

April 24, 2014

Mayor Joe Fontana and
Clerk Cathy Saunders
300 Dufferin Avenue
London, ON N6A 4L9

Dear Mayor Fontana and Ms. Saunders,

Re: Closed Session re: Industrial Land Strategy (Strategic Priorities and Policy Committee Budget Meetings, 2014)

I am writing further to our conversation on April 14, 2014, regarding the outcome of our review of a complaint that the City of London's Strategic Priorities and Policy Committee violated the open meeting provisions of the *Municipal Act* by going beyond the permitted topic of discussion during its closed meeting on February 7, 2014.

As you are aware, the *Municipal Act, 2001* (the Act) requires that meetings of council, local boards, and their committees are open to the public, with limited exceptions and subject to certain procedural requirements.

In reviewing this complaint, our Office obtained and reviewed the relevant meeting documents, spoke with Mayor Joe Fontana, Councillor Stephen Orser, and Clerk Cathy Saunders, and considered the relevant sections of the City's Procedure By-Law and the *Municipal Act, 2001*.

Background

The Strategic Priorities and Policy Committee (the Committee) is a standing committee of council that is comprised of all the members of City Council. According to the City's Procedure By-Law (No. A-45), the Committee's mandate includes making recommendations and reports to Council on such matters as the annual operating and capital budgets and strategic plans.

This year, the Committee held public budget meetings on January 30, January 31, February 6, February 7, February 10, and February 25, 2014.

Bell Trinity Square
483 Bay Street, 10th Floor, South Tower, Toronto, ON M5G 2C9
483, rue Bay, 10^e étage, Tour sud, Toronto (Ontario) M5G 2C9
Tel./Tél. : 416-586-3300
Facsimile/Télécopieur : 416-586-3485 TTY/ATS : 1-866-411-4211

www.ombudsman.on.ca

The City's Industrial Land Strategy involves the City's proposed acquisition and servicing of lands for industrial development. The budget for the Strategy was being considered by the Committee in the course of the public budget meetings.

February 7, 2014 Strategic Priorities and Policy Committee Budget Meeting

The agenda for the 2014 Committee budget meetings indicated that the Committee was scheduled to review in closed session:

A matter pertaining to reports, advice and recommendations of officers and employees of the Corporation concerning labour relations and employee negotiations in regard to the Corporation's employees.

The public record of the budget meetings states that the Committee passed a motion to proceed in camera to discuss:

A matter pertaining to instructions and directions to officers and employees of the Corporation pertaining to a proposed acquisition of land; advice that is subject to solicitor-client privilege, including communications necessary for that purpose; reports or advice or recommendations of officers and employees of the Corporation pertaining to a proposed acquisition of land; commercial and financial information supplied in confidence pertaining to a proposed acquisition of land, the disclosure of which could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the Corporation, result in similar information no longer being supplied to the Corporation where it is in the public interest that similar information continue to be so supplied, and result in undue loss or gain to any person, group, committee or financial institution or agency; commercial information relating to a proposed acquisition of land that belongs to the Corporation that has monetary value or potential monetary value; information concerning a proposed acquisition of land whose disclosure could reasonably be expected to prejudice the economic interests of the Corporation or its competitive position; information concerning a proposed acquisition, the disclosure of which could reasonably be expected to be injurious to the financial interests of the Corporation; and instructions to be applied to any negotiations carried on or to be carried on by or on behalf of the Corporation concerning the proposed acquisition of land regarding the Industrial Land Strategy.

Mayor Fontana advised our Office that a majority of Committee members passed a motion to add the Industrial Land Strategy to the closed meeting agenda in the course of the budget meetings because staff wished to present new information to the Committee on the parameters of the strategy, which impacted the land purchasing component.

The Mayor and the Clerk said that the meeting was closed to the public because it involved discussions of particular properties and land areas that the City was interested in purchasing, and disclosure of such information was contrary to the public interest because it could inflate the value of the land.

The meeting record of the closed session was limited to a general summary contained in “Confidential Appendix to the 5th Report of the Strategic Priorities and Policy Committee: 2014 Budget.”. The summary states that the Committee “heard a verbal overview from the City Manager, and received advice subject to solicitor-client privilege from the City Solicitor, regarding the City of London’s industrial Land Development Strategy...”

The Mayor and the Clerk confirmed to us that the City Manager provided a verbal report and update on the Industrial Land Strategy during the closed session (including reference to the lands that the City may seek to acquire), and the City Solicitor provided advice on the matter.

Both the Clerk and the Mayor said that a councillor raised a question about how the property acquisitions would impact tax rates, but the Clerk immediately noted that the question could not be discussed or answered as it went beyond the topic of closed session discussion permitted under the *Municipal Act* exceptions. The Clerk advised the councillor that the purpose of the closed meeting was to discuss property acquisition. The Mayor also advised the councillor that the question was “out of order.” The Mayor and Clerk agreed that the exchange lasted less than one minute. Councillor Stephen Orser told us that he left the meeting at this point, noting that he felt uncomfortable with the course of the discussion.

