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REPORT ON CLOSED MEETING INVESTIGATION 2024-02

THE CORPORATION OF THE COUNTY OF PRINCE EDWARD

Aird & Berlis LLP

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COUNTY OF PRINCE EDWARD REPORT ON CLOSED MEETING INVESTIGATION 2024-02

I. INTRODUCTION

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

2. A formal request for a closed meeting investigation, dated September 20, 2024 (the “**Request**”), was filed with the Clerk of The Corporation of the County of Prince Edward (the “**County**”), and subsequently provided to our office, in our capacity as the closed meeting investigator (the “**Investigator**”) for the County.

3. The Request seeks an investigation of a meeting of the Council of the County (“**Council**”) held on September 10, 2024 (the “**Meeting**”), and more particularly, the closed session portion thereof. The Request alleges that the Meeting contravened subsection 239(1) of the *Municipal Act, 2001* as a portion of the Meeting was improperly closed to the public. The Request does not raise any assertion that Council breached the County’s Procedural By-law No. 16-2022.

4. We have conducted an investigation of the matter and our conclusion is that we have found that the allegations in the Request cannot be sustained.

II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

5. The County appointed Local Authority Services Inc. (“**LAS**”) as its Investigator pursuant to section 239.1 of the *Municipal Act, 2001*. LAS has delegated its authority to act as Investigator to Aird & Berlis LLP pursuant to its authority under subsection 239.2(6) of the *Municipal Act, 2001*.

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 Investigator.

7. Prior to accepting any investigation mandate, Aird & Berlis LLP conducts a thorough legal conflict search and makes other conflict inquiries to ensure that 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 County has complied with section 239 of the *Municipal Act, 2001* or a by-law enacted under subsection 238(2) (i.e., a procedure by-law) in respect of a meeting or part of a meeting that was closed to the public.

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

9. Upon concluding an investigation, our office reports to Council on the outcome of the investigation, together with any recommendations as may be applicable.

10. 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 County.

III. REQUEST

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

12. The Request alleges that the portion of the Meeting that addressed the topic “Advisory Committee” was improperly closed to the public in reliance on clause 239(2)(b) of the *Municipal Act, 2001*.

13. The Request further asserts that during this closed session, Council discussed the dissolution of the Athol Recreational Committee (“**ARC**”), an advisory committee of Council, and that this discussion did not qualify for discussion in closed session pursuant to the cited closed meeting exception.

IV. REVIEW OF MATERIALS AND INQUIRY PROCESS

14. In order to properly consider the allegations in the Request and make our determinations, we have reviewed the following materials:

- The County’s Procedural By-law No. 16-2022;
- The agenda and minutes for the open session of the Meeting; and
- The agenda and minutes for the closed session of the Meeting.

15. In addition to our review of the materials referred to above, we interviewed the Clerk who we determined had relevant information regarding what transpired at the Meeting.

16. 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 we deemed necessary in order to make our determination.

17. The County and its representatives were fully cooperative and forthright during our investigation process. We commend their efforts in providing assistance to us as requested.

V. THE MEETING

18. The Meeting took place on Tuesday, September 10, 2024, commencing at 6:00 p.m. The open session agenda originally contemplated a single closed session, included as Item 5.1:

5.1 Motion to move into closed session

THAT Council move into closed session to consider:

- Personal matters about an identifiable individual, including municipal or local board employees – Advisory Committee;
- Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- Advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

Pursuant to Section 239 (2) (b) (e) & (f) of the Municipal Act.

19. After the Mayor called the Meeting to order at 6:00 p.m., and following the confirmation of the open session agenda, Council passed a resolution to convene in closed session, which resolution replicated the recommendation above. The closed session was called to order at 6:06 p.m. and recessed at 6:59 p.m. so that Council could resume open session to deal with its regular business.

20. Additional time was required to address all of the closed session matters intended to be considered by Council at the Meeting. Following its consideration of the open session items on its agenda, Council passed a second resolution, essentially mirroring the wording of the first resolution, to reconvene the Meeting in closed session. This second resolution is recorded as Item 13.1 in the open session minutes:

13.1 Motion to move into closed session

Motion 2024-405

Moved by Councillor McNaughton

Seconded by Councillor Branderhorst

THAT Council move into closed session to consider:

- Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- Advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- Personal matters about an identifiable individual, including municipal or local board employees – Advisory Committee.

Pursuant to Section 239 (2) (e) (f) and (b) of the Municipal Act.

CARRIED

21. During the continuation of the closed session meeting, Council received a verbal update from a senior member of County staff and a member of Council regarding the conduct of certain individuals who had been appointed to a local board of the County, which was subsequently revealed in the open session minutes to be the ARC. Council was advised that six (6) members of the ARC had resigned over a nine-month period, citing the behaviour of certain members of the ARC as the primary reason for their departures. The verbal update to Council described how this behaviour had created what was characterized as an “unbearable” working environment, rendering the ARC unable to function effectively.

22. Discussion by members of Council during this item of business was kept general and high-level, focusing on the challenges posed by the conduct of these individuals and its impact on the functionality of the ARC.

