

BY EMAIL

November 16, 2023

Council for the City of Hamilton
c/o Mayor Andrea Horwath
Hamilton City Hall
71 Main Street West
Hamilton, ON L8P 4Y5

Dear Members of Council for the City of Hamilton,

Re: Closed meeting complaint

My Office received a complaint alleging that the Agriculture and Rural Affairs Sub-Committee (the “Sub-Committee”) for the City of Hamilton (the “City”) violated the open meeting rules in the *Municipal Act, 2001*¹ (the “Act”) when it failed to broadcast a livestream of its meeting on April 18, 2023 to the public.

I am writing to share the outcome of my review of this complaint. As I explain below, I am unable to conclude whether or not the meeting on April 18, 2023 was improperly closed to the public. However, I would like to clarify for the City its obligation to preserve evidence that is the subject of a review or investigation by my Office.

Ombudsman’s role and authority

All meetings, as defined by the Act, held by council, local boards or their committees must be open to the public subject to limited exceptions. As of January 1, 2008, the Act gives anyone 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. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own. My Office is the closed meeting investigator for the City of Hamilton.

¹ SO 2001, c 25.

My Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman's decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of the Ombudsman's previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Review

My Office reviewed relevant documentation including the City's procedural by-law, the Sub-Committee's terms of reference, and the records from the April 18 meeting. We also reviewed the City's YouTube channel where the Sub-committee's meetings are livestreamed to the public. We spoke with the Deputy Clerk, and two Legislative Coordinators.

The City provided my Office with a link to a YouTube recording of the April 18 meeting livestream that we were able to review. However, within days of the meeting, the City permanently deleted the recording.

Background

The Sub-Committee is mandated to provide the City with advice on matters that impact agriculture and rural communities, act as a liaison between those communities and council, and preserve and advance an economically viable agriculture base in the City. The Sub-committee reports to council through the City's Planning Committee. According to its terms of reference, the Sub-Committee may be composed of up to 23 members. At the time of the April 18 meeting, the Sub-Committee's membership consisted of seventeen members, five of whom were council members.

This is not the first time my Office has reviewed a complaint that the Sub-Committee's meetings were not livestreamed. In September 2022, my Office sent the City a letter regarding a complaint that the Sub-Committee (known at the time as the Agriculture and Rural Affairs Advisory Committee) did not broadcast a livestream of its March 29, 2022 meeting. Based on my review of the meeting, I was unable to conclude whether the meeting was livestreamed. My Office was told by the City that it would begin to archive all committee meeting recordings on the City's YouTube page beginning with the new term of council in 2022.

Review

The Agriculture and Rural Affairs Sub-Committee is a committee subject to the open meeting rules

Under s. 238 of the Act, a committee is “any advisory or other committee, subcommittee or similar entity of which at least 50 per cent of the members are also members of one or more councils or local boards”. My Office has found that a body can also be a committee if deemed so by municipal by-law,² and that a body may also be subject to the open meeting requirements if it is a committee as defined in the municipality’s procedural by-law.³

At the time of the April 18, 2023 meeting, the Sub-Committee’s membership did not meet the threshold in the Act. However, we were advised by the City that the Sub-Committee is a “sub-committee” under the procedural by-law. Accordingly, the Sub-Committee is subject to the open meeting rules.

April 18, 2023 meeting

The City provided notice of the Sub-Committee’s April 18, 2023 meeting on its website. The notice stated that a virtual meeting would take place at 7:00 p.m. and provided a link to the City’s YouTube channel, as well as the name and phone number of the Legislative Coordinator responsible for clerking the meeting. The meeting lasted approximately one hour and fifteen minutes.

The complainant alleged that the meeting was not livestreamed to the public on YouTube. The complainant told my Office that they visited the City’s YouTube channel at the time of the meeting and did not see a livestream taking place, and did not receive a notification from YouTube that a livestream was occurring – although they did receive notifications for other City meetings that were livestreamed on April 18. The complainant believes that the meeting may have been an “unlisted” livestream on YouTube. An “unlisted” livestream would not appear on the City’s general YouTube channel and is only visible to individuals who have a direct link.⁴

My Office spoke to the Legislative Coordinator who managed the livestream for the meeting. The Legislative Coordinator told my Office that she followed the general process for initiating the livestream of the Sub-Committee’s April 18 meeting and periodically checked the City’s YouTube page to confirm that the livestream was working. The Legislative Coordinator did not receive any indications that the public was unable to view the livestream.

