



John Mascarin
Direct: 416.865.7721
E-mail: jmascarin@airdberlis.com

REPORT ON CLOSED MEETING INVESTIGATION 2024-01

THE CORPORATION OF THE MUNICIPALITY OF HASTINGS HIGHLANDS

Aird & Berlis LLP

John Mascarin

April 23, 2024



TABLE OF CONTENTS

- I. INTRODUCTION 1
- II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JUSTIFICATION 1
- III. REQUEST 2
- IV. REVIEW OF MATERIALS AND INQUIRY PROCESS..... 2
- V. THE MEETING 3
- VI. ISSUE..... 4
- VII. ANALYSIS..... 5
- VIII. CONCLUSIONS 7

MUNICIPALITY OF HASTINGS HIGHLANDS REPORT ON CLOSED MEETING INVESTIGATION 2024-01

I. INTRODUCTION

1. This is a report on the investigation of a request made in accordance with section 239.2 of the *Municipal Act, 2001*.¹
2. A formal request for a closed meeting investigation, dated March 4, 2024 (the “**Request**”), was filed with the Clerk of The Corporation of the Municipality of Hastings Highlands (the “**Municipality**”), who forwarded the request to us as the closed meeting investigator (the “**Investigator**”). The Request seeks an investigation of a closed session of Council, Operations and Planning held on December 6, 2023 (the “**Meeting**”).
3. The Request alleges that the Meeting contravened section 239 of the *Municipal Act, 2001*. The Request does not raise any assertion that Council breached the Municipality’s Procedure By-law 2024-001.
4. Upon concluding our investigation, we have found that the allegations in the Request cannot be sustained. As such, we have been careful in providing our formal report on our investigation of the above-noted matter to not disclose matters discussed and debated at the Meeting as the details thereof remain confidential although we have attempted set sufficient detail to ensure our report is intelligible.

II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JUSTIFICATION

5. The Municipality appointed Local Authority Services Inc. (“**LAS**”) as its closed meeting investigator pursuant to section 239.1 of the *Municipal Act, 2001*. LAS has delegated its authority to act as closed meeting investigator to Aird & Berlis LLP.
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 Municipality to act in this particular matter or in general as its closed meeting investigator.
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 or complaint made by any person to determine whether the Municipality has complied with section 239 of the *Municipal Act, 2001* in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation, together with any recommendations as may be applicable.

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

III. REQUEST

9. The Request was properly filed pursuant to section 239.1 of the *Municipal Act, 2001*.
10. As indicated above, the Request alleges that the Meeting contravened the *Municipal Act, 2001*. The Request contends that Council considered a matter in closed session for which proper notice was not provided in its resolution to convene *in camera*. The assertion appears to be that parts of the closed meeting discussion ought to have been considered in whole, or at least in part, in open session.
11. The Request alleges that Council was not entitled to convene in closed session pursuant to clause 239(2)(b) of the *Municipal Act, 2001* to make a decision to disband a local board and appoint other persons as members of the local board.
12. The Request also questions why the requester, who is a taxpayer in the Municipality, would be the subject matter of discussion by the Council.

IV. REVIEW OF MATERIALS AND INQUIRY PROCESS

13. In order to properly consider the allegations in the Request and make our determinations on the issue, we have reviewed the following materials:
 - the Request;
 - Open Meeting Agenda for the Meeting;
 - Closed Session Agenda for the Meeting;
 - Confidential Report to Council (the “**Report**”);
 - Minutes of the Meeting;
 - Closed Session Minutes of the Meeting (the “**Minutes**”);
 - Notes re Closed Session; and
 - the Procedure By-law.
14. Following our review of materials, we conducted a telephone interview with the Clerk. The Clerk attended the Meeting and prepared the Minutes and she had direct, relevant knowledge about the subject matter of the Request and what took place at the Meeting. There were only two other staff members present at the Meeting. We did not believe that it was necessary to interview any other persons at the Meeting.
15. We also had recourse to the provisions of the *Municipal Act, 2001*, and such secondary sources and case law as we considered applicable to the issues raised in the Request.
16. Although not binding on us, we also reviewed and considered reports of other closed meeting investigators in order to assess our findings and make our determinations.

V. THE MEETING

17. The Meeting took place on December 6, 2023. The Open Meeting Agenda included the following as Item 26:

26. CLOSED SESSION

- a Council Rise to go into Closed Session

That Council rise from the open session to go into Closed Session as permitted by the Municipal Act for the purpose of: Section 239(2)(b) A meeting or part of a meeting may be closed to the public if the subject matter being considered is personal matters about an identifiable individual, including municipal or local board employees;

- Local Board

18. Council passed a resolution to convene in closed session that essentially repeated the above wording.

19. The Meeting was called to order at 11:31 a.m. The Council received the Report from a senior member of staff that detailed the conduct of certain members who had been appointed to a local board of the Municipality, subsequently revealed in the open session minutes to be the Municipality's Committee of Adjustment ("**COA**").²

20. The Minutes note that Council accepted the Report and provided direction on how to proceed with the COA. Council also directed staff to send release letters to members of the COA.

