

REPORT ON CLOSED MEETING INVESTIGATION – 2022-01

THE CORPORATION OF THE TOWN OF WHITCHURCH-STOUFFVILLE

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INTRODUCTION

A request for a closed meeting investigation was received on April 18, 2022 (the “**Complaint**”). It was sent to us in our capacity as the closed meeting investigator (“**Investigator**”) for The Corporation of The Town of Whitchurch-Stouffville (the “**Town**”).

The Complaint alleges that the Town’s Council (“**Council**”) held an closed session meeting over one year ago on April 6, 2021 (the “**Meeting**”) that contravened section 239 of the *Municipal Act, 2001*¹ and the Town’s Procedural By-law No. 2016-001-RE.²

The Complaint alleges that the Meeting was closed to the public in contravention of subsection 239(2) of the *Municipal Act, 2001*, and that Council’s resolution upon reconvening in open session did not comply with the requirements of the Procedural By-law.

CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

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 to Aird & Berlis LLP its authority to act as the Investigator for the Town.

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 complaint made by any person to determine whether the Town has complied with section 239 of the *Municipal Act, 2001* or a by-law enacted under subsection 238(2) (i.e. a procedure by-law) in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation to Council, together with any recommendations as may be applicable.

THE COMPLAINT

The Complaint was properly filed pursuant to section 239.2 of the *Municipal Act, 2001*.

The Complaint alleges that the Meeting was improperly held in closed session. In particular, the Complaint asserts that the subject matter considered at the Meeting did not entitle Council to consider the matter in closed session pursuant to the exception in clause 239(2)(c) of the *Municipal Act, 2001*. The Complaint specifically asserts that “at no time was there a financial agreement between the town and the proponent of the application for the full disposition of the Town owned property.”

The Complaint also alleges that Council’s “report out” in open session was insufficient, noting that “a more in depth explanation should have been released.”

¹ S.O. 2001, c. 25.

² Town of Whitchurch-Stouffville, By-law No. 2016-001 RE, *Procedure By-law* [“**Procedure By-law**”].

ISSUES

The Complaint raises the following issues with respect to the Meeting:

1. Did the exception in clause 239(2)(c) of the *Municipal Act, 2001* apply to allow Council to hold a portion of the Meeting in closed session?
2. Did Council's resolution upon re-entering the open session portion of the Meeting provide sufficient detail to comply with the Town's Procedural By-law?

INVESTIGATION

We initially reviewed the request in accordance with our standard in-take process and determined that the request related to matters within the scope of our jurisdiction as Investigator pursuant to sections 239.1 and 239.2 of the *Municipal Act, 2001*.

We communicated to both the requester and the Town's Clerk on April 19, 2022 that we would proceed with an inquiry into the matter.

In order to assess the request pertaining to this matter and to make a proper determination on the issues, we wrote to the Clerk to request copies of all applicable documentation necessary to undertake our review. Our office was promptly provided with all applicable documentation and records on May 9, 2022.

We have reviewed the following materials, in addition to the applicable law, as set out below:

- the Complaint;
- the Procedural By-law;
- materials received from the Town, including a closed meeting presentation provided to Council; and
- the meeting minutes, agendas and reports for the regular meeting as well as the Meeting.

Additionally, we conducted a telephone interview with the Council Coordinator (i.e. witness) who was in attendance at the Meeting that is the subject of the Complaint in order to verify our understanding of precisely what transpired at the closed session.

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.

The Town and its representatives were fully cooperative and forthright during our investigation and sought to assist us as required, including by providing us with timely disclosure of the materials and records we requested in order to conduct our investigation.

This is a report on the investigation of the Complaint 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 of Council are to be open to the public, unless otherwise excepted. Therefore, all meetings of Council, unless they deal with a subject matter falling within a specific exception set out in section 239, are required to be held in a public forum.

The exception relevant to this matter is set out in subsection 239(2) of the *Municipal Act, 2001*:

Exceptions

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

...

- (c) a proposed or pending acquisition or disposition of land by the municipality or local board;

(2) *Procedural By-law*

Subsection 238(2) of the *Municipal Act, 2001* requires the Town to pass a procedural by-law for governing the calling, place and proceedings of meetings. The Meeting referenced in the Complaint is subject to the Town's Procedural By-law.

Section 5 (5.7) of the Procedural By-law provides that all meetings are open to the public except where provided for in section 239 of the *Municipal Act, 2001*. The Procedural By-law provides that a Council meeting or part of a meeting may be closed to the public if the subject matter being considered is, *inter alia*:

- iii) A proposed or pending acquisition or disposition of land for municipal or local board purposes (*Municipal Act, Sec. 239(2)(c)*);³

The foregoing provision largely, although not identically, follows the same wording in clause subsection 239(2)(c) of the *Municipal Act, 2001*.

THE MEETING

On April 6, 2021, Council met electronically for the Meeting at 10:02 a.m. The Meeting proceeded ahead of the regular meeting of Council which was scheduled for 1:00 p.m. that date.

