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REPORT ON CLOSED MEETING INVESTIGATION 2024-01

THE CORPORATION OF THE TOWN OF WHITBY

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TOWN OF WHITBY

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 Town of Whitby (the “Town”).
2. In our capacity as Investigator, we received a formal request for a closed meeting investigation, dated October 8, 2024 (the “Request”).
3. The Request seeks an investigation concerning what it alleges to be an illegal closed meeting of the Town’s Council (“Council”) which took place during a recess (the “Recess”) called at the meeting of Council held on October 7, 2024.
4. This is a report on our closed meeting investigation (the “Investigation”) made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.¹

II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

5. The Town 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 pursuant to subsection 239.2(6) of the *Municipal Act, 2001*.
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 Town 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.
9. 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 Town.

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. The Request raises the following issue:

Did Council contravene section 239 of the *Municipal Act, 2001* when it met as a quorum in the absence of the public during the Recess called at the Council meeting on October 7, 2024?

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;
- written submissions of the Requester;
- the Clerk's note to file made on October 8, 2024 providing his recollection of the Recess and the events that led up to the Recess;
- the Town's Procedure By-law # 8081-24; and
- audiovisual recording of the October 7, 2024 Council meeting.

13. We also conducted virtual interviews via Teams with all nine members of Council, including the Mayor, as well as the Town Clerk and the Chief Administrative Officer (“CAO”).

14. A draft of this Report was provided to the Town Clerk prior to being finalized. We have considered the Clerk's comments and have made minor revisions to this Report in light of some of the comments received.

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

17. 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.

18. In this case, there is no question that a quorum of members was present in the same room or space during the Recess at the meeting of Council on October 7, 2024 (the first criterion for a “meeting” pursuant to the statutory definition).

19. This Investigation focused on whether the members present at the Recess held an illegal meeting by discussing or otherwise dealing with any matter in a way that materially advanced the business or decision-making of Council (the second criterion for a “meeting” under the statute).

VI. THE MEETING

20. The Request alleges that Council held a “secret meeting behind closed doors” during the Recess held during the October 7, 2024 Council meeting.

21. The discussion and events leading up to the calling of the Recess are relevant to understanding the context of the Recess and the Request.

22. Prior to the Recess, Councillor Leahy had the floor and raised concerns regarding Council’s alleged mistreatment of Councillor Steve Yamada when he was the Deputy Mayor of the Town. Councillor Leahy alleged that during this time, Council engaged in “lots of different microaggressions” as a “way of “diminishing the stature of somebody who has earned his place in society.” Councillor Leahy proceeded to call out Council “...for treating Councillor Yamada in a different manner than those of us who aren’t of an Asian background”. Below we have transcribed the subsequent discussion.

Mayor Roy: Councillor Leahy, enough, enough. That is out of order.

Councillor Leahy: No, it’s not.

Mayor Roy: No, it’s not. It’s completely out of order. Councillor Leahy, those comments need to be taken back and you need to apologize to this member...all members of Council.

Councillor Leahy: Absolutely not, absolutely not.

20. At this point, Councillor Leahy continued to voice his accusations over the Mayor’s interjections and Councillor Steve Lee’s calls for a Point of Order. The discussion continued as follows:

Mayor Roy: Councillor Leahy, I am going to say it one more time and if not, I am going to expel you from this room. Councillor Leahy, you take those comments back. You are insinuating that the members of Council are racist towards Councillor Yamada.

Councillor Leahy: I didn’t use that word.

Mayor Roy: Those are inaccurate comments and I am going to tell you right now, you apologize to Council or you are going to be removed from this Council chambers.

Councillor Leahy: I am not apologizing for facts. No one referred to him as Deputy Mayor for five months.

Mayor Roy: That’s not true.

Councillor Leahy: That is true. You didn't put him in the seat, you worried about his sign...

Mayor Roy: Councillor Leahy, we are going to stop this dialogue and you either refrain...you first you apologize to Council members or you leave these chambers.

Councillor Leahy: I'm not apologizing for facts.

Mayor Roy: So Councillor Leahy, I am asking you to leave these chambers.

Councillor Leahy: I'm not leaving.

Mayor Roy: Councillor Leahy I am asking you to leave these chambers.

Councillor Leahy: I'm an elected official, I'm not leaving.

