

REPORT ON CLOSED MEETING INVESTIGATION 2021-02

THE CORPORATION OF THE CITY OF CAMBRIDGE

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INTRODUCTION

A request for a closed meeting investigation, dated December 15, 2021 (the “**Request**”) was filed with the Clerk of The Corporation of the City of Cambridge (the “**City**”).

In our capacity as the closed meeting investigator for the City (“**Investigator**”), our office received a copy of the Request and all applicable documentation and records from the City Clerk’s office on December 16, 2021.

The Request was related to a Complaint that alleged that several members of City Council (“**Council**”) contravened the Code of Conduct for Members of Council and Local Boards (the “**Code of Conduct**”), which included allegations related to those members’ conduct at and preceding the Special Council Meeting of October 12, 2021 (the “**Special Council Meeting**”). The Complaint was under investigation by our office in its capacity as the City’s appointed Integrity Commissioner. The Request was held in abeyance until the completion of the Code of Conduct investigation. That investigation has concluded and it resulted in a summary dismissal of all allegations in the Complaint.

The Request raises a number of matters that are outside of the scope of our jurisdiction as Investigator, and which have been dealt with through the related complaint filed pursuant to the Code of Conduct. These matters relate to allegations that certain named members of Council “purposely deceived the public and misled two fellow councillors” and “acted in a manner that was devoid of transparency as they concealed a hidden agenda”. As noted, this Complaint was dismissed.

However, the Request raises one issue related to the Special Council Meeting that is within our jurisdiction to consider as the City’s Investigator: the Request alleges that the Special Council Meeting was preceded by undisclosed serial conversations that collectively constitute an improper closed meeting that is not permitted under section 239 of the *Municipal Act, 2001*.¹

EXECUTIVE SUMMARY

Based on our inquiry and review of the meeting identified in the Request and the events preceding the meeting, we have concluded that the City did not contravene subsection 239(2) of the *Municipal Act, 2001* or the City’s Procedural By-law 18-15 (the “**Procedural By-law**”).

We find that pre-meeting discussions between the members of Council that voted in favour of the motion to identify the Downtown Site as the preferred location for a CTS site did not constitute a “meeting” in that there was no quorum of members present nor did the discussions materially advance the business or decision-making of Council. Importantly, no formal consensus was

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

sought or reached in respect of the Downtown Site during the course of those gatherings and discussions.

CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

The City appointed Local Authority Services Inc. (“**LAS**”) as its closed meeting investigator pursuant to section 239.2 of the *Municipal Act, 2001*. LAS has delegated to Aird & Berlis LLP its authority to act as the Investigator for the City.

Aird & Berlis LLP was selected by LAS through a competitive procurement process to provide closed meeting investigation services to its participating municipalities. Aird & Berlis LLP was not directly selected by the City as its Investigator to act in this particular matter. Prior to accepting any investigation mandate, Aird & Berlis LLP conducts a thorough legal conflict search and makes other conflict inquiries to ensure our firm is in a position to conduct an independent and impartial investigation.

Our jurisdiction as Investigator is set out in section 239.2 of the *Municipal Act, 2001*. Our function includes the authority to investigate, in a confidential and independent manner, a complaint made by any person to determine whether the City 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 REQUEST

The Request was properly filed pursuant to section 239.1 of the *Municipal Act, 2001*. The Request was filed directly with the City Clerk, and subsequently provided to our office.

The Request sought a review of the events preceding the Special Council Meeting at which Council passed a resolution to endorse a specific site as the preferred location for a proposed Consumption and Treatment Services (“**CTS**”) centre in the City.

The Special Council Meeting was called in respect of a report entitled the “Cambridge Consumption and Treatment Services Community Consultation Summary Report” (the “**CTS Report**”), summarizing the community consultation process that had been conducted between April 2021 and July 2021 in respect of two candidate locations for a CTS site in the City. A third location, at 150 Main Street (the “**Downtown Site**”), had been previously studied but was not explicitly included as part of the community consultation process that was the subject of the CTS Report.

As is detailed in the Request, the issue of the location for the CTS centre in the City has been a contentious political issue with significant history. The central matters of controversy in respect of this issue is whether a CTS centre should be opened in the City and, if so, where it should be located. The Downtown Site had been the topic of previous discussion for potential consideration for a CTS site, but was removed as an option after significant protest from some members of Council and certain members of the community.

