

REPORT ON CLOSED MEETING INVESTIGATION – 2020-01

THE CORPORATION OF THE CITY OF STRATFORD

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INTRODUCTION

Our office received a request for a closed meeting investigation, dated December 8, 2020 (the “**Complaint**”). Through our initial intake process and review, and with the consent of the person who had filed the Complaint (the “**Requestor**”), the scope of the Complaint was significantly reduced and was re-submitted by the Requestor in January 2021.

We wrote to the Clerk of The Corporation of The City of Stratford (the “**City**”) in our capacity as the closed meeting investigator (“**Investigator**”) to request copies of all applicable documentation necessary to undertake our review. Our office was provided all applicable documentation and records on January 29, 2021.

The Complaint alleges that the City’s Council (“**Council**”), at its Committee of the Whole – In Camera Session meetings on September 10, 2018, October 9, 2018, and November 13, 2018, contravened section 239 of the *Municipal Act, 2001*.¹

In particular, the Complaint alleges that these meetings were improperly closed to the public, in contravention of subsection 239(2) of the *Municipal Act, 2001*, to discuss subject matter that is not permitted to be considered in a closed meeting.

The Complaint also alleges that the City has failed to comply with the provisions of the *Municipal Act, 2001* and the City’s Procedure By-law No. 140-2007, as amended (the “**Procedure By-law**”), by failing to provide an adequate description of the matters that were discussed in closed session.

CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

The City 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 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. 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 an 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.

¹ S.O. 2001, c. 25.

THE COMPLAINT

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

The Complaint was initially filed on December 8, 2020. The first iteration of the Complaint requested an investigation of all closed meetings held by Council from September 1, 2018 to December 16, 2020 – totalling approximately 75 meetings.

In essence, the Complaint speculated that at some point between September 1, 2018 and December 16, 2020, Council may or may not have considered, in a closed meeting, making a request to the Minister of Municipal Affairs and Housing (the “**Minister**”) to issue a Minister’s Zoning Order (“**MZO**”) pursuant to section 47 of the *Planning Act*² in support of a proposed float glass factory on lands that were annexed by the City from the neighbouring Township of Perth South.

The grounds for this allegation were that no such reference to a request for an MZO could be found in the open meeting records, and that City staff have not provided such information upon inquiry. Further, public representations by the Minister indicated that all MZOs were made at the request of municipal councils and “discussed in an open meeting in a council and presented as a resolution to the Ministry”.³ The Complaint submits that the *Municipal Act, 2001* would not allow this subject matter to be discussed or a resolution requesting a MZO to be passed in closed session.

Upon review of the Complaint, as initially drafted, we determined that it lacked sufficient detail and reasonable particulars to proceed with a full investigation. In December 2020, we advised the Requestor of these deficiencies and provided the Requestor with an opportunity to address them through appropriate revisions to their Complaint.

After further discussions in January 2021, the Requestor resubmitted the Complaint, which was reduced to three meetings of Council: on September 10, October 9, and November 13, 2018. The scope of the Complaint was revised on the basis that, by public accounts, the City was first made aware of the proposal for the float glass factory in the Fall of 2018, and the Mayor sent his first of three letters to the Minister requesting an MZO on November 20, 2018. The Requestor maintained their position that this subject matter was not permitted to be discussed in a closed session pursuant to subsection 239(2) of the *Municipal Act, 2001*.

For the purpose of our investigation into this aspect of the Complaint, only the meeting held on September 10, 2018 (the “**Meeting**”) requires consideration in this Report.

In addition, the Complaint also takes issue with the manner in which the City indicates what matters it will discuss in closed session and “reports out” from closed session. The Complaint alleges the City does not include sufficient detail as to the “general nature of the matters being considered” in closed session, and simply recites the closed meeting exception it relies upon. This practice is alleged to contravene the *Municipal Act, 2001* and the Procedure By-law. In the Requestor’s view, this practice makes it “very difficult to glean” when Council would have considered a request for an MZO, if at all.

² R.S.O. 1990, c. P.13.

³ The following interview with the Minister is specifically cited in the Complaint: <https://www.tv.o.gov/article/what-bill-197-means-for-planning-deal-making-and-cities-in-ontario>

The Complaint refers to the requirements of the Procedure By-law which specify what information is needed in a resolution to move into closed session, and a resolution to “rise and report” after a closed session. The Complaint alleges Council does not follow either requirement given that “at no time is the public aware of the general nature of the matters being discussed, other than the reference to the statute giving permission.”

