

- 23 Once in closed session, the Chairman of the Board of Directors for OPUC kicked off the presentation. He advised that the OPUC Board had begun entertaining discussions with Veridian, a neighbouring utility. He said that to facilitate these discussions, OPUC had agreed to sign a non-disclosure agreement with Veridian. The Chairman said that he wanted council to understand what steps OPUC was considering and what the trade-offs would be. He said that once this work was complete, OPUC would provide council with advice and recommendations, but that that was “not for today”.
- 24 Following this overview, the Chairman introduced the primary presenters for the session – the then-President and CEO of OPUC and a partner from Grant Thornton LLP, a large accounting and advisory firm. Each presenter closely followed a prepared PowerPoint, which our Office has reviewed.

Rationale for creating a combined utility

- 25 The then-President and CEO of OPUC began by remarking that the day’s presentation would discuss general industry trends, but that the discussion was occurring in closed session because OPUC was under non-disclosure obligations with Veridian. He advised that he would begin by explaining the purpose of the discussions with Veridian – which concerned the creation of a combined utility – and why they were occurring now. He indicated that following this portion of the presentation, the partner from Grant Thornton would explain how the combined utility could be structured and what the outcome could be. He reiterated that nothing being presented required a decision from council that day. Rather, the purpose was to help council understand the “options” it has in an asset (i.e. OPUC) when the energy industry is changing very rapidly.
- 26 During this introduction, a councillor requested the then-President and CEO cut short his introductory remarks because the councillor did not feel they needed to be discussed in closed session. In response, the Mayor advised that the information being presented was background for the upcoming portion of the presentation.
- 27 Following this interruption, the then-President and CEO explained the series of steps that brought OPUC to its present day discussions with Veridian. He said that in early 2015, leadership at Veridian and OPUC began discussions about the viability of a combined utility. After brief

discussions, the organizations' Boards struck a joint steering committee to further explore merger possibilities. The steering committee decided to assess the viability of the merger and engaged Grant Thornton to analyze the business case.

- 28 In a portion of the presentation entitled "Why would you do this now?", the then-President and CEO outlined various external considerations that made 2016 a favourable time to consolidate hydro utilities. While this explanation was ongoing, a councillor interrupted the presentation on a point of order and stated that, in the councillor's opinion, the then-President and CEO's remarks could affect the decision-making of council. The councillor said that the education session was making the councillor uncomfortable because they were talking about the possible consolidation of OPUC. The councillor felt the information being provided was advancing the decision-making of city council. The Mayor rejected this point of order, noting that the meeting was an education and training session.
- 29 Before the presentation could resume, another councillor raised a similar point of order and asked the presenter to consolidate his background information so that the in camera meeting would only discuss what needed to be kept confidential. Following this remark, the Mayor asked the City Solicitor to give another explanation of what council is "able to do" in the meeting.
- 30 After the interruption, the then-President and CEO returned to the prepared presentation, noting additional factors that make the current regulatory climate favourable to utility consolidation. Next, he provided twelve benefits that the leadership of OPUC and Veridian believed would be achieved by creating a combined utility.

How to create a combined utility

- 31 Following this portion of the presentation, a partner from the accounting and advisory firm Grant Thornton provided council with an overview of how to create a combined utility. In the PowerPoint presentation, this section is titled "How would you do this?"
- 32 First, the partner outlined eleven core principles that the leadership at Veridian and OPUC had agreed were fundamental to the combined utility. Next, he provided information about the current ownership structure for OPUC and Veridian. After providing this background information, the partner presented the approximate ownership interest that each municipality would have in a combined utility. He explained that if the

- parties went ahead with the merger, it would be necessary to go through a valuation exercise to determine precise ownership percentages. He indicated that no one municipality would have voting control over the amalgamated utility.
- 33** The partner next outlined a proposed corporate governance structure for the combined utility and presented monetization options for selling a portion of the combined utility. He discussed the pros and cons of different types of investors (e.g. strategic partners versus financial partners) and advised that municipal shareholders would be able to maintain current dividend levels even if they decided to monetize a portion of the combined utility.
- 34** Following this explanation, the partner provided a financial summary of the proposed combined utility. The Chairman of OPUC briefly interjected at the start of this portion to remind councillors that OPUC is under a non-disclosure agreement with Veridian and that the upcoming financial figures were part of that agreement. In addition, he advised that the mere fact that the two corporations are in discussions is part of the non-disclosure agreement.
- 35** After this reminder, the partner provided a financial summary of the combined utility, including projected revenue, debt levels, and dividends. He explained how much money would be saved in “gross synergies” following the merger, and how these savings would be shared between the utility and ratepayers. The partner then presented detailed sample balance sheets for the combined utility. The balance sheet was intended to show how the merger and related decisions would impact Oshawa’s return on investment. The partner said that he recognized OPUC’s shareholders (i.e. councillors, on behalf of the city) have “options in front of them” in terms of what they could do with the utility.
- 36** On the subsequent slide, the partner presented another sample balance sheet based on slightly different assumptions. Lastly, he presented a table further explaining how the merger could affect Oshawa’s expected return on equity.