Following receipt of the CTS Report, presentations from staff and a number of public delegations, a motion was moved in accordance with Section 22.1 of the Procedural By-law to waive the notice requirements and allow a new motion related to an alternative site for the CTS centre.² The entirety of this meeting occurred in open session.

The Request alleges that certain named members of Council participated in undisclosed serial gatherings and conversations prior to the Special Council Meeting and that those gatherings and discussions constituted an improper closed meeting or meetings. The allegation is that during these improper meetings, members of Council met and inappropriately coordinated amongst themselves to bring forward the motion to approve the Downtown Site, without notice to the community or to all members of Council.

MATERIALS REVIEWED

We have reviewed the City's Procedural By-law, an audio-visual recording of the Special Council Meeting, the Agenda and Minutes of that meeting and the background materials provided as part of the Request.

Additionally, we conducted telephone interviews with seven (7) persons (i.e. witnesses) with direct, relevant knowledge about the subject matter of the Request.

We also reviewed, considered and had recourse to such applicable secondary source materials, including other closed meeting investigation reports, that we believed to be pertinent to the issues at hand.

A draft copy of this Report was provided to the City to solicit its comments and feedback. The City and its representatives were fully cooperative and forthright during our inquiry and sought to assist us as required.

The inquiry was carried out in a confidential manner.

² The first motion sought to waive the notice requirements to allow the matter to be considered by Council at the Special Council Meeting, and was brought in accordance with the requirements in the City's Procedural By-law:

 THAT the notice requirements of the procedural by-law be waived to consider a motion related to an alternative site for CTS in Cambridge.

The second motion was then brought, which provided:

 WHEREAS Cambridge City Council endorses 150 Main Street as the preferred location for any potential Consumption and Treatment site within the City of Cambridge; and

 WHEREAS Cambridge City Council request the Region of Waterloo Public Health and health system partners of Ontario Health to support as needed any potential future operators with an application through the Federal and Provincial application process should any such operator express interest in establishing a Consumption and Treatment Site at 150 Main Street; and

 THEREFORE, BE IT RESOLVED that Cambridge City Council direct the City Clerk to send correspondence to the Region of Waterloo Public Health and the Cambridge-North Dumfries Ontario Health Team outlining the results of this motion and the request for support as needed for a potential future operator.

This is a report on our inquiry in respect of the Request made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.

APPLICABLE LAW

1. *Municipal Act, 2001*

Subsection 239(1) of the *Municipal Act, 2001* provides that all meetings are to be open to the public, unless otherwise excepted. Unless they deal with subject matter falling within a specific exception set out in subsection 239(2), all meetings are required to be held in an open forum where the public is entitled to attend.

The purpose of Ontario's "open meeting" rule is to foster democratic values, enhance the responsiveness of government and public confidence in government, and to increase transparency.³ By setting out specific exceptions to the general rule that all meetings must be open to the public, section 239 balances the need for confidentiality in certain matters with the public's right to information about the decision-making process of local government.⁴

The term "meeting" is defined in s. 238(2) of the *Municipal Act, 2001* as follows:

"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.

Quorum for Council of the City of Cambridge is defined in Section 7.1 of the City's Procedural By-law as five members.⁵

2. *Procedural By-law*

Subsection 238(2) of the *Municipal Act, 2001* requires the City to pass a procedure by-law that governs the calling, place and proceedings of meetings.

The relevant provisions of the City's Procedural By-law are:

- Section 12.1, which provides that all meetings shall be open to the public except as provided for in Section 12.2, and

³ See e.g. *R.S.J. Holdings Inc. v. London (City)* (2007), 36 M.P.L.R. (4th) 1 (S.C.C.).

⁴ Stephen Auerback & John Mascarin, *The Annotated Municipal Act*, 2nd ed., (Toronto, ON: Thomson Reuters Canada Limited, 2017) (e-loose leaf updated 2021 – Rel 1) annotation to s. 239.

⁵ Subsection 237(1) of the *Municipal Act, 2001* provides that "a majority of the members of a municipal council is necessary to form a quorum..."