ISSUES

The Complaint raised the following issues:

Issue 1

Did the exception in clause 239(2)(f) of the *Municipal Act, 2001* apply to allow Council to hold a **portion** of the Meeting in closed session to discuss Agenda Item 6.3?

Issue 2

Do the City’s resolutions passed before holding a meeting in closed session comply with the *Municipal Act, 2001* and the City’s Procedure By-law?

Issue 3

Do the City’s “rise and report” resolutions passed following a closed meeting comply with the City’s Procedure By-law?

INVESTIGATION

In order to assess the Complaint and to make a proper determination on the issues, we have reviewed the following materials, in addition to the applicable law, as set out below:

- the Complaint, including additional correspondence and materials received from the Requestor;
- the Procedure By-law, including various amendments thereto; and
- the open and closed meeting minutes, agendas and reports for the meetings at issue.

Additionally, we conducted telephone interviews with three (3) persons (i.e. witnesses) with direct, relevant knowledge about the subject matter of the Complaint.

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 City and its representatives were fully cooperative and forthright during our investigation and sought to assist us as required.

A draft copy of this Report was provided to the City on April 19, 2021. We received additional comments and submissions from the City in response to our draft report, which have been addressed in this report.

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.⁴

Therefore, all Council or committee meetings, unless they deal with a subject matter falling within a specific exception set out in section 239, are required to be held in an open forum where the public is entitled to attend.

The exception that is 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,

...

(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

Further, clause 239(4)(a) of the *Municipal Act, 2001* sets out certain procedural requirements to be satisfied before the City holds a closed meeting:

Resolution

(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) *The Procedure 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.

All meetings referenced in the Complaint are subject to the Procedure By-law.

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.

In summary, the closed meeting provisions in the Procedure By-law in force during the timeframe of the meetings under investigation include:

- a discretionary provision that a meeting may be held in closed session for the reasons set out in the *Municipal Act, 2001*;
- a provision that the rules of procedure that apply to regular meetings also apply to meetings held in closed session, with some limited exceptions;
- a requirement that before all or part of a meeting is closed to the public, Council state by resolution the fact of the holding of the closed meeting, and the general nature of the matters to be considered;
- a requirement that any voting during a closed meeting be in accordance with the *Municipal Act, 2001*, or in other words, that the only votes permitted during a closed meeting are for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality;
- a requirement that where a closed meeting is held before a Regular Council meeting, Council shall report the general nature of the matters considered at that meeting;
- a requirement that where a matter arising from closed session requires a Council decision by resolution and/or by-law, that the matter be listed on a subsequent Council agenda to give notice to the public;
- an exception to the above rule for urgent matters requiring a decision of Council, and, in such circumstances, permitting Council to report out and consider the matter at the same Council meeting;
- a provision that the lack of receipt of a closed meeting agenda by any member of Council does not affect the validity of the meeting or action taken at a closed meeting; and
- a requirement that members of Council, staff and other persons in attendance at a closed meeting turn off their communication devices for the duration of a closed meeting.⁵

THE MEETING

As noted above, for the purpose of our investigation as to whether there was compliance with subsection 239(2) of the *Municipal Act, 2001*, only the Meeting has been identified as requiring consideration in this Report.

On September 10, 2018, Council met for a Committee of the Whole In-Camera Session Meeting, commencing at 5:05 p.m.

It is Council's practice, codified in its Procedure By-law, to schedule separate "Committee of the Whole In-Camera Session" meetings to consider closed session matters, as opposed to regularly considering closed session matters during a portion of a regular Council meeting.

⁵ Procedure By-law, Part 6 – In-Camera Meetings; as amended by By-laws No. 80-2010 and 129-2014.

1. Council Convenes in Closed Session

Council's publicly-available agenda for the Meeting indicates that Council would pass the following motion before moving into closed session:

1.0 That the meeting adjourn to an In-camera Session to discuss:

Personal matters about an identifiable individual(s) including municipal employees or local board employees (section 239.(2)(b));

Proposed or pending acquisition or disposition of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years;

Advice that is subject to solicitor-client privilege including communications necessary for that purpose (section 239.(2)(f));

Proposed or pending acquisition or disposition of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years;

Advice that is subject to solicitor-client privilege including communications necessary for that purpose (section 239.(2)(f));

Proposed or pending acquisition or disposition of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years.

It is our understanding, confirmed by witnesses in our investigation, that the above motion to move into closed session was presented on the Meeting Agenda, posted in advance of the Meeting, and was the only motion available to the public. No other minutes of the Meeting are publicly available.