Council convened in closed session to discuss a number of closed session matters for approximately two and one-half (2 ½) hours. There was no issue raised as to the convening of the closed session meeting or the resolution that was passed by Council pursuant to subsection 239(4) of the *Municipal Act, 2001*.⁴

³ Procedural By-law, Section 5 (5.7) a) iii).

⁴ Item 5 of the regular meeting minutes indicates that Council passed a resolution to hold a closed meeting to consider, *inter alia*, a proposed or pending acquisition or disposition of land.

The subject matter of the Meeting which is the subject of this Report was listed as Item 3 on the agenda for the closed session.

The minutes of the Meeting note that the Town's Chief Administrative Officer provided a verbal report to Council "re: A proposed or pending acquisition or disposition of land for municipal or local board purposes (Municipal Act, Sec. 239(2)(c))."

The minutes disclose that Council discussed and deliberated on the verbal report and the information provided by staff.

This is supported by a presentation document entitled "CM-006-22 Attachment 3" which identifies a specific property owned by the Town for which the Town had received an offer to purchase (referred to in the presentation document as "Agreement of Purchase and Sale for <address>").

The minutes of the Meeting also disclose that Town staff were directed "to proceed as discussed."

FINDINGS

1. Did the exception in clause 239(2)(c) of the *Municipal Act, 2001* apply to allow Council to hold a portion of the Meeting in closed session?

Based on our review of the evidence, Council was entitled to consider the matter of a proposed disposition of Town-owned land in closed session pursuant to the exception in clause 239(2)(c) of the *Municipal Act, 2001*.

The evidentiary record clearly disclosed that there was an offer to purchase property owned by the Town. In our view, this constitutes a "proposed...disposition of land by the municipality" in accordance with clause 239(2)(c) of the *Municipal Act, 2001*. This subject matter would also fall within the scope of Section 5 (5.7) a) iii) of the Procedural By-law.

The exception in clause 239(2)(c) (as well Section 5 (5.7) a) iii) of the Procedural By-law) – which was cited and relied on by the Town – as the exception permitting the closed session for the discussion is intended to protect the municipality's bargaining position in a land transaction.⁵

The exception applies to transactions that are "proposed" or "pending," rather than to hypothetical or speculative future transactions that may or may not occur.⁶ In order for the exception under clause 239(2)(c) to apply, there must be some evidence to demonstrate an actual transaction is actively being negotiated, or that there is some proposed or potential transaction that will be negotiated.⁷

⁵ See *Final Order MO-2468-F, Toronto (City)(Re)*, 2009 CanLII 60399 (Ont. I.P.C.); cited in Ombudsman of Ontario, *Investigation into whether Council for City of Port Colborne held illegal closed meetings on March 8, 2010, January 27, 2014, and December 8, 2014* (November 2015), online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/city-of-port-colborne>.

⁶ Ombudsman of Ontario, *Investigation into whether Council for the Town of Fort Erie held an illegal closed meeting on December 10, 2014* (April 2015), online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/town-of-fort-erie>.

⁷ *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information*, Toronto: The Committee, July 1984; cited with approval in *R.S.J. Holdings Inc. v. London (City)* (2007), 36 M.P.L.R. (4th) 1 at para. 18 (S.C.C.).

Based on our review of the evidentiary record, there was a proposed offer to purchase and, therefore, the matter fell within the scope of the exception. The fact that there was only a single offer to purchase does not derogate from the authority of Council to meet in a closed setting to consider the matter.

The Complaint noted as follows:

The property was not put on the open market for sale. This was a closed sale to one single purchaser with the Town, Mayor and CAO negotiating the price and acting on behalf of the Town of Whitchurch-Stouffville.

If the Town wanted to sell the property, then they can hold a Closed Door meeting for the expressed reason of an open to the market sale of the lands that may involve multiple offers or multiple purchasers. As that did not happen, it only involved one purchaser and one price, then this goes against the Ontario Municipal Act, Section 239.2(c), along with Procedural Bylaw 238(2) in respect to holding a meeting or part of a meeting that was closed to the public.

There is nothing in the *Municipal Act, 2001* that requires multiple offers or multiple purchasers in order for a municipal council to consider a proposed disposition of land in a closed meeting.⁸

Council did not contravene section 239 of the *Municipal Act, 2001* or the Procedural By-law by convening in the Meeting to consider the offer to purchase. The exception in clause 239(2)(c) of the *Municipal Act, 2001* permitted Council to hold the Meeting in the absence of the public to discuss the proposed disposition of Town land that arose by virtue of the submission of an offer to purchase certain municipal lands. Only members of Council and certain members of Town staff were in attendance at the Meeting.

2. Did Council's resolution upon re-entering the open session portion of the Meeting provide sufficient detail to comply with the Town's Procedural By-law?

While Council was permitted to convene in a closed session to consider the proposed disposition of land, based on our review of the evidence, Council's resolution to "report out" in this instance did *not* comply with Section 5 (5.7) e) of the Procedural By-law.

