

REPORT ON CLOSED MEETING INVESTIGATION 2022-01

THE CORPORATION OF THE COUNTY OF SIMCOE

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COUNTY OF SIMCOE REPORT ON CLOSED MEETING INVESTIGATION 2022-01

I. INTRODUCTION

1. This is a report on the investigation of a request made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.¹

2. As closed meeting investigator (the “**Investigator**”) for the County of Simcoe (the “**County**”) we received a request for a closed meeting investigation, dated May 31, 2022 (the “**Request**”). The Request was properly filed pursuant to section 239.2 of the *Municipal Act, 2001*.

3. The Request took issue with the meeting held by the Regional Government Review – Service Delivery Task Force (“**Task Force**”) on April 19, 2022 at 1:00 P.M. (the “**Closed Meeting**”).

4. The following is alleged by the person who filed the request (the “**Complainant**”) in connection with Resolution RGR-13-22 and the Closed Meeting:

- The resolution did not include meaningful information in the resolution about the issue to be considered.
- The closed meeting exceptions are not intended to allow discussion of fiscal matters, even if those matters directly or indirectly impact employees;² further, exceptions should be interpreted narrowly, and broader budgetary matters, including staffing needs, should not be discussed in a closed meeting.
- A significant portion of the closed session could have been dealt with in open session to the public.

5. The Task Force relied on the following closed meeting exceptions under the *Municipal Act, 2001*, to convene the Closed Meeting:

- Clause 239(3)(d) - labour relations or employee negotiations
- Clause 239(2)(k) - a position, plan procedure, criteria or instruction to be applied to any negotiations to be carried on by or on behalf of the municipality

6. The Recommendation published on the open agenda referenced the in-camera direction contained within Confidential Item RGR 2022-118, the exceptions to open meetings relied upon for convening the Closed Meeting, and finally, that the direction be voted upon and approved in accordance with clause 239(6)(b) of the *Municipal Act, 2001*.

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

² Based on the resolution passed in open session following the meeting – and which resolution was contained in full on the open agenda – it could be inferred that a budgetary matter was discussed in closed session.

7. While we have concluded that some of the topics of discussion were properly the subject matter of a closed session, we have also determined that the Task Force contravened section 239 of the *Municipal Act, 2001* for the following reasons:

- Resolution RGR-13-22 to convene the Closed Meeting provided no description of the general nature of the matter to be considered in-camera;
- The discussion in the Closed Meeting should have been limited to the labour relations and the negotiations concerns with the remainder addressed in a companion open report and discussion; and
- The Task Force held, at least in part, an improper vote in closed session, as the motion contained several items that did not address a procedural matter or constitute a direction to officers, employees or agents of the County.

II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

8. The County 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 County. Aird & Berlis LLP was selected by LAS through a competitive procurement process to provide closed meeting investigation services to its participating municipalities. The County is a participating municipality.

9. The Task Force is a committee of council, as defined under section 238 of the *Municipal Act, 2001*.³ A closed meeting of a committee of council may be investigated under section 239.1 of the statute.

10. Our jurisdiction as Investigator is set out in section 239.2 of the *Municipal Act, 2001*. Among other things, we are authorized to investigate, in an independent manner, a request made by any person to determine whether the County 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 the County, together with any recommendations as may be applicable.

III. ISSUES

11. We have considered the following issues from the Request:

1. Did the Task Force’s resolution to convene the Closed Meeting comply with subsection 239(4) of the *Municipal Act, 2001*?
2. Did the exceptions relied upon by the Task Force apply to permit the Closed Meeting?
 - (a) Did the discussion go beyond what was permitted in a closed session?
 - (b) Did the Task Force hold an improper vote related to budgetary allocation or otherwise?

³ Section 1.0 of the County’s Procedure By-Law expressly defines “Committee” to include “a Task Force of Council”.

IV. INQUIRY

12. We contacted the County Clerk of Simcoe County to request copies of all applicable documentation necessary to undertake our review. Our office was promptly provided relevant documentation by the Clerk both initially and as requested throughout the investigation.

13. To assess the issues raised in the Request and to make a determination on the issues, we reviewed the following materials, in addition to the applicable law:

- the County's Procedure By-law;⁴
- the open and Closed Meeting agendas and minutes, and the report provided in closed session; and
- meeting agendas and minutes after the Closed Meeting.