20. It is not visible on the video recording, however we understand that at this point in the meeting, some Council members had started to leave their seats in protest to the remarks made by Councillor Leahy. The discussion continued as follows:

Councillor Lee: Point of Order, there is no cross debate and I would request a five minute recess.

Mayor Roy: We can have a five minute recess and we will adjourn to the back room but until then if there is no apology, that's fine. You make your choice.

23. At this point, the Mayor can be seen leaving her chair and approaching the Clerk. We understand the Clerk then agreed to accompany the Mayor to the "back room", an office space which connects to the Council chambers through a door. We understand the Mayor then requested that all Members assemble in the back room. With the exception of Councillors Leahy and Yamada, all members of Council, including the Mayor, as well as the CAO and Clerk, eventually convened in the back room during the Recess.

24. The Recess lasted approximately 15 minutes. During the Recess, before Council returned, the Clerk came out to speak to Councillor Leahy who was seated with Councillor Yamada. The Clerk is reported to have said that "a decision had been made" on how Council would proceed going forward. The Clerk allegedly informed Councillor Leahy that he would be asked to apologize in order for the meeting to move forward, otherwise the meeting would be adjourned. Councillor Leahy reportedly told the Clerk that he was not going to apologize. The Clerk then returned to the back room after which time, Council members returned to the Council chambers.

25. Below is a transcript of the discussion that followed once the Members had returned from the Recess:

Mayor Roy: I am going to call this meeting back to order. And I know that the Clerk has shared with the Councillor the position of what can take place in accordance to our procedural by-law but also in accordance to the *Municipal Act*. That the opportunity as the Chair to ask for a member of the council to leave the meeting is within the prerogative and the right of myself, so Councillor Leahy, one more time, we are looking for an apology to all of Council.

Councillor Leahy: Again, I stood up when I saw Islamophobic hate directed towards Muslim people last month...

Mayor Roy: Councillor Leahy, Councillor Leahy, it's a yes or a no.

Councillor Leahy: I stood up against antisemitic hate when I see it...

Mayor Roy: Councillor Leahy, it's a yes or a no. Is there an apology to the Council members for the comments? Is it a yes or a no?

Councillor Leahy: I never got to finish my comments.

Mayor Roy: Is it a yes or a no?

Councillor Leahy: No.

26. The Mayor then asked for a motion to adjourn which was moved and seconded. A recorded vote was called. The motion was carried by a vote of 6 to 3 and the meeting was adjourned.

VII. THE RECESS

27. Through this investigation we have been able to establish the following regarding what took place during the Recess:

- The Mayor, Clerk, CAO and all members of Council except Councillors Leahy and Yamada eventually convened in the back room following the calling of the Recess.
- There was a general consensus among Council members that emotions were "running high".
- Members initially engaged in unorganized chatter and voiced various observations and statements of opinion regarding what had transpired at the Council meeting prior to the Recess.
- The Recess was not conducted as a formal meeting with the Mayor as the Chair and various members taking turns speaking.
- A three way conversation took place between the Clerk and the CAO regarding procedural options for carrying on or not carrying on with the Council meeting. Various members weighed in with questions or commentary regarding the options.
- The procedural options available to the Mayor were not formally put to the members to debate or decide upon.
- The option of involving the Durham Regional Police Services ("DRPS") in light of Councillor Leahy's refusal to leave the meeting was raised and there was agreement that this option should not be pursued.

- No vote was taken during the Recess.
- Council did not discuss any item of business on the Council agenda.
- The members left the Recess understanding what procedure the Mayor would follow when the Council meeting resumed. The Mayor would ask Councillor Leahy to apologize again and if he did not do so, she would ask for a motion to adjourn the meeting.

VIII. PROCEDURE BY-LAW

28. The Town's Procedure By-law, referred to as the Rules of Procedure, governs the calling, place and proceedings of meetings.

29. The Procedure By-law contain provisions regarding member decorum and the procedure to be followed should a member fail to adhere to and persist in disobeying the Procedure By-law.

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

5. Conduct at Meetings

Members of Council

5.1 No Member shall,

...

- 5.1.2. speak disrespectfully of any level of government, including elected or appointed members of government, another municipality, or the Region of Durham;
- 5.1.3. use offensive words or speak disrespectfully against Council, staff, a Committee or Local Board, or against any Member;
- 5.1.4. speak on any subject other than the subject in debate;
- 5.1.5. criticize any decision of Council except for the purpose of moving that the question be rescinded, amended, or reconsidered; and,
- 5.1.6. disobey the Procedure By-law or decisions on questions of order or practice, or upon the interpretation of the Rules of Procedure, and in the case where a Member persists in any such disobedience after having been called to order, the Mayor or the Chair of the Committee or Local Board, as the case may be, may order that such Member leave the Meeting, however if the Member apologizes and agrees to adhere to the Rules of Procedure, matter of order, or matter of practice, the Member shall be permitted to remain at the Meeting.

31. The Procedure By-law contain specific provisions outlining the duties of the Mayor:

6. Powers and Duties of the Mayor

Duties of the Mayor

6.1 It shall be the duty of the Mayor,

6.1.1. to preside at all Meetings of the Council;

...

6.1.6. to restrain the Members, within the Rules of Procedure, when engaged in debate;

6.1.7. to enforce on all occasions the observance of order and decorum among the Members;

6.1.8. to expel any person for improper conduct at a Meeting, it being understood that such action shall be at the sole discretion of the Mayor;

...

6.1.11. to adjourn the Meeting without the question being put or to suspend or recess the sitting for a time to be named if considered necessary because of disorder arising in the Meeting.

32. It is worth noting that the Rules of Procedure do not provide direction on what the Chair should do in the event a member refuse to leave a meeting after being told they were expelled.

IX. ANALYSIS

33. The issue to be determined is whether the gathering of Councillors at the Recess constituted an illegal meeting for the purpose of section 239 of the *Municipal Act, 2001*.

34. As noted above, subsection 238(1) of the *Municipal Act, 2001* contains a broad definition of the term “meeting”:

“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.

35. A quorum of members was present in the back room during the Recess.

36. The analysis then turns to whether members of Council discussed or otherwise dealt with a matter in a way that “materially” advanced Council’s business or decision-making.

37. The Requester alleges that “the act of adjournment being discussed in the councillors office materially impacted the decisions of the Town by delaying consideration of the remaining agenda items.” The Requester further alleges that discussion regarding the involvement of the DRPS “materially impacted the business of the Town.”

38. It is instructive to consider previous investigations into similar requests conducted by the Ontario Ombudsman (the “**Ombudsman**”) which is the default closed meeting investigator where a municipality has not appointed one. In 2020, the Ombudsman conducted an investigation into an alleged closed meeting in the Town of Saugeen Shores.² The facts giving rise to that investigation closely mirror what took place at the Town during the Recess.

39. Part of the Ombudsman’s investigation considered whether Council for the Town of Saugeen Shores contravened the *Municipal Act, 2001* open meeting requirements by holding an illegal meeting during a recess held during an open session of Council. In this case, the recess was called due to the Mayor’s concerns with the conduct of a delegation.

40. The paragraphs below from the Ombudsman’s investigation report illustrate the parallels between that circumstance and the present Investigation:

43 After the Mayor called a recess, all members of council and the CAO exited council chambers through a back door into an adjoining room. We were told that the adjoining room is a kitchenette that also leads to a hallway containing entryways to the Town offices.

44 During the recess, the Mayor discussed procedural options for next steps with the Clerk. The Mayor then relayed these options to members of council who were gathered in the kitchenette and the adjoining hallway.

45 We were told that after hearing these options, one councillor indicated they would bring a motion that would allow the resident to speak. We were told that shortly thereafter, council returned to chambers to resume the meeting.

46 The open session video resumed after council members had returned to their seats. A councillor raised a point of order and asked that the resident be allowed to speak. The Mayor received the point of order and asked to subject it to a vote.

41. In finding the discussions at the recess not to be a meeting for the purpose of the *Municipal Act, 2001*, the Ombudsman determined:

...while a quorum of council was present at the recess, no members of council had any discussions that materially advanced council business and council did not make any decisions. Rather, the Clerk relayed potential next steps to the Mayor, who then relayed this information to Council. Council returned to open session to exercise its decision-making authority.

² Ombudsman of Ontario, [Investigation into complaints about closed meetings held by the Town of Saugeen Shores on July 22, November 11, November 25, 2019, and February 24, 2020](#) (July 2020).

42. The Ombudsman has provided the following commentary regarding the meaning of “materially advances”:

“materially advances” involves considering the extent to which the discussions at issue moved forward the business of the municipality, based on factual indicators.