Questions from councillors

- 37** Following this portion of the presentation, councillors were given the opportunity to ask questions of the presenters. Although some of the councillors sought general information about provincial hydro regulation, the majority of questions sought additional clarification on the proposed

merger of Veridian and OPUC. On the audio recording, there was no discussion or debate between councillors during the question period. However, some of the questions asked expressed the view of the councillor. For instance, one councillor asked a variety of detailed questions, including:

- Would the new jobs resulting from the merger be private or public?
- Would there be more or fewer employment opportunities for Oshawa residents?
- Have there been discussions with the Town of Whitby?
- Why should Oshawa monetize a portion of the utility?
- While there is discussion about “synergy sharing” with ratepayers in the future, how can the councillors be certain this will materialize? Will technology affect the projected savings for ratepayers?

38 Another councillor asked similar questions, including:

- What initiatives has the province put forward to incentivize mergers?
- Why should Oshawa merge with Veridian in particular?
- How do we [council] protect the interests of ratepayers?
- If the “exercise is played all the way out”, does OPUC have to make the merger opportunity available to other utility companies?

39 While asking these questions, the councillor also made two comments. After receiving the response to one question, the councillor began commenting on the impact mergers can have on people. However, the councillor was cut off because the statement was not a question. Following the response to a subsequent question, the councillor expressed concern about what constituents would say about the proposed course of action. The councillor was again cut off, this time for being off topic.

40 A third councillor asked numerous questions, primarily to confirm the councillor’s understanding of various portions of the presentation. For instance, the councillor wanted to know if the merger would leave OPUC in public ownership, whether hydro rates would remain the same, whether dividend levels for Oshawa would be maintained, and whether the Board of Directors for the combined utility would include city councillors.

- 41 During these questions, a councillor interrupted on a point of order, stating that council was using language like “if a decision was to be made”. The councillor said that, in reality, council was already discussing whether to make that decision. The Mayor cut the councillor off, effectively denied the point of order, and said that council was in the middle of an education and training session. The councillor reiterated the objection and left the meeting.
- 42 After this interruption, the councillor who had been speaking previously asked additional questions about the proposed merger. In addition, the councillor made several comments that, part way through, were rephrased as a question. For instance, the councillor asked whether the monetization option could be seen in Oshawa as a sale to the private sector, unless a very controlled and limited amount of OPUC was sold. The councillor said this would need to be considered going forward. The councillor also commented that previously, council obtained independent reviews before making certain decisions. The councillor indicated that if the merger were to proceed, it would be helpful for council to obtain its own independent advice. The councillor was told this would be an appropriate way to proceed.
- 43 The councillor concluded by noting that there were other parties who were not observing the non-disclosure agreement. In response, council was urged to respect the non-disclosure agreement and the Mayor asked the City Solicitor to give a definition of a non-disclosure agreement.
- 44 Following this definition, other councillors asked a few additional questions. The final question asked was: “What is the timing now – what happens next?” In response, the councillor was told that the question could not be answered and that this was not part of the meeting.
- 45 At 10:33 a.m., council resolved to return to open session.

Return to open session

- 46 Council returned to open session and adjourned the meeting at 10:34 a.m. While the open meeting minutes include a summary of the closed session discussion, the recording does not indicate that council reported back orally in open session following the in camera meeting.

