

**AIRD BERLIS**

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

## **REPORT ON CLOSED MEETING INVESTIGATION 2024-01**

**THE CORPORATION OF THE COUNTY OF BRANT**

**Aird & Berlis LLP**

**Laura Dean**

September 4, 2024

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## COUNTY OF BRANT

### REPORT ON CLOSED MEETING INVESTIGATION 2024-01

#### I. INTRODUCTION

1. Aird & Berlis LLP is the Closed Meeting Investigator (the “**Investigator**”) for The Corporation of the County of Brant (the “**County**”).
2. In our capacity as Investigator, we received a formal request for a closed meeting investigation, dated May 26, 2024 (the “**Request**”).
3. The Request seeks an investigation concerning an *in-camera* meeting held by Council for the County (“**Council**”) while convened as the Administration and Operations Standing Committee (the “**Committee**”). The meeting in question was held on May 21, 2024 (the “**Meeting**”).
4. The Complaint specifically relates to the Committee’s consideration of an item concerning the Joint City County Shared Services Committee (the “**Joint Services Committee**”) during the *in-camera* portion of the Meeting.
5. This is a report on our closed meeting investigation (the “**Investigation**”) made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.<sup>1</sup>

#### II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

6. The County 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. Our conflict search was clear.
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 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.
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 County.

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<sup>1</sup> *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. The Request raises the following issues:

(a) Did the subject matter of the *in-camera* portion of the Meeting fit within the closed meeting exception under clause 239(2)(k) of the *Municipal Act, 2001*?

(a) Did the Committee fail to comply with subsection 239(4) of the *Municipal Act, 2001* when it went *in-camera* to discuss an item related to the Joint Services Committee?

### 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;
- By-law Number 14-20 (the “**Procedural By-law**”)
- public and closed meeting agenda for the Meeting;
- public and closed meeting minutes from the Meeting;
- public and closed meeting minutes from the County Council meeting held on May 28, 2024;
- audiovisual recording of the Meeting; and
- audiovisual recording of the County Council Meeting held on May 28, 2024.

13. We also conducted telephone interviews with individuals having knowledge of the *in-camera* portion of the Closed Meeting.

14. We provided the County with an opportunity to review and comment on an earlier preliminary draft of this report. The County provided its comments and we have considered and addressed the comments in 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. The purpose of the open meeting rule is to foster democratic values, increase transparency, and enhance public confidence in local government.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

18. 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:

### Exceptions

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

...

- (k) a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.

19. Subsection 239(4) of the *Municipal Act, 2001* sets 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
- (b) in the case of a meeting under subsection (3.1), the fact of the holding of the closed meeting, the general nature of its subject-matter and that it is to be closed under that subsection.

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

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

<sup>4</sup> 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.

## VI. PROCEDURAL BY-LAW

20. The Committee has been established to address matters of a routine nature requiring Council consideration. The Committee is made up of all members of Council and is governed by the Procedural By-law.

21. Section 6 of the Procedural By-law sets out the rules for *in-camera* meetings.

22. Section 6.b.xi. of the Procedural By-law provides:

Notwithstanding Paragraph 5 above [which requires all Council and Committee meetings to be open to the public], a meeting or part of a meeting may be closed to the public if the subject matter being considered relates to:

...

a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.

23. The above Procedural By-law provision repeats the open meeting exemption contained in clause 239(2)(k) of the *Municipal Act, 2001*.

24. Section 6.e. of the Procedural By-law reflects the requirements of clause 239(4)(a) of the *Municipal Act, 2001* and provides:

Before all or part of a meeting is closed to the public, the Council shall state by resolution:

- i) the fact for holding a closed meeting,
- ii) the general nature of the matter to be considered at the closed meeting.

25. Section 9(b) of the Procedural By-law further requires notice of meetings to be provided by making meeting agendas available to the public on the County's website by 4:00 pm on the Friday prior to the meeting.

## VII. THE MEETING

### A. May 21, 2024 Committee Meeting

26. The Committee met on May 21, 2024. The agenda, which was provided to members of the public and the Committee in advance of the Meeting identifies that a portion of the Meeting would be held *in in-camera*.

27. The public and *in-camera* agendas for the Meeting provide the following description of the proposed *in-camera* item related to the Joint Services Committee under the "In-Camera" heading:

s. 239(2)(k) a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board (Verbal Update - Strategy for Joint Services) - Councillor Kyle

28. The Meeting minutes indicate that the Committee adopted the following resolution to go *in-camera*:

That the Administration and Operations Committee convene In Camera to discuss PWU Verbal Update, RPT-0225-24 Service Agreement, and Verbal Update - Strategy for Joint Services.

29. The agenda for the Meeting contained more than one item to be considered *in-camera*.

30. The audiovisual recording from the Meeting demonstrates that although the Committee passed a resolution to go *in-camera*, it did not state the general nature of the matter(s) to be considered, contrary to clause 239(4)(a) of the *Municipal Act, 2001*.

31. With respect to the particular item which is the subject of this Investigation, the *in-camera* minutes from the Meeting state:

13.3 Councillor Kyle gave a verbal update regarding a strategy for the Joint Services Committee. Discussion commenced between committee members.

