

AIRD BERLIS

Laura Dean
Direct: 416.865.7706
E-mail: ldean@airdberlis.com

REPORT ON CLOSED MEETING INVESTIGATION 2023-01

THE CORPORATION OF THE CITY OF WINDSOR

Aird & Berlis LLP

Laura Dean

March 11, 2024

TABLE OF CONTENTS

I. INTRODUCTION	1
II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION	1
III. REQUEST	2
IV. REVIEW OF MATERIALS AND INVESTIGATIVE PROCESS	2
V. STATUTORY FRAMEWORK	2
VI. PROCEDURE BY-LAW	4
VII. THE MEETING	6
VIII. FINDINGS.....	7
IX. RECOMMENDATIONS.....	8

CITY OF WINDSOR 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 City of Windsor (the “**City**”).
2. In our capacity as Investigator, we received a formal request for a closed meeting investigation, dated March 2, 2023 (the “**Request**”).
3. The Request sought an investigation concerning the closed session portion of a meeting held by Council for the City (“**Council**”), while convened as the Striking Committee for agencies, boards and commissions (the “**Striking Committee**”). The meeting of the Striking Committee in question was held on February 27, 2023 (the “**Meeting**”).
4. The Request alleged that, at the Meeting, the Striking Committee voted to assume authority for all Windsor-based business improvement areas (“**BIAs**”) for a period of 60 days. The Request did not question the lawful authority of the Striking Committee to take this action, but alleged that section 239 of the *Municipal Act, 2001* did not authorize the Striking Committee to convene into a closed session to discuss the matter. The Request also asserted that there was no public notice of the matter being placed on the agenda and no accompanying staff report.
5. This is a report on our closed meeting investigation made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.¹

II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

6. The City 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 to investigate 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 request 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.
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 City.

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

III. THE REQUEST

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

11. To summarize, the Request raises the following issues:

- Did the Striking Committee fail to comply with section 239 of the *Municipal Act, 2001* with respect to the closed session portion of the Meeting?
- Did the Striking Committee fail to comply with the Procedure By-law 98-2011 (the “**Procedure By-law**”) with respect to the closed portion of the Meeting?

IV. REVIEW OF MATERIALS AND INVESTIGATIVE PROCESS

12. In order to properly consider the Request and make our determinations on the issues, we have reviewed the following materials:

- the Request;
- the Procedure By-law;
- Agenda for the Meeting;
- City Clerk’s notes from the Meeting;
- Report of the Striking Committee from the Meeting;
- The “Council Agendas” page of the City’s website; and
- Agenda, minutes and audiovisual recording of the March 9, 2023 Special Meeting of Council.

13. In addition, we 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.

14. We provided the City with the opportunity to review a draft of this report and met with the City Clerk and Commissioner of Corporate Service to discuss our preliminary findings. We have considered that discussion and their subsequent written submissions in preparing this final report.

V. STATUTORY FRAMEWORK

15. Ontario’s “open meeting” rule is enshrined in section 239 of the *Municipal Act, 2001*, which requires that “meetings” be open to the public, unless otherwise excepted.

16. Section 238 defines “meeting” 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.

17. Section 238 of the *Municipal Act, 2001* defines “committee” as:

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

18. The Striking Committee is comprised of all members of Council. It is a “committee” as defined above, whose meetings are captured by section 239 of the *Municipal Act, 2001*.

19. 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.

20. The purpose of the “open meeting” rule is to foster democratic values, increase transparency, and enhance public confidence in local government.² However, it has been long recognized that there are certain circumstances where open meetings, or full transparency in the immediate term, would not serve the public interest or the interests of the municipal corporation.³ In providing for certain limited exceptions to the general rule, section 239 seeks to balance the need for confidentiality in certain matters with the right of the public to information respecting the decision-making process of local government.⁴

21. Subsection 239(2) lists eleven matters that permit council or a committee 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,

...

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

² See *RSJ Holdings Inc. v. London (City)* (2007), 36 M.P.L.R. (4th) 1 (S.C.C.).

³ See Ontario, *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information* (Toronto: The Committee, July 1984), at p. 7.

⁴ 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.

22. 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 an identifiable individual, including municipal or local board employees”. The agenda for the meeting which was provided to members of Council relied upon this provision to go into closed session at the Meeting.

23. The Ontario Ombudsman has found that information about the education and employment history of applicants for volunteer committee positions, and discussions of their suitability for a committee, may fit within the exception in clause 239(2)(b).

24. The clear purpose of the exception in clause 239(2)(b) is to protect the privacy of identifiable individuals.⁵

25. Subsections 239(4) and 239(5) of the *Municipal Act, 2001* set out certain requirements for meetings that are closed to the public:

Resolution

239 (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;

...

Open meeting

(5) Subject to subsection (6), a meeting shall not be closed to the public during the taking of a vote.

