

REPORT ON CLOSED MEETING INVESTIGATION NO. 2022-01

THE REGIONAL MUNICIPALITY OF PEEL

John Mascarin

Aird & Berlis LLP

May 30, 2022



John Mascarin
Direct: 416.865.7721
E-mail: jmascarin@airdberlis.com

REPORT ON CLOSED MEETING INVESTIGATION – 2022-01

INTRODUCTION

We received a request for a closed meeting investigation on May 10, 2022 (the “**Complaint**”) from the Regional Clerk of The Regional Municipality of Peel (the “**Region**”) in our capacity as the appointed closed meeting investigator (“**Investigator**”) for the Region.

The Complaint appears to allege that Regional Council (“**Council**”) was not entitled to consider Item 22.4 on the agenda for the meeting of Council on April 28, 2022 (the “**Meeting**”) in a closed meeting setting.

Item 22.4 of the meeting agenda pertained to a letter to the Region dated April 7, 2022 from The Honourable Steve Clark, Minister of Municipal Affairs and Housing (the “**Letter**”).

CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

The Region appointed Local Authority Services Inc. (“**LAS**”) as its closed meeting investigator pursuant to section 239.1 of the *Municipal Act, 2001*. LAS has delegated to Aird & Berlis LLP its authority to act as the Investigator for the Region.

Our jurisdiction as Investigator is set out in section 239.2 of the *Municipal Act, 2001*.¹ Among other things, we are authorized to investigate, in an independent manner, a complaint made by any person to determine whether the Region has complied with section 239 of the *Municipal Act, 2001* or a by-law enacted under subsection 238(2) (i.e. a procedure by-law) in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation to Council, together with any recommendations as may be applicable.

THE COMPLAINT

The Complaint was filed pursuant to section 239.2 of the *Municipal Act, 2001*. The Complaint relates to the following item list on the agenda for the Meeting:

22.4 Letter from the Minister of Municipal Affairs and Housing dated April 7, 2022

(Information explicitly supplied in confidence to the municipality or local board by Canada, a province or territory or a Crown agency of any of them)

Resolution Number 2022-392

Received

¹ *Municipal Act, 2001*, S.O. 2001, c. 25.

Prior to filing the Complaint, the requester wrote the Regional Clerk on April 28, 2022 as follows:

This is a preemptive closed meeting investigation request for Item 22.4. If the matter has to deal with the Official Plan, infrastructure, funding or other strategit to plan for growth this is not consistent with the Municipal Act as set out in Sections 238 and 239. Further many of the closed meeting items are discretionary the only ones that are mandatory deal w/ MFIPPA and Ombudsman Investigations. It appears more likely that the Province and Region are trying to hide their actions and decisions from the public.

The Regional Clerk replied to the requestor as follows on May 3, 2022:

Good afternoon,

Thank you for your email.

The item listed as item 22.4 on the April 28, 2022 Regional Council Agenda is not related to the Official Plan, infrastructure, funding or other strategies to plan for growth.

The Ministry provided information and required that it be kept confidential. The item was received by Regional Council under the Consent Agenda.

If you wish to request a closed meeting investigation, the following information is required:

- Requester's full name, mailing address and telephone number;
- committee name and meeting date where closed session occurred;
- brief description of the agenda item(s) considered;
- reason for requesting the investigation.

Thank you,

Office of the Regional Clerk

Regional Municipality of Peel

Notwithstanding what amounted to a full response to the requester's "preemptive" closed meeting investigation request, the requester responded on May 6, 2022 that they would pursue their request for a closed meeting investigation. The requester wrote:

I would like certainty from an independent third party that this information provided is reasonable to be kept in confidence as per the requirements of the Municipal Act, Section 239. There are other letters received that were made public. There is no subject line to indicate the general nature of the letter only that it is a letter from Minister Clark. I am concerned that Minister Clark may have directed the letter to be kept confidential inappropriately to avoid any negative public image that may result so near to the provincial election. In particular any issues surrounding land use planning, growth or transportation would be politically sensitive and it's questionable to me why this information would need to be supplied in confidence to the Region of Peel at this time. This government may or may not be in power next term so I struggle to understand what could be in the letter at this time that is required to be kept in confidence.

Preliminary Issue

Upon receipt of the Complaint, we undertook our standard in-take analysis of the matter to verify that it fell within the scope of our jurisdiction as Investigator. Although it is debateable whether the Complaint even falls within the scope of section 239.1 (because there was no closed meeting on the matter related to the Complaint), the issue appeared to ask whether the Letter was a matter that could be considered by Council in a closed meeting under section 239(2) of the *Municipal Act, 2001*. We determined that we would proceed to inquire into the matter to provide an answer.

As part of our standard in-take, we undertook an internal conflict check at our firm to ascertain whether any legal conflicts of interest existed. Our comprehensive conflict check confirmed that we had no conflict with the specific matter. We contacted the Regional Clerk and advised that, as she was aware, we have periodically acted on behalf of the Region and also against the Region. The Regional Clerk indicated that she was prepared to have us undertake the inquiry.

We contacted the requester on May 10, 2022 to provide the same advisement noting that we could confirm that there were no legal conflicts precluding us from proceeding with the investigation and noting that the Regional Clerk had consented to us investigating the matter. We expressly noted that “our firm has had no involvement in any way with respect to the matter of Minister Clark’s correspondence to the Region of Peel nor with any aspect of the matter that is the subject matter of your request.” We asked the requester for their consent.

The requester responded within 15 minutes as follows:

In this instance there are too many conflicts and I would ask it be transferred to another investigator. Especially because it includes the MMHA [sic].

We considered the matter and wrote back to the requester the same day, submitting that we disagreed with their view and reiterating that we stated that there were no conflicts. We noted that the threshold test for investigator bias or lack of impartiality was not met.

The issue respecting the independence or impartiality of an investigator was recently considered by the Ontario Divisional Court in *Chiarelli v. Ottawa (City)*² in the context of an investigation conducted by an integrity commissioner, another municipal accountability officer appointed under the *Municipal Act, 2001*. The Divisional Court first notes the high bar to establish adjudicator bias before turning to set out the even higher threshold to prove investigator bias:

(a) The Legal Test for Bias and Reasonable Apprehension of Bias

The Commissioner’s role is investigative, not adjudicative. Councillor Chiarelli accepts this characterization (Councillor Chiarelli’s Factum, paras. 8, 10 and 60).

The test to show bias or a reasonable apprehension of bias on the part of an adjudicator is a high one:

“Bias” refers to anything that may reasonably lead the adjudicator to decide the case on some basis other than the evidence before the tribunal and the law. “Apprehended bias” refers to anything that may lead the informed and reasonable observer to form a reasonable apprehension that the adjudicator might decide the case on some basis other than the evidence and the law.

² [Chiarelli v. Ottawa \(City\)](#), 2021 ONSC 8256 at paras. 74-76 (Div. Ct.) [citations omitted].

There is a “strong presumption” of impartiality; “[t]he threshold for a successful allegation of apprehended bias is high”.

The test for showing bias or a reasonable apprehension of bias on the part of someone performing an investigative or administrative function is even higher than it is for someone performing an adjudicative function:

The standard of conduct which is applicable to those performing an adjudicative function is different from those performing a purely administrative or investigative function. In the case of an administrative or investigate function, the standard is not whether there is a reasonable apprehension of bias on the part of the investigator, but rather whether the investigator maintained an open mind, that is whether the investigator has not predetermined the issue.

The question is whether the Commissioner exhibited a “closed mind” such that he “predetermined the issue”.

Based on the above and very recent court ruling, we determined that no issue of a closed mind or pre-determination of the issue was raised by the requester. The requester asked that we indicate that they did not consent to Aird & Berlis LLP proceeding with this investigation. We have done so, but we have also provided an explanation of why we determined that we could proceed with the inquiry into the Complaint.³

ISSUE

Could the Letter be considered by Council in a closed meeting?

INVESTIGATION

In order to assess the Complaint and to make a proper determination on the issues, we have reviewed the following materials, in addition to the applicable law, as set out below:

- the Complaint, including the preemptive request by the requester;
- the Region’s Procedure By-law No. 56-2019 (the “**Procedure By-law**”);
- the video of the [Meeting](#);
- the Letter; and
- the open and closed meeting minutes, agendas and reports for the Meeting.

Our investigation was conducted in accordance with section 239.2 of the *Municipal Act, 2001* in a confidential, independent and impartial manner.

This is a report on the investigation of the Complaint made in accordance with section 239.2 of the *Municipal Act, 2001*.

³ We commonly raise such an issue with both the municipality and the requester in order that the matter can be dealt with upfront and determined at that point rather than await for when the investigation has been undertaken or completed.

APPLICABLE LAW

1. *Municipal Act, 2001*

Subsection 239(1) of the *Municipal Act, 2001* provides that all meetings of Council are to be open to the public, unless otherwise excepted. This is often referred to as the “open meeting rule”.

All meetings of a council or a committee, unless they deal with a subject matter falling within a specific exception set out in section 239 are required to be held in the presence of the public.

