

July 25, 2014

Mayor John Henry and
City Clerk Sandra Kranc
The Corporation of the City of Oshawa
50 Centre Street South,
Oshawa, ON L1H 3Z7

Dear Mayor Henry and Ms Kranc,

Re: Complaints re: Closed Meetings of Council on or about May 21 and September 3, 2013.

I am writing further to our conversation of July 22, 2014 about the outcome of our review of allegations that members of council violated the provisions of the *Municipal Act, 2001* by holding closed meetings, as follows:

- a) Sometime prior to a council meeting on May 21, 2013 – to discuss hiring an independent investigator to review allegations made about individual employees and city departments by the city's Auditor General in Report AG-13-09 dated May 16, 2013; and
- b) Sometime prior to a council meeting on September 3, 2013 – to discuss not renewing the Auditor General's contract and eliminating the Office of the Auditor General; and to request a police presence at the public meeting.

As you know, the *Municipal Act 2001* (the Act) requires that all meetings of council, local boards, and their committees be open to the public, with limited exceptions. The Ombudsman is the closed meeting investigator for the City of Oshawa.

The Ombudsman's review focused on whether the closed meeting provisions of the *Municipal Act* were complied with. The Ombudsman's mandate does not allow for our Office to review the substance of any decisions that were made at municipal meetings or decisions made by city staff, including the decision to have municipal police attend the council meeting on September 3, 2013.

In reviewing this complaint, our Office obtained and reviewed relevant documents, including the reports of the Auditor General and independent investigator, spoke with the Clerk, city staff and members of council, and considered the relevant sections of the city's Procedure By-Law and the Act.

Background

On May 21, 2013, council passed a resolution in open session to appoint an independent investigator, George Rust D'Eye, to review allegations made about individual employees and city departments by the city's Auditor General in Report AG-13-09, dated May 16, 2013, and to present his findings as soon as possible to council in an open session.

On August 23, 2013, Mr. Rust D'Eye issued his final report, which was presented to council at its meeting on September 3, 2013. In his report, Mr. Rust D'Eye made eight recommendations to council. These were voted on separately during the September 3 meeting.

During the September 3 meeting, council passed motions to eliminate the Office of Auditor General and not to renew the contract for the Auditor General, which was due to expire on September 6, 2013.

Alleged Closed Meetings on or about May 21, 2013

Our Office received a complaint alleging that six to eight members of Council met prior to the May 21, 2013 meeting to discuss the appointment of Mr. Rust D'Eye.

Council's public meeting minutes of May 21, 2013 indicate that the resolution to appoint Mr. Rust D'Eye was introduced by Councillors Chapman and Diamond, and ultimately passed by a 5-4 vote. Two council members were absent for the vote.

Our review determined that on May 18, 2013, Councillors Bouma, Chapman, and Diamond met in the Councillor Boardroom at City Hall to discuss allegations made about individual employees and city departments by the city's Auditor General in Report AG-13-09, dated May 16, 2013. They also discussed the need to hire a third party to investigate the allegations.

During the discussions, Councillor Diamond put forward the name of Mr. Rust D'Eye because he is a leading expert in the field of municipal law and had previously conducted some work for the city in the past. Councillor Diamond informed our Office that given the seriousness of the issue, she contacted Mr. Rust D'Eye to inquire about his immediate availability to conduct an investigation, subject to council's approval. According to Councillor Diamond, Mr. Rust D'Eye agreed and suggested that council consider granting him the powers of an Integrity Commissioner to assist with his investigation.

On May 20, 2013, Councillors Bouma, Chapman, and Diamond met again to discuss the final wording of the motion they wished to propose to council concerning

appointing Mr. Rust D'Eye. At 2:22p.m. on May 21, 2013, Councillor Diamond emailed Mr. Rust D'Eye, providing him with a draft copy of the proposed motion and requesting that he identify any problems with the language prior to 5:00 p.m., when the meeting was scheduled to begin. Councillor Bouma informed our Office that he drafted the motion, but was absent for the May 21, 2013 council meeting, so Councillors Chapman and Diamond introduced the motion.

Other members of Council informed our Office that they were not present on May 18, 2013, with Councillors Bouma, Chapman and Diamond and were not contacted by any of these councillors to discuss the motion to appoint Mr. Rust D'Eye. The Mayor told our Office that, although he was at City Hall on May 18, 2013, and did witness the gathering of the three councillors, he did not participate in any discussion with them in relation to the issue.

Analysis

In order for the provisions of the *Municipal Act* to apply, it must be found that council held a meeting for purposes of the Act. Section 238 (1) of the Act defines a "meeting" as "any regular, special or other meeting of a council, of a local board or of a committee of either of them."

When determining whether a private meeting of members of council is governed by the Act, a number of factors are considered, including whether a legal quorum of council was present. Although having a quorum of council present is not determinative, it is an important consideration, as the presence of a quorum means that there are sufficient numbers of council members present to make binding decisions and transact city business.

As the Ombudsman noted in his investigation concerning a private lunch meeting involving members of London city council:

In Ontario, legislators have not gone so far as to make a quorum necessary to satisfy the definition of a meeting. As such, my interpretation is that the Legislature contemplated, and left open, the possibility that a gathering short of a quorum can still contravene the open meeting rules of the *Municipal Act*. This was my conclusion in 2009 when I found that the Council of the Township of Nipissing engaged in serial telephone meetings to improperly conduct business, despite a quorum never being present when the individual calls occurred.¹

The *Municipal Act, 2001* does not create an absolute prohibition against members of

¹ "In the Back Room": Investigation into whether members of Council for the City of London held an improper closed meeting on February 23, 2013. André Marin Ombudsman of Ontario. October 2013
http://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/London_BT_Final-EN_1.pdf

council discussing city business outside chambers. As the Ombudsman has noted in previous reports, it is a healthy thing in a democracy for government officials to share information informally before making policy decisions. To expect council members never to talk to one another outside of a public meeting is unrealistic and would have the effect of unnecessarily chilling speech.