23. The closed session minutes indicate that Council passed a motion to provide direction to County staff to take specific actions regarding the ARC. These directions and actions were subsequently disclosed in Item 14.3 of the open session minutes, as reproduced below:

14.3 Athol Ward Recreation Committee

Motion 2024-412

Moved by Councillor Branderhorst

Seconded by Councillor MacNaughton

THAT in accordance with sections 13.3(3) and (4) of the Procedural By-law, all Athol Ward Recreation Committee membership be rescinded; and,

THAT Council direct the Clerk's Office to recruit public members for the Athol Ward Recreation Committee in accordance with the Public Appointment to Committees and Boards of Council Policy.

CARRIED

24. The Meeting was concluded and adjourned at 10:27 p.m.

VI. ANALYSIS

25. The sole issue raised in the Request is as follows:

- Was Council entitled to consider the topic "Advisory Committee", and more specifically, the dissolution of the ARC, in closed session in reliance on clause 239(2)(b) of the *Municipal Act, 2001*?

26. The Requestor takes the position that Council's consideration of this topic and the dissolution of the ARC ought to have been conducted in open session.

(1) Statutory Framework

27. Ontario's "open meeting" rule is set out in subsection 239(1) of the *Municipal Act, 2001*, which requires that all meetings of a municipal council be held in an open forum where the public is entitled to attend and observe local government in process.

28. 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.²

² Stephen Auerback & John Mascarin, *The Annotated Municipal Act, 2nd ed* (Toronto: Thomson Reuters Canada, 2020), commentary on section 239.

29. Subsection 239(2) sets out eleven separate subject matter exceptions that entitle a council to hold a meeting that is closed to the public. Relevant to this Report and investigation is the following exception, which was cited in Council's resolution to convene in closed session:

Exceptions

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

...

- (b) personal matters about an identifiable individual, including municipal or local board employees;

(2) Exception for "Personal Matters"

30. The closed meeting exception in clause 239(2)(b) allows a council to close a meeting to the public where it will discuss personal matters about identifiable individuals. The purpose of this closed meeting exception is to allow a municipality to have discussions concerning one or more individuals in a setting that is closed to the public so to protect the privacy of the individual(s).

31. While, in general, information related to an individual's professional capacity does not typically fall within the exception for "personal" matters, it may fall within the scope of the exception when it pertains to the scrutiny of an individual's conduct.³ The exception would also apply to critical remarks about the conduct of a member of council, a local board, or a committee that extends *beyond* their official capacity.⁴

32. By way of example, in a 2015 report regarding the Town of Bracebridge, the Ontario Ombudsman concluded that discussions held in closed session regarding the removal of a member from the Town's Accessibility Advisory Committee fell within the "personal matters" exception under clause 239(2)(b) of the *Municipal Act, 2001*.⁵ In that case, the council's closed session discussions involved scrutiny of an individual's performance and qualifications, as well as opinions about their suitability for the committee. The Ombudsman determined that such discussions properly fit within the exception for "personal matters" as they pertained to the conduct of an identifiable individual beyond their professional capacity.

(3) Application of the Exception

33. The verbal update provided to Council during the continuation of the closed session of the Meeting focused on concerns regarding the conduct and behaviour of certain individuals involved with the ARC. It highlighted actions that were having a significant negative impact on other members of the ARC and which contributed to a challenging and unsustainable working environment. The verbal update also included the experiences of an affected member who shared their account on the condition that it only be shared in closed session, reflecting the sensitivity and personal nature of the matters raised.

³ Ontario Ombudsman, [Municipality of South Huron](#) (March 2, 2015) at para. 31; citing the Information and Privacy Commissioner of Ontario, Order [MO-2519](#).

⁴ Ontario Ombudsman, [Township of Lanark Highlands](#) (January, 2018) at para. 52.

⁵ Ontario Ombudsman, [Town of Bracebridge](#) (March, 2015).

34. Based on our review of the evidentiary record and our interview with the Clerk, the verbal update and discussion during the second closed session of the Meeting involved remarks that were critical in nature regarding the conduct of certain ARC members. It was clear that the focus of the session related to the subject matter of the closed meeting exception under clause 239(2)(b) of the *Municipal Act, 2001*.

35. In our view, the subject matter of the second closed session of the Meeting fell within the scope of the closed meeting exception in clause 239(2)(b) relating to personal matters about identifiable individuals, namely, the members of the ARC.

VII. CONCLUSION

36. For the reasons set out above, we have determined that Council did not contravene the *Municipal Act, 2001*. Council was entitled to consider the verbal update on the ARC in closed session pursuant to the closed meeting exception in clause 239(2)(b).

37. 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*.

38. As Investigator, we have discretion under the *Municipal Act, 2001* to disclose in our report such matters as, in our opinion, ought to be disclosed in order to establish our conclusions and recommendations.⁶ We have exercised that discretion to disclose only those matters we believe are necessary in order to consider and assess the issue raised in the Request.

39. We recommend that this Report be made public by publishing it on a Council agenda.

Respectfully submitted,

AIRD & BERLIS LLP



John George Pappas

Closed Meeting Investigator for The Corporation of the County of Prince Edward

Dated this 6th day of January, 2025

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⁶ *Municipal Act, 2001*, s. 223.15(2), as applicable by virtue of s. 239.2(9).