The In-camera Minutes of the Meeting, which are not available to the public, indicate the formal resolution Council actually passed before moving into closed session:

1.0 Adjournment into In-camera Session

Motion by Councillor Beatty and Councillor Mark

That the meeting adjourn into an In-camera Session to discuss:

4.1 Code of Conduct Complaint

[Personal matters about an identifiable individual(s) including municipal employees or local board employees (section 239.(2)(b))]

4.2 Request to purchase Part Lot 32 and Part Lot 33, Plan 36 – 65 Home Street

[Proposed or pending acquisition or disposition of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years)]

5.1 Agreement to Lease Space to the Canadian Opera Company

[Advice that is subject to solicitor-client privilege including communications necessary for that purpose (section 239.(2)(f))]

6.1 Sale of Part Lot 10, Plan 44M-38, Wright Business Park

[Proposed or pending acquisition or disposition of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years)]

6.2 MOU with Automotive Parts Manufacturers Association

[Advice that is subject to solicitor-client privilege including communications necessary for that purpose (section 239.(2)(f))]

7.1 To declare Surplus – City Owned Lands fronting Forman Avenue

[Proposed or pending acquisition or disposition of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years)]

6.3 Added – Company X Manufacturer Inquiry

[Advice that is subject to solicitor-client privilege including communications necessary for that purpose (section 239.(2)(f))]

Carried

Agenda Item 6.3 “Added – Company X Manufacturer Inquiry” (“**Agenda Item 6.3**”) was not included on the Meeting Agenda in advance, but was added for discussion at the outset of the open portion of the Meeting.

2. **Agenda Item 6.3**

In accordance with the Procedure By-law, Agenda Item 6.3 was added to the Agenda at the Meeting by the Mayor before Council moved into closed session. The item was a verbal update from the Mayor only and was not accompanied by any staff report, correspondence or other materials.

The reference in the title of Agenda Item 6.3 to a “Company X” is the City’s standard placeholder title when an entity does not wish its name to be released. The evidence in our investigation indicates this reference is in no way intended to represent the initials or abbreviation of any company name.

The Mayor provided a verbal briefing to Council on the following information. The City, through its economic development corporation, investStratford, was approached by a large company expressing interest in the possibility of locating a manufacturing facility in the City. As is common practice, the inquiry was made on a strictly confidential basis to protect the private interests involved. No details were shared about the name of the company or the industry at the time, other than the fact that the nature of the facility was a manufacturing use.

The City regularly receives requests by businesses and other entities to assist in locating operations on suitable properties. However, at the time this matter was before Council, there was a “critical shortage” of large, serviced industrial lands that were suitable for the proposed manufacturing facility. In the past, the City has annexed land from adjacent municipalities to fulfil such needs.

As there were no suitable properties to accommodate the manufacturing facility within the City, the Mayor advised that the manufacturing facility might require the annexation of land from a neighbouring municipality, the Township of Perth South.

The Mayor advised Council of an upcoming visit by a company official to view the City as a possible location and have preliminary discussions with City representatives. The Mayor also advised that the Mayor of Perth South and the local MPP for Perth-Wellington, Randy Pettapiece, were aware of the matter.

City staff, investStratford and the City’s external legal counsel did not present any additional information to Council.

Based on our investigation, there was no evidence to suggest there was any discussion among members of Council on this matter; the In-camera Minutes of the Meeting confirm this. No questions were asked of City staff. Furthermore, there was no evidence the City’s external legal counsel was asked questions, spoke to the matter, or provided any further information to Council, or in other words, provided or was asked to provide legal advice.

There was no evidence Council considered or discussed the process by which the manufacturing facility would receive approval, nor was there any evidence that Council discussed the types of incentives that would be offered to the company.

As Agenda Item 6.3 was simply for the information of Council, there was no direction given to City staff, or any indication that follow up matters were necessary at the time. Council did not make any decision or give direction on the matter (i.e. take a vote), and the In-camera Minutes of the Meeting reflect this.

3. Closed Meeting Exception

Council’s consideration of Agenda Item 6.3 was closed pursuant to the exception for matters dealing with advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

Our investigation indicated this closed meeting exception was selected because the City’s external legal counsel was present at the Meeting, and if members of Council had questions about annexation proceedings, the City’s external legal counsel would be able to answer questions about the legal process.

We will note that the City’s external legal counsel was already set to be present at the Meeting to discuss other items with Council, and Agenda Item 6.3 cited the same exception on account of the potential for questions about annexation proceedings.

