

REPORT ON CLOSED MEETING INVESTIGATION 2023-01

THE CORPORATION OF THE COUNTY OF LANARK

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COUNTY OF LANARK

REPORT ON CLOSED MEETING INVESTIGATION 2023-01

I. INTRODUCTION

1. This is a report on the investigation of a request made in accordance with section 239.2 of the *Municipal Act, 2001*.¹
2. A formal request for a closed meeting investigation, dated September 8, 2022 (the “**Request**”), was filed directly with our office, in our capacity as the closed meeting investigator (the “**Investigator**”) for The Corporation of the County of Lanark (the “**County**”). The Request seeks an investigation of a meeting of the Community Services Committee of the Whole (the “**Committee**”).²
3. The Request alleges that the closed meeting of the Committee held on August 16, 2023 (the “**Meeting**”), contravened section 239 of the *Municipal Act, 2001*. The Request does not raise any assertion that the Committee breached the County’s Procedural By-law No. 2022-43.
4. Upon concluding our investigation, we have found that the allegations in the Request cannot be sustained. As noted, this is our formal report on our investigation of the above-noted matter.

II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JUSTIFICATION

5. The Town appointed Local Authority Services Inc. (“**LAS**”) as its closed meeting investigator pursuant to section 239.1 of the *Municipal Act, 2001*. LAS has delegated its authority to act as closed meeting investigator to Aird & Berlis LLP.
6. 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 County to act in this particular matter or, in general, as its closed meeting investigator. 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.
7. Our jurisdiction as Investigator is set out in section 239.2 of the *Municipal Act, 2001*. Our function includes the authority to investigate, in an independent manner, a complaint made by any person to determine whether the County or any of its committees has complied with section 239 of the *Municipal Act, 2001* in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation to County Council, together with any recommendations as may be applicable.

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

² The Request actually referenced “Lanark County Council” as convening into the closed meeting to consider a report relating to childcare on August 16, 2023. The closed meeting on the subject matter of Child Care was held by the Community Services Committee of the Whole – not County Council.

III. REQUEST

8. The Request was properly filed pursuant to section 239.1 of the *Municipal Act, 2001*.
9. For the reasons noted below, the Committee is a committee to which sections 239, 239.1 and 239.2 of the *Municipal Act, 2001* apply.
10. As indicated above, the Request alleges that the Meeting contravened the *Municipal Act, 2001*. The Request contends that the Committee considered a matter in closed session that ought to have been considered in whole, or at least in part, in the open part of the Meeting.
11. The Request raises two issues with the Meeting.
12. First, the Request alleges that the Committee was not entitled to consider a report on childcare in closed session pursuant to clause 239(2)(e) of the *Municipal Act, 2001*. The Request takes the position that the subject matter did not qualify for the application of the exception related to “litigation or potential litigation” for a closed meeting. The Request provides that the Committee did not meet the threshold of “more than a mere suspicion that there will be litigation” which is necessary for the exception to apply.
13. Second, the Request submits that the Committee subject matter also did not meet the threshold of holding a closed meeting pursuant to the exception for “solicitor-client privilege” under clause 239(2)(f) of the *Municipal Act, 2001*.
14. In addition, the Request contends that, even if the Meeting did pertain to the discussion of legal advice, it was not appropriate for the entire discussion to have been held *in camera*. The Request asserts that “most of [the discussion] should have been open to the public, especially due to its impact on the public.”

IV. REVIEW OF MATERIALS AND INQUIRY PROCESS

15. In order to properly consider the allegations in the Request and make our determinations on the issues, we have reviewed the following materials:
 - Procedural By-law;
 - Committee Agenda for the Meeting;
 - Confidential Report to Committee re Childcare (the “**Staff Report**”);
 - Confidential Presentation to Committee (draft and final versions) (the “**Presentation**”);
 - Correspondence from the County’s solicitor (the “**Legal Opinion**”);
 - Confidential Minutes of the Meeting (the “**Minutes**”);
 - Video-recording of the open session of the meeting of the Committee; and
 - Open Session Minutes of the Committee Meeting (the “**Open Session Minutes**”).

