

REPORT ON CLOSED MEETING INVESTIGATION 2023-01

THE CORPORATION OF THE MUNICIPALITY OF PORT HOPE

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MUNICIPALITY OF PORT HOPE REPORT ON CLOSED MEETING INVESTIGATION 2023-01

I. INTRODUCTION

1. Aird & Berlis LLP is the Closed Meeting Investigator (the “**Investigator**”) for The Corporation of the Municipality of Port Hope (the “**Municipality**”).
2. In our capacity as Investigator, we received a formal request for a closed meeting investigation, dated June 27, 2023 (the “**Request**”).
3. The Request seeks an investigation concerning a Special Meeting of the Council for the Municipality (“**Council**”) held on May 23, 2023 (the “**Meeting**”), and more specifically, the closed session portion thereof (the “**Closed Session**”).
4. This is a report on our closed meeting investigation made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.¹
5. Upon concluding our investigation, we have found that the allegation in the Request, being that the Closed Session was improperly closed to the public on account of the attendance of three individuals who were neither representatives of the Municipality nor the Province (the “**Third Party Attendees**”), cannot be sustained.

II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

6. The Municipality has appointed Local Authority Services (“**LAS**”) to perform Closed Meeting Investigations pursuant to section 239.1 of the *Municipal Act, 2001*. LAS delegated its authority as Investigator to Aird & Berlis LLP.
7. 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.
8. 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 Municipality 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.
9. Upon conducting an investigation, we report to Council on the outcome of the investigation, together with any recommendations, as may be applicable. Our role as Investigator does not include engaging with the merits of any particular item of municipal business, or questioning the policies or priorities of the Municipality.

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

III. BACKGROUND

13. The property known municipally as 65 Ward Street (the “**Property**”) is the subject of a Minister’s Zoning Order (“**MZO**”), which was issued on June 13, 2023. Prior to the issuance of the MZO, Council had refused a development application filed by Southbridge Care Homes to permit the development of a long-term care facility on the Property.

IV. REQUEST

10. The Request was properly filed pursuant to section 239.1 of the *Municipal Act, 2001*.

11. The Request relates to the Closed Session which was closed to the public pursuant to clause 239(2)(h) of the *Municipal Act, 2001*. This clause provides that meetings may be closed to the public to consider information explicitly supplied in confidence to a municipality by another level of government.

12. After the Closed Session, the Municipality provided, at the request of members of the public, a list of the individuals who attended the Closed Session, apart from members of Council. The Municipality’s list named: the Honourable Paul Calandra, Minister of Long-Term Care, the Honourable David Piccini, MPP, Northumberland-Peterborough South (the “**MPPs**”), four representatives from the MPP’s offices and the Third Party Attendees, specifically, the CEO of Southbridge, the Vice President, Development of Southbridge and the CEO of Yorkville Healthcare Fund.

13. The Request raises the concern that the Third Party Attendees were privy to confidential information provided by the Province to the Municipality, while the citizens of the Municipality were excluded. The Request also speculates that the length of the Meeting (approximately 3 hours) suggests that the Third Party Attendees used the meeting to discuss matters unrelated to the exemption in clause 239(2)(h) of the *Municipal Act, 2001*.

14. The Request raises the following issue:

Did the Municipality fail to comply with section 239 of the *Municipal Act, 2001* or its procedure by-law because three persons who are not representatives of the MPP’s offices or the Municipality attended the closed portion of the Meeting?

V. 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:

- The Request and attachments;
- An audio-visual recording of the open session portion of the Meeting;
- Procedure By-law No. 49-2015, as amended (the “**Procedure By-law**”);
- Council Agenda for the open session portion of the Meeting;
- Council Minutes for the open session portion of the Meeting;
- the Closed Session Agenda; and
- the Closed Session Minutes.

16. In addition, we interviewed an employee of the Municipality who was present at the Meeting and the Closed Session.

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 order to make our determinations.

VI. THE MEETING

18. A notice of the Meeting was provided advising residents of the Meeting, the planned Closed Session and the reason for the Closed Session. The notice indicated that at the Meeting, Council would be provided information supplied in confidence from representatives of the Province, including MPP Piccini related to 65 Ward Street.