Despite the City’s intention in choosing this exception, the evidence of our investigation indicates no member of Council asked any questions, and the City’s external legal counsel did not answer any questions and did not provide any information to Council, including legal advice.

4. Council Reconvenes in Open Session

After considering other matters in closed session, the Meeting adjourned at 6:18 PM. Council reconvened in open session at 7:00 PM in a Regular Council Meeting and adopted the following resolution:

5. Report of the Committee of the Whole In-Camera Session:

...

5.3 At the September 10, 2018 Session under the *Municipal Act, 2001*, as amended, matters concerning the following items were considered:

Personal matters about an identifiable individual(s) including municipal employees or local board employees (section 239.(2)(b));

Proposed or pending acquisition or disposal of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years;

Advice that is subject to solicitor-client privilege including communications necessary for that purpose (section 239.(2)(f));

Proposed or pending acquisition or disposal of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years;

Advice that is subject to solicitor-client privilege including communications necessary for that purpose (section 239.(2)(f)); and

Proposed or pending acquisition or disposal of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years.

ADDED: Advice that is subject to solicitor-client privilege including communications necessary for that purpose (section 239.(2)(f)); and

At the In-camera Session direction was given on all matters.

FINDINGS

1. Did the exception in clause 239(2)(f) of the *Municipal Act, 2001* apply to allow Council to discuss Agenda Item 6.3 in closed session?

Based on our review of the evidence on a balance of probabilities, Council was not entitled to consider Agenda Item 6.3 in closed session under the exception in clause 239(2)(f) of the *Municipal Act, 2001*.

(a) Statutory Provisions

As noted, clause 239(2)(f) of the *Municipal Act, 2001* provides as follows:

Exceptions

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

...

(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

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.⁶ 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.⁷

While municipal powers should be afforded a broad and liberal interpretation,⁸ the scope of the open meeting rule must take into account the proposition that a municipal council “should only exercise its discretion [to hold a closed meeting pursuant to section 239] when there is some potential harm, financial or otherwise, of having a discussion...” in open session.⁹

(b) Clause 239(2)(f) – “Solicitor-Client Privilege”

The exception in clause 239(2)(f) – which was cited and relied on by the City – provides that a meeting may be closed to the public if the matter under consideration is the giving or receiving of “advice that is subject to solicitor-client privilege,” which includes communications necessary for giving or receiving legal advice. The purpose of this exception is to protect the municipality’s interests as a client seeking legal advice.

The case law and other closed meeting investigation reports considering this exception have adopted a three-part test for determining whether a verbal or written communication is subject to solicitor-client privilege. The communication must:

1. be between a client (i.e. the municipality or a local board) and its lawyer;
2. entail the seeking or giving of legal advice; and
3. be considered confidential by the parties.¹⁰

⁶ See e.g. *R.S.J. Holdings Inc. v. London (City)* (2007), 36 M.P.L.R. (4th) 2 (S.C.C.).

⁷ 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.

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

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 (CanLII).

¹⁰ See *Solosky v. R.*, [1979] S.C.J. No. 130, [1980] 1 S.C.R. 281 (S.C.C.).

The mere presence of a lawyer at a meeting of the municipality or local board will not be enough for the meeting to automatically fall within the scope of this exception.¹¹ On the converse, a lawyer need not be present for this exception to apply; for example, municipal staff may convey legal advice from a lawyer to council in a meeting closed under this exception.¹² However, an essential element of this exception is that some legal advice must be communicated.

(c) Exception for “Solicitor-Client Privilege” Not Applicable

Based on our review of the relevant authorities and evidence obtained during our investigation, the matter before Council was not legal advice or communications for the purpose of giving or receiving legal advice. Accordingly, this portion of the Meeting was not closed to the public for this statutorily-authorized purpose.

At its crux, Agenda Item 6.3 was an information briefing from the Mayor to members of Council. By all accounts, it was characterized as a “high level” update on a company’s search for a suitable property in the City. There was no discussion by Council on the topic, no decision made nor any direction given to City staff.

The City’s external legal counsel was present during discussion of Agenda Item 6.3. However, during the course of our investigation, there was no evidence the City’s external legal counsel spoke to the matter, was asked any questions relating to the matter or was asked to give or provide legal advice on the matter.

It is our understanding the exception in clause 239(2)(f) was selected because of the potential for members of Council to ask questions about the potential annexation component of the matter. Despite this, no questions were put to the City’s external legal counsel on this or any related topic.