There are fourteen (14) separate exceptions to the open meeting rule variously set out in subsections 239(2), (3) and (3.1) of the *Municipal Act, 2001*.

The exception relevant to this Complaint is set out in clause 239(2)(h) of the statute and it provides as follows:

Exceptions

239 (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

...

(h) information explicitly supplied in confidence to the municipality or local board by Canada, a province or territory or a Crown agency of any of them...⁴

2. *The Procedure By-law*

Subsection 238(2) of the *Municipal Act, 2001* requires the Region to pass a procedure by-law for governing the calling, place and proceedings of meetings. A procedure by-law is a mandatory by-law requirement that the Region has complied with by enacting its Procedure By-law.

The Meeting referenced in the Complaint is subject to the Region’s Procedure By-law.

The Procedure By-law largely mirrors exceptions to the open meeting rule in Section 5.10. In particular, Section 5.10.3 h provides as follows:

5.10 CLOSED MEETINGS ("IN CAMERA")

...

5.10.3 A meeting or a part of that meeting may be closed to the public if the subject matter being considered is:

...

h. information explicitly supplied in confidence to the municipality or local board by Canada, a province or territory or a Crown agency of any of them;

⁴ The exception relates in large part to the exception from disclosure of information received in confidence from other levels of government under s. 9 of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (which itself is derived from s. 15 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31).

THE MEETING

While Item 22.4 of the Meeting was listed as a closed meeting item, Council never convened in closed session to discuss or consider the Letter. This is confirmed by the Closed Session Report. The minutes of the Meeting expressly note “This item was dealt with under the Consent Agenda.”⁵

FINDINGS

Both clause 239(2)(h) of the *Municipal Act, 2001* and Section 5.10.3 h. of the Procedural By-law specify that certain information from a superior level of government may be considered in a closed setting if it is expressly supplied in confidence.

As noted above, the corresponding exemption to clause 239(2)(h) is section 9 of the *Municipal Freedom of Information and Protection of Privacy Act*. The Information and Privacy Commissioner of Ontario has held that the purpose of the exemption is to “ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure.”⁶

There are two (2) requirements that must be met for the exception to apply to information given to a municipality from another level of government:

- it must be from Canada, a province or territory or a Crown agency of any of them; and
- it must be explicitly supplied in confidence.

Both conditions have been satisfied with respect to the Letter.

The Letter is from the Minister Municipal Affairs and Housing. Minister Clark is a representative of her Majesty’s Government of Ontario. The Letter is thus information from “a province.”

The Letter was expressly provided to the Region on a confidential basis. The statement in the Letter was not ambiguous and noted that “[t]he Ministry requires that all information set out in this letter... be held confidential until publicly announced by the province.” The information in the Letter was thus “explicitly supplied in confidence”.

The Ontario Ombudsman has twice considered the exception in clause 239(2)(h) of the *Municipal Act, 2001* and both times has held that information explicitly supplied in confidence to a municipality by other level of government (federal and provincial) was permissible to be considered in a closed meeting of council.⁷

⁵ The Regional Clerk had also confirmed to the requester that “[t]he item was received by Regional Council under the Consent Agenda.”

⁶ Information and Privacy Commissioner of Ontario, Orders M-844 and M-912. For the exemption under s. 9 of the *Municipal Freedom of Information and Protection of Privacy Act* to apply “the institution must demonstrate that the disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section **and** that the information was received by the institution in confidence”: Order MO-1581.

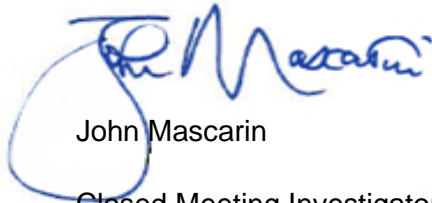
⁷ Ombudsman of Ontario, [City of Niagara Falls](#) (April 14, 2020) and [Township of Russell](#) (December 10, 2021).

CONCLUSIONS

For all of the reasons set out above, we conclude that Council complied with its requirements under the *Municipal Act, 2001* and the Procedure By-law with respect to the Meeting and, in particular, in regards to the Letter. There is no contravention of section 239 of the *Municipal Act, 2001* nor any breach of the Procedure By-law arising from the Meeting. Although Council never convened in closed session to consider the Letter, it was fully entitled to do so under the *Municipal Act, 2001* and the Procedure By-law.

This Report has been prepared for and is forwarded to Council for its information. Subsection 239.2(11) of the *Municipal Act, 2001* provides that this Report is to be made public.

AIRD & BERLIS LLP



John Mascarin

Closed Meeting Investigator for The Regional Municipality of Peel

Dated this May 30, 2022