- Section 12.2, which provides that a meeting may be conducted in closed session in accordance with the *Municipal Act, 2001*.⁶

THE ALLEGED MEETING(S)

The Request alleges that “undisclosed serial conversations” between members of Council occurred prior to the Special Council Meeting, and that these serial conversations amounted to an improper meeting of Council. The Request alleges that the members of Council who voted in favour of the Downtown Site colluded in advance of the Special Council Meeting, deliberately left those members that would not be in favour of the Downtown Site out of these conversations, without notice, and effectively pre-determined the outcome of the surprise motion at the Special Council Meeting.

(a) Absence of Quorum

The allegation is that various members of Council met one-on-one for a series of gatherings that collectively constituted a closed meeting. We note that prior to the most recent amendments to section 238 of the *Municipal Act, 2001*,⁷ the Ontario Ombudsman had taken the position that serial *electronic* communications between members of a council might constitute meetings under the statute.

For example, the Ontario Ombudsman has noted that “email exchanges between Councillors on topics before Council may constitute meetings of Council that are open to the open meeting requirements in some circumstances.”⁸

The Ombudsman had also found that serial telephone calls placed by the head of council to a member of his council to discuss capital purchases amounted to a meeting.⁹ In his investigation report on this matter, the Ontario Ombudsman wrote:

Municipal councils should not be able to circumvent the open meeting requirements through the use of electronic or telephone communication, in which not all parties are communicating at the same time, but council business is nonetheless carried out in the absence of the public... It is not necessarily the form that a meeting takes

⁶ Section 22.1 of the Procedural By-law provides that by a special majority vote, Council may suspend the notice requirements for a motion. While outside the scope of our investigation into the alleged improper meeting(s) that occurred prior to the Special Council Meeting, it should be noted that the motion that precipitated this Request was brought in accordance with the requirements in the Procedural By-law.

⁷ *Modernizing Ontario’s Municipal Legislation Act, 2017*, S.O. 2017, c. 10, s. 25.

⁸ Ombudsman Ontario, Letter to the Corporation of the Municipality of Leamington re: Electronic Closed Meeting Complaint – Email Correspondence November 2012 (January 16, 2013) online: <<http://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Leamington-Jan-16-2013.pdf>>.

⁹ Ombudsman Ontario, *Investigation into Council of the Township of Nipissing Special Meeting of April 25, 2008* at para 30, online: <<http://www.ombudsman.on.ca/Files/Sitemedia>

/Documents/Resources/Reports/Municipal/nipissingfinaleng.pdf>.

that should be determinative, but its substance. In my view, a meeting of council is not limited to a physical gathering of its members.¹⁰

The Ombudsman appears to have changed its position with respect to serial electronic communications of members. The Ombudsman has noted that the statutory amendments make it clear that a meeting requires “that a quorum of members must be present in order of a meeting to occur. The words “is present,” when given a plain and ordinary interpretation, mean that someone is physically present in a particular place.”¹¹ While we do not necessarily concur with the view of the Ombudsman respecting physical presence being necessary for quorum, we note that he has modulated his position on serial meetings to provide that where no quorum of members is present at any one time gathering, there cannot be a “meeting” under the *Municipal Act, 2001*. The Ombudsman clarifies this in his letter to the Town of Hawkesbury that a quorum of members is not “present” if the communication occurs over a series of individual discussions.¹²

Taken to its logical conclusion, the position advanced in the Request would mean that members of Council could never individually meet with one another to discuss any business or matter that might come before Council if they each then discussed the same business or matter with other members of Council that would total more than a majority of the members on the Council. As noted below, the pre-meeting discussions between members of Council never at any one time constituted a quorum.

(b) Material Advancement of Council Business or Decision-Making

The second requirement for a meeting as defined in subsection 238(2) of the *Municipal Act, 2001* is that “members discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the council.”

The Ombudsman has provided the following guidance on the second part of the definition in respect of what it means for council business or decision-making to be “materially advanced”:

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.¹³

We interviewed the members of Council that were alleged to have participated in the conversations prior to the Special Council Meeting. Each of these members of Council was specifically named in the Request.

¹⁰ *Ibid* at paras. 28 and 29.

¹¹ *Hamilton (City of) (Re)*, 2019 ONOMBUD 2 at para. 27.

¹² *Hawkesbury (Town of) (Re)*, 2021 ONOMBUD 7 at para. 18 [*Hawkesbury*].