Analysis

The February 7, 2014 closed session was closed under the authority of the “proposed or pending acquisition or disposition of land” (s. 239 (2) (c)) and “solicitor client privilege” (s. 239 (2) (f)) exceptions to the open meeting requirements.

A review of the history of the “acquisition or disposition of land” exception suggests that its primary purpose is to protect the municipality’s bargaining position in property negotiations.¹ While this exception has not yet been extensively considered by the Canadian courts, the U.S. experience confirms that preservation of the municipality’s negotiating position underpins this exception.²

As noted in our review of a closed meeting held by City of Oshawa Council on March 20, 2013, the exception is discretionary and therefore it is up to Council to determine whether it is necessary to discuss the matter in camera³.

Based on the information reviewed, the Committee’s February 7, 2014 closed meeting discussion focused on lands that the City was interested in purchasing and/or had initiated negotiations to purchase. This subject matter falls within the “acquisition or disposition of land” exception.

Because the Committee also received advice from the City Solicitor with respect to the industrial land strategy, the “advice that is subject to solicitor-client privilege” exception also applied to the closed session discussion.

Although a member of Council raised a question in the closed session about the tax implications associated with the proposed land purchases, the Clerk addressed and curtailed this line of discussion immediately, preventing the Committee from going beyond the stated subject matter, which was permitted under the *Municipal Act* exceptions.

Meeting Record

The closed meeting record for the Strategic Priorities and Policy Committee’s February 7, 2014 closed meeting is limited and consists only of a one-line summary contained in the “confidential appendix” to the public meeting record (5th Report of the Strategic Priorities and Policy Committee – 2014 Budget), as well as the general information in the resolution to proceed in camera.

¹ See *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information*, Toronto: The Committee, July 1984.; Stanley Makush and John Jackson, *Freedom of Information in Local Government in Ontario*, Toronto: Commission on Freedom of Information and Individual Privacy, 1979.

² See *Allen et al v Board of Selectman of Belmont et al* (58 Mass. App. Ct. 715).

³ www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Oshawa-Closing-Letter-March-20-2013-mtg---final.pdf

The *Municipal Act* requires municipalities, local boards and their committees to “record without note or comment all resolutions, decisions and other proceedings at a meeting of the body, whether it is closed to the public or not.”

The Ombudsman’s position on record keeping is expressed in our 2008 report (*The ABC’s of Education and Training*) to the city of Oshawa:

The requirement to keep a meeting record should be interpreted in a manner that is consistent with the intent of the open meeting provisions, which are directed at enhancing the openness, transparency and accountability of municipal government. While extraneous notes and comments not germane to the actual proceedings ... should be excluded, the minutes should reflect what actually transpired, including the general nature of the subjects discussed.

In addition to identifying who attended the meeting and the start and adjournment times, the meeting record should provide a detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered, as well as any motions (including who introduced and seconded them), and any and all votes or directions to staff that occur in the meeting.

A complete, detailed record of discussions was especially warranted in this case, given that a member of Council expressed concern about the content of the discussions.

In the past, our Office has encouraged Council to consider audio or video recording closed meetings⁴ in order to enhance transparency and accountability in ensuring a complete and accurate meeting record of closed session discussions. Electronically recording meetings may also alleviate the need for councilors to exit a closed meeting if they are uncomfortable with the topic under consideration, because they will have the option to express their concerns on the record.

Several jurisdictions in the United States require that municipal closed meetings be electronically recorded or videotaped, and others have adopted this practice to enhance the accountability and transparency of their proceedings. For example, the

⁴ Ombudsman’s City of London Investigation (Closed Meeting February 21, 2012)
www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/LondonAugust2012-EN.pdf;

Illinois *Open Meetings Act* states that all public bodies must keep a verbatim record of all their closed meetings in the form of an audio or video recording⁵. Similarly, Iowa's legislation⁶ requires that audio recordings be made of all closed sessions, and Nevada requires that public bodies record audio of open and closed meetings or use a court stenographer to transcribe the proceedings⁷.

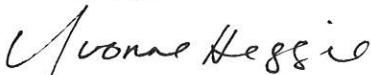
Ontario municipalities that electronically record their closed sessions include the Municipality of Lambton Shores, the Town of Midland, the Townships of Madawaska Valley and Tiny, and the City of Oshawa. We again encourage you to consider adopting a practice of audio or video recording closed Council and Committee meetings.

On April 14, 2014, we discussed our review and findings with you and provided you with an opportunity to provide feedback. You thanked our Office for the review and did not express any concerns with our findings.

You agreed to include this letter on the next public Council meeting agenda and to post a copy of the letter on your website.

Thank you for your cooperation with our review.

Sincerely,



Yvonne Heggie
Early Resolution Officer
Open Meeting Law Enforcement Team

⁵ 5 ILCS 120/2.06

⁶ Iowa Code § 21.5(4)

⁷ N.R.S 241.035(4)