32. The *in-camera* minutes do not indicate that any vote was taken during the *in-camera* session. When the Committee rose from the *in-camera* session, no votes were taken and the meeting was adjourned.

#### **B. May 28, 2024 Council Meeting**

33. At its meeting on May 28, 2024, County Council passed a resolution to withdraw from the Joint Services Committee.

34. We note that the agenda for the May 28, 2024 meeting did not contain any item related to the County's withdrawal from the Joint Services Committee. The above motion arose in connection with item 9.1 of the May 28, 2024 Council meeting agenda which related to the Joint City-County Shared Services Committee Report- April 25, 2024. When Council reached this item, the following resolution was moved:

That the Joint City County Shared Services Committee Report of April 25, 2024 be approved.

35. The above resolution was defeated by a unanimous vote. Immediately following the failed resolution, the following resolution was put forward and was unanimously approved by Council, without debate:

Whereas the Joint City County Shared Services Committee was re-established at the Council meeting of September 26, 2023 with the County expressing its interest in exploring shared interest and initiatives with the City of Brantford; and

Whereas the Committee has met two times and has made significant progress in identifying some shared initiatives; and

Whereas the shared services initiatives included within the Committees' [*sic*] mandate are moving forward at the staff level;

Be it resolved that the County of Brant Council advise the City of Brantford Council that it is now withdrawing its participation from the Joint City County Shared Services Committee, but will continue to explore shared initiatives at the staff level; and

That staff be directed to bring forward any future joint service initiatives to County Council on a case by case basis.

## VIII. FINDINGS

36. The Joint Services Committee was established between the City of Brantford and the County to investigate and collaborate on opportunities for both municipalities to make improvements, find efficiencies and implement strategies to improve service delivery and possible tax savings for constituents.

37. Through this Investigation, we have made necessary inquiries with individuals present at the Meeting. Based on these discussions, our review of the Meeting materials and our review of the audiovisual recording of the Meeting, we are satisfied that:

- (a) the Committee's discussion at the Meeting did not fit within the closed meeting exception under clause 239(2)(k) of the *Municipal Act, 2001*; and
- (b) the Committee did not follow the process set out in subsection 239(4) of the *Municipal Act, 2001* or the Procedural By-law when it went *in-camera* at the Meeting to discuss the Joint Services Committee.

**(a) The Committee's discussion at Meeting did not fit within the closed meeting exception under clause 239(2)(k) of the *Municipal Act, 2001***

38. Based on our investigation, we conclude that the Committee's discussion at the Meeting did not fit within the closed meeting exception under clause 239(2)(k) of the *Municipal Act, 2001*.

39. The Ontario Ombudsman is the province's default closed meeting investigator for municipalities who have not appointed their own investigator. The Ontario Ombudsman has found that the purpose of the exception in clause 239(2)(k) "is to allow a municipality to protect information that could undermine its bargaining position or give another party an unfair advantage over the municipality during an ongoing negotiation."<sup>5</sup>

40. For the exception under clause 239(2)(k) to apply, the municipality must establish that:

- 1. The *in-camera* discussion was about positions, plans, procedures, criteria, or instructions;
- 2. The positions, plans, procedures, criteria, or instructions are intended to be applied to negotiations;
- 3. The negotiations are being carried on currently, or will be carried on in future; and
- 4. The negotiations are being conducted by or on behalf of the institution.<sup>6</sup>

<sup>5</sup> [Saugeen Shores \(Town of\) \(Re\)](#), 2020 ONOMBUD 3 at para. 22.

<sup>6</sup> [St. Catharines \(City of\) \(Re\)](#), 2019 ONOMBUD 1 at para 31.



41. The exemption in clause 239(2)(k) of the *Municipal Act, 2001* was added to the statute in 2018 by Bill 68, *Modernizing Ontario's Municipal Legislation Act, 2017*.<sup>7</sup> It mirrors the exemption found in the *Municipal Freedom of Information and Protection of Privacy Act*<sup>8</sup> which permits a municipality to withhold records that relate to a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.

42. The Information and Privacy Commissioner of Ontario (“**IPC**”) is the body that considers appeals of disclosure decisions by municipal institutions. Orders of the IPC that interpret the identical exemption in *Municipal Freedom of Information and Protection of Privacy Act* provide useful guidance in the context of closed meetings.

43. In a 2002 order by the IPC, which was subsequently upheld by the Divisional Court, the IPC determined that in order to satisfy part one of the above test, there must be “some evidence that a course of action or manner of proceeding is ‘pre-determined’ that is, there is some organized structure or definition given to the course to be taken.”<sup>9</sup>

44. The IPC further found that a “plan” is “a formulated and especially detailed method by which a thing is to be done; a design, or scheme.” The IPC also determined that the terms “positions, procedures, criteria, and instructions” are “similarly referable to pre-determined courses of action or ways of proceeding.”