14. Additionally, we conducted an interview with one staff member of the County who had direct, relevant knowledge about the subject matter of the Request. County staff was fully cooperative and forthright during our investigation.

15. We also reviewed and considered other closed meeting investigation reports that we believed to be pertinent to the issues.

16. A copy of our draft Report was provided to the County for an opportunity to review and comment.

V. APPLICABLE LAW AND PROCEDURAL RULES

1. *Municipal Act, 2001*

17. Subsection 239(1) of the *Municipal Act, 2001* provides that all meetings of Council are to be open to the public, unless an exception applies permitting a closed meeting.⁵

18. The open session minutes indicate that the exceptions relied upon by the County were the following:

Exceptions

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

⁴ Procedure By-Law No. 6703, as amended by By-Law Nos. 6841 & 6867, which applies to all "Committees", which, by definition, includes a Task Force of Council [section 1.0].

⁵ 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.

...

(d) labour relations or employee negotiations;

...

(k) a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.

19. Section 239(4) of the *Municipal Act, 2001* requires the following:

Resolution

239 (4) Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution,

(a) the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting; ...

2. Procedure By-law

20. Subsection 238(2) of the *Municipal Act, 2001* requires the County to pass a procedure by-law for governing the calling, place and proceedings of meetings. The Closed Meeting is subject to the County's Procedure By-law.

21. Section 3.10 of the Procedure By-Law addresses the resolution required to convene a closed meeting:

3.10 Closed Meeting- Resolution Required

Prior to Council resolving into a closed session under the *Municipal Act*, Council shall state by resolution;

- a) the fact of holding the closed meeting;
- b) the general nature of the matter to be considered; and
- c) the specific provision under the Act, which permits the closing of the meeting.

22. The foregoing echoes the requirements of subsection 239(4) of the *Municipal Act, 2001*.

23. Sections 3.11 and 3.12 of the Procedure By-law provide that a vote cannot be taken in a closed session, except if the vote is for:

- a matter authorized to be convened in closed session a procedural matter;
- a procedural matter or for giving directions or instructions to officials, employees or agents of the municipality or committee of the County, or persons retained by or under contract with the County.⁶

⁶ This reflects the authority to vote in a closed meeting under s. 239(6) of the *Municipal Act, 2001*.

24. We note that while the Procedure By-law does not have a “report out” obligation following a closed session, and the *Municipal Act, 2001* does not require it, as a matter of practice, the Council does do a “report out” at the conclusion of a closed session. This is a best practice and improves transparency of the municipal decision-making process.

VI. CLOSED MEETING

25. The Closed Meeting addressed library services in the County. We are advised that in the lead-up to the Closed Meeting, all discussions related to library services were held in open session. This resulted in a resolution on November 9, 2021 (Recommendation RGR-26-21) by the Task Force that staff report on what was referred to as “Option 1- Modified Status Quo”.⁷

26. The resolution directed that, “[S]taff report further on Option 1 – Modified Status Quo while considering other aspects to improve the library system as reported in the November 9, 2021 KPMG report.”

27. The meeting on April 19, 2022 of the Task Force was the outcome of the resolution passed on November 9, 2021.

28. In addition to the Confidential Report prepared for the Closed Meeting, to refresh memories, the agenda contained both the Gantt Chart (timeline of tasks to be completed) related to this work and the November 9, 2021 KPMG report out of which the resolution came.

29. The topics presented in the Confidential Report were the following:

1. The current service model for library services through the Simcoe County Library Co-operative (“Library Co-op”).
2. A proposed new model to be called the “Information Library Service”, being a modern database and subscription management service, without physical assets. The County would support the service through its IT department. A single library card for the entire County would be established.
3. The potential for savings through shared library services.
4. The manner in which physical assets for the Simcoe County Library Co-operative would be disposed of or retained by the County.
5. The dissolution of the Library Co-op and the employees that would be affected.
6. Transition through a transition specialist.
7. Feedback received through consultation.
8. Financial and resource implications.

⁷ The November 9, 2021 KPMG Report offered three options, of which Option 1 – Modified Status Quo was one.

30. At the meeting of the Task Force on April 19, 2022, the following resolution was carried prior to convening the Closed Meeting:

Resolution RGR-13-22

That Regional Government Review Task Force resolve into Closed Session at 1:01 p.m. under the authority of the Municipal Act, Section 239(2)(d) labour relations or employee negotiations, and (2)(k) a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.