VI. PROCEDURE BY-LAW

26. The Striking Committee is made up of all members of Council and is governed by the Procedure By-law.

27. The purpose of the Striking Committee is described in section 22.1 of the Procedure By-law:

All members of Council shall meet as a Striking Committee as soon as convenient after the inaugural meeting of Council to make recommendations on the appointment of members to the various Council Committees, and other Boards, Commissions and Agencies, in accordance with the City of Windsor Council Appointment Policy attached as Appendix "C".

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

28. Appendix "C" of the Procedure By-law contains the City's Council Appointment Policy. Section 5.5 of the policy provides, in part, as follows:

At the appropriate Council Meeting, Council shall consider all circulated applications [for vacancies on City agencies, boards, committees, commissions, panels or corporations] in closed session in accordance with Part II of the *Municipal Freedom of Information and Protection of Privacy Act* and with Section 239 of the *Municipal Act, 2001*...

29. The Striking Committee makes recommendations to Council through Striking Committee reports. The City's process is to attach Striking Committee reports to public agendas of Council meetings. The Striking Committee recommendations which are contained in the reports are then considered and voted on by Council in open session.

30. Section 5.6 of the Council Appointment Policy provides:

After due consideration in closed session, Council shall in open session vote on any recommendation for appointments arising from closed session deliberations.

31. Section 3.4 of the Procedure By-law sets out the rules for closed meetings of Council.

32. Section 3.4(a) of the Procedure By-law provides that "Council meetings, or portions thereof, may be held "In Camera" only in accordance with section 239 of the *Municipal Act, 2001*".

33. Section 3.4(b) further provides:⁶

In the event that the subject matter to be considered at a meeting qualifies to be considered in closed session pursuant to section 239...of the *Municipal Act, 2001*, as amended, the public notice of meeting provided by the Clerk shall contain the general nature of the matter to be considered as required by the Act, and in addition, the Clerk shall provide to all members of Council a further notice which contains specifics of the confidential matters to be considered.

34. Section 3.4(c) further provides:

Prior to moving "In Camera" for one of the reasons listed in section 3.4(a), Committee/Council shall pass a motion in public session stating:

- i) the fact that the Committee/Council is convening into closed session, and
- ii) the general nature of the matter to be considered.

⁶ We note that this provision imposes an additional requirement beyond the *Municipal Act, 2001* and may preclude Council from deciding to go into closed session on an *ad hoc* basis until notice has been given for the next meeting.

35. Section 3.4(d) of the Procedure By-law states:

A meeting may be closed to the public during the taking of a vote if section 3.4(a) permits it, or requires that the meeting be closed to the public; and the vote is for a procedural matter or for giving directions and instructions to officers, employees, or agents of the municipality or local board or committee of either of them, or persons retained by, or under contract to the municipality or local board.

36. Section 3.4(e) of the Procedure By-law further states:

All resolutions, directions and general actions resulting from "In Camera" discussions shall be confirmed/adopted in open or public session.

37. Finally, section 3.4(f) of the Procedure By-law provides:

The rules of Council as outlined in the procedural by-law shall apply during the closed meetings of Council.

VII. THE MEETING

38. The agenda for the Meeting was provided to Council on February 24, 2023. The agenda is labelled "Private & Confidential". It lists one specific agenda item which is identified as "Personal matter – about identifiable individuals – appointment of BIA members" and cites clause 239(2)(b) of the *Municipal Act, 2001*. The agenda also includes, as a standard line item before "Motion to adjourn", "Motion to move back into public session for the purpose of adopting recommendations and providing the clerk with instructions". The agenda also attaches a slate of potential appointees to the various BIAs.

39. The agenda for the Meeting was not posted online or otherwise made available to the public in advance. As part of this investigation, we spoke to the City Clerk who advised that paper copies of the agenda were available at the Meeting in accordance with the practice in place at the time, in case members of the public or the media attended.

40. The Clerk's notes from the Meeting indicate that Council passed a resolution to move *in camera*. The notes do not identify the section of the *Municipal Act, 2001* the Striking Committee was relying on to convene in closed session.

41. As part of this investigation, we spoke with the City Clerk who advised that the process in place at the time of the Meeting provided that the Mayor would verbally state the reason for convening *in camera* by either referencing the meeting agenda or by stating the relevant provision of the *Municipal Act, 2001*. We understand that in this circumstance, the Mayor referenced the agenda.

42. The Clerk's notes contain the Striking Committee's recommendations arising from its discussion at the Meeting. The notes indicate that the Striking Committee voted to move the recommendations forward for Council's consideration. The recommendations were subsequently incorporated into the Striking Committee's report from the Meeting.

43. The Striking Committee report was attached to the public agenda for the Special Council Meeting on March 9, 2023 which is posted on the City's website. The Striking Committee report was ultimately adopted at the open session of the March 9, 2023 Special Meeting of Council.

