

REPORT ON CLOSED MEETING INVESTIGATION 2023-02

THE CORPORATION OF THE CITY OF WINDSOR

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CITY OF WINDSOR REPORT ON CLOSED MEETING INVESTIGATION 2023-02

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 8, 2023 (the “**Request**”).
3. The Request seeks an investigation concerning meetings held by Council for the City (“**Council**”), while convened as the Striking Committee for agencies, boards and commissions (the “**Striking Committee**”). The Striking Committee meetings in question were held on November 28, 2022, December 12, 2022 and January 16, 2023 (collectively, the “**Meetings**”).
4. The Request also seeks an investigation regarding whether any closed sessions of the Meetings complied with the City’s Procedure By-law 98-2011 (the “**Procedure By-law**”) with respect to notice, reporting out and voting.
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 as investigator to Aird & Berlis LLP.
7. Prior to accepting any investigation mandate, Aird & Berlis LLP conducts a thorough legal conflict search and makes other conflict inquiries to ensure our firm is in a position to conduct an independent and impartial investigation.
8. Our jurisdiction as investigator is set out in section 239.2 of the *Municipal Act, 2001*. Our function includes the authority to investigate, in an independent manner, a 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 any closed portions of the Meetings?
- Did the Striking Committee fail to comply with the Procedure By-law with respect to any closed portions of the Meetings?

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 on November 28, 2022;
- Report of the Striking Committee from its meeting held November 28, 2022;
- City Clerk's notes from the Striking Committee meeting on November 28, 2022;
- Agenda for the Striking Committee meeting on December 12, 2022;
- Report of the Striking Committee from the meeting on December 12, 2022;
- City Clerk's notes from the Striking Committee meeting on December 12, 2022;
- Agenda for the Striking Committee meeting on January 16, 2023;
- Report of the Striking Committee from the meeting on January 16, 2023;
- City Clerk's notes from the closed session portion of the Striking Committee meeting on January 16, 2023; and
- Meeting minutes from the Council meeting on January 30, 2023.

13. In addition, we have 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 of the *Municipal Act, 2001* defines "meeting" broadly as:

"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 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. It is clear that the Striking Committee is a "committee" 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

21. However, it has been long recognized that there are certain situations where open meetings, or full transparency in the immediate term, would not serve the public interest or the interests of the municipal corporation.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 public's right to information about the decision-making process of local government.⁴

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

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

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;

23. 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; or

...

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

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

25. 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".

26. Appendix "C" of the Procedure By-law contains the City's Council Appointment Policy. Section 5.5 of this 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*...

27. The Striking Committee makes recommendations to Council through Striking Committee reports. The City attaches these reports to public agendas of Council meetings.

28. 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.

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

30. 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*".

31. Section 3.4(b) of the Procedure By-law further provides:

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.

32. 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.

33. 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.

34. Section 3.4(e) of the Procedure By-law further provides:

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

35. Finally, section 3.4(f) of the Procedure By-law states:

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

VII. THE MEETINGS

A. November 28, 2022 Striking Committee Meeting

36. The Striking Committee did not go into closed session at its meeting held on November 28, 2022. According to the City Clerk's notes, the Committee determined it was unnecessary to proceed into closed session at this Meeting because it was deferring citizen appointments to the various boards, agencies and commissions until to its meeting on January 16, 2023. We have confirmed through our investigation that the agenda for this meeting was not posted online or otherwise provided to the public. The Striking Committee's report from this meeting containing its recommendations to Council was considered by Council at its meeting on December 12, 2022 and was attached to the public agenda for that meeting.

B. December 12, 2022 Striking Committee Meeting

37. The Striking Committee met again on December 12, 2022. It was confirmed to us through our investigation that the Striking Committee did not go into closed session at this meeting. As above, we have confirmed that the agenda for this meeting was not posted online or otherwise provided to the public. The Striking Committee's report from this meeting was considered by Council at its meeting on January 16, 2023 and is attached to the public agenda for that meeting.

C. January 16, 2023 Striking Committee Meeting

38. The Striking Committee met again on January 16, 2023. The agenda, which was provided to members of the Striking Committee in advance of the meeting, does not identify that a portion of the meeting would be held in closed session and, therefore, does not contain a description of the matter to be considered, contrary to section 3.4(b) of the Procedure By-law. The agenda for this meeting was not posted online or otherwise provided to the public.

39. The Clerk's notes from the meeting on January 16, 2023 identify that a resolution was passed to convene *in camera*, however, the resolution identifying the fact of the closed meeting and the general nature of the matter to be considered is not recorded in the Striking Committee report. In the absence of the recorded resolution, we conclude that the Striking Committee did not comply with section 3.4(c) of the Procedure By-law and subsection 239(4) of the *Municipal Act, 2001* at this meeting.

40. It is clear from the Clerk's notes from the meeting on January 16, 2023 that the Striking Committee discussed matters about identifiable individuals, being those individuals who had applied for a citizen appointment. During the closed session, the Striking Committee discussed a slate of appointees for the relevant agencies, boards and commissions to be brought forward at a future meeting of Council for consideration and approval. There is no indication that the Striking Committee formally voted on any matters at this meeting. The Striking Committee moved back into open session following the closed session.

41. There is no indication that once back in open session, the Striking Committee confirmed or adopted the general actions resulting from its *in camera* session, as required by section 3.4(e) of the Procedure By-law.

42. The report from the January 16, 2022 meeting of the Striking Committee attaches a list of appointees selected by the Striking Committee and contains the following recommendation:

That the list of citizen and Council appointments (copy attached) to various Agencies, Boards and Commissions BE APPROVED, for the term commencing January 17, 2023 and ending November 14, 2026, except the Windsor Utilities Commission whose terms are staggered as indicated, or until their successors are appointed.

43. At its meeting on January 30, 2023, Council adopted the Striking Committee's January 16, 2023 report, thereby confirming the list of appointees attached to that public report.

VIII. FINDINGS

44. 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".

45. 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).

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

47. We find the Striking Committee did not contravene the closed meeting requirements at its meetings on November 28, 2022 or December 12, 2022 because it did not go into closed session at either of these meetings.

48. With respect to whether the closed session portion of the meeting on January 16, 2023 complied with the requirements of the *Municipal Act, 2001*, we have determined that:

- the subject matter fell squarely within the exemption to the open meeting rule contained in clause 239(2)(b) of the *Municipal Act, 2001* as relating to "personal matter[s] about an identifiable individual including municipal or local board employees". As such, we find that the Striking Committee was authorized to go into closed session to discuss citizen appointments at the meeting on January 16, 2023. Section 5.5 of the City's Council Appointment Policy contemplates that the deliberations of the Striking Committee regarding citizen appointments would take place in closed session;
- the closed session of the meeting on January 16, 2023 did not comply with clause 239(4)(a) of the *Municipal Act, 2001* because there is no record of the Striking Committee having stated by resolution, prior to convening *in camera*, the fact that it was holding the closed meeting and the general nature of the matter to be considered at the closed meeting; and

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

- the closed session of the meeting on January 16, 2023 did not contravene subsection 294(5) of the *Municipal Act, 2001* because no vote was taken at this meeting. The Clerk's notes show that the Striking Committee reached agreements regarding the various slates of candidates but there is no indication that any votes were taken. Despite our finding, we caution the Striking Committee that "informal" votes such as straw votes and a show of hands are not permitted by subsection 294(5).

49. With respect to compliance with the Procedure By-law, we make the following findings with respect to the closed session of the meeting held on January 16, 2023:

- it did not comply with the requirements of the Procedural By-law for notice because no public notice of the meeting or closed session thereof was provided;
- and
- it did not technically comply with subsection 3.4(e) of the Procedure By-law because the Striking Committee did not confirm or adopt any of its general actions resulting from the *in camera* discussions when it returned to open session. We note that the report of the Striking Committee setting out its directions and general actions was ultimately confirmed/adopted in an open session of Council on January 20, 2023. We find, however, that confirmation/adoption of such actions should have taken place once the Striking Committee rose from its closed session on January 16, 2023, and not at a subsequent Council meeting.

IX. RECOMMENDATIONS

50. While the public may wish to understand why the Striking Committee made certain public appointments, this is a matter that the Striking Committee is authorized to discuss in the absence of the public. Nevertheless, notice is a fundamental element of transparency. While members of the public may not have been able to participate in the closed session on January 16, 2023, notice of the meeting would have alerted members of the public to the meeting and to Council's future consideration of the Striking Committee's recommended list of appointments.

51. We note that agendas for Striking Committee meetings held on May 29, 2023, July 10, 2023 and November 27, 2023 have been posted online. We are aware of at least two other Striking Committee meetings which took place between January 16, 2023 and May 29, 2023. Agendas for these meetings have not been posted online.

52. We recommend the City maintain a consistent practice of posting the meeting agendas for the Striking Committee on its website, where the public would find notice of other Council and committee meetings. If a portion of a 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.

53. We are encouraged to see that those Striking Committee agendas which have been posted online contain a description of the general nature of the matter to be considered where a closed session is proposed.

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

55. For the purposes of transparency, the City should also ensure that resolutions to convene into closed session are recorded in reports of the Striking Committee. Such resolutions must include a description of the general nature of the matter that will be discussed in accordance with the requirements of clause 239(4)(a) of the *Municipal Act, 2001*.

56. Finally, despite our finding that the closed session of the January 16, 2023 meeting did not contravene the prohibition against voting therein in the *Municipal Act, 2001*, we remind the City that straw polls and shows of hand are not permitted by subsection 294(5).⁶

57. Subsection 239.2(11) of the *Municipal Act, 2001* provides that this Report is to be made public and that 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

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⁶ Ontario Ombudsman, [Niagara District Airport Commission](#) (February 2013).