



Ombudsman Report

Investigation into complaints about closed meetings held by Council for the City of London on May 17 and June 23, 2016

**Paul Dubé
Ombudsman of Ontario**

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Complaint

- 1 In June 2016, my Office received two complaints about closed meetings held by council for the City of London.
- 2 The first complaint was about a closed meeting held on May 17, 2016 to discuss the appointment of an integrity commissioner. The complaint alleged that the discussions at that meeting did not fit within any of the exceptions to the open meeting requirements, and that the hiring of the integrity commissioner should have been discussed publicly, as it was a matter of public interest.
- 3 The second complaint pertained to a closed meeting held on June 23, 2016, during which discussions took place related to a recent report of the city's Integrity Commissioner. The complainant noted that the city had released the report to the public two days prior, and complained that a public document should not have been discussed in a closed session.

Ombudsman jurisdiction

- 4 Under the *Municipal Act, 2011*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 5 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 6 The Ombudsman is the closed meeting investigator for the City of London.
- 7 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's procedure by-law have been observed.

Investigative process

- 8 On July 11, 2016, my Office issued notice in accordance with section 18(1) of the *Ombudsman Act* that we would be investigating these complaints.
- 9 Members of my Office's staff reviewed the agenda and minutes for the meetings in question, as well as staff reports and the Integrity Commissioner's report. We spoke with members of staff, and also considered relevant sections of the *Municipal Act* and the city's procedure by-law.

The meetings

The May 17, 2016 Committee of the Whole meeting

- 10 City staff told our Office that the hiring of an integrity commissioner was part of the city's strategic plan for 2015. The city issued a request for proposal (RFP) for an integrity commissioner in June 2015.
- 11 At the January 26, 2016 council meeting, in open session, council voted to cancel the RFP, and to undertake a confidential targeted recruitment process. Eventually, one preferred candidate was identified, and this candidate's hiring was discussed at the May 17 Committee of the Whole meeting
- 12 The May 17 meeting was a regular council meeting, scheduled to begin at 4:00 p.m. According to the agenda, council would be proceeding in camera as Committee of the Whole during the meeting. As outlined in the city's procedure by-law, it is within the mandate of Committee of the Whole to consider confidential reports from the city's standing committees when held as part of the proceedings at a council meeting.
- 13 According to the open session minutes, council passed a resolution to proceed in camera as Committee of the Whole to discuss six matters, including:

A matter pertaining to personal matters about identifiable individuals with respect to employment related matters; advice that is subject to solicitor-client privilege; including

communications necessary for that purpose and for the purpose of providing instructions and directions to officers and employees of the Corporation.

- 14 While in camera, Committee of the Whole reviewed a recommendation from one of the city's standing committees, the Strategic Priorities and Policy Committee, arising from its May 16, 2016 closed session at which the appointment of the integrity commissioner was discussed. Council also reviewed a report, prepared by legal counsel, that had been considered by the Strategic Priorities and Policy Committee before being forwarded to Committee of the Whole.
- 15 Legal counsel attended both the May 16 and May 17 meetings, to answer questions about the report and to provide legal advice. The staff report was redacted from the materials provided to our Office, as we were advised it was subject to solicitor-client privilege.
- 16 At the end of Committee of the Whole's in camera discussions, a motion was forwarded to council for deliberation and a vote in public session.
- 17 When the closed session concluded and the council meeting resumed, council voted to appoint the integrity commissioner.

Analysis

- 18 Council cited two grounds for discussing this matter in closed session at the May 17 meeting: 1) personal matters about an identifiable individual and 2) advice that is subject to solicitor-client privilege.

The personal matters exception

- 19 We were advised that the personal matters exception was cited to protect the privacy of the candidate for the integrity commissioner position while council discussed his fitness for the job, including his past work history and other qualifications. My Office has consistently found that discussions relating to an identifiable individual's education, employment history and qualification for a particular job fit within the personal matters exception of the Act.¹

¹ See, for example: Ombudsman of Ontario, *Investigation into whether the Councils for Armour Township and the Village of Burk's Falls held illegal closed meetings on January 16th, 2015* (October 2015), online: <https://www.ombudsman.on.ca/Resources/Reports/Village-of-Burk-s-Falls--br-Armour-Township.aspx>

- 20** This exception applied to Committee of the Whole's in camera discussions about the hiring of the integrity commissioner on May 17.