16. Following our review of materials, we conducted one telephone interview with the County Clerk who attended and prepared the Minutes for the Meeting. The County Clerk had direct, relevant knowledge about the subject matter of the Request. We did not believe that it was necessary to interview any other persons at the Meeting.

17. We have also had recourse to the provisions of the *Municipal Act, 2001*, and such secondary sources, case law, and reports of other closed meeting investigators as we deemed necessary in our to make our determinations.

V. COMMUNITY SERVICES COMMITTEE

18. The Committee is a “Standing Committee” of the County.³

19. County Council operates under a Committee of the Whole structure which consists of four (4) Standing Committees, including the Committee. All members of County Council are members of the Committee.⁴

20. The Committee is a committee as defined in subsection 238(1) of the *Municipal Act, 2001*:

“committee” means any advisory or other committee, subcommittee or similar entity of which at least 50 per cent of the members are also members of one or more councils or local boards

21. As such, the Committee must comply with the open meeting requirement under section 239 of the *Municipal Act, 2001*.

VI. THE MEETING

22. The County’s Calendar lists the meeting on August 16, 2023 as “Special Community Services Committee.”

23. The open session of the meeting of the Committee was called to order at 3:33 p.m. The Chair expressly states at the commencement of the open meeting:

This is a Special Meeting of the Community Services Committee to deal with a legal matter.

...Item 13 – confidential reports of the County’s lawyer...

³ See s. 1.0 of the Procedural By-law:

“**Committee**” – shall mean any Committee of the Whole, Steering or Sub-Committee unless otherwise stated.

“**Standing Committee**” – is a Committee of Council constituted to perform a continuing function and which has a continuous existence. For the purpose of this bylaw the Committee of the Whole is deemed to be a Standing Committee.

⁴ The Committee also includes two representatives of the Town of Smiths Falls.

24. The agenda listed the following under the heading **13. CONFIDENTIAL REPORTS:**

- i) Child Care – Legal Advice
Emily Hollington, Director of Social Services

MOTION #CS-2023-66

MOVED BY: E. McPherson **SECONDED BY:** B. Dowdall

THAT, Committee move in camera at ___ p.m. to discuss items subject to section 239 (2) (e) and (f) of the Municipal Act: advice that is subject to solicitor-client privilege, including communications necessary for that purpose and litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;

More specifically, a report on childcare that contains legal advice; and

***THAT,** J. Ralph, Clerk, M. Beson, Deputy Clerk, K. Greaves, CAO, E. Hollington, Director of Social Services, T. Kealey-Donaldson, Children's Services Manager and J. McBride, Deputy Treasurer remain in the room.*

ADOPTED

25. The agenda also listed a Suggested Motion for the Meeting and a Suggested Motion for the Chair's Rise and Report as follows:

Suggested Motion:

***THAT,** the in camera session rise at ___ p.m.*

Chair's Rise and Report.

Suggested Motion:

***THAT,** Council proceed with Option 2 as detailed in the in camera report.*

26. The Minutes of the Meeting note that the Committee convened into the closed session at approximately 3:33 p.m.

27. The County's Director of Social Services had prepared the confidential Staff Report to Committee regarding significant issues relating to the County's Childcare Contract and the Presentation which she addressed before the Committee at the Meeting.

28. The Legal Opinion was appended as an attachment to the Staff Report.

29. The Minutes of the Meeting provide that the Director of Social Services presented an overview of the issues and the actions that County staff had undertaken to review the matter. The Director of Social Services expressly referred to the legal advice that had been provided.

30. The Minutes disclose that the Committee discussed the matter and considered the Staff Report and the Legal Opinion.

31. The Committee adjourned the Meeting and it returned to the open session portion of the meeting at 4:27 p.m.
32. The Open Session Minutes indicate that Committee proceeded as follows:

MOTION #CS-2023-67

MOVED BY: T. Randell **SECONDED BY:** R. Minnille

THAT, the in camera session rise at 4:27 p.m.

Chair's Rise and Report – Council considered a report on childcare that contains legal advice.

ADOPTED

MOTION #CS-2023-68

MOVED BY: K. Jennings **SECONDED BY:** R. Rainer

THAT, Council proceed with Option 2 as detailed in the in camera report.