As has been determined in other closed meeting investigation reports, the mere presence of a lawyer at a meeting does not serve to bring discussion on the matter within this exception.¹³ This conclusion remains even if there is a possibility that members of Council will ask questions of the municipality’s lawyer. Absent actual communications for the purpose of giving or receiving legal advice, this exception does not apply.¹⁴

Accordingly, we conclude this portion of the Meeting was not permitted to be closed under clause 239(2)(f).

¹¹ Ombudsman of Ontario, *Investigation into the closed meeting held by the City of Niagara Falls on February 10, 2015* (November 2016) [“Niagara Falls”], online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2016/city-of-niagara-falls>

¹² Ombudsman of Ontario, *Investigation into whether council for the City of Greater Sudbury held illegal closed meetings on March 2, March 23, and April 26, 2016* (January 2017), online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2017/city-of-greater-sudbury>

¹³ See e.g. *Niagara Falls*, *supra* note 11, at paras. 37-38.

¹⁴ Ombudsman of Ontario, *Investigation into a complaint about closed meetings held by the City of Timmins on August 8 and August 29, 2016* (January 2017), at para. 28, online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2017/city-of-timmins>

(d) Other Applicable Exception

In response to our draft report of findings, the City urged us to consider that Council would have been entitled to discuss Agenda Item 6.3 in closed session under the exception in clause 239(2)(k) of the *Municipal Act, 2001*. This exception allows consideration in closed session of 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 City. We note that the City did not cite or rely upon this exception at the Meeting to consider Agenda Item 6.3, and has only relied on this exception this after the fact.

The City submits that the exception in clause 239(2)(k) would have applied as the Mayor’s verbal update made clear that he would be engaging in “preliminary discussions” with a company official and wanted to advise members of Council of the potential for these negotiations. At the time the Mayor provided the update in closed session, the company was also inquiring with other municipalities as to a suitable location – essentially “venue shopping” for the best site.

The Mayor’s update through Agenda Item 6.3 set out how the City intended to proceed with negotiations with the company and Council “confirmed and acknowledged by not making any statements, objections or other comments” at the Meeting.

In the City’s submission, the release of any further information related to the company, such as the name of the company, the site being considered for the facility, and availability of servicing, would have had a “significant and detrimental impact” on the potential negotiation.

After careful consideration of the City’s submissions and a review of the evidence of our investigation, we do not agree that this exception would have applied in the circumstances and disagree with the City’s characterization of the facts.

In order for the exception in clause 239(2)(k) to apply, the municipality must show that:

1. The *in camera* discussion was about 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 municipality.¹⁵

In order to satisfy the first part of this test, there must be some evidence that council discussed a course of action or manner of proceeding that is “pre-determined”, meaning some organized structure or definition given to the course to be taken, or discussed a formulated and especially detailed method by which a thing is to be done.¹⁶

¹⁵ Ombudsman of Ontario, *Investigation into a complaint about a closed meeting held by the City of St. Catharines on June 25, 2018*, (February 2019), at paras. 30-31 [“St. Catharines”], online:

<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2019/city-of-st-catharines>

¹⁶ *Ibid*, at para 32; citing *Order PO-2034, Ontario (Community and Social Services) (Re)*, 2002 CanLII 46436 (Ont. I.P.C.); aff’d *Ontario (Ministry of Community & Social Services) v. Ontario (Information & Privacy Commissioner)*, 2004 CanLII 11694 (Ont. Div.Ct.). The Ontario Information and Privacy Commissioner

The purpose of the exception in clause 239(2)(k), as recently confirmed by the Ontario Ombudsman, is to allow a municipality to protect information that could undermine its bargaining position or give another party an unfair advantage over the municipality during an ongoing or future negotiation.¹⁷

The exception in clause 239(2)(k), at its crux, permits a municipality to discuss, debate, and ultimately formulate its bargaining position and give direction to those undertaking the negotiation without fear of “showing its cards”. An important but understated aspect of this exception is that a municipal corporation must act through its council by by-law (or resolution).¹⁸ No one member of council has authority to bind the corporation or give direction, absent an express delegation of powers. Further, a municipal council cannot give legal, binding direction through informal mechanisms, such as the nod of a head. Some level of discussion, or at the very least, a vote on a resolution, is required from a council.

The evidence in our investigation revealed that no such discussion took place during the Meeting, and further that Council did not take any vote or pass any resolution in response to Agenda Item 6.3 that would indicate ratification or formulation of a bargaining position. The Mayor’s verbal update to Council was for informational purposes only, and did not contain any information on what the City was prepared to offer or position it would take in dealing with the company.