19. The notice also indicated that Council would not be making any decisions regarding the matter in closed session or during the open portion of the Meeting and further indicated that the purpose of the Meeting was solely for the confidential information to be received and discussed.

20. The Request does not raise any issues with the sufficiency of the notice or its compliance with the Municipality's Procedure By-law. Our review has not uncovered any issues with respect to the notice of the Meeting.

21. The Meeting was convened to permit Council to hold a closed session meeting to consider one agenda item, listed on the Special Council Agenda as follows:

3. CLOSED SESSION

Council will move into a closed meeting in accordance with the provisions of the Municipal Act in order to address a matter pertaining to 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 – Section 239(2)(h) – (65 Ward Street).

CARRIED

22. A letter from Minister Calandra to the Mayor requesting the Closed Session was attached to the Special Council Agenda.

23. Subsection 239(4) of the *Municipal Act, 2001* requires that before holding a closed session, Council must pass a resolution stating both the fact that it will hold a closed meeting and the "general nature" of the matter that will be discussed in closed session. This requirement is also mirrored in Section 5.3 of the Procedure By-law.

24. The Court of Appeal has commented that resolutions to convene in closed session should strive to balance the public interest in maximizing the information available to the public, while at the same time not undermining the very reason for excluding the public in the first place.²

² *Farber v. Kingston (City)* (2007), 32 M.P.L.R. (4th) 31 (Ont. C.A.).

25. As set out in the Special Meeting Minutes, Council passed the following resolution to convene into the Closed Session:

CLOSED SESSION

Moved by Councillor Andrews

Seconded by Councillor Collins

Be it resolved that Council proceed In-Camera in accordance with the provisions of the Municipal Act, 2001 in order to address a matter pertaining to 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 - Section 239(2)(h) - (65 Ward Street).

CARRIED

26. In our opinion, the resolution provided sufficient information with respect to the matter to be considered in Closed Session. Additional information regarding the Closed Session was provided by the Municipality by attaching the above noted letter by means of the Special Council Agenda.

27. The Third Party Attendees attended the Closed Session at the request of the Province. At the Closed Session, MPP Piccini provided a verbal update and confidential information regarding next steps. A detailed question and answer period ensued. There was no written report associated with this item.

(1) Statutory Framework

28. Ontario's "open meeting" rule is enshrined in section 239 of the *Municipal Act, 2001*, which requires that all meetings of a municipal council be open to the public, unless otherwise excepted. Unless they deal with a subject matter falling within a specific enumerated exception in subsection 239(2), all meetings are required to be held in an open forum where the public is entitled to attend and observe local government in process.

29. The purpose of the "open meeting" rule is to foster democratic values, increase transparency, and enhance public confidence in local government.³ However, it has been long recognized that there are certain situations where open meetings, or full transparency in the immediate term, would not serve the public interest or the interests of the municipal corporation.⁴ In providing for certain limited exceptions to the general rule, section 239 seeks to balance the need for confidentiality in certain matters with the public's right to information about the decision-making process of local government.⁵

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

⁴ See Ontario, *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information* (Toronto: The Committee, July 1984), at p. 7.

⁵ Stephen Auerback & John Mascarini, *The Annotated Municipal Act*, 2nd ed., (Toronto, ON: Thomson Reuters Canada Limited, 2017) (e-loose leaf updated 2021 – rel 1) annotation to s. 239.

30. To that end, subsection 239(2) sets out certain subject matter exceptions that permit Council to hold a meeting that is closed to the public, including 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,

...

- (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;

(2) Analysis

31. In our review of the Closed Session, in light of the statutory framework, Council was entitled to hold a portion of the Meeting in closed session and the attendance of the Third Party Attendees did not contravene section 239 of the *Municipal Act, 2001* nor the Municipality's Procedure By-law.