The Complaint asserted as follows:

Council is also in contravention of the [Municipal] Act and procedural Bylaws in not reporting correctly upon closing of the Closed Door Meeting and reporting the happenings to the public.

The so-called "reporting out" from a closed meeting is not a requirement that is established in or regulated by the *Municipal Act, 2001*. Not being statutorily prescribed, the requirements for a proper "reporting out" from a closed session vary from municipality to municipality. In this case, Council was not in contravention of the *Municipal Act, 2001*.

The practice of "reporting out" from a closed session is a matter that is typically addressed in a municipality's procedural by-law.

⁸ The actions of the Council did not contravene the Town's Sale and Other disposition of Land By-law No. 2008-057-LA.

Section 5 (5.7) e) of the Town's Procedural By-law sets out Council's obligations to "report out" from a closed meeting session as follows:

Where appropriate and where it does not conflict with the best interest of the Town, Council shall report any decision made in the Closed Meeting upon reconvening in Open Session.

In this case, the public minutes from the regular meeting held on April 6, 2021 set out in Item 9 – Items Arising from a Closed Meeting. Only one item is listed and there is no reporting of the matter of the proposed disposition of land that comprised Item 3 of the Meeting.

In our view, the resolution to "report out" in this instance does not comply with Section 5(5.7) e) of the Procedural By-law because there is no mention whatsoever of the matter that was considered by Council in the Meeting. We appreciate that direction was given to Town staff, that the disclosure of the specific site was not disclosed and that it was important that it not be disclosed at the time. However, the complete dearth of information with respect to Item 3 of the Meeting does not appear to comply with the requirements of the Procedural By-law.

We recognize that Section 5(5.7) e) provides some discretion as to which Council decisions will be disclosed, based on whether disclosure would be appropriate and not conflict with the best interests of the Town. However, the complete absence of any reference to Council having considered the potential disposition of land and that it provided direction to Town staff in the closed session does not appear to comply with Section 5(5.7) e). There appeared to be no consideration by Council of whether it would be in the best interest of the Town for there to be any reporting of the matter that had been discussed in closed session.

Even if Council had only reported out that it did consider a proposed or pending acquisition or disposition of land and that it provided direction to staff, the public would have been aware that the matter was at least considered by Council during closed session. In the absence of any mention, the public is left to wonder if the matter had even been discussed or considered by Council.

CONCLUSIONS

Based on the foregoing, we conclude that Council did not contravene either the *Municipal Act, 2001* or its Procedural By-law in considering the offer to purchase that had been submitted to the Town. It is our view that clause 239(2)(c) clearly authorizes a council to meet in the absence of the public to consider a proposed disposition of land.

The evidence demonstrated that a *bona fide* offer to purchase municipal lands has been submitted to the Town and, therefore, notwithstanding that there was only a single proposed purchaser, the Town was nevertheless permitted to convene the Meeting to deliberate upon what was a proposed disposition of land.

With respect to the Council's failure to report out anything related to the matter, we have determined that Council did not comply with the reporting out requirement of the Procedural By-law. We have noted that discretion is provided to Council pursuant to Section 5(5.7) e) but the complete absence of any mention of the matter being considered in the Meeting left the public entirely in the dark as to whether Council even met to consider the matter.

RECOMMENDATIONS

Based on our Closed Meeting Investigation Report 2020-01 dated February 22, 2021, we had recommended that both Town staff and members of Council should familiarize themselves with the proper application of section 239 of the *Municipal Act, 2001*. We commend the Town for having held an education and training session which was carried out on September 14, 2021.

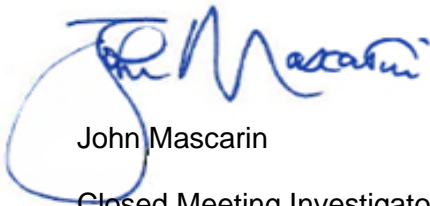
This Report has concluded that the Town did not comply with its obligation to report out as required by Section 5(5.7) e) of the Procedural By-law. The Meeting took place prior to the education session attended by Council and Town staff. Based on this Report we are confident that Council and Town staff will be mindful of the responsibility to report out from closed meetings to the greatest extent possible while always being mindful of the public interest in doing so. We recognize that balancing disclosure to the public for purposes of accountability and transparency while still maintaining the confidentiality of closed meeting information to protect the public interest is not always easy to achieve.

Our simple recommendation in this case is Council and Town staff always consider both the objectives of open and transparent local government when it comes time to “report out” what has occurred at a closed meeting and the need to protect the public interest which is the very purpose for why the matter was considered in a closed setting in the first place.

This Report has been prepared for and is forwarded to Council for its consideration pursuant to subsection 239.2(10) of the *Municipal Act, 2001*.

Subsection 239.2(11) of the *Municipal Act, 2001* provides that this Report is to be made public and subsection 239.1(12) provides that Council shall pass a resolution stating how it intends to address this Report.

AIRD & BERLIS LLP



John Mascarin

Closed Meeting Investigator for The Corporation of the Town of Whitchurch-Stouffville

Dated this 30th day of May, 2022