ADOPTED

33. The above motions were the final order of business at the Committee meeting which was adjourned at 4:31 p.m.

VII. ISSUES

The Request raises two issues: whether the Committee was entitled under the *Municipal Act, 2001* to consider the subject matter of the Staff Report in closed session pursuant to the exceptions set out in:

- (a) clause 239(2)(e) – for litigation or potential litigation; and
- (b) clause 239(2)(f) – for solicitor-client privileged advice.

34. In addition, the Request alleges that if the subject matter could have been considered pursuant to the exception for solicitor-client privileged advice, most of the discussion ought to have been held in open session.

VIII. ANALYSIS

(1) Statutory Framework

35. Ontario's "open meeting" rule is set out in section 239 of the *Municipal Act, 2001*, which requires that all meetings of a municipal council (or local board or a committee of either of them) be held in an open forum where the public is entitled to attend and observe local government in action.

36. However, there are exceptions to this rule which balance the need for confidentiality in certain matters with the public's right to information about the decision-making process of local government.⁵

37. Subsection 239(2) sets out eleven separate subject matter exceptions that entitle Council to hold a meeting that is closed to the public, including the following two exceptions which were cited in the Committee's resolution to convene *in camera*:

Exceptions

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

...

- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

(2) **Exception for Litigation or Potential Litigation Matters**

38. The closed meeting exception in clause 239(2)(e) allows a council or committee to close a meeting to the public where it will discuss matters related to litigation or potential litigation. The purpose of this closed meeting exception is to protect a municipality's interests as a litigant or potential litigant in a legal proceeding by permitting the council or committee to formulate and protect its legal position and strategy in the absence of other persons who may be adverse in interest.

39. The Request noted that the Committee did not meet the threshold of "more than a mere suspicion that there will be litigation".⁶ The exception under clause 239(2)(e) will only apply where the matter under consideration is the subject of ongoing litigation or there is a "reasonable prospect of litigation." There must be something more than a remote possibility that litigation will commence – a mere possibility or suspicion will not suffice.⁷

40. As part of our investigation, we were provided with a social media posting indicating that a member of the public noted that they were searching for a lawyer to represent them in a lawsuit against Lanark County on this particular matter. We were not provided with any additional information or correspondence to support or substantiate any other threats of litigation.

⁵ 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.

⁶ *C.R., Re*, 2004 CanLII 34368 (ON SC), at para. 21, citing *Royal & Sun Alliance Insurance Co. of Canada v. Fiberglas Canada Inc.*, (2002), 47 C.C.L.I. (3d) 249, [2002] O.J. No. 3846, 2002 CarswellOnt 3232 (Ont. S.C.) which itself cites *Carlucci v. Laurentian Casualty Co. of Canada*, [1991] O.J. No. 269.

⁷ *RSJ Holdings Inc. v. London (City)* (2007), 36 M.P.L.R. (4th) 1 per Charron J. at para. 22 (S.C.C.); *Investigation into complaints about a closed meeting held by Council for the County of Norfolk on May 24, 2016*, Ontario Ombudsman (November 2016).

41. The social media post is rather flimsy evidence of any kind of potential litigation. It is our view that County staff had no more than a mere suspicion that litigation could possibly ensue with respect to the subject matter of the Meeting. It was not sufficient to provide a solid footing for the application of the exception under clause 239(2)(e).

42. In our opinion, the subject matter of the Meeting did not fall within the ambit of the closed meeting exception in clause 239(2)(e) of the *Municipal Act, 2001* relating to potential litigation. As such, the Committee was not entitled to consider the matter in a closed session under this exception.

(3) Exception for Solicitor-Client Privilege Advice

43. The closed meeting exception in clause 239(2)(f) allows a council or committee to meet in the absence of the public in order to consider advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

44. As noted in paragraph 28, the Legal Opinion was appended to the Staff Report. The lawyer who prepared the Legal Opinion was invited to but did not attend the Meeting. Nevertheless, the Legal Opinion was considered by the Committee and was part of the presentation from the Director of Social Services.

