



J. Paul Dubé, Ombudsman

BY EMAIL

Mayor Dave Ryan
Council for the City of Pickering
One The Esplanade
Pickering, ON L1V 6K7

August 31, 2022

Dear Members of Council for the City of Pickering:

RE: Closed meeting complaint

My Office received a complaint regarding the January 10, 2022 closed meeting of council for the City of Pickering (the “City”). The complaint alleged that portions of the discussion did not come within any of the closed meeting exceptions found in the *Municipal Act, 2001*¹ (the “Act”).

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 under the exceptions for discussions about litigation or potential litigation and advice subject to solicitor-client privilege.

Ombudsman’s role and authority

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.² 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 Pickering.

¹ SO 2001 c 25.

² *Ibid* at s 239.1.

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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 agenda for the January 10, 2022 meeting, as well as the open and closed meeting minutes. We also reviewed relevant sections of the Act and the City's procedure by-law, and spoke to the City Clerk.

According to our review, council held a special meeting at 3:25 p.m. on January 10, 2022. The open session minutes indicate that council soon proceeded *in camera*, citing the closed meeting exceptions for litigation or potential litigation and advice subject to solicitor-client privilege under sections 239(2)(e) and 239(2)(f) of the Act. While the resolution cited two exceptions, it did not provide any information about the general matters to be discussed while in closed session. However, additional information was provided in the meeting agenda indicating that council would receive a confidential verbal update from the Director of Corporate Services & City Solicitor as well as from the Director of City Development & Chief Building Officer related to appeals of decisions made by the City's Committee of Adjustment.

Our review found that once in closed session, council received information and advice from staff and legal counsel relating to appeals of Committee of Adjustment decisions. Council then considered specific matters that were appealed to the Ontario Land Tribunal and directed staff with respect to each matter.

Applicability of the exception for litigation or potential litigation

The complaint alleged that not all matters discussed by council were subject to litigation or potential litigation.

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Section 239(2)(e) of the Act allows council to discuss litigation or potential litigation, including matters before administrative tribunals that affect the municipality. While the Act does not define what constitutes “litigation or potential litigation” the courts have determined that this exception is reserved for circumstances where the subject matter discussed is ongoing litigation or involves a reasonable prospect of litigation.³

The closed meeting minutes indicate that council spoke about a number of decisions from the Committee of Adjustment concerning local properties that were subject to ongoing appeals at the Ontario Land Tribunal. Council received legal advice and directed staff with respect to each matter. Accordingly, council was permitted to rely on the open meeting exception for litigation or potential litigation pursuant to s.239(2)(e) of the Act in these circumstances.

Applicability of the exception for advice subject to solicitor-client privilege

Section 239(2)(f) of the Act allows council to discuss advice subject to solicitor-client privilege. For instance, this applies to discussions that include communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential. The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.

The closed meeting minutes indicate that council received advice from legal counsel while in closed session relating to appeals of Committee of Adjustment decisions. Accordingly, council was permitted to rely on the open meeting exception for advice subject to solicitor-client privilege pursuant to s.239(2)(f) of the Act in these circumstances.

Resolution to proceed into closed session

Section 239(4)(a) of the Act requires that before moving into closed session, a municipality 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”. In *Farber v. Kingston (City)*, the Ontario Court of Appeal determined that the resolution to go into a closed meeting should provide a general description of the issue(s) to be discussed in a way that maximizes the information available to the public while not

³ *RSJ Holdings Inc. v. London (City)*, 2005 CanLII 43895 (ON CA), at para 22.



undermining the reason for closing the meeting.⁴ As such, my Office has stated that the resolution should include a brief description of the subject matter to be considered in closed session in addition to the specific exceptions being relied upon.⁵

In this case, the resolution passed by council to proceed *in camera* cited the closed meeting exceptions it relied on to exclude the public, but failed to provide any further detail regarding the intended discussion. While the agenda and minutes provided a general description of the matter to be discussed in closed session, this information was not included in the resolution itself. Staff acknowledged this oversight and confirmed that in future they would include a description of the matter in the resolution to proceed *in camera*, not just in the agenda and minutes, in order to maximize the information available to the public.

Conclusion

My review found that council for the City of Pickering did not contravene the *Municipal Act, 2001* when it discussed matters in closed session on January 10, 2022, relating to appeals of Committee of Adjustment decisions.

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

Sincerely,



Paul Dubé
Ombudsman of Ontario

CC: Susan Cassel, City Clerk

⁴ *Farber v. Kingston (City)*, 2007 ONCA 173.

⁵ *Temagami (Municipality of) (Re)*, 2021 ONOMBUD 3, online: <<https://canlii.ca/t/jcxs0>>.