² *Hamilton (City of) (Re)*, 2021 ONOMBUD 9, online: <<https://canlii.ca/t/jfi02>>.

³ *Niagara (Regional Municipality of) (Re)*, 2015 ONOMBUD 37, online: <<https://canlii.ca/t/gtp7n>>; *Ibid.*

⁴ <<https://support.google.com/youtube/answer/157177?hl=en&sjid=10205234468643377914-NA#unlisted&zippy=%2Cunlisted-videos>>.

My Office received detailed information about the process followed by staff to set up and livestream virtual meetings on YouTube, including viewing the “back end” of the City’s YouTube channel. The April 18 meeting is documented to have been livestreamed and was viewed 24 times. The City’s YouTube account does not indicate whether the livestream was “unlisted” at the time of the meeting.

Analysis

My Office obtained conflicting accounts about whether the livestream of the Sub-Committee’s April 18 meeting was accessible to the public. It is clear that a livestream of the meeting on YouTube did occur; however, my Office was unable to confirm whether the livestream was “unlisted” or “public”. I am unable to conclude that the meeting was improperly closed to the public. I recognize that this is the second complaint I have received from a member of the public who was unable to watch a livestream of the Sub-Committee’s meetings. In light of this, I strongly encourage the City to carefully review its YouTube livestreaming process to ensure that all meeting livestreams are public.

The recording of the April 18, 2023 meeting

When my Office receives an open meeting complaint and conducts a review or investigation, collecting evidence from the municipality is a fundamental part of the process. Evidence may include meeting records, statements from staff, and audio or visual recordings. Recordings provide a clear and accessible record for closed meeting investigators to review. My Office has consistently recommended that all municipalities record their meetings, both open and closed.⁵

On April 19, 2023, my Office notified the City that a complaint was filed about the Sub-Committee’s April 18 meeting. The City provided my Office with a link to the recording of the meeting livestream on YouTube. However, within days and while my Office’s review was ongoing, the recording was permanently deleted by the City. The staff member responsible for deleting the recording was not informed that my Office was conducting a review of the meeting. The Deputy Clerk told my Office that the City deleted the recording in accordance with the City’s records retention practices at the time.

Regardless of a municipality’s records retention practices, when my Office notifies a municipality that an open meeting complaint has been received, the municipality must preserve evidence in its possession. As a practical matter, the municipality should inform the appropriate staff to retain any evidence, including recordings, that is relevant to my Office’s review. The preservation of evidence is not merely a procedural formality; it is an obligation fundamental to the required co-operation with my Office during our review, and affects my ability to make findings as a closed meeting investigator.

⁵ Bruce (County of) (Re), 2022 ONOMBUD 7, online: <<https://canlii.ca/t/jpbf9>>.

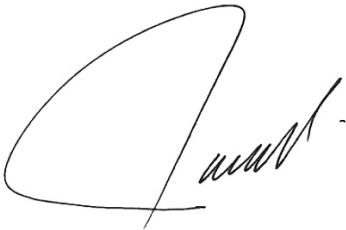
I understand that the City has amended its records retention by-law and now preserves the recordings of all sub-committee meetings, including the Agriculture and Rural Affairs Sub-Committee.⁶ In this case, there is no evidence that the recording was deleted with the intention to affect the outcome of my Office's review. Nevertheless, the effect of the deletion was to frustrate my review. It is incumbent on the City to ensure that appropriate members of staff are informed when my Office conducts a review or investigation and that evidence is properly preserved.

The City should be mindful that it is an offence under the *Ombudsman Act* to wilfully mislead the Ombudsman or to obstruct an Ombudsman investigation.⁷ All provincial government organizations and municipalities, universities and school boards must co-operate with the Ombudsman's investigations.

Conclusion

Under the circumstances, my Office will not be taking further steps regarding this complaint. The Clerk confirmed that this letter will be included as correspondence at an upcoming meeting of council.

Sincerely,



Paul Dubé
Ombudsman of Ontario

cc: Janet Pilon, Acting Clerk, City of Hamilton

Cette lettre est aussi disponible en français

⁶ By-law No. 11-040 To Establish Retention Periods for Records of the City of Hamilton.

⁷ *Ombudsman Act*, R.S.O. 1990, c. O.6 at s 27.