Analysis

“Education and training” – s.239(3.1)

- 47 Council relied on the “education and training” exception in section 239(3.1) to receive information related to a potential merger of OPUC and Veridian.
- 48 Section 239(3.1) of the Act states that a council may close a meeting to the public if the meeting is held for the purpose of “educating or training” members, and if no member discusses or otherwise deals with a matter in a way that materially advances the business or decision-making of council.
- 49 Any attempt to rely on this exception must be carefully scrutinized. As we noted in our 2009 report regarding closed meetings in the City of Oshawa:

While there are an infinite number of topics that could potentially form the subject of an education session, it must be clear that the purpose of such a meeting relates to education only... A municipality cannot simply circumvent the open meeting law by characterizing a subject normally considered in open session as ‘educational.’³

- 50 Local Authority Services (LAS) has also interpreted the exception narrowly, stating that the exception is only appropriate where “the sole purpose is to provide education or training [and] where no transactional business or decision making occurs during the session”.⁴ In its 2015 report regarding closed meetings in the Township of Brock, LAS again emphasized the narrow scope and purpose of the exception, stating “the purpose of such training or education is not to discuss council business, either in terms of past business or decisions or potential future business or decisions”.⁵

³ Ombudsman of Ontario, “*The ABCs of Education and Training*”: *Investigation into City of Oshawa Development Services Committee Special Meeting of May 22, 2008* (March 2009) at para 29, online: <http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/oshawa_may08final.pdf>.

⁴ Local Authority Services, *Report to the Corporation of the County of Essex* (September 2009) at 13, online: <http://www.agavel.com/wp-content/uploads/2013/09/Essex_County_Report_Sep_18_Final.doc>.

⁵ Local Authority Services, *Report to the Corporation of the Township of Brock* (September 2015) at 6.

- 51 In a 2013 report regarding closed meetings in the Township of Madawaska Valley, LAS found that a presentation, which included an “educational” component but primarily outlined specific options available to the town for imposing development charges, did not fall within the education or training exception.⁶ The allowable “educational” component of the presentation related to the general purpose and process of development charges. However, the majority of the presentation fell outside the education and training exception because it was intended to inform council of the findings of a study specifically commissioned by the township on the issue of proposed development charges.
- 52 Similarly, in our Office’s 2014 investigation into a closed meeting in the Town of Moosonee, we determined that a consultant’s presentation was not a proper use of the education or training exception.⁷ In that case, Moosonee council went in camera to obtain information from a municipal advisor about specific grants the town would be receiving and about conditions attached to those grants. Our Office determined that the information presented was not general in nature and related to matters that directly impacted the business of the municipality. Following the presentation, Moosonee council voted in open session to approve the course of action presented by the municipal advisor.
- 53 During the special meeting on December 17, 2015, council proceeded in camera to obtain information about a specific proposed merger between OPUC and Veridian. While a small portion of the presentation related to general marketplace trends, the majority of the presentation was intended to inform council about a particular course of action that would likely come before council for a future vote. As OPUC’s sole shareholder, Oshawa City Council must provide its approval before OPUC can merge with other corporations. The presentation contained specific information about the proposed ownership, corporate structure and governance of the combined utility, as well detailed financial projections. Although some of the questions asked by councillors related to general market trends (e.g. what initiatives has the province put forward to incentivize mergers?), many others related to information about the proposed merger (e.g. would dividend levels be maintained after the merger?). One councillor even asked “what happens next?” at the conclusion of the meeting.

⁶ Local Authority Services, *Report to the Council of the Township of Madawaska Valley* (June 2013) at 15, online: <http://www.agavel.com/wp-content/uploads/2013/09/Madawaska_Valley_2013.doc>.

⁷ Letter from Ombudsman of Ontario to Town of Moosonee (9 September 2014), online: <<http://www.ombudsman.on.ca/Files/sitemedia/Documents/Moosonee-closing.pdf>>.

- 54 During the December 17, 2015 “education and training” session, councillors were provided with detailed information about OPUC’s proposed merger with Veridian and given the opportunity to ask questions about that information. Although council did not debate the proposed merger or make a decision, the information presented and the questions asked materially advanced council’s business and decision-making. Accordingly, council was not entitled to rely on the “education and training” exception in section 239(3.1).
- 55 Based on council’s discussion and our interview with the Mayor, it appears that council’s primary reason for discussing the proposed merger in camera was to respect the non-disclosure agreement that OPUC and Veridian had entered into. While our Office understands council’s motivation, this is not the purpose of the “education and training” exception and there is no other closed meeting exception that would apply in these circumstances. Our Office has previously noted that the *Municipal Act* does not currently contain a general closed meeting exception that allows a municipality to discuss sensitive business or commercial negotiations in private. The Ministry of Municipal Affairs and Housing is currently conducting a legislation review that includes a review of the *Municipal Act*. While the Ministry is no longer accepting comments about the Act, the City of Oshawa may consider raising this matter should draft legislation be introduced.

Reporting back

- 57 Following the closed session on December 17, 2015, council did not report back in open session about what it generally discussed in camera. However, the open meeting minutes do include a written summary of the closed session.
- 58 Numerous closed meeting investigators, including our Office, have recommended that municipalities adopt the best practice of reporting back.⁸ In a 2009 report regarding closed meetings in the County of Essex, LAS recommended that councils “report...in a general way, what

⁸ Ombudsman of Ontario, *Investigation into whether council for the Municipality of Magnetawan held illegal closed meetings* (June 2015) at para 54, online: <http://www.ombudsman.on.ca/Files/sitemedial/files/FinalReport-Magnetawan_2015.pdf>.

happened at the closed session”.⁹ Similarly, Douglas R. Wallace noted in his 2009 investigation into closed meetings in the City of Ottawa that council should report in open session the fact that council had met in camera, the matters which were considered, and that no votes were taken other than to give directions to staff or to deal with procedural matters.¹⁰

- 59 Council’s decision to not report back in open session failed to provide members of the public who may have been present with a general idea of what was discussed in camera. While the city included information about the closed session discussion in its open meeting minutes, this is not the same as directly sharing the information during the open portion of the meeting. The city should adopt the best practice of reporting back in open session about the general nature of the closed session discussion.

Opinion

- 60 Council for the City of Oshawa contravened the *Municipal Act, 2001* on December 17, 2015, when it went in camera to obtain information about a specific proposed merger between OPUC and Veridian. As OPUC’s sole shareholder, council must provide its approval before OPUC can merge with other corporations. During the closed session, councillors were provided with detailed information about OPUC’s proposed merger with Veridian and given the opportunity to ask questions about that information. Although council did not debate the proposed merger or make a decision, the information presented and the questions asked materially advanced council’s business and decision-making.

- 61 This meeting did not fall within the “education and training” exception, or

Recommendations

- 62 I make the following recommendations to assist the city in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

⁹ Local Authority Services, *A Report to the corporation of the County of Essex* (September 2009) at 17, online: <http://www.agavel.com/wp-content/uploads/2013/09/Essex_County_Report_Sep_18_Final.doc>.

¹⁰ Douglas R Wallace, *Report to the council of the City of Ottawa*, online: <<http://ottawa.ca/en/city-hall/accountability-and-transparency/accountability-framework/december-19-2008-january-6-2009>>.

Recommendation 1

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

Recommendation 2

Council for the City of Oshawa should ensure that no subject is discussed in closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 3

Council for the City of Oshawa should ensure that that no subject is discussed in a closed “education or training” session unless it is clear that the session is only for the purpose of education or training, and that the presentation or discussion will not materially advance the business or decision making of council.

Recommendation 4

Council for the City of Oshawa should adopt the best practice of reporting back in open session following an in camera meeting.

Recommendation 5

Council for the City of Oshawa should amend its procedure by-law to accurately reflect the *Municipal Act's* closed meeting exceptions.

Response of Oshawa City Council

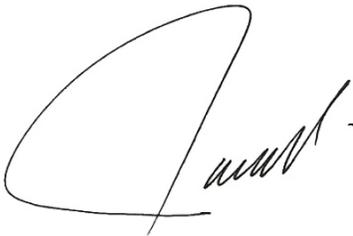
- 63 Council for the City of Oshawa was given the opportunity to review a preliminary version of this report. Council provided comments to our Office in a letter dated July 8, 2016. All comments received were considered in the preparation of this final report.
- 64 In addition to providing comments about specific matters in the report, council submitted that its discussions were permissible under the “education and training” exception because in its view the business or decision-making of council will not be materially advanced unless a

resolution, decision, or other proceeding is formally recorded in council minutes. Council also expressed that the other investigative findings cited in this report were not applicable to this case, as council maintains that its decision-making was not advanced by the education and training session.

- 65 I have considered council's submission in its totality and I am not persuaded by it. Council's suggested interpretation of the education and training exception would mean that a council is permitted to discuss any topic during an education and training session, so long as it returns to open session before voting on the related resolution. This is clearly not the intention of the plain wording of the Act, nor is it consistent with how our Office and other closed meeting investigators have interpreted and applied the exception. The open meeting provisions in the *Municipal Act* are remedial in nature and are intended to be interpreted in a way that promotes transparency. The restrictive interpretation of the education and training exception advocated by Oshawa City Council is inconsistent with this approach.

Report

- 66 My report should be shared with council for the City of Oshawa and made available to the public as soon as possible, and no later than the city's



Paul Dubé
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