31. The recommendation provided for on the open agenda was as follows:

Recommendation

That direction in-camera contained within Confidential Item RGR 2022-118 [“Confidential Report”], dated April 19, 2022 regarding 239(d) labour relations or employee negotiations, and (k) a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board, be voted upon and approved in accordance with section 239(6)(b) of the Municipal Act, as amended; and

That staff undertake all necessary actions to implement the new Information Library Service (ILS); and

That the new Information Library Service (ILS) focus its services on providing Software as a Service (SaaS) to existing Simcoe County libraries, and that the County assume licence costs for existing Sirsi Dynix products and project management launch costs; and

That the County IT Department engage and offer enhanced technical services to the municipal libraries; and

That up to \$280,000 be funded from by the General Contingency Reserve to deliver the recommended outcomes; and

That By-law 2242, be rescinded when appropriate, and that the Ministry of Heritage, Sport, Tourism and Culture Industries, municipal Councils, and Library Boards be so advised.

32. Upon adjourning the Closed Meeting, and then reconvening in open session, the Task Force passed the foregoing resolution as its “report out”.

33. We learned that a very similar, but not identical, recommendation was presented to the Task Force through the Confidential Report. This resolution was adopted by the Task Force in closed session, in addition to the resolution adopted in open session, which subsumed it: paragraph one of the open session resolution addressed the resolution that was voted upon in the Closed Meeting.

34. We were advised that more typically, only the first paragraph of the resolution passed in open session would appear in an open agenda and be voted upon as part of the “report out”.

35. We were further advised that the purpose of this additional information and modified public resolution was to provide as much information as possible to the community about the matters under consideration, while limiting public disclosure of the more sensitive information related to the negotiations and labour relations matters.

36. The modified public resolution would not be as obvious about the dissolution of the Library Co-op, which would have made it clear to the four employees of the Library Co-op that their positions would be terminated, without any prior notice having been provided to them. It also eliminated reference to the distribution of assets from the Library Co-op, which addressed the negotiations aspect of the Closed Meeting.

37. The resolution passed in the Closed Meeting provided as follows:

- (i) That direction in-camera contained within Confidential Item RGR 2022-118, dated April 19, 2022 regarding the Simcoe County Co-operative, be received; and
- (ii) That the Simcoe County Library Co-operative transition to a new model called Information Library Service (ILS) as generally outlined in the subject report; and
- (iii) That staff undertake all necessary actions to implement the new Information Library Service (ILS); and
- (iv) That the new Information Library Service (ILS) focus its services on providing Software as a Service (SaaS) to existing Simcoe County libraries, and that the County assume licence costs for existing Sirsi Dynix products and project management launch costs; and
- (v) That available assets and resources of the Simcoe County Library Co-operative be distributed to the municipal libraries as generally outlined in the subject report; and
- (vi) That the County IT Department engage and offer enhanced technical services to the municipal libraries; and
- (vii) That up to \$280,000 be funded from the General Contingency Reserve to deliver the recommended outcomes; and
- (viii) That the Library Board be dissolved and that By-law 2242 be rescinded when appropriate, and that the Ministry of Heritage, Sport, Tourism and Culture Industries, municipal Councils, and Library Boards be so advised.

38. The recommendations of the Task Force were then considered and ultimately adopted by County Council at its April 26, 2022 meeting.

VII. ANALYSIS

(a) General Principles

39. It is generally accepted that while municipal powers should be afforded a broad and liberal interpretation,⁸ the scope of the open meeting rule must take into account the notion that a municipal council “should only exercise its discretion [to hold a closed meeting pursuant to section

⁸ See s. 8(1) of the *Municipal Act, 2001* and *Croplife Canada v. Toronto (City)* (2005), 10 M.P.L.R. (4th) 1 (Ont. C.A.).