¹³ *Casselman (Village of) (Re)*, 2018 ONOMBUD 11 at para 31.

It is clear from our investigation that meetings between members of Council and between members of Council and the Mayor concerning the proposed location of the CTS site occurred prior to the Special Council Meeting. There is no evidence that a quorum of Council (i.e. five members) ever met to discuss this matter at any one time. Based on our interviews, the discussions only ever included two members of Council at any one time.

Did the discussions between members of Council, which included the Mayor, materially advance the business or decision-making of Council in respect of the preferred location for the CTS site in a way that is contrary to the open meeting rule in the *Municipal Act, 2001*?

During the course of our interviews, we heard in detail about the meetings that occurred between individual members of Council about the preferred CTS location. It is evident from these discussions that there were concerns raised by a number of councillors about the two sites being proposed in the CTS Report and an alternative option, being the reintroduction of the Downtown Site, was being openly discussed.

The Council member that brought the motion, who has been a vocal advocate of the Downtown Site for years, indicated that she became aware that other members of Council may be changing their minds about Downtown Site after reviewing the CTS Report. She advised that she started to speak with a handful of these other members of Council, one on one, as is permitted under the *Municipal Act, 2001* about the Downtown Site in advance of the Special Council Meeting.

The Council member who brought the motion was not the only member of Council initiating conversations about the CTS Report. We are aware that the Mayor also had some one-on-one conversations with certain members of Council at which the CTS Report was discussed. Neither the Mayor nor the Council member who brought the motion recall speaking directly to one another about the matter.

Many of the members of Council that we spoke with indicated that, after reviewing the CTS Report, hearing the staff presentations and delegations, and, in some cases, following site visits and other independent research, it became clear that the Downtown Site was the best option. It was on this basis that they made their decisions to vote in favour of the Downtown Site.

We were advised by all members of Council that we interviewed that it is common practice for members of Council to discuss, one-on-one, upcoming matters. During the pandemic, in particular, where in-person interactions have been significantly limited, it is common for like-minded members of Council to call one another in advance of a Council meeting and speak about a number of the items up for discussion. If a member intends to bring a motion or an amendment to a motion, they are particularly likely to reach out to other members of Council to advise that the motion or amendment will be presented. All members of Council advised that they are careful in these conversations and do not make a final determination on an issue until it is time to formally vote on a matter at a properly constituted meeting.

FINDINGS

Based on our review of the entire evidentiary record, there was no improper meeting held prior to the Special Council Meeting.

We note that the Request did not allege that the number of members who met ever constituted a quorum at any single point in time. Council members meeting one-on-one in a series of meetings on the same matter does not constitute an illegal or improper closed meeting. In fact, it could be argued that such actions are those of prudent and cautious politicians to ensure that they are properly doing their due diligence and seeking to understand the political landscape on the issue. Accordingly, no quorum was ever reached in the pre-meeting discussions.

We have also determined that the discussions between the members of Council that voted in favour of the motion to identify the Downtown Site as the preferred location for a CTS site did not materially advance the business or decision-making of Council. Importantly, no formal consensus was sought or reached in respect of the Downtown Site during the course of pre-meeting discussions.

Discussions amongst members of Council are permitted and are actually expected to occur. In its Annual Report 2014-2015, the Ontario Ombudsman's Open Meeting Law Enforcement Team reported as follows:

Our Office has always maintained it is healthy in a democracy for government officials to share information informally. To expect council members never to talk to one another outside of a public meeting is unrealistic and would have an unnecessarily chilling effect on free discourse.¹⁴

In *Hawkesbury*, the Ontario Ombudsman wrote that "it is important that all council members be able to speak freely with one another outside the structure of a formal meeting".¹⁵

In a letter to Loyalist Township, the Ombudsman cited his comments in *Hawkesbury* and further explained that "it would not be realistic, nor respectful of democratic governance in municipalities, to implement a culture of absolute silence between council members outside of council chambers".¹⁶

The facts and the Ombudsman's findings in *Hawkesbury* are instructive for our consideration of the Request. In *Hawkesbury*, the Mayor met with three members of council separately and at

¹⁴ Ontario Ombudsman, *Open Meeting Law Enforcement Team - Annual Report 2014-2015* at page 9.