The Mayor’s update referred to the particular needs of the company, being a large, serviced industrial site. However, the Mayor did not present any specific information on the types of incentives, benefits, or concessions the City was prepared to make to attract the company. In other words, there was no discussion of “positions, plans, procedures, criteria or instructions” at the Meeting. The mere fact that a negotiation may occur in the near future was not enough to bring this topic within the ambit of clause 239(2)(k).

With benefit of hindsight, City staff and members of Council will be aware of the types of offers and incentives eventually offered to the company. At the time of the Meeting however – which in our view is the only relevant period of time – no such information was being considered by Council.

The circumstances of Agenda Item 6.3 differ from those assessed in other closed meeting investigation reports the City has referred us to. In each of those cases, the municipal council considered and discussed some detailed, pre-determined course of action to be applied to an ongoing negotiation where the positions of the parties has been established, and ultimately the municipal council made a decision to direct municipal staff on specific topics subject to the negotiation and differing positions of the parties.

In summary, the exception in clause 239(2)(k) would not have applied in the circumstances as there was no discussion of what the City’s bargaining position would be.

considered a substantially similar provision of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 c. F.31, s. 18(1)(e), which provides an exemption to disclosure of records that contain “positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario.”

¹⁷ Ombudsman of Ontario, *The Ombudsman received a complaint about a closed meeting held by council for the City of Pickering on August 10, 2020* (September 23, 2020) p. 3, online: <https://www.ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Municipal-Meetings/Pickering-Letter-from-Ontario-Ombudsman-Sept-2020-accessible.pdf>

¹⁸ *Municipal Act, 2001*, ss. 5(1), (3).

2. Do the City's resolutions passed before holding a meeting in closed session comply with the *Municipal Act, 2001* and the City's Procedure By-law?

Based on our review of the evidence on a balance of probabilities, Council's general resolutions to hold a closed meeting do not comply with the *Municipal Act, 2001* and the Procedure By-law.

(a) Resolution to go into Closed Session

For each of the three meetings we were asked to investigate, the only publicly-available resolutions to go into closed session were in the following format:

1.0 Adjournment into In-camera Session

Motion by...

That the meeting adjourn to an In-camera Session to discuss:

Personal matters about an identifiable individual(s) including municipal employees or local board employees (section 239.(2)(b));

Proposed or pending acquisition or disposition of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years;

Advice that is subject to solicitor-client privilege including communications necessary for that purpose (section 239.(2)(f));

Proposed or pending acquisition or disposition of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years;

Advice that is subject to solicitor-client privilege including communications necessary for that purpose (section 239.(2)(f));

Proposed or pending acquisition or disposition of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years.

The above motion from the September 10, 2018 meeting agenda is indicative of the City's general practice. Council's resolution recites the section of the *Municipal Act, 2001* on which it relies to hold a closed meeting, but does not give any further detail as to the particular topics that will be discussed. The publicly-available resolutions for the October 9, 2018 and November 13, 2018 meetings also reflect this format.

(b) Requirement for Resolution to go into Closed Session

Subsection 239(4) of the *Municipal Act, 2001* requires Council to state by resolution both the fact it will hold a closed meeting and the general nature of the matter to be discussed at the closed meeting. In *Farber v. Kingston (City)*, the Ontario Court of Appeal emphasized the need for such resolutions to balance the public interest in maximizing information available to the public while also not undermining the reason for excluding the public. In that case, the Court of Appeal held that a council's statutory obligation to state the "general nature" of the matter to be considered in closed session is not satisfied by a generic language or a recitation of the closed meeting exception.¹⁹

¹⁹ *Farber v. Kingston (City)* (2007) 31 M.P.L.R. (4th) 31, at paras. 18-21 (Ont. C.A.); [*"Farber"*].

Citing *Farber v. Kingston (City)*, the Ombudsman of Ontario has determined that subsection 239(4) of the *Municipal Act, 2001* requires municipalities to provide at least a brief description of the issues under discussion in such a resolution, and that simply reciting the language of the applicable closed meeting exception does not generally satisfy this requirement.²⁰ There is an important distinction between the “general nature of the matter” and the applicable closed meeting exception that must be reflected in such a resolution.

These statutory requirements are also adopted in the Procedure By-law. The version of the Procedure By-law in-force during the timeframe of the meetings under investigation provided as follows:

6.4 Procedure – moving into – In-camera

Prior to adjourning to an In-camera Session for one or more of the reasons authorized in the *Municipal Act*, or any other applicable legislation, the Council or Committee of the Whole shall adopt a resolution in Open Session, stating:

- a) the fact that the meeting is adjourning to an In-camera Session,
- b) the general nature of the matter(s) to be considered, and
- c) a brief description of the matter(s) being considered, where necessary.