44. The report from the Meeting does not indicate that any portion of the Meeting was held in closed session.

VIII. FINDINGS

45. Upon concluding our investigation, we have made the following findings regarding compliance with the open meeting provisions of the *Municipal Act, 2001*:

- The Striking Committee's discussion regarding assuming authority for BIAs was not covered by the exemption in clause 239(2)(b) for "personal matter[s] about an identifiable individual including municipal or local board employees". If the discussion at the closed session of the Meeting had in fact dealt with the appointment of BIA members, then the exemption would have properly applied. Our investigation however, finds the appointment of BIA members was not the focus of discussion at the closed session of the Meeting. We find the discussion regarding Council's temporary assumption of the BIAs could have been parsed out of any discussion regarding "personal matter[s] about an identifiable individual" and should have occurred in open session. We therefore find the Striking Committee violated the open meeting rule when it discussed the matter in closed session.
- The closed session of the Meeting did not comply with clause 239(4)(a) of the *Municipal Act, 2001* because the Striking Committee did not state by resolution, prior to going into closed session, the fact of the holding of the closed meeting and the general nature of the matter to be considered. The requirements of clause 239(4) are clear that a resolution is required prior to going into closed session. A reference by the Mayor to the agenda prior to going into closed session does not satisfy the requirement that a resolution be passed stating the fact of the holding of the closed meeting and the general nature of the matter to be considered.
- The closed session of the Meeting contravened subsection 239(5) of the *Municipal Act, 2001*. As we have found above, the vote was with respect to the Striking Committee's recommendations related to Council's temporary assumption of the BIAs. The vote was not for a procedural matter or for giving directions and instructions to officers, employees, or agents of the City or persons retained by, or under contract to the City. Therefore, the vote was not permitted to have taken place in closed session.
- The City asserts that the *in camera* vote was to give directions to the Clerk to prepare and generate a Striking Committee report and, therefore, it did not contravene subsection 239(5) of the *Municipal Act, 2001*. We note that the recommendations make no reference to providing directions to the Clerk. Where council or a committee is instructing or directing an officer, the instructions or directions must be made clear in the resolution itself and cannot be implied or assumed. In addition, it appears obvious that some form of consensus was reached at the closed portion of the

Meeting. While a consensus may be reached without a vote, we note, as observed by the Ontario Ombudsman, the prohibition on voting in closed session extends to informal votes, such as straw polls or “shows of hands.”⁷

- We note that the Striking Committee report incorporating the Striking Committee’s recommendations arising from the Meeting was ultimately adopted in an open session of Council on March 9, 2023. The report was attached to the public agenda for the Special Council Meeting which was posted on the City’s website. The *Municipal Act, 2001* is clear that a vote cannot be taken in closed session except regarding the matters identified in subsection 239(5). The fact that the matter would ultimately be voted on or formalized by Council in open session does not relieve the Striking Committee from the requirement to comply with subsection 239(5).

46. With respect to compliance with the Procedure By-law, we make the following findings:

- the closed session of the Meeting did not comply with the requirements of the Procedure By-law for notice because no public notice of the Meeting or closed session, in the form of a public agenda, was posted online. It is not clear how members of the public would have known about the Meeting if advance notice had not been provided via a publicly-posted agenda.
- the closed session of the Meeting did not comply with subsection 3.4(e) of the Procedure By-law because the Striking Committee did not confirm or adopt in open session the directions resulting from the *in camera* discussions. It is not evident from the materials we reviewed that the Striking Committee formally convened back into open session at the Meeting.

IX. RECOMMENDATIONS

47. As a closed meeting investigator we are entitled to make recommendations in addition to reporting our findings and conclusions.

48. We recommend that the City provide notice of Striking Committee meetings to the public by posting all Striking Committee agendas online in accordance with the Procedure By-law. If a portion of the Striking Committee meeting is proposed to be held in closed session, the agenda must state the reason for going into closed session and provide a description of the general nature of the matter to be discussed.

49. We also recommend the City update its website to ensure that agendas and reports for all Striking Committee meetings which have occurred during this Council term are posted online.

50. The Committee must also ensure that prior to convening into closed session, it must state, by resolution, the fact of the holding of the closed meeting and the general nature of the matter to be considered.

⁷ Ontario Ombudsman, [Re Niagara District Airport Commission](#) (February 2013).

51. The City should also ensure these resolutions to go into closed session are recorded in the Striking Committee's reports. Resolutions must include a description of the general nature of the matter to be discussed "... in a way that maximizes the information available to the public while not undermining the reason for excluding the public."⁸

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

Respectfully submitted,

AIRD & BERLIS LLP



Laura Dean

Closed Meeting Investigator for The Corporation of the City of Windsor

Dated this 11th day of March, 2024

54997044.5

⁸ *Farber v. Kingston (City)*, 2007 ONCA 173, 31 M.P.L.R. (4th) 31 at para. 21.