45. Negotiation has been interpreted by the Ontario Ombudsman, by reference to the ordinary dictionary definition: i.e., to negotiate is “to confer (with another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to a settlement or compromise.”<sup>10</sup>

46. According to the County, the Joint Services Committee had established a list of municipal services that would be put forward as the focus of discussions, requiring municipal time and resources. The County contends that the Committee met *in-camera* at the Meeting to have an opportunity to determine a position/strategy for negotiating that list of municipal services with the City when meeting either as the Joint Services Committee or in considering the Joint Services Committee recommendations at Council. The County states that the Joint Services Committee was meant to be the venue for negotiations with the City over those municipal services that would be dealt with jointly.

47. Based on the County’s comments, we accept the Committee’s discussion regarding which municipal services the County should advocate for when negotiating with the City as part of the Joint Services Committee, fell within the exemption in clause 239(2)(k). Given the resolution from the May 28, 2024 meeting of Council to withdraw from the Joint Services Committee, however, it is clear that the Committee’s discussion at the *in-camera* portion of the Meeting must have encompassed more than a conversation regarding which services to prioritize for negotiations.

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<sup>7</sup> *Modernizing Ontario's Municipal Legislation Act, 2017*, S.O. 2017, c. 10.

<sup>8</sup> *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56.

<sup>9</sup> [Order PO-2034](#), (Ontario (Community and Social Services; August 21, 2002), aff'd [Ontario \(Ministry of Community and Social Services\) v. Ontario \(Information and Privacy Commissioner\)](#), [2004] O.J. No. 1854, 70 O.R. (3d) 680.

<sup>10</sup> [Leeds and the Thousand Islands \(Township of\) \(Re\)](#), 2022 ONOMBUD 5 at para. 52.

48. We have determined discussions about the County's withdrawal from the Joint Services Committee did not relate to a position, plan, procedure, criteria or instruction to be applied to negotiations carried on by or on behalf of the County. In our opinion, the Committee should have returned to open session to discuss the County's possible withdrawal from the Joint Services Committee. For there to be a negotiation, there must be an intention to confer with the other party with a view towards settlement or compromise. We understand the decision to withdraw from the Joint Services Committee came without warning to the City and could not be described as a "negotiation". As such, we find the discussion could not have satisfied the criteria for the exception in clause 239(2)(k). We therefore find the Meeting was improperly closed to the public insofar as it related to the specific item in question.

**(b) The Committee did not follow the process set out in subsection 239(4) of the *Municipal Act, 2001* or the Procedural By-law when it went *in-camera* at the Meeting to discuss the Joint Services Committee**

49. Subsection 239(4) of the *Municipal Act, 2001* requires that before closing a meeting to the public, Council must pass a resolution stating the fact that it will be holding a closed meeting, and the "general nature" of the matters to be discussed in that meeting.

50. In *Farber v. Kingston (City)*, the Ontario Court of Appeal held that such resolutions "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."<sup>11</sup>

51. The Procedural By-law also requires that prior to proceeding *in-camera*, the Committee must state by resolution the fact of holding a closed meeting and the general nature of the subject matter to be considered.

52. As noted above, the public and *in-camera* agendas for the Meeting provided the following description of the proposed *in-camera* item related to the Joint Services Committee under the "In-Camera" heading:

s.239(2)(k) a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board (Verbal Update - Strategy for Joint Services) - Councillor Kyle

53. As also noted above, the Meeting minutes, indicate that the Committee adopted the following resolution to convene *in-camera*:

That the Administration and Operations Committee convene In Camera to discuss PWU Verbal Update, RPT-0225-24 Service Agreement, and Verbal Update - Strategy for Joint Services.

54. The audiovisual recording from the Meeting demonstrates that although the Committee passed a resolution to go into closed session, it did not state the general nature of the matter(s) to be considered, contrary to clause 239 (4)(a) of the *Municipal Act, 2001* and section 6.e.ii. of the Procedural By-law.

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<sup>11</sup> *Farber v. Kingston (City)* (2007), 31 M.P.L.R. (4th) 31, 2007 ONCA 173, at para. 21.

55. Based on the above, we conclude that the Committee did not comply with the requirements of clause 239(4) of the *Municipal Act, 2001* or section 6 e. ii. of the Procedural By-law when it passed a resolution to convene *in-camera* at the Meeting.

56. The County provided the following response to our finding above:

*The County acknowledges that in the meeting and on the live stream, there was no specific reference to the exemption cited or general nature of discussions to be held In Camera. These details were provided on the open agenda for the meeting, however in a less-formal Committee setting, the wording of the motion spoken by the mover was not explicit.*

*County staff will review the process for moving In Camera at Committee meetings and implement a process where either the mover or the Clerk specifically state the appropriate exemption and general nature of discussions to be held in the meeting rather than relying on the fact that the motion is laid out on the agenda.*

## **IX. RECOMMENDATIONS**

57. We have determined that the County has fallen short of its obligations to comply with the open meeting rules in section 239 of the *Municipal Act, 2001* and with the requirements of its own Procedural By-law.

58. We recommend Council and senior administrative staff receive formal training regarding the closed meeting provisions of the *Municipal Act, 2001* to ensure that the exemptions and process for convening *in-camera* are understood and complied with.

59. 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.

Respectfully submitted,

AIRD & BERLIS LLP



Laura Dean

Partner

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