

BY EMAIL

Council for the City of Niagara Falls
4310 Queen Street
Niagara Falls, ON L2E 6X5

May 12, 2017

Dear Members of Council for the City of Niagara Falls,

Re: Closed meeting complaint, February 14, 2017

I am writing with the results of our review of a complaint made about a closed meeting held by council for the City of Niagara Falls on February 14, 2017.

Authority of the Ombudsman

Under the *Municipal Act, 2001*, citizens have the right to request an investigation into whether a municipality has complied with the Act and its procedural by-law in closing a meeting to the public. My Office is the closed meeting investigator for the City of Niagara Falls.

Closed meeting complaint

The complaint to my Office concerned a February 14, 2017 closed meeting of council that took place at 4:30 p.m., prior to an open council meeting. During the closed session, council discussed a proposed disposition of land pertaining to River Lane. The complaint alleged that the disposition of land discussed was not the subject of ongoing negotiations, such that the city did not have a bargaining position to protect at the time of the meeting and the exception did not apply to the discussion. The complaint also alleged that council voted in camera regarding the disposition of land.

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Steps taken by our Office

In response to this complaint, my staff spoke with the complainant and reviewed documentation provided. The then-Clerk provided my Office with an overview of the closed session discussions on February 14, 2017, as well as copies of the minutes for the open and closed meetings on that date and supporting documentation. We also reviewed an audio recording of the closed meeting.

The February 14, 2017 closed council meeting

The agenda package for the City of Niagara Fall's February 14, 2017 council meeting included a report to council from the City Solicitor regarding a proposed disposition of city-owned land on River Lane. It noted that the city had received one offer of \$12,000 for the land, which had an appraised value of \$11,400. The report also stated that, if the city decided to dispose of the land, a number of easements would be required and the land would have to be declared surplus. The report recommended disposing of the land, if the easements were first put in place.

On February 14, 2017, at 4:30 p.m., council for Niagara Falls passed a resolution in open session to go in camera pursuant to subsections 239(2)(c), relating to a proposed disposition of land on River Lane, and 239(2)(f), advice subject to solicitor client privilege, relating to another property.

During the closed meeting, council discussed the proposed disposition of land. The City Solicitor and members of council provided some context for the disposition, and council confirmed that a decision to dispose of the land would not impact any future decision related to a potential development on the site. Following the discussion, council voted to “put forward” the solicitor’s recommendation.

At 5:15 p.m., council reconvened in open session. During the open meeting, council approved the recommendation set out in the City Solicitor’s report. Council declared a portion of land surplus to the requirements of the city, and

agreed to sell the land for \$12,000, subject to certain conditions. Council authorized the Mayor, Clerk, and City Solicitor to take whatever steps and sign whatever documents were required to carry out the sale. The open session minutes recorded this decision of council under the heading, “Ratification of ‘In Camera Matters’”.

Applicability of the closed meeting exceptions

Council cited the exception in subsection 239(2)(c), a proposed or pending acquisition or disposition of land by the municipality, to discuss the disposition of land on River Lane in camera.

The exception for discussions about acquisition or disposition of land is a discretionary exception, which is intended to protect a municipality’s bargaining position when selling or buying land.¹ The complaint alleged that, since an offer had been made of \$12,000 at the time of this meeting, and the City Solicitor had recommended accepting that offer, bargaining was concluded and the municipality no longer had a bargaining position to protect.

At the time of the meeting, while an offer had been made to purchase the land for \$12,000, that offer had not yet been accepted by council. Council was still free to reject that offer, or to negotiate a different agreement. As no final decision had been made about whether or not to accept the offer, the discussion fit within the exception for discussions about a proposed or pending disposition of land.

Voting in camera

The complaint alleged that council voted to sell the land on River Lane during the closed meeting. Under the Act, a meeting shall not be closed to the public during

¹ See *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information*, Toronto: The Committee, July 1984; S. Makush & J. Jackson, *Freedom of Information in Local Government in Ontario*, Toronto: Commission on Freedom of Information and Individual Privacy, 1979, as cited in Final Order MO-2468-F, *Re: City of Toronto*, [2009] O.I.P.C. No. 171.

the taking of a vote, except where the meeting is properly closed, and the vote is for a procedural matter or to give direction to staff, officers or agents of the municipality.

The then-Clerk explained to my staff that during the closed session, council voted to consider the proposed sale of land in open session. The audio recording indicates that the vote was phrased as a motion to “put forward” the staff recommendation in open session, and the closed session minutes end with, “ACTION: For consideration in open Council”. The open session minutes include the resolution to dispose of the land on River Lane under the heading, “Ratification of ‘In Camera Matters’”.

Council did not vote on whether to sell the land on River Lane in camera, but rather voted to have the matter put to council for consideration in open session. This matter was procedural, as permitted by s. 239(6) of the Act.

Council should take care to avoid language that suggests council in open session is ratifying or confirming decisions already made in camera, when instead council is making a decision in open session related to a matter discussed in camera.

Closed session minutes and audio recordings

The closed session minutes for February 14 record the date, time, and location of the meeting, those in attendance, and the text of the resolution regarding River Lane that was to be considered in open council. The minutes do not reflect any discussion, or indicate that any procedural decision was made or direction given to staff.

Council for Niagara Falls should be commended for audio recording closed session meetings. This provides the most clear, accessible record for closed meeting investigators to review, and assists in ensuring that officials do not stray from the legal requirements during closed meetings.

J. Paul Dubé, Ombudsman

However, audio recordings should not replace the written records required by the *Municipal Act, 2001*. While an audio recording can provide a record of discussions held in camera, in this case, the audio recording of the closed session is of low quality, such that it was difficult to hear all statements, and to attribute statements to particular individuals.

The City of Niagara Falls should ensure that its written closed session minutes provide a sufficiently detailed record of the discussions, such that the minutes can provide a back up point of reference if there is a technical issue with the audio recording. In addition to the information noted above, minutes should include a record of:

- the substantive and procedural matters discussed, including reference to any specific documents considered;
- any motions, including who introduced the motion and seconders;
- all votes taken, and all directions given.

The city's Acting Clerk informed us that staff are reviewing the technology used to audio record closed meetings, and gathering information about the recording technology used by other municipalities. We encourage the city to pursue this review of its system, to ensure that audio recordings provide a clear and audible record of all of the discussions.

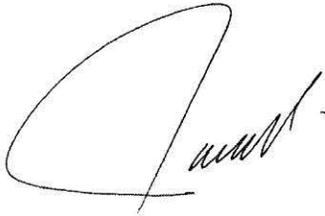
Conclusion

The in camera discussion on February 14, 2017 fit within the exceptions to the open meeting rules set out in s. 239 of the *Municipal Act, 2001*. We offer the best practice recommendations set out above for the benefit of council and staff. This letter should be made public at the city's next council meeting.

J. Paul Dubé, Ombudsman

Should you have any questions or concerns, please do not hesitate to contact our Office.

Yours truly,



Paul Dubé
Ombudsman of Ontario

CC: Bill Matson, Acting Clerk, City of Niagara Falls