The solicitor-client privilege exception

- 21** We were provided with closed session materials for the May 16 Strategic Priorities and Policy Committee meeting and the May 17 Committee of the Whole meeting. The minutes provided to my Office were largely redacted due to solicitor-client privilege, as was the entire staff report that was considered in camera.
- 22** As noted in a previous report regarding a meeting held by council for the City of London², one of the limited and narrow exceptions to our general authority under the *Ombudsman Act* to require disclosure of information is that my Office cannot compel production of information subject to solicitor-client privilege. However, we must exercise due diligence and inquire into the circumstances surrounding meetings closed to consider legal advice. This can include determining whether legal counsel attended the meeting to provide advice verbally and/or whether council considered written legal advice during the meeting.
- 23** Some municipalities choose to waive solicitor-client privilege and provide us with privileged information. In such cases the information is protected by the *Ombudsman Act*, which requires that any information provided to my Office be kept confidential unless, in the opinion of the Ombudsman, it ought to be disclosed to establish grounds for the Ombudsman's conclusions or recommendations.
- 24** My Office was advised that the staff report considered at the May 16 Strategic Priorities and Policy Committee meeting and the May 17 Committee of the Whole meeting was prepared by legal counsel and was subject to solicitor-client privilege. We were also advised that counsel attended these meetings to provide legal advice.
- 25** As noted in several of my Office's reports³, this exception can be used when council is considering specific advice, or a related communication, from a solicitor. Accordingly, I am satisfied that the in camera discussions

² Ombudsman of Ontario, *Investigation into whether the City of London's Committee of the Whole improperly discussed "Occupy London" in camera on November 7, 2011* (March 2012), online: <https://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/LondonOccupy-Final-EN.pdf>

³ See, for example: Ombudsman of Ontario, *Investigation into whether Council for the City of Greater Sudbury held illegal closed meetings on March 2, March 23, and April 26, 2016* (January 2017), online: [https://www.ombudsman.on.ca/Resources/Reports/City-of-Greater-Sudbury-\(5\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-Greater-Sudbury-(5).aspx)

were permitted to be held in camera under the solicitor-client privilege exception found in section 239(2)(f) of the Act.

The June 23, 2016 council meeting

26 The June 23 council meeting began at 4:00 p.m. On the agenda were ten items for closed session discussion, including:

F) A matter pertaining to personal matters about identifiable individuals and labour relations and advice subject to solicitor-client privilege, including advice from officers and employees of the Corporation and communications necessary for that purpose, and for the purpose of providing directions and instructions to officers and employees of the Corporation, relating to a potential request for Inquiry by the Integrity Commissioner and the Integrity Commissioner Report dated June 21, 2016.

27 This matter pertained to a request from a member of council for the Integrity Commissioner to consider conducting an inquiry. The request had first been considered at the June 20, 2016 Corporate Services Committee meeting. The Committee had passed a motion that the matter be referred for consideration at the June 23 council meeting in order to receive advice from the city solicitor's office.

28 In open session at the June 23 meeting, council passed a motion to proceed in camera, for the reasons outlined on the agenda.

29 According to the closed session minutes, while in camera council considered a confidential report, prepared by legal counsel, that was not provided to my Office as it was subject to solicitor-client privilege. The city's legal counsel also was present for the closed session and provided a verbal review of the report.

30 When the open session resumed, council received the June 21, 2016 report of the Integrity Commissioner, which was already available to the public. Council then voted to adopt the Integrity Commissioner's findings.

Analysis

31 As with the May 17 meeting, little information was provided to my Office about the June 23 in camera discussions; the majority of the information was redacted due to solicitor-client privilege. Accordingly, we were unable to evaluate whether the personal matters or labour relations exceptions,

found in sections 239 2(b) and (d) of the Act, applied to the closed session discussions.

- 32** We were advised that both written and verbal legal advice was presented to council during the closed session and that this, rather than the substance of the publicly available report of the Integrity Commissioner, was the topic of discussion during the in camera session. Accordingly, I am satisfied that the section 239(2)(f) exception was the primary exception authorizing the closed session.

Opinion

- 33** My investigation found that the discussions that took place in camera at the May 17, 2016 Committee of the Whole meeting were permitted to be closed to the public under the personal matters and solicitor-client privilege exceptions of the *Municipal Act, 2001*. The in camera discussions held at the June 23, 2016 council meeting were permitted to be closed to the public under the solicitor-client privilege exception.

Report

- 34** I request that my final report be shared with council for the City of London and the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario