



Ombudsman Report

**Investigation into a complaint about a
closed meeting held by
Council for the City of Timmins
on June 27, 2016**

**Paul Dubé
Ombudsman of Ontario
January 2017**

Complaint

- 1 In September 2016, my Office received a complaint about a closed meeting of council for the City of Timmins held on June 27, 2016.
- 2 The complaint alleged that council for the city held an illegal closed meeting to discuss the retirement of the city's Chief Administrative Officer (CAO) and the recruitment process to replace him. The complaint also alleged that council improperly voted to create a hiring committee during the closed meeting.

Ombudsman jurisdiction

- 3 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.
- 4 As of January 1, 2008, the Act gives citizens 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.
- 5 The Ombudsman is the closed meeting investigator for the City of Timmins.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's governing procedures have been observed.

Council procedures

- 7 The city's procedure by-law (by-law no. 2007-6570) was repealed and replaced by by-law 2016-7914 on October 3, 2016. Since the closed meeting occurred prior to the enactment of by-law 2016-7914, by-law no. 2007-6570 (the 'procedure by-law') was in effect at the time of the meeting.
- 8 The procedure by-law states that all meetings shall be open to the public except as provided in section 239 of the Act. Prior to proceeding in camera, council must state by resolution the fact of holding a closed meeting and the general nature of the subject matter to be considered.

- 9 The procedure by-law also prevents the closure of a meeting to the public during the taking of a vote, except where the meeting is required or permitted to be closed under the procedure by-law or the Act, and the vote is for a procedural matter or for giving directions or instructions to municipal employees or persons retained by the municipality.

Investigative process

- 10 On October 12, 2016, after conducting a preliminary review, we advised the municipality of our intent to investigate this complaint.
- 11 Members of my Office's staff reviewed relevant portions of the city's by-laws and policies, and the Act. We reviewed the agenda and minutes of the open and closed portions of the council meeting on June 27.
- 12 The clerk, the Human Resources Director (HR Director), and members of council who were present at the closed meeting were interviewed by my Office.
- 13 My Office received full co-operation in this matter.

Background

June 27, 2016 closed meeting of council

- 14 On June 27, following an open council meeting, council met with the HR Director in closed session under the personal matters exception found in subsection 239(2)(b) of the Act. The resolution to proceed in camera only referenced the personal matters exception with no other information about the matter to be discussed in closed session. The purpose of the meeting was to inform council of the CAO's retirement in January 2017.
- 15 The clerk was not present during the in camera session. The HR Director took minutes of the meeting.
- 16 During the in camera meeting, the HR Director informed council that the CAO had decided to retire. The HR Director then provided council with information about the CAO position (for example, the current CAO's salary) and the recruitment process to fill the vacancy.

- 17 Council's discussion about the recruitment process focused on whether the recruitment should be managed by the city or by a third party consultant. The HR Director provided information to council on both options. Council discussed these options and asked the HR Director questions.
- 18 Following the discussion, council reached verbal consensus on a number of items. First, council decided that municipal staff will carry out the hiring process instead of a third party consultant, however the option to use a third party consultant would be available if needed. Second, council decided to create a hiring committee composed of council members that would conduct interviews and short list the candidates. Third, council decided that the hiring committee would be composed of the mayor as chair and four council members.
- 19 Council then used a secret ballot process to choose the four committee members since more than four council members wanted to be on the hiring committee. In order to avoid embarrassing any council members who may not receive votes of support, council voted anonymously to decide the committee membership. The mayor asked individual members of council to privately provide him with their votes which he then tallied in secret.
- 20 The closed session ended at 11:20 p.m.
- 21 The open meeting minutes indicate that following the closed session, council reported out that a hiring committee will be established to find a replacement for the retiring CAO.

Council's actions September 19 - 26, 2016

- 22 At a special open meeting of council on September 19, council passed a resolution to appoint Mayor Black, Councillor Grezela, Councillor Bamford, Councillor Rinaldo and Councillor Wawrzaszek to the hiring committee.
- 23 At the regular open meeting of council on September 26, Councillor Campbell introduced a motion to reconsider the September 19 resolution to appoint the hiring committee members. Council discussed the process used to select the hiring committee members in closed session on June 27. The motion for reconsideration failed.

Analysis

- 24 The complaint to my Office alleged that the in camera discussion of council did not fit within the closed meeting exceptions and was therefore contrary
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to the *Municipal Act*. The complaint also alleged that council violated the *Municipal Act* when it voted during the closed session.