This provision of the Procedure By-law must be understood in light of Council’s statutory obligation pursuant to subsection 239(4) of the *Municipal Act, 2001*.

(c) City’s Resolutions to go into Closed Session are Deficient

Based on our review, the City’s general resolutions to go into closed session are deficient. The City regularly does not provide any detail about the “general nature” of the matters to be discussed in closed session. Instead, the resolutions to go into closed session restate the language of the applicable closed meeting exceptions. In the language of the Court of Appeal’s decision in *Farber v. Kingston*, Council’s resolutions do not maximize transparency so far as possible in the circumstances.

Accordingly, the resolutions to go into closed session for the meetings held on September 10, October 9 and November 23, 2018 each contravene subsection 239(4) of the *Municipal Act, 2001* and Section 6.4 of the Procedure By-law.

In our view, Council’s In-Camera Minutes indicate the structure and content of a resolution that would comply with these requirements. However, the In-Camera Minutes are not made publicly-available. The purpose of the resolution to go into closed session, being to foster an open and transparent decision-making process, is therefore defeated. To the extent it can, the City is encouraged to follow the structure and content of such resolutions in its publicly-available council documents.

²⁰ Ombudsman of Ontario, *Investigation into whether the Town of Mattawa Council and its Ad Hoc Heritage Committee held improperly closed meetings* (December 2010) at para. 51, online: <https://www.ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/mattawafinal.pdf>

There are certainly some instances where the very nature or particular sensitivity of a matter under consideration would allow for a less detailed description in a resolution. Additionally, there may be circumstances where the need for confidentiality encompasses even the fact that a matter is being discussed by Council where disclosure would impair any interest that the exception is designed to protect.²¹ However, this does not give the City blanket permission to shield its closed meeting discussions behind generic resolutions. The City must engage in the delicate exercise of balancing openness and transparency, on the one hand, with protecting the City's interests in the closed session item, on the other. Generic resolutions as a default are simply not sufficient.

If the City is engaged in the re-negotiation of a collective agreement with municipal employees, Council might choose to rely on the exception for "labour relations or employee negotiations." The identity of the bargaining unit and the very fact of collective bargaining taking place will be plain and obvious; the City's willingness to make concessions on wages or hours of work, for example, might not be. In such a circumstance, there would be no prejudice to the City's interest in protecting its bargaining position if its resolution to move into closed session stated such information. Simply reciting the exception for "labour relations" would not maximize transparency.

3. Do the City's "rise and report" resolutions passed following a closed meeting comply with the City's Procedure By-law?

Based on our review of the evidence, on a balance of probabilities, Council's general "rise and report" resolutions provide insufficient detail to comply with Section 6.5 of the Procedure By-law. The only exception to this is where matters required a Council decision by resolution or by-law; in those instances, the general nature of those matters were reported in detail.

(a) Resolution to "Rise and Report"

Council's "rise and report" resolutions are passed at the next Regular Council meeting after a closed session meeting, which in the normal course immediately follows a Committee of the Whole In-Camera Session meeting. Similar to resolutions to go into closed session, Council's "rise and report" resolutions follow the following general format:

5. Report of the Committee of the Whole In-Camera Session:
...
- 5.3 At the September 10, 2018 Session under the *Municipal Act, 2001*, as amended, matters concerning the following items were considered:
 - Personal matters about an identifiable individual(s) including municipal employees or local board employees (section 239.(2)(b));
 - Proposed or pending acquisition or disposal of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years;
 - Advice that is subject to solicitor-client privilege including communications necessary for that purpose (section 239.(2)(f));
 - Proposed or pending acquisition or disposal of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years;

²¹ See *Farber, supra* note 19, at para. 21.

Advice that is subject to solicitor-client privilege including communications necessary for that purpose (section 239.(2)(f)); and

Proposed or pending acquisition or disposal of land by the municipality or local board (section 239.(2)(c)) (includes municipal property leased for more than 21 years.

ADDED: Advice that is subject to solicitor-client privilege including communications necessary for that purpose (section 239.(2)(f)); and

At the In-camera Session direction was given on all matters.