239] when there is some potential harm, financial or otherwise, of having a discussion...” in open session.⁹

40. Another general principle is that matters that do not fit within an exception can sometimes be discussed during a closed session if they relate to a discussion on a single topic, and if splitting the information would require unreasonable interruption in the conversation, i.e. it is so interwoven with the matters that are properly within the closed session, that to parse it would be unreasonable. If the discussion can be separated, then council is expected to return to open session for that portion of the discussion that do not fit within an open meeting exception.¹⁰

(b) Labour and Employee Exception

41. Decisions, orders and rulings from the courts, the Information and Privacy Commissioner, and the Ontario Ombudsman indicate that the following are included under the labour and employee exception:¹¹

- “Labour relations” can extend to the relations and conditions of work beyond those related to collective bargaining;
- The term “labour relations” refers to the collective bargaining relationship between an institution and its employees;
- The purpose of the labour relations exception is to protect discussions relating to the relationship between a municipality and its employees;
- The hiring of specific individuals can also fit into this exception.

42. In addition, and most germane to the issues in this matter, the Ontario Ombudsman has held that the labour relations exception does not apply to discussions relating to an organizational review or restructuring; however, the Ontario Ombudsman has found that the exception may apply to a discussion relating to a reorganization as it affects individuals and their roles.¹²

(c) Negotiations Exception

43. The test adopted by the Ontario Ombudsman for the negotiations exception reflects jurisprudence developed in the context of Information and Privacy Commissioner (“IPC”) decisions, orders and rulings. Flowing from that jurisprudence, the Ombudsman has indicated the following:

⁹ See Ombudsman of Ontario, *Investigation into whether the Finance and Administration Committee for the City of Elliot Lake held an improper closed meeting on July 7, 2014 (City of) (Re)* (October 27, 2014): 2014 ONOMBUD 5.

¹⁰ *Ombudsman Report, Leeds and the Thousand Islands Final Report*, April 2022, para. 54.

¹¹ Ombudsman Report, *Investigation into a request about a closed meeting held by the City of St. Catharines on June 25, 2018*, February 2019, at paras. 23 to 24.

¹² Ombudsman Report, *Investigation into a complaint about a meeting held by Council for the City of Sault Ste. Marie on October 13, 2015*, at para. 22.

The IPC established a four-part test to determine whether an institution can refuse to disclose a record because it contains information related to negotiations carried on by the institution. The institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions;
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations;
3. the negotiations are being carried on currently, or will be carried on in future; and
4. the negotiations are being conducted by or on behalf of the institution.

In a 2002 decision that was upheld on appeal to the Divisional Court, the IPC determined that in order to satisfy the first part of the test, there must be “some evidence that a course of action or manner of proceeding is “pre-determined”, that is, there is some organized structure or definition given to the course to be taken.” The IPC found that a “plan” is “a formulated and especially detailed method by which a thing is to be done; a design, or scheme.” With respect to positions, procedures, criteria, and instructions, the Commissioner found that these terms “are similarly referable to pre-determined courses of action or ways of proceeding.”¹³

44. Negotiation has been interpreted by the Ontario Ombudsman by reference to its ordinary dictionary definition: to negotiate is “to confer (with another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to a settlement or compromise”.¹⁴

VIII. FINDINGS

1. Did Council’s resolution to convene the Closed Meeting comply with subsection 239(4) of the *Municipal Act, 2001*?

45. To comply with subsection 239(4), the resolution must include a description of the general nature of the matter to be considered. The resolution plainly did not do so – it offered no description of the matter to be considered. The resolution did not comply with the requirements of both the statute and the Procedure By-law.

2. Did the exceptions relied upon by Council apply to permit the Closed Meeting?

46. Our review of the Confidential Report supports closure of the session on the basis of both the labour exception and the negotiations exception. While an organizational restructuring is not typically a subject matter that may be discussed in a closed session, in this case, the consideration to dissolve the Library Co-op clearly would have meant that four identifiable employees would be affected. It was appropriate to address this in a closed session.

47. Similarly, the report clearly addressed a formulated plan to dissolve the Library Co-op and how the assets would be distributed, which would involve certain negotiations with the lower-tier municipalities.

¹³ Ombudsman Report, *Investigation into a request about a closed meeting held by the City of St. Catharines on June 25, 2018*, February 2019, at paras. 31 and 32.

¹⁴ *Supra* 10, at para. 52.

(a) Did the discussion go beyond what was permitted in a closed session?