“Personal matters” exception

- 25 The June 27 meeting was closed under the “personal matters” exception in subsection 239(2)(b) of the Act. This exception provides for council to discuss personal matters about an identifiable individual in a closed meeting.
- 26 The clerk told my Office that the personal matters exception was cited because knowledge of the CAO’s retirement was not publicly known at the time of the meeting and that the discussion would likely encompass details of the CAO’s position like his salary.
- 27 My Office has found that discussions about upcoming retirement of municipal staff fits within the personal matters exception.¹ My Office has also found that an individual’s salary may qualify as a personal matter about an identifiable individual.²
- 28 Council’s discussions about the CAO’s retirement and his salary fit within the cited exception. However, council’s discussions went beyond the CAO’s upcoming retirement and moved into the recruitment process for a new CAO.
- 29 In a letter to the Township of Leeds and the Thousand Islands, I found that general consideration of a hiring process for the CAO does not fit within the personal matters exception unless the discussion is brief and incidental to the main discussion.³
- 30 In this case, council’s discussions about the recruitment process were neither brief nor incidental to the main discussion. Council asked all staff (except the HR Director) to leave to discuss the CAO’s retirement which

¹ Ontario Ombudsman, *Investigation into whether Council for the Municipality of Whitestone held an illegal closed meeting on February 4, 2014* (October 2014), online: <https://www.ombudsman.on.ca/Files/sitemedia/files/Whitestone-Report---FINAL.pdf>

² Ontario Ombudsman, *Into the Light – Investigation into Council of the Township of Baldwin Closed Meeting of July 14, 2008* (March 2009), online: <https://www.ombudsman.on.ca/Resources/Reports/Township-of-Baldwin-br--Investigation-into-council.aspx>

³ Letter from Ombudsman of Ontario to Township of Leeds and the Thousand Islands (September 2016), online: <https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/Ombudsman-letter-TLTI-Sept-2016-accessible.pdf>

was not public knowledge at the time. However, the majority of the in camera discussions were about the recruitment process to replace the CAO. After the in camera session ended, council reported out that it had established a hiring committee to find a replacement for the CAO. Since council publicly announced the retirement of the CAO after the closed session ended, there was no reason to keep the recruitment process discussion in camera.

- 31 Accordingly, council's discussion about the recruitment process did not fit within the personal matters exception.

Voting during the closed session

- 32 Section 244 of the Act states:
244. Except as provided in sections 233 and 238, no vote shall be taken by ballot or by any other method of secret voting, and every vote so taken is of no effect.
- 33 Section 239(6) of the Act states:
Exception
(6) Despite section 244, a meeting may be closed to the public during a vote if,
(a) subsection (2) or (3) permits or requires the meeting to be closed to the public; and
(b) the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board.
- 34 The closed meeting minutes do not capture any voting by council. However, the individuals interviewed told my Office that council came to a verbal consensus to form a hiring committee during the in camera session.
- 35 Council also voted by secret ballot to appoint council members to the hiring committee. My Office was provided with conflicting information on whether the secret ballot was used to nominate or to formally appoint council members to the committee. The appointments were formalized by resolution at an open meeting of council on September 19.
- 36 The Act only permits voting in closed session in limited circumstances during a properly closed meeting. I have already found that council's discussions regarding the recruitment process do not fit within any of the closed meeting exceptions. Accordingly, council should not have voted in

closed session. Section 244 also prohibits a vote being taken by way of secret ballot.

Procedural matters

Closed meeting record

- 37 When voting in closed session council should clearly identify the item, formally vote on it, and record the outcome in the closed session meeting minutes.

Resolution to proceed in camera

- 38 Subsection 239(4) of the Act requires that the resolution to proceed in camera include the general nature of the subject matter to be considered. The city's procedure by-law has equivalent requirements.

- 39 The Court of Appeal in *Farber v. Kingston (City)*⁴ stated that:

the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.

- 40 My Office has also recommended that councils provide more substantive detail in resolutions authorizing closed sessions. For instance, in our Office's 2015 review of closed meetings in the Municipality of South Huron, we noted that council's resolution "should provide a brief description of the subject matter to be considered in closed session".⁵
- 41 In this case, the council's resolution to proceed in camera on June 27 did not provide meaningful information to the public about the issue that would be discussed in camera.

⁴ *Farber v. Kingston (City)*, 2007 ONCA 173 at para 21.

⁵ Ombudsman of Ontario, *Investigation into closed meetings held by council for the Municipality of South Huron* (February 2015) at para 58, online: https://www.ombudsman.on.ca/Files/sitemedia/files/SouthHuronFinal_2015.pdf

Opinion

- 42 Council for the City of Timmins contravened the *Municipal Act, 2001* and the city's procedure by-law when it discussed the recruitment process for the CAO position in camera on June 27, 2016 in closed session.
- 43 Accordingly, it follows that council should not have voted in closed session to form a hiring committee and on the membership of council members to that committee.
- 44 The *Municipal Act, 2001* also prohibits voting by secret ballot unless the vote falls in the exceptions found in section 244 of the Act.

Recommendations

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

Recommendation 1

All members of council for the City of Timmins 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

The City of Timmins 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

The City of Timmins should ensure that its in camera votes comply with sections 239(6). In order for council to vote in closed session, it must meet the requirements under section 239(6) and the meeting must have been properly closed.

Recommendation 4

The City of Timmins should refrain from voting by secret ballot unless the exceptions in section 244 of the *Municipal Act, 2001* apply.

Recommendation 5

The City of Timmins should ensure that its resolutions to proceed in camera provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.

Report

- 46 The City of Timmins was given the opportunity to review a preliminary version of this report and provide comments. The clerk told my Office that council agreed to be more diligent when considering whether or not to proceed in camera in the future.
- 47 My report should be shared with council for the City of Timmins and should be made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario