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REPORT ON CLOSED MEETING INVESTIGATION 2023-01

THE CORPORATION OF HALDIMAND COUNTY

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March 15, 2024

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THE CORPORATION OF HALDIMAND COUNTY REPORT ON CLOSED MEETING INVESTIGATION 2023-01

I. INTRODUCTION

1. Aird & Berlis LLP is the Closed Meeting Investigator (“**Investigator**”) for Haldimand County (the “**County**”).
2. In our capacity as Investigator, we received a formal request (the “**Request**”) dated November 29, 2023 for a closed meeting investigation (the “**Investigation**”).
3. The Request seeks an investigation concerning closed sessions of meetings alleged to have been held by the County’s Council regarding the appointment and performance evaluation of a named senior officer. Through our preliminary review of the Request, the requester confirmed that the meetings to be investigated were the Council in Committee meetings held on February 16, 2023, March 21, 2023 and September 19, 2023 (the “**Meetings**”).
4. 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 AND JURISDICTION

5. The County appointed Local Authority Services (“**LAS**”) to perform closed meeting investigation services pursuant to section 239.1 of the *Municipal Act, 2001*. LAS has delegated its authority Investigator to Aird & Berlis LLP.
6. 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.
7. 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 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.
8. 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 County.

III. REQUEST

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

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

10. The Request concerns Council's appointment of a named individual as the County's interim CAO, that individual's performance review and Council's subsequent appointment of the named individual as the County's CAO.

11. As noted above, the Request identifies County Council meetings which occurred on February 16, 2023, March 21, 2023 and September 19, 2023 as the meetings to be investigated.

12. The Request also alleges contraventions of the following provisions of the *Municipal Act, 2001*: clauses 224(a),(d.1), 225(a), and 226.1(a) and (d). These provisions relate to the role of Council, the role of the head of Council and the role of the head of Council as chief executive officer. Our authority as Investigator does not include the jurisdiction to consider these provisions of the *Municipal Act, 2001* accordingly we have declined to consider this part of the Request.

13. Finally the Request alleges contraventions of Part 3 and Part 4 of the County's Procedure By-law 2477-23 (the "**Procedure By-law**").

IV. REVIEW OF MATERIALS AND INVESTIGATIVE PROCESS

14. 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
- open and closed session agendas and minutes from the Meetings; and
- written Notices to Council and Senior Management of the publication of the agenda for the February 16, 2023 Council in Committee meeting.

15. 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.

V. STATUTORY FRAMEWORK

16. 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.

17. Section 238 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.

18. Unless they deal with a subject matter falling within a specific enumerated exception in subsections 239(2), (3) or (3.1), all meetings are required to be held in an open forum where the public is entitled to attend and observe local government in process.

19. The purpose of the “open meeting” rule is to foster democratic values, increase transparency, and enhance public confidence in local government. 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. 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.

20. Subsection 239(2) lists eleven (11) matters that permit Council 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;

21. 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”.

22. Discussions regarding the hiring of a specific individual, including their employment history and past job performance, fall within the personal matters exception.²

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

24. 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;

...

² [Russell \(Township of\) \(Re\)](#), 2015 ON OMBUD 29 at para. 31.

Open meeting

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

Exception

(6) Despite section 244, a meeting may be closed to the public during a vote if,

- (a) subsection (2) or (3) permits or requires the meeting to be closed to the public; and
- (b) the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board.

VI. PROCEDURE BY-LAW

25. The following provisions of the Procedure By-law are relevant to the Investigation:

7.3.4 Before holding a Meeting or part of a Meeting that is to be closed to the public, a recommendation or resolution shall be passed stating:

- the fact of the holding of the Meeting in Closed Session; and
- the general nature of the matter(s) to be considered in the Closed Session of the meeting.

7.3.5 A Meeting shall not be closed to the public during the taking of a vote except where:

- the provisions of this by-law permit or require a Meeting to be closed to the public; and
- the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality or persons retained by or under contract with the municipality.

VII. THE MEETINGS**(a) February 16, 2023**

26. The public agenda for the February 16, 2023 meeting lists one item under the heading "Closed Session" - *1. Verbal Update Re: Personnel Matter*. The description under that item is "personal matters about an identifiable individual, including municipal or local board employees."

27. The minutes from this meeting indicate that Council passed a resolution to go into closed session pursuant to section 239 of the *Municipal Act, 2001* to discuss personal matters about an identifiable individual, including municipal or local board employees, specifically, a verbal update re: personnel matter.

28. The confidential minutes from the closed session of the February 16, 2023 meeting indicate that a recommendation was moved, voted on and carried during the closed session. The minutes indicate that Council reconvened in open session after approximately 45 minutes in closed session. The minutes show that Council did not report back on the closed session once it had reconvened in open session.

(b) March 21, 2023

29. The public agenda for the March 21, 2023 meeting contains one item related to the appointment of the CAO. Under the heading “N. MOTIONS ARISING FROM CLOSED SESSION” is one item, “1. CAO Appointment”. The agenda does not provide the motion arising from closed session nor the date of the closed session to which the motion relates.

30. At the meeting on March 21, 2023, Council adopted Recommendation 20 (below) without discussion or debate. The recommendation was introduced by the County Clerk as follows: “The last item and this was listed on the agenda, is just the formalization of the CAO appointment motion and so I will just read that out.”

Recommendation 20

Moved By: Councillor Patterson

Seconded By: Councillor Lawrence

1. THAT Cathy Case be appointed as Interim Chief Administrative Officer for Haldimand County as of June 1, 2023;
2. AND THAT, subject to an acceptable performance assessment by Council and an employment agreement being finalized, Cathy Case be appointed as Chief Administrative Officer as of October 1, 2023;
3. AND THAT, as required, Cathy Case be authorized to appoint a General Manager to act in her place during any absences.

CARRIED

(c) September 19, 2023

31. The minutes of the meeting on September 19, 2023 lists four closed session items including: 3. *CAO Performance Review*. The description under that item is, “personal matters about an identifiable individual, including municipal or local board employees”.

32. The minutes from this meeting indicate that Council passed a resolution to go into closed session pursuant to section 239 of the *Municipal Act, 2001* to discuss personal matters about an identifiable individual, including municipal or local board employees, specifically, the CAO Performance Review.

33. The confidential minutes from the closed session indicate that a recommendation was moved, voted on and carried during the closed session. The minutes show that Council did not report back on this closed session item once it had reconvened in open session following the closed session.

VIII. FINDINGS

34. Upon concluding the Investigation, we have made the following findings regarding compliance with the open meeting provisions of the *Municipal Act, 2001*.

35. Council was authorized to go into closed session on February 16, 2023 and September 19, 2023 to discuss employment matters related to the County's CAO.

36. The resolution to go into closed session on February 16, 2023 was insufficient and fell short of providing "the general nature of the matter to be considered". The Ontario Court of Appeal has held that "the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public."³

37. We also find the meeting of February 16, 2023 contravened subsection 239(5) of the *Municipal Act, 2001* because a vote was taken during the closed portion of the meeting. The vote was not for a procedural matter nor for giving directions or instructions to officers, employees or agents of the County.

38. We note that Council's open session vote on March 21, 2023 to appoint the interim CAO retroactively fulfilled the requirements of the *Municipal Act, 2001* by ensuring the vote took place in open session.⁴ That said, the public agenda description related to this item was unclear and did not provide an adequate description of the proposed topic.

39. We find Council's vote at the closed session held on September 19, 2023 was exempted from the open meeting provisions of the *Municipal Act, 2001* pursuant to clause 239(6)(b) and did not, therefore, contravene the *Municipal Act, 2001*.

IX. RECOMMENDATIONS

40. Council must ensure it only votes on matters in open session unless the *Municipal Act, 2001* permits the taking of a vote in closed session. The rules for voting in closed session are expressly set out in subsections 239(5) and (6) of the *Municipal Act, 2001*.

41. We recommend that, in keeping with the judicial guidance above, future resolutions to go into closed session provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.

³ [Farber v. Kingston \(City\)](#), 2007 ONCA 173, 31 M.P.L.R. (4th) 31, at para. 21.

⁴ This was similar to what happened in *Farber v. Kingston (City)*, *ibid.*, when the council in that case voted in open session following the improper vote in closed session. The Court wrote (at para. 28): "I conclude that the failure to pass the necessary resolutions prior to going into closed session and the unauthorized vote held on April 5 are at most procedural irregularities unconnected to the real decision to pass the by-law. They therefore do not taint its legality."

42. We recommend that Council adopt a procedure for “reporting back” from closed sessions. As a best practice, Council should provide general information on what occurred *in camera*.⁵

43. This Report has been prepared for and is forwarded to Council for its consideration.

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

45. Section 7.4.1 of the Procedure By-law requires Council to pass a resolution stating how the County intends to address a closed meeting investigation report. This requirement supplements the statutory obligation for Council to pass such a resolution as set out in subsection 239.2(12) of the *Municipal Act, 2001*.

Respectfully submitted,

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⁵ [*Bonfield \(Township of\) \(Re\)*](#), 2015 ON OMBUD 35 at para. 76. See also Ontario Ombudsman, *Municipality of Magnetawan* (June 24, 2015) [at para. 54] and *Village of Westport* (January 2015) [at para. 29]:

I encourage councils to report back on what occurred *in camera*, at least in a general way. In some cases, public reporting might consist of a general discussion in open session of subjects considered in closed session. This might be similar to the information in the resolution authorizing the session, together with information about any decisions, resolutions, and directions given to staff. In other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided publicly.