



Ombudsman Report

**Investigation into a meeting
held by the City of Hamilton's
Election Compliance Audit Committee
on July 15, 2015**

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Ombudsman of Ontario
July 2016**

Complaint

- 1 On October 22, 2015, our Office received a complaint alleging that the Election Compliance Audit Committee for the City of Hamilton held a “deliberation” on July 15, 2015, which was illegally closed to the public. The complainant alleged that three of the committee’s four members, as well as various members of city staff, entered a staff meeting room at approximately 5:30 p.m. The complainant contended that the Election Compliance Audit Committee is a local board, subject to the open meeting requirements in the *Municipal Act, 2001*, and that this private deliberation was contrary to the Act.
- 2 The Clerk confirmed that the Election Compliance Audit Committee met at 5:30 p.m. on July 15, 2015 to deliberate in private about applications that were before the committee. She acknowledged that the public was not allowed to attend and was not provided notice of the deliberations. In addition, formal meeting procedures were not followed; there was no resolution to proceed in camera and no minutes were taken.
- 3 However, the City Clerk and City Solicitor assert that the Election Compliance Audit Committee is not a “committee” or “local board” under the *Municipal Act, 2001*, and that it therefore is not subject to the Act’s open meeting requirements. They acknowledged that, if the Election Compliance Audit Committee is subject to the Act’s open meeting requirements, the subject matters discussed by the committee on July 15, 2015 would not have fallen within any of the Act’s closed meeting exceptions.

Ombudsman jurisdiction

- 4 Under the Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 5 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality or local board has properly closed a meeting to the public. Municipalities and local boards may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities and local boards that have not appointed their own.
- 6 The Ombudsman is the closed meeting investigator for the City of Hamilton and the Election Compliance Audit Committee.

- 7 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the local board's governing procedures have been observed.

Investigative process

- 8 On January 11, 2016, we advised council for the City of Hamilton of our intent to investigate this complaint.
- 9 Members of the Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the Election Compliance Audit Committee's procedure, the *Municipal Act, 2001*, and the *Municipal Elections Act*. They also reviewed the committee's Terms of Reference, materials related to the applications under consideration by the committee, and submissions provided by the city and the committee.
- 10 In addition, OMLET staff reviewed the meeting procedures of selected compliance audit committees throughout the province, including those in the Cities of Toronto, Ottawa, Brampton, Markham, Greater Sudbury and Kawartha Lakes, as well as the Waterloo and Niagara regions. In response to submissions provided by the City of Hamilton, we also reviewed the procedures of the compliance audit committee in the City of Guelph and the joint compliance audit committee for the Towns of Aurora, East Gwillimbury, et al.
- 11 In the course of our investigation, staff spoke with Hamilton's Clerk, Deputy Clerk, City Solicitor, and Solicitor. At the City of Hamilton's request, OMLET staff and Ombudsman legal counsel also met with the City Solicitor, Solicitor, and Clerk to discuss the city's comments on a preliminary version of this report.
- 12 We received full co-operation in this matter.

The *Municipal Elections Act* and compliance audit committees

Creation and structure

- 13 Section 88.37(1) of the *Municipal Elections Act* (the *MEA*) requires that a municipal council establish a compliance audit committee before October 1 of an election year. The committee must have between three and seven members, none of whom can be an employee of the municipality, council

member, or candidate in the election for which the committee is established.¹

- 14** Section 88.37(6) states that the clerk of the municipality “shall establish administrative practices and procedures for the committee and shall carry out any other duties required under this Act to implement the committee’s decisions”. Under section 88.37(7), council is responsible for funding the committee’s operations and activities.

Function of the Committee

- 15** Any elector who: (i) is entitled to vote in an election and (ii) believes on reasonable grounds that a candidate has contravened a provision of the *MEA* may apply to a municipality’s compliance audit committee for an audit of the candidate’s election campaign finances.² The committee must consider the elector’s application within 30 days and decide whether it should be granted or rejected.³ The decision of the committee may be appealed to the Ontario Court of Justice, and the court may make any decision the committee could have made.⁴
- 16** If the application is granted, the committee must appoint an auditor to conduct a compliance audit of the candidate’s election campaign finances.⁵ If the auditor’s report concludes that the candidate appears to have contravened a provision of the *MEA*, the committee may commence a legal proceeding against the candidate for the apparent contravention.⁶

Hamilton’s Election Compliance Audit Committee

- 17** Hamilton’s Election Compliance Audit Committee consists of four members of the public with relevant expertise and experience. The members were selected by the city’s Selection Committee and appointed by city council in June 2014.
- 18** The committee operates according to its own procedures, which are set out in a documented entitled *Procedure for the Election Compliance Audit Committee*. These procedures were drafted by the Clerk’s office and

¹ *Municipal Elections Act*, 1996, SO 1996 c 32, s. 88.37(2).

² *Ibid* at s. 88.33(1).

³ *Ibid* at s. 88.33(7).

