

BY EMAIL

July 14, 2022

Board of Management for the Niagara Falls Downtown Business Improvement Area
c/o Ron Charbonneau, Chair of the Board
4605 Queen Street
Niagara Falls, ON L2E 2L7

Dear Members of the Board for the Niagara Falls Downtown Business Improvement Area:

Re: Closed meeting complaint

My Office received a complaint regarding a closed meeting held by the Governance Committee (the “Committee”) for the Niagara Falls Downtown Business Improvement Area (the “BIA”) on January 12, 2022. The complaint alleged that the closed session did not comply with the procedural requirements found in the *Municipal Act, 2001*¹ (the “Act”). Specifically, the complainant alleged that the Committee did not pass a resolution prior to proceeding *in camera* and that the Committee did not report back to the public in open session following the *in camera* meeting. The complainant further alleged that the Committee lacked quorum for this *in camera* meeting and that the agenda did not indicate that the Committee would proceed *in camera*.

I am writing to share the outcome of my review of this matter. For the reasons set out below, I have found that this meeting was properly closed pursuant to the rules and procedures outlined in the Act.

Ombudsman’s role and authority

As of January 1, 2008, the Act gives anyone the right to request an investigation into whether a municipality, local board, or a committee of either, has complied with the Act in

¹ *Municipal Act, 2001*, SO 2001 c 25.



closing a meeting to the public.² Municipalities may appoint their own investigator. The Act designates the Ombudsman as the default investigator for municipalities and local boards that have not appointed their own.

Section 204(2.1) of the Act specifies that a board of management for a business improvement area is a local board of the municipality for all purposes. Accordingly, the BIA is a local board of the City of Niagara Falls and therefore its meetings, and those of its committees, are subject to the Act's open meeting requirements.

My Office is the closed meeting investigator for the Committee.

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 the Committee's January 12, 2022 meeting agenda, as well as the open and closed meeting minutes. We also reviewed relevant sections of the Act and the BIA's by-laws, and spoke to the BIA's Executive Director.

According to the meeting minutes, the Committee held a meeting at 4:31 p.m. on January 12, 2022 with two of its five members present. The minutes indicate the Committee resolved to proceed *in camera* "for reasons of personal matters about an identifiable individual, including local board employee and/or member(s)."

Our review found that once in closed session, the Committee received an update from staff about a named individual's employment status. The update included information about the individual's job performance with comments about their behaviour. We were told that the Committee did not discuss this information, and ultimately resolved to return to open session and adjourn the meeting.

² *Ibid* at s 239.1.



Applicability of the exception for personal matters about an identifiable individual

While the complaint focused on procedural matters, my Office also reviewed the applicability of the exception to the open meeting rules for this closed session discussion.

Section 239(2)(b) of the Act allows a meeting, or a portion of it, to be closed when discussions pertain to a personal matter about an identifiable individual. Information about an individual in their professional capacity may qualify as personal information if it reveals something of a personal nature.³ My Office has previously found that discussions about an individual's job performance,⁴ their suitability as a candidate for a position,⁵ and their salary,⁶ can qualify as personal matters.

In this case, the closed meeting minutes indicate that the Committee received detailed information about an identifiable individual's job performance and behaviour. Therefore, the Committee's discussion fit within the exception to the open meeting rules for discussions about personal matters about an identifiable individual.

Procedural matters

Resolution

The complainant told my Office that the Committee failed to pass a resolution to proceed *in camera* at the meeting on January 12, 2022.

Subsection 239(4) of the Act requires that, before holding a closed meeting, a committee must state by resolution "the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting." While the Act does not require a committee to specifically indicate which exception to the open meeting rules it intends to rely on for each matter discussed in closed session, my Office suggested this as a best practice.⁷

³ *Amherstburg (Town of) (Re)*, 2015 ONOMBUD 13 at para 22, online: <<https://canlii.ca/t/gtp5z>> .

⁴ *Kirkland Lake (Town of) (Re)*, 2021 ONOMBUD 12 (CanLII), online: <<https://canlii.ca/t/jqvld>> at para 30.

⁵ Ontario Ombudsman, "Letter to the Town of South Algonquin," (8 September 2021) online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipalmeetings/2021/township-of-south-algonquin-en>>.

⁶ *The Nation (Municipality of) (Re)*, 2019 ONOMBUD 4 (CanLII), online: <<https://canlii.ca/t/j2b4c>> at para 56.

⁷ Ontario Ombudsman, "Letter to the City of Pickering," (23 September 2020) online: [ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2020/city-of-pickering](https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2020/city-of-pickering)



In this case, the Committee passed a resolution to proceed *in camera*, indicating that it would be discussing “personal matters about an identifiable individual, including local board employee and/or member(s)”. This closely mirrors the language contained in s. 239(2)(b) of the Act and gives a general description of the matter to be discussed. Given the content of the discussion and the small size of the BIA staff, it would not have been possible to provide additional information in the circumstances.

Report back

The complainant also told my Office that the Committee did not report back to the public following the *in camera* session.

According to the minutes, the Committee did not report back to the public about the nature of the *in camera* discussion. We were told in interviews that the Committee does not typically report back after a closed session unless there are any procedural decisions or directions to staff to report, which did not occur in this case.

Although there is no requirement under the Act to report back in public after the conclusion of a closed meeting, my Office recommends this best practice to increase transparency of the closed meeting process.

Quorum

The complainant told my Office that the Committee lacked quorum for the January 12, 2022 meeting because only two out of its five members were present.

Under the Act, there must be a quorum of committee members present in order for a gathering to be considered a meeting.⁸ The Act does not define what constitutes a quorum for the purposes of a local board’s committee meeting. However, the BIA’s by-laws define a quorum of committee as at least one board member and one staff member.

On January 12, 2022, there were two board members and one staff member present. Accordingly, there was a quorum present for this meeting.

Agenda

The complainant noted that the meeting agenda did not indicate that the Committee would proceed *in camera*.

⁸ *Municipal Act, 2001*, SO 2001 c 25. s.238(1).



My review confirmed that the closed session discussion was not included on the agenda. We were told in our interviews that the *in camera* matter was not foreseen at the time the agenda was prepared and that the Committee decided at some point after the meeting had started to proceed *in camera*.

There are no specific notice requirements for *in camera* meetings or discussion items outlined in the Act or in the BIA's by-laws. Instead, the requirement in the Act is that notice be provided for the meeting as a whole, which occurred in this instance. Accordingly, the Committee was entitled to proceed *in camera* at the January 12, 2022 meeting.

Conclusion

My review found that the Governance Committee for the Niagara Falls Downtown Business Improvement Area did not contravene the *Municipal Act, 2001* when it proceeded into closed session on January 12, 2022. Further, the *in camera* discussion fit within the exception to the open meeting rules for personal matters about an identifiable individual.

I would like to thank the Committee for its co-operation during my review. The Executive Director confirmed that this letter will be included as correspondence at an upcoming meeting.

Sincerely,



Paul Dubé
Ombudsman of Ontario

CC: Amanda Nicol-MacDonald, Executive Director

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