45. There is a tripartite test that is used for determining whether a verbal or written communication is subject to solicitor-client privilege in order for the exception under clause 239(2)(f) to apply. The communication must:

- (a) be between a client (i.e. the municipality) and its lawyer;
- (b) entail the seeking or giving of legal advice; and
- (c) be considered confidential by the parties.⁸

46. A review of the Meeting materials, including the Staff Report (attaching the Legal Opinion), the Presentation and the Minutes, reveals that the Committee expressly received and considered legal advice that is subject to solicitor-client privilege, including communications necessary for that purpose (i.e. the Legal Opinion).

47. In summary, the subject matter of the Meeting clearly fell within the scope of the closed meeting exception in clause 239(2)(f) relating to solicitor-client privileged advice. As such, the Committee was entitled to consider the matter, in its entirety, in a closed session.

(4) Entire Meeting Should Not have been Closed

48. The Request asserts that even if a portion of the Meeting did relate to solicitor-client privileged advice (which we have found that it did), the Committee should have not held the entire Meeting in closed session. The Request speculates that “most of it [i.e. the Meeting] should have been open to the public, especially due to its impact on the public.”

⁸ *Solosky v. R.* (1979), 105 D.L.R. (3d) 745 (S.C.C.).

49. The Meeting was not an excessively lengthy one – it lasted 54 minutes in total.
50. We questioned the County Clerk with respect to the Meeting and the primary or core discussion of the members of the Committee. The County Clerk confirmed that the purpose of the Meeting was to obtain legal advice as to an issue related to Child Care and discuss the legal options that had been put forward by the County’s lawyer.
51. It is our finding that the central focus of the Meeting was on the legal advice that the Committee was receiving and considering. The purpose of the Meeting was for the Committee to receive the legal advice from its solicitor and to formulate its legal position. The Committee was provided with two legal options and almost the entirety of the discussion *in camera* was concentrated on which of the options would be selected.
52. In any event, the courts have recognized that it may be difficult for a council or committee to “toggle” back-and-forth between open and closed meeting discussions. The Ontario Divisional Court considered the issue in *St. Catharines (City) v. Ontario (Information & Privacy Commissioner)* and commented with respect to the unrealistic nature of expecting a municipal council to “parse” its discussions:

The decision determined that only parts of the meeting could be closed. How is such a meeting to be conducted? Whenever a participant interrupts the consideration of the disposition of land to refer to any other option being considered or to review any part of the history or background, the meeting would have to adjourn to go into a public session and then close again when the discussion returned to consider the sale of property. It is not realistic to expect the members of a municipal council to parse their meetings in this way. At a minimum, it would detract from free, open and uninterrupted discussion. It could lead to meetings that dissolve into recurring, if not continuous, debate about when to close the meeting and when to invite the interested public to return.⁹

53. It is our opinion that the main thrust of the matter at the Meeting was related to legal advice and communications related to solicitor-client privileged advice. Even if there were discussions that could have been held in open session, those portions of the Meeting were inextricably linked to the *in camera* discussions which were properly convened in a closed setting.

IX. CONCLUSIONS

54. Based on the foregoing, we find that Committee did not contravene the *Municipal Act, 2001* by holding the Meeting. The Committee was entitled to consider the Staff Report and Legal Opinion in closed session pursuant to the closed meeting exception for solicitor-client privilege under clause 239(2)(f) of the *Municipal Act, 2001*.
55. We have determined that the Committee was not permitted to rely in the exception related to litigation or potential litigation under clause 239(2)(e) but that does not serve to constitute the Meeting as improper since the Committee was entitled to rely on the exception pursuant to clause 239(2)(f).

⁹ *St. Catharines (City) v. Ontario (Information & Privacy Commissioner)* (2011), 81 M.P.L.R. (4th) 243 (Ont. Div. Ct.).

56. We caution Council, for future reference, that if it seeks to rely the closed meeting exception relating to litigation or potential litigation, the possibility of litigation must be real and discernible and not remote or speculative.

57. This Report has been prepared for and is forwarded to Council for its consideration. Given that we have not found a contravention of the *Municipal Act, 2001*, no Council action is required.

58. We note that subsection 239.2(11) of the *Municipal Act, 2001* provides that this Report is to be made public.

Respectfully submitted,

AIRD & BERLIS LLP



John Mascarin

Closed Meeting Investigator for The Corporation of the County of Lanark

Dated this 28th day of September, 2023