⁴ *Ibid* at s. 88.33(9).

⁵ *Ibid* at s. 88.33(10) and (11).

⁶ *Ibid* at s. 88.33(17).

received by the committee. According to these procedures, the committee adheres to the following process when reviewing an application:

- The Clerk receives an application under the *MEA* from an elector;
- The Clerk calls a meeting of the committee and provides notice on the City of Hamilton website committee meeting calendar (s.6.1). The Clerk also provides notice to the applicant and the candidate of the time and place of the meeting (s.6.2);
- The Clerk creates an agenda, which includes a copy of the application, the candidate's financial statements, and any written submissions (s.6.3). This agenda is made available to the public (s.6.4);
- The meeting of the Election Compliance Audit Committee is conducted like a quasi-judicial hearing (s.8). The meeting is open to the public. The Clerk must prepare minutes of each meeting of the committee (s.14.1). The applicant and candidate are each given an opportunity to make submissions and the committee may ask questions. Once the applicant and candidate have addressed the committee, each committee member is given the opportunity to speak;
- In some cases, there is clear consensus and the committee issues a decision right away (s.9.3). In other cases, the committee retires to deliberate before rendering its decision (s.8.6(4)). In either case, the committee must provide written reasons for the decision (s.9.2-9.3); and
- The decision of the committee is made public through the city's website. In addition, the decision is individually sent to the applicant, the candidate, and other individuals who provide their contact information to the Clerk at the hearing (s.9.4).

19 Section 4.5 of the committee's procedure further specifies that:

The Committee shall conduct its meetings in accordance with its Procedure, the Council Procedural By-law and the *Statutory Powers Procedure Act*, with modifications as necessary.

20 When asked what this section was intended to accomplish, the Clerk said this section was included to allow for basic procedural matters that were not covered in the compliance audit committee procedure or the *Statutory Powers Procedure Act* to be relied on if necessary without making the committee's procedures too lengthy. The Clerk advised our Office that the procedure could be amended to provide specific information about what portions of the council's procedure by-law and/or the *Statutory Powers Procedure Act* are applicable to the committee.

July 15, 2015 meeting of the Election Compliance Audit Committee

- 21 On July 15, 2015 at approximately 5:30 p.m., Hamilton's Election Compliance Audit Committee met to deliberate on various applications before the committee. The committee met in Room 140 of City Hall, a room typically used for staff meetings. Because this was intended to be a private "deliberation" of the committee, notice was not provided to the public, no agenda was created, and no minutes were kept.
- 22 Prior to July 15, the committee met on July 13, 2015, and received submissions from each applicant and candidate regarding the pending applications. This meeting was open to the public, notice was provided on the city's website, and minutes were taken. At the meeting on July 13, the meeting minutes indicate that the committee was reserving its decisions for a later date.

The Committee's discussion

- 23 The Clerk indicated that during the July 15 deliberation, the committee reviewed eight applications about which it had received submissions on July 13. The Clerk advised that the majority of the committee's time was spent reviewing financial paperwork and the submissions of the parties. As the committee reviewed these documents, the members periodically discussed points raised in a party's submission and came to a decision on that particular issue. City staff members provided administrative support recording these decisions and formatting them into written decisions.
- 24 While legal staff from the city was present during the deliberation, the Clerk advised that no legal advice was provided to the committee by the legal staff. When our Office spoke jointly with Hamilton's Clerk, Deputy Clerk, and legal staff about the committee's meeting, each agreed that the discussion did not fit within any of the Act's closed meeting exceptions.
- 25 The Clerk believes that the deliberation concluded at approximately 8:30 p.m.

Analysis

- 26 Section 239(1) of the *Municipal Act* states that "[e]xcept as provided in this section, all meetings shall be open to the public". The Act defines a "meeting" as:

[a]ny regular, special or other meeting of a council, of a local board or of a committee of either of them.⁷

27 Section 1(1) of the Act broadly defines a “local board” as:

a municipal service board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities, excluding a school board and a conservation authority. [emphasis added]

28 For the purposes of section 238 and 239, police services boards and public library boards are also excluded from the definition of “local board”. However, no such exclusion exists for compliance audit committees. It is therefore necessary to determine if Hamilton’s Election Compliance Audit Committee fits within the Act’s definition of a “local board”.

“Local board” criteria

29 In our Office’s 2014 letter to the City of Elliot Lake⁸, we identified four criteria which represent the different elements that have been recognized in case law to determine if an entity is a “local board”:

1. the entity must be carrying on the “affairs of the municipality” (as set out in the definition in section 1);
2. a direct link with the municipality must be found (either by way of legislation or authority from the municipality);
3. there must be a connection to or control by the municipality; and
4. there must be an element of autonomy.⁹

30 Although not specifically identified as a “judicial test”, these criteria represent a summary of the different factors courts have considered when determining whether an entity is a “local board” for the purpose of various acts.

⁷ *Municipal Act, 2001*, SO 2001, c 25, s. 238(1).