¹⁵ *Hawkesbury*, *supra* note 12 at para. 19.

¹⁶ Letter from the Ontario Ombudsman to Council for Loyalist Township, dated December 6, 2021, available online: <https://www.ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Municipal-Meetings/Ontario-Ombudsman-letter-Loyalist-Township-Dec-2021-accessible.pdf>.

Also, in Ontario Ombudsman, *City of London – "In the Back Room"* (October 22, 2013) at page 25:

To be clear, the *Municipal Act, 2001* does not create an absolute prohibition against members of council discussing city business outside chambers. It is a healthy thing in a democracy for government officials to share information informally before making policy decisions. I agree that to expect council members never to talk to one another outside of a public meeting is unrealistic and would have the effect of unnecessarily chilling speech.

different locations to determine whether they were in favour of terminating identified municipal employees. The support of four members of council (the three councillors plus the Mayor) would mean that a majority supported the terminations. After each of the councillors expressed support for the termination, the Mayor asked them to sign a “confidential” document that set out the steps they wanted the municipality to take during a planned closed session meeting the next day. At the meeting, one of the councillors approached by the Mayor introduced the employee termination matter, Council discussed the matter and voted 4-3 to give directions to staff that were consistent with the steps set out in the document that the councillors had signed the previous day.

The Ombudsman found that that the members’ discussions went beyond sharing information informally, and that the mayor had “effectively organized a voting bloc of councillors who strategically agreed ahead of time about how to deal with a specific matter,” and that “this denied other councillors who weren’t approached the opportunity to participate in the discussion, and meant that meeting minutes and other municipal records would not record this discussion.” The Ombudsman determined that the members’ conduct was not technically prohibited by s. 239 of the *Municipal Act, 2001* because the statute does not directly address this scenario.¹⁷ In making this determination, the Ombudsman nevertheless noted that, rather than privately canvassing individual council members for support, the member could have acted in a more transparent and accountable fashion by introducing this matter at a formal council meeting.¹⁸

In this case, there was no attempt to expressly confirm any member’s position in respect of the CTS Site. There is evidence that members sought to obtain information from one another to understand the “lay of the land” in advance of the Special Council Meeting, which included sharing information about the motion that one member intended to bring to re-introduce the Downtown Site for consideration.

We take note of the Ombudsman’s caution in *Hawkesbury*: while it is technically permissible to have discussions behind the scenes in advance of a Council meeting, the full discussion and debate should occur in open session so that all members of Council have an opportunity to participate in the deliberation and the contents of the debate are fully transparent and on the public record.

We find that Council could have acted in a more transparent and accountable manner by providing notice of the motion to adopt the Downtown Site as the preferred option in accordance with Section 5 of the Procedural By-law. While technically permitted, the lack of notice in light of the politically-charged context and lengthy history in which the motion was brought resulted in members of the public and certain members of Council being left with the impression that they were left out of the final discussion.¹⁹ This taken together with the discussions that occurred between certain members of Council in advance of the Special Council Meeting led to an apprehension that Council failed to act in a fully transparent and accountable way.

¹⁷ We note that at para. 21 of *Hawkesbury*, the Ombudsman makes a suggestion that the provincial government may wish to amend the *Municipal Act, 2001* in order to clarify whether pre-arrangements by a majority of Council are contrary to the statute’s open meeting provisions.

¹⁸ *Hawkesbury*, *supra* note 12 at para. 20.

¹⁹ It must be noted that a public debate did occur at the Special Council Meeting, and all members of Council had an opportunity to address the motion introducing the Downtown Site.

CONCLUSIONS

Based on the foregoing, we conclude that the discussions between members of Council that did not constitute a quorum of Council that preceded the Special Council Meeting did not contravene section 239 of the *Municipal Act, 2001*. We find no contravention of the Procedural By-law in respect of these one-on-one member discussions.

This Report has been prepared for and is forwarded to Council for its consideration. Subsection 239.2(10) of the *Municipal Act, 2001* provides that where the Investigator does not find a contravention of the *Municipal Act, 2001* or the Procedure By-law (as is the case with this Report), the Investigator has discretion to prepare a report to Council.

AIRD & BERLIS LLP



Meaghan Barrett

Closed Meeting Investigator for The Corporation of the City of Cambridge

Dated this 20th day of June, 2022