21. The Meeting adjourned at 12:54 p.m.

22. The Municipality does not audio or visual record its closed meetings.

23. The Open Session Minutes report as follows:

27 Council Rise from Council Session:

Council Rise and Report from Closed Session 12:55 p.m.

Buck (490-2023)

That Council rise from the closed session and direct staff and officials to carry out all actions as approved in the December 6th, 2023 Closed Session of Council and report.

Carried

The Mayor reported that "in Closed Session we had the discussion on the matter of personal matters about an identifiable individual including municipal or local board employees and in this case a Local Board, and now we have a motion arising."

² A committee of adjustment is a "local" board of a municipality pursuant to the definition of the term in s. 1 of the *Municipal Act, 2001*.

New Motion - Committee of Adjustment

T. Davis (491-2023)

Whereas the Committee of Adjustment is a quasi-judicial tribunal with authority delegated to it by the Council of the Municipality of Hastings Highlands under the provisions of the *Planning Act* to make decisions on minor variance applications and permissions submitted;

And Whereas Bylaw 2023-022 constitutes a Committee of Adjustment for Hastings Highlands that is composed of five (5) voting members, being one (1) member of Council appointed for one (1) year and four (4) citizens of the Municipality of Hastings Highlands appointed for the Term of Council;

And Whereas the Municipality of Hastings Highlands takes duty in providing Council, Committees and Members of Staff with the appropriate training, resources and supports to execute their role and responsibilities in accordance with applicable legislation, policies, bylaws and standards;

And Whereas the Municipality of Hastings Highlands expects that such legislation, policies and bylaws are strictly adhered to and complied with, in upholding the integrity of the Municipality and it's *[sic]* mandates and in satisfying the expectations of stakeholders of Hastings Highlands;

Therefore Be it Resolved that the Council of the Municipality of Hastings Highlands deems it necessary to disband the current Committee of Adjustment;

And That a letter be sent from the Office of the Mayor notifying Members that effective December 6, 2023 they are released from their appointment and position on the Committee of Adjustment;

And Furthermore That Council direct staff to bring a new Constitution Bylaw and Appointment Bylaw to the next Regular Meeting of Council appointing three (3) Members of Council by repealing Bylaws 2023-022 and 2023-30.

24. The above motions were the final order of business at the Council prior to the enactment of the Confirmatory By-law.

VI. ISSUE

25. What was Council entitled to consider in closed session pursuant to the exception set out in clause 239(2)(b) of the *Municipal Act, 2001*?

26. The Request essentially takes the position that Council's resolution to convene in closed session was expressly for the purpose of considering personal matters about identifiable individuals respecting the COA.

27. It is alleged that the Council's authority only expressly permitted it to consider personal matters about one or more identifiable individuals, revealed to be members of the COA (which included the requester). In other words, the permitted exception did *not* extend to Council considering disbanding the COA. Although not explicit, the Request contends that while personal matters about identifiable individuals could have been discussed, the matter of disbanding the COA ought to have been held in open session.

VII. ANALYSIS

(1) *Statutory Framework*

28. Ontario's "open meeting" rule is set out in section 239 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 action.

29. 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.³

30. Subsection 239(2) sets out eleven separate subject matter exceptions that entitle Council to hold a meeting that is closed to the public, including the following exception which was cited in Council's resolution to convene *in camera* (the "**Resolution**"):

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 about Identifiable Individual*

(i) *Scope of Exception*

31. 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).

32. While, in general, information that relates to an individual's professional capacity does not typically fall within the exception for "personal" matters, it may come within the ambit of the exception where the information relates to the scrutiny of an individual's conduct.⁴

33. The Report was lengthy and outlined in detail a multitude of issues related to the conduct of the members of the COA. It reviewed and provided specific instances of a long list of incidents where the conduct of the members was questioned under a number of heads and as against various standards of comportment expected of members pursuant to the *Planning Act*, the *Municipal Conflict of Interest Act*, the Municipality's Procedure by-law, Code of Conduct and its Council-Staff Relations Policy, as well as the COA's Terms of Reference.

³ 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.

⁴ Ontario Ombudsman, [Municipality of South Huron](#) (March 2, 2015) at para. 31. See also Information and Privacy Commissioner of Ontario, Order [MO-2519](#).

34. Based on our review of the evidentiary record and our interview with the Clerk, the predominant discussion and debate at the Meeting was focused on the conduct of the individuals that were the subject matter of the Report. It was apparent that the main thrust and focus of the Meeting related to the subject matter of the closed meeting exception in clause 239(2)(b) of the *Municipal Act, 2001*.

35. In our view, the subject matter 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 COA.

(ii) Wording of Resolution

36. The Resolution identified that the purpose of the Meeting pertained to personal matters about identifiable individuals, which included the requester who was appointed as a member of the COA. Council predominantly discussed this subject matter at the Meeting.

37. However, the resolution that is required under clause 239(4)(a) of the *Municipal Act, 2001* requires Council to state “the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting.”