- 5.4 From the September 10, 2018 Session under the Municipal Act, 2001 as amended:

Council Code of Conduct

[Personal matters about an identifiable individual(s) including municipal employees or local board employees (section 239.(2) (b)

R2018-382

Motion by Councillor Bunting

Seconded By Councillor Mark

THAT the investigation report finding there have been no violations of the Council Code of Conduct and finding that the Complainant's June 2018 allegations are not substantiated, be received for information purposes.

Carried

The above resolution from the Regular Council meeting on September 10, 2018 is indicative of the City's general "rise and report" practice. Unless there is a specific Council decision or resolution, Council's "rise and report" resolution recites the section of the *Municipal Act, 2001* on which it relied to hold the closed meeting, but does not describe in any detail the matter discussed.

(b) Requirement to "Rise and Report"

"Reporting out" or "rising and reporting" from a closed meeting is not a requirement that is set out in the *Municipal Act, 2001*. The practice of "reporting out" from closed session is a matter typically addressed in a municipality's procedure by-law. The precise requirements, not being statutorily mandated, vary amongst municipalities.

Section 6.5 of the Procedure By-law, as applicable to the meetings under investigation, sets out Council's obligation to "rise and report" from a closed meeting and provides as follows:

6.5 Procedure – rise and report – In-camera

Where Council or Committee of the Whole met in In-camera Session prior to a Council meeting, the general nature of the matter(s) considered at the In-camera Session shall be reported out at that Council meeting. Further, In-camera matters that require a decision of Council by resolution and/or by-law shall be listed on a subsequent Council agenda in order to give prior notice to the public. Urgent matters that require a decision of Council may be reported out and considered at the same Council meeting.

(c) Council's General "Rise and Report" Resolutions Do Not Provide Sufficient Detail

Based on the evidentiary record, we have determined that Council's general resolutions to "rise and report" do not comply with Section 6.5 of the Procedure By-law. Much like its resolutions to hold a closed meeting, Council's "rise and report" resolutions recite the applicable closed meeting exception, but do not provide any detail or description of the "general nature" of the matters considered in closed session.

Similar to our conclusions above on Issue 2, Council's "rise and report" resolutions should generally include greater detail about the matter (i.e. topic) discussed in closed session. Simply reciting the applicable closed meeting exception defeats the pressing objectives of accountability and transparency underlying the "open meeting" rule and the Procedure By-law. To the greatest extent possible, "rise and report" resolutions should contain a brief description of the issues discussed in closed session.

The exception to this practice is where a Council resolution is required to give effect to a decision arising from closed session. In those instances, the "rise and report" resolutions do provide sufficient information for a member of the public to understand the "general nature" of the matter discussed in closed session.

CONCLUSIONS

Based on the foregoing, we conclude that Council contravened the *Municipal Act, 2001* and the Procedure By-law in three respects:

- Council was not permitted to discuss Agenda Item 6.3 in closed session pursuant to clause 239(2)(f) at the Meeting;
- Council's resolutions to go into closed session contravene the *Municipal Act, 2001* and the Procedure By-law as they regularly provide insufficient detail of the subject matter to be discussed; and
- Council's general "rise and report" resolutions contravene the Procedure By-law as they also provide insufficient detail of the general nature of the matters discussed.

RECOMMENDATIONS

Based on our conclusions, we recommend that City staff and members of Council familiarize themselves with the proper application of section 239 of the *Municipal Act, 2001*.

During the course of our investigation, we learned the closed meeting exception relied on to consider Agenda Item 6.3 in closed session was selected on the good faith but mistaken belief that the exception permitted discussion if there was a potential for questions to be asked of legal counsel. As such, it would benefit City staff and members of Council to receive further training on the closed meeting exceptions and types of situations to which these exceptions may apply.

We also recommend that Council ensure its resolutions to go into closed session and its "rise and report" resolutions provide sufficient detail of the "general nature of the matter" – beyond the language of the applicable closed meeting exception – discussed in closed session, to the extent

it is possible in the circumstances. The City should consider the objectives of open and transparent local government when drafting such resolutions and seek to provide as much information as possible without negating or severely derogating from the very reason the matter is being considered in closed session.

This Report has been prepared for and is forwarded to Council for its consideration. We note that subsection 239.2(11) of the *Municipal Act, 2001* provides that this Report is to be made public. Subsection 239.2(12) provides that Council shall pass a resolution stating how it intends to address this Report.

AIRD & BERLIS LLP

A handwritten signature in black ink, appearing to read 'JGP', with a long horizontal flourish extending to the right.

John George Pappas

Closed Meeting Investigator for The Corporation of The City of Stratford

Dated this 11th day of May, 2021