Our review determined that three of the eleven council members met privately on two occasions prior to the May 21, 2013 meeting, to informally discuss their views on the Auditor's report and the need to retain an independent investigator. There is no evidence to suggest that a quorum of council was present during these discussions. Our review determined that the pre-May 21 private meetings and discussions among three members of council were of an informal nature and did not come within the scope of the *Municipal Act*.

Alleged Closed Meeting on or about September 3, 2013

On September 3, 2013, Mr. Rust D'Eye presented council with his final report into allegations made about individual employees and city departments by the city's Auditor General in Report AG-13-09. Council voted on each of Mr. Rust D'Eye's eight recommendations. It decided not to renew the Auditor General's contract and to eliminate the Office of Auditor General altogether. As the meeting progressed, there were interruptions by members of the public, which resulted in arrests by Durham Regional Police officers who were present at the meeting.

The complaints to our Office alleged that six to eight members of council met in advance of the September 3 meeting to agree upon terminating the Auditor General's contract and eliminating the Office of the Auditor General, and requested a police presence in advance of the meeting in anticipation of controversy.

Non-Renewal of the Auditor General's Contract & Termination of the Office of Auditor General

Based on the meeting agenda and minutes, on September 3, 2013, council was to consider renewing the Auditor General's contract, which was set to expire on September 6, 2013. The Auditor General's Report AG-13-11 included a request for a renewal of his contract to December 31, 2013.

Although not on the original agenda, at the beginning of the public meeting Councillors Diamond and Chapman moved to request an opportunity to obtain legal advice from the City Solicitor concerning the Auditor General's report, which was referred to in the closed meeting agenda. This motion was carried on a two-thirds vote of the members present.

Councillor Diamond told our Office that she was unfamiliar with the specific terms of the Auditor General's contract and wanted to understand council's legal obligations with respect to the issue.

The resolution to proceed in camera stated:

“That pursuant to Section 239 (2) subsection (a), (d) and (f) of the *Municipal Act* Council go into closed session to obtain legal advice concerning the employee contract referred to in Report AG-13-11 listed on Council’s Public Agenda as Item 2 under Committee of the Whole Reports; and, to discuss the security of municipal property referred to in Confidential Report CM-13-46 under Item 1 of Committee of the Whole Reports concerning the potential disposition of City-owned property.”

According to the public minutes, the closed meeting recessed at 4:43 p.m. and the public meeting reconvened at 6:30 p.m. The Closed Meeting Summary Report in the public minutes states that council members questioned the City Solicitor about the Auditor General’s Report and that the City Solicitor provided legal advice to council on this issue.

During the public meeting, public delegations were permitted to present their views on the Auditor General’s office as well as on the findings of Mr. Rust D’Eye. The minutes also reflect that Council members posed questions to Mr. Rust D’Eye about his findings and recommendations. Later in the public session, Councillor Chapman introduced a motion, seconded by Councillor Sanders, on how to respond to Mr. Rust D’Eye’s recommendations. The resolution included a provision “that upon the expiry of the term of employment of the current Auditor General, the position of Auditor General be eliminated.” The resolution to eliminate the Auditor General’s office passed by a vote of 8-3.

During our interview with Councillor Chapman, he informed our Office that he drafted the motion on his own, either the morning of the September 3 meeting or the day before. After the closed meeting on September 3 to obtain legal advice regarding the Auditor’s contract, he went back to his office and recalled asking Councillor Sanders to second the motion.

Councillor Sanders confirmed in our interview with him that Councillor Chapman asked him into his office and showed him the motion, which he seconded. Councillor Sanders said this took place about 5:00 p.m. on September 3, before the public meeting. Both councillors said they did not discuss the draft motion with other council members prior to the public meeting.

Towards the end of the September 3 public meeting, Councillors Bouma and England introduced a motion not to renew the contract of employment for the Auditor General. Councillor Bouma informed our Office that he drafted the motion after a brief conversation with Councillor England prior to the September 3 meeting. Both councillors said they did not discuss this motion with any other members of council or exchange any correspondence on the subject. The other members of council we interviewed confirmed that they did not speak with Councillors Bouma and England on this issue.

Analysis

In relation to the motions to eliminate the Office of Auditor General and not to renew the Auditor General's contract, our review did not establish that a quorum of council met outside of a formal council meeting to discuss or decide in advance on the motions introduced on September 3, 2013. The discussions between two members of an eleven member Council do not come within the scope of the *Municipal Act*.

Police presence at the September 3 Meeting

The members of council we interviewed told us they had no idea or advance warning that there would be a police presence at the meeting on September 3, 2013. Our review did not establish that there were any private meetings among council members on this subject. The decision to request a police presence at the hearing was beyond the Ombudsman's mandate to review.

Conclusion

Our review concluded that members of Oshawa council did not hold closed meetings in violation of the *Municipal Act*.

When we spoke on July 22, 2014, we asked that this letter be included on the agenda for the next public council meeting on September 2, 2014 and a copy made available to the public on your website.

We would like to take this opportunity to thank you for your cooperation with our review.

Sincerely,

Ciarán Buggle
Investigator