38. In this case, the Resolution merely reiterated the wording of the statutory exception and only added the words “Local Board” at the end.

39. The resolution that is required to properly convene into closed session should provide a “general description” of the issue to be discussed in a way that maximizes the information that is made available to the public while not, at the same time, undermining the very reason for excluding the public from the discussion and debate.⁵

40. While the Resolution did not meet this standard by simply repeating the wording of clause 239(2)(b) of the *Municipal Act, 2001*, we recognize that it would have been difficult for the Resolution to actually have provided a greater level of detail. In this case, for example, had the Resolution specified that the Meeting related to the COA (instead of “Local Board”), that information would have provided more information to the public. However, it would also have identified that the matter related to one or more members of the COA.

(3) Entire Meeting should Not have been Closed

41. The Request implies that even if a portion of the Meeting did relate to personal matters related to one or more individuals (which we have found that it did), Council should not have held the entire Meeting in closed session because the reporting out disclosed that Council decided to disband the COA. The assertion is that this was not disclosed as the purpose of the Meeting in Council’s resolution.

42. We questioned the Clerk with respect to the Meeting and the core of the deliberations undertaken by the members of Council. The Clerk confirmed approximately one-third of the Meeting related to a detailed presentation of the Report with the remainder relating to questions and comments from members of Council. The primary discussion at the Meeting focused on the conduct of the members of the COA.

⁵ [Farber v. Kingston \(City\)](#) (2007), 31 M.P.L.R. (4th) 31 at paras. 19-21 (Ont. C.A.).

43. It is our finding that the central focus of the Meeting was to consider the conduct and suitability of the members of the COA. It is clear from the outcome that was reported out by Council, that it made a decision to relieve the members of their appointments to the COA. It was a necessary consequence of that determination by Council that the COA would be disbanded.⁶

44. In any event, the courts have recognized that it may be difficult for a council to “toggle” back-and-forth between open and closed meeting discussions. The Ontario Divisional Court considered the issue in *St. Catharines (City) v. Ontario (Information & Privacy Commissioner)* and commented with respect to the unrealistic expectation that a municipal council is always required to “parse” its discussions:

The decision determined that only parts of the meeting could be closed. How is such a meeting to be conducted? Whenever a participant interrupts the consideration of the disposition of land to refer to any other option being considered or to review any part of the history or background, the meeting would have to adjourn to go into a public session and then close again when the discussion returned to consider the sale of property. It is not realistic to expect the members of a municipal council to parse their meetings in this way. At a minimum, it would detract from free, open and uninterrupted discussion. It could lead to meetings that dissolve into recurring, if not continuous, debate about when to close the meeting and when to invite the interested public to return.⁷

45. It is our opinion that the main thrust of the matter at the Meeting was directly related to the subject matter for which Council resolved to convene in closed session. The fact that Council did not include any mention in the Resolution that it would be disbanding the COA is obvious – it could not have predicted that was going to be the result from its closed session deliberations.

46. Even if Council had not decided to “disband” the COA, that would effectively have been the result of its decision when it directed staff to provide the release letters to the members.

47. However, even if there were discussions that could have been held in open session, those portions of the Meeting were inextricably linked to the *in camera* discussions which were properly held in in a closed setting.

VIII. CONCLUSIONS

48. For all of the reasons set out above, we have determined that Council did not contravene the *Municipal Act, 2001* and did not hold an improper Meeting. Council was entitled to consider the Report in closed session pursuant to the closed meeting exception in clause 239(2)(b).

49. While not finding that the Resolution to convene into closed session in this specific context failed to comply with the requirements of clause 239(4)(a) of the *Municipal Act, 2001* because the Resolution only reiterated the wording of the closed meeting exception, we do wish Council to be mindful that, in general, the statutory requirement to identify “the general nature of the matter to be considered” typically would suggest that an authorizing resolution do more than repeat the wording of the applicable closed meeting exception.

⁶ The final clause of the resolution in open meeting directed staff to bring forward a new constitution by-law as well as an appointment by-law for the COA.

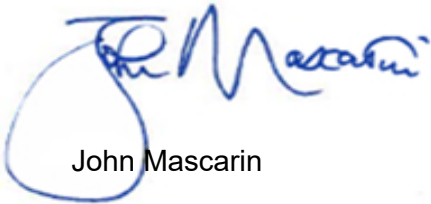
⁷ *St. Catharines (City) v. Ontario (Information & Privacy Commissioner)* (2011), 81 M.P.L.R. (4th) 243 (Ont. Div. Ct.).

50. We recommend that in the future Council should seek to provide more information about the closed meeting subject matter so as to maximize the information available to the public for purposes of accountability and transparency.

51. This Report has been prepared for and is forwarded to Council for its consideration, including our recommendation respecting its future resolutions to convene into closed session.

Respectfully submitted,

AIRD & BERLIS LLP



John Mascarin

Closed Meeting Investigator for The Corporation of the Municipality of Hastings Highlands

Dated this 23rd day of April, 2024

56671175.3