32. The closed meeting exception in clause 239(2)(h) allows a council to close a meeting to the public where it will discuss 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. This exemption was added to the *Municipal Act, 2001* by the *Modernizing Ontario's Municipal Legislation Act, 2017*.⁶ Clause 239(2)(h) was added to the *Municipal Act, 2001* along with other exceptions to align the statute more closely with the exceptions contained in the *Municipal Freedom of Information and Protection of Privacy Act*⁷ which provides that an institution, in response to a freedom of information request, may or is mandated to refuse disclosure of certain information.

33. Clause 239(2)(h) of the *Municipal Act, 2001* has not been judicially considered. However, the Information and Privacy Commissioner of Ontario has commented on the identical section of MFIPPA noting as follows:

... the purpose of an exemption of this nature 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. Clearly, it is the supplier of information's requirement of confidentiality that is the focus here, not a need of the recipient. It is only satisfaction of the former need, which would have a bearing on the ability of the institution to obtain information from other governments.⁸

34. The clear purpose of the exception in clause 239(2)(h) is to permit a municipality to receive confidential information from other levels of government. If a municipality were prohibited from

⁶ S.O. 2017, c. 10, Sched. 1.

⁷ R.S.O. 1990, c. M.56, ("MFIPPA").

⁸ Information and Privacy Commissioner of Ontario, Order M-844 (re City of Guelph, October 2, 1996) online: https://decisions.ipc.on.ca/ipc-cipvp/orders/en/item/130132/index.do?site_preference=normal

considering this information *in-camera*, its ability to receive and consider this type of confidential information may be compromised.

35. Our review has confirmed that confidential information was provided by the Province to members of Council at the closed portion of the Meeting. Accordingly, it was appropriate for Council to discuss the report under clause 239(2)(h) of the *Municipal Act, 2001*.

36. We find the presence of the Third Party Attendees at the Closed Session did not constitute a contravention of section 239 of the *Municipal Act, 2001* or the Procedure By-law or otherwise nullify the exemption in clause 239(2)(h) of the *Municipal Act, 2001*.

37. The Ontario Ombudsman, who acts as the default closed-meeting investigator where a municipality has not otherwise appointed one, has noted that there is nothing in the *Municipal Act, 2001* that prohibits municipal councils from inviting groups to attend closed meetings⁹.

38. The Municipality's Procedure By-law places no restrictions on who may attend a closed session of Council. It may be the case that the presence of a non-governmental representative is necessary to the discussion of a particular matter. In our view, there was nothing improper about Council permitting the Third Party Attendees to attend the Closed Session at the request of the MPPs.

39. We also note that there is nothing in the *Municipal Act, 2001* nor the Municipality's Procedure By-law that requires the Municipality to report on who attended a closed session of Council.

40. Based on the interview we conducted with an employee of the Municipality who was in attendance at the Closed Session, we are satisfied that the subject matter discussed remained within the scope of the exception set out in clause 239(2)(h) and that the presence of the Third Party Attendees did not somehow serve to bring the Closed Session outside of the confines of the exception in clause 239(2)(h).

41. For the reasons set out above, we do not find that the attendance of the Third Party Attendees at the Closed Session impacted the confidentiality of the matter discussed.

VII. CONCLUSION

42. Based on the foregoing, we find that Council did not contravene the *Municipal Act, 2001* or the Procedure By-law at the Closed Session by permitting the participation of the Third Party Attendees. There are no rules setting out who is permitted or not permitted to be in attendance at a closed session of Council. Council was entitled to allow any individuals to the Closed Session whose attendance it deemed appropriate or necessary.

⁹ Ontario Ombudsman, Letter to Township of North Huron (January 9, 2018), online: <https://www.ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Municipal-Meetings/Township-of-North-Huron-letter-accessible.pdf>

43. Based on the above, we have not found any breach of section 239 of the *Municipal Act, 2001* nor the Municipality's Procedure By-law with respect to the Closed Session.

44. This Report has been prepared for and is forwarded to Council for its consideration pursuant to subsection 293.2(10) of the *Municipal Act, 2001*.

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



Laura Dean

Closed Meeting Investigator for The Corporation of the Municipality of Port Hope

Dated this 21st day of July, 2023