48. We agree with the Complainant that the discussion in the Closed Meeting, presumably in reflection of the topics presented in the Confidential Report and the resolution, should largely have been presented in open session. Specifically the following need not have been part of the Confidential Report, nor part of the Closed Meeting, and could have been parsed out:

1. The current service model for library services through the Simcoe County Library Co-operative (“Library Co-op”).
2. A proposed new model to be called the “Information Library Service”, being a modern database and subscription management service, without physical assets. The County would support the service through its IT department. A single library card for the entire County would be established.
3. In generalities, financial and resource implications (overall budget numbers without specification on staffing levels or staffing implications; the Confidential Report would have provided more specific detail on these aspects).
4. The potential for savings through shared library services (which were not described in any specificity in the Confidential Report in any event).
5. Feedback received through consultation.

49. Following discussion in open session of the foregoing, a closed session and related report could have been limited to a discussion of what the staffing implications would be and what negotiations would be necessary to deal with the assets following a dissolution of the Library Co-op. A vote on directions in the Closed Meeting would not have been required at all.

(b) Did the Task Force hold an improper vote related to budgetary allocation or otherwise?

50. Subsections 239(5) and (6) of the *Municipal Act, 2001* provide as follows with respect to voting at a closed session:

Open meeting

239 (5) Subject to subsection (6), a meeting shall not be closed to the public during the taking of a vote.

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.

51. With respect to the vote held in the Closed Meeting, there were several items that did not constitute giving directions or instructions to employees. These were as follows:

...

That the new Information Library Service (ILS) focus its services on providing Software as a Service (SaaS) to existing Simcoe County libraries, and that the County assume licence costs for existing Sirsi Dynix products and project management launch costs; and

...

That the County IT Department engage and offer enhanced technical services to the municipal libraries; and

That up to \$280,000 be funded from the General Contingency Reserve to deliver the recommended outcomes; and

That the Library Board be dissolved and that By-law 2242 be rescinded when appropriate, and that the Ministry of Heritage, Sport, Tourism and Culture Industries, municipal Councils, and Library Boards be so advised.

52. These items ought to have been left – as modified for the open agenda - for an open session vote and discussion.

IX. CONCLUSIONS

53. While we have concluded that some of the topics of discussion were properly the subject matter of a closed session, we have also determined that the Task Force contravened section 239 of the *Municipal Act, 2001* and the Procedure By-law for the following reasons:

- Resolution RGR-13-22 to convene the Closed Meeting provided no description of the general nature of the matter to be considered in-camera;
- The discussion in the Closed Meeting should have been limited to the labour relations and the negotiations concerns with the remainder addressed in a companion open report and discussion; and
- The Task Force held, at least in part, an improper vote in closed session, as the motion voted upon contained several items that did not address a procedural matter or constitute directions or instructions to officers, employees or agents of the County.

X. RECOMMENDATIONS

54. Our investigation has revealed that the County has a reasonably good system in place to alert report authors to consider on what basis a matter can be recommended to be addressed in a closed session, the development and review of reports for closed session meetings, and the development of appropriate resolutions for closed meetings.

55. Given what occurred in this instance, however, we recommend a check list should be developed or the current template for reports be modified to ensure the following:

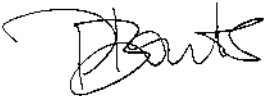
- That resolutions to convene a closed session always include reference to the general nature of the matter(s) to be discussed is properly articulated as part of the resolution, in accordance with the *Municipal Act, 2001* and the County's Procedure By-law. The current template makes it clear that the relevant sections of the *Municipal Act, 2001* must be cited, but does not specifically direct report authors to include the general nature of the matter to be considered in the resolution;
- That items for a closed agenda be carefully considered to determine if parts may be addressed and separated from the closed matter(s) through a companion open report and discussion. Perfection is not required, however, on the facts of this case, it appears that significant portions could easily have been addressed through a report and discussion in open session, without delving into the specifics of dissolution of the Library Co-op, implications for staffing, or any negotiations that would arise from a decision to move to the new system;
- That any items intended to be voted upon in closed session be reviewed to ensure compliance with the rule that only directions or instructions may be voted upon in closed session, and in relation to a matter that is otherwise properly in closed session.

56. This Report and our recommendations have been prepared and are being provided to the County in accordance with subsection 239.2(10) of the *Municipal Act, 2001*. Pursuant to subsection 239.2(12), Council is required to pass a resolution stating how it intends to address the Report.

57. This Report is to be made available to the public.

Respectfully submitted,

AIRD & BERLIS LLP



Paula Boutis

Closed Meeting Investigator for The Corporation of the County of Simcoe

Dated this 17th day of October, 2022.