Discussions, debates or decisions that are intended to lead to specific outcomes or to persuade decision-makers one way or another are likely to “materially advance” the business or decision-making of a council, committee or local board. Mere receipt or exchange of information is unlikely to “materially advance” business or decision-making, as long as there is no attempt to discuss or debate that information as it relates to a specific matter that is or will be before a council, committee or local board.³

43. The analysis under section 238 of the *Municipal Act, 2001* also requires consideration of whether the subject discussed is “council business”. In this respect, the Ontario Ombudsman will consider whether information received by members of council could inform the future business and decision-making of council.⁴ The Ombudsman takes the position that conversations which relate to matters or decisions set to come back to council are especially likely to constitute discussions about council business under the *Municipal Act, 2001*.⁵

44. Based on the above, we find the discussion and the manner in which procedural considerations were dealt with at the Recess did not materially advance the business of Council.

45. The Recess was called to regain decorum and to provide the Mayor an opportunity to consult with the Clerk and CAO regarding procedural options due to Councillor Leahy’s refusal to leave Council chambers despite the Mayor’s direction as Chair of the meeting.

46. The discussion that took place at the Recess was primarily between the Mayor, the Clerk and the CAO, with members chiming in. Members were not canvassed for their opinions on how to move forward nor did any vote take place with respect to the procedure to be followed. The decision to call for a motion to adjourn the meeting if Councillor Leahy did not apologize was made by the Mayor as Chair of the meeting. Additionally, while members may have opined on whether or not to involve the DRPS, the decision not to do so was ultimately the Mayor’s to make.

47. The decision to adjourn the meeting delayed Council’s consideration of the remaining agenda items but it did not materially advance the business or decision-making of Council. The discussion at the Recess was about how to proceed with the meeting itself which had nothing to do with the substance of any matter that was or would be before Council.

³ Ombudsman of Ontario, [Investigation into a complaint about March 7, 2018 information sessions involving a quorum of councillors for the Village of Casselman](#), (August 2018), at paras 30–31.

⁴ Ombudsman of Ontario, [Letter regarding the results of a review of complaints received regarding alleged improper closed meetings of Council and the Finance and Administration Committee for the City of Elliot Lake](#); Ombudsman of Ontario, [Investigation into a complaint about a call held by members of council for the Municipality of Casselman on January 26, 2021](#) (January 2024) at para 35.

⁵ Ombudsman of Ontario, [Investigation into alleged closed meetings held by the Walkerton Business Improvement Area and the Municipality of Brockton on June 13, June 20, and September 27, 2016](#), (February 2017), at paras 69-70.

X. CONCLUSIONS

48. Based on the above, we find Council did not contravene the open meeting requirements of the *Municipal Act, 2001* during the Recess. The discussion did not constitute a “meeting” as Council did not materially advance any business or decision-making.

49. Despite our finding that the Recess did not constitute an illegal meeting, we strongly advise Council against gathering as a quorum behind closed doors during the course of a Council meeting unless it has done so in accordance with the permitted exceptions under section 239 of the *Municipal Act, 2001*.

50. This Report does not suggest that a quorum of Council can never gather outside of a Council meeting. The Ontario Ombudsman has recognized that “[i]t would not be realistic nor respectful of democratic governance in municipalities to implement a culture of absolute silence between council members outside of council chambers.”⁶ In every municipality there will be circumstances such as social gatherings, ceremonies and events at which a quorum of council will be assembled. Such gatherings are permitted as long as members do not discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of Council.

51. Gatherings and events in the nature of those discussed above can be distinguished from the Recess, where Council assembled in the absence of the public, during the course of a Council meeting, not as the result of shared social or official obligations. While calling a recess is good practice when a meeting has lost decorum, inviting all members to gather during a recess, in the absence of the public, no matter how well intentioned, invites justified suspicion and should be avoided.

52. Apart from the challenge and discomfort of contending with a member who refused to comply with the Chair’s direction, the procedural matters discussed at the Recess could have been considered in an open session for the public to witness. Alternatively, the procedural discussion could have been limited to the Mayor, Clerk and CAO instead of a quorum of Council.

Respectfully submitted,

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⁶ Ombudsman of Ontario, [Investigation into a complaint about a gathering held by members of the Community and Protective Services Committee of the City of London on March 21](#) (January 2024) at para 46.