⁸ Letter from Ombudsman of Ontario to City of Elliott Lake (12 June 2014) at 4, online: <<https://www.ombudsman.on.ca/Files/sitemedia/Documents/Elliot-Lake---June-2014.pdf>>.

⁹ Rick O’Connor, municipal lawyer and author of several texts on municipal law, noted that these four criteria are drawn from the case law, including: *City of Hamilton and Hamilton Harbour Commissioners et al*, [1984] 48 OR (2d) 757 at 11; *Westfall v Eedy*, [1991] OJ No 2125 at para 23; *Mangano v Moscoe*, [1991] OJ No 1257 at 4; *Toronto and Region Conservation Authority v Ontario (Minister of Finance)*, [1999] OJ No 4349.

1. The entity must be carrying on the “affairs of the municipality” (as set out in the definition in section 1)

- 31 A number of reported cases have considered whether certain bodies carry on the affairs or purposes of a municipality. In *Toronto & Region Conservation Authority v Ontario (Minister of Finance)*¹⁰, the court was asked to determine whether a conservation authority fell within the definition of a “local board” for the purposes of the *Retail Sales Tax Act*. Although not identical to the *Municipal Act*’s definition of the term, both look to whether an organization is exercising powers respecting the “affairs or purposes” of a municipality.
- 32 In *Toronto & Region Conservation Authority*, the court determined that the conservation authority was not a local board because it was not conducting the affairs or purposes of a municipality. The court noted that the conservation authority was an independent body, created by the provincial government and responsible to the Minister of Natural Resources; it required the approval of the Minister of Natural Resources before proceeding with a project. In addition, the conservation authority was not bound by municipal official plans.¹¹ These factors led the court to conclude that the conservation authority was carrying out provincial, rather than municipal, purposes.
- 33 In *St. Lawrence Power*, the court determined that a private hydro corporation operating for profit was not a local board carrying out the affairs of the municipality under the *Retail Sales Tax Act*.¹² The court noted that local boards:
- are those normally existing as municipally established for the governing and regulating of civic affairs with a view to providing certain services for the municipality.¹³ [emphasis added]
- 34 The court determined that the private hydro corporation had an “object of carrying on a commercial operation for the financial benefit of its shareholders” and therefore was not a local board. It had a private, rather than public municipal, purpose.
- 35 In this case, the Election Compliance Audit Committee considers applications from eligible electors seeking a compliance audit of a municipal candidate’s campaign finances. It is also responsible for reviewing auditor’s

¹⁰ [1999] OJ No 4349.

¹¹ *Ibid* at para 16 and 20.

¹² *St. Lawrence Power Co v Ontario (Minister of Revenue)*, 1978 CarswellOnt 583 (Sup Ct Ont).

¹³ *Ibid* at para 10.

reports and determining what further action, if any, the committee will take with respect to complaints about the financial affairs of candidates in municipal elections. Although mandated by provincial legislation, compliance audit committees are established by municipal councils at the local level. Unlike the conservation authorities considered in *Toronto & Region Conservation Authority*, the committee is not responsible to the provincial government and does not require provincial approval before taking action. Rather, it is subject to the procedures that are drafted at the municipal level by Hamilton's Clerk. Further, the committee is "governing and regulating...civic affairs with a view to providing certain services for the municipality" (i.e. municipal elections), as required by the court in *St. Lawrence Power*, it is not an entity carried on for private purposes. As a result, Hamilton's Election Compliance Audit Committee is carrying on the affairs of the municipality.

2. A direct link with the municipality must be found (either by way of legislation or authority from the municipality)

- 36 Section 81.1(1) of the *MEA* requires that a municipal council establish a compliance audit committee before October 1 of an election year. Hamilton's Selection Committee recommended the members for the committee, and council appointed the recommended members. The city's Clerk, an officer of the municipality under the *Municipal Act*, drafted the committee's Terms of Reference and provides ongoing administrative support to the committee. These factors indicate that there is a direct link between the Election Compliance Audit Committee and the City of Hamilton.

3. There must be a connection to or control by the municipality

- 37 In *Toronto & Region Conservation Authority*, the court said that in order to be considered a local board, a body "must be connected to, or be controlled by, a municipality or municipalities".¹⁴ In that instance, the factors leading the court to conclude that the conservation authority was not subject to municipal control were the mixture of councillors and others on the board, as well as lack of control over the conservation authority's budget.
- 38 In its communications with our Office, Hamilton argued that amendments to the *Municipal Elections Act* in 2009 mean that the city no longer has a connection to or control over its compliance audit committee. Prior to the amendments, council itself could decide whether to grant or deny

¹⁴ *Toronto and Region Conservation Authority*, *supra* note 10 at para 15.

applications seeking a compliance audit of a candidate's election campaign finances. The Act allowed council to delegate these powers to a committee, and council members were allowed to sit on the committee. Following the Act's amendments in 2009, this structure changed. Municipalities are now required to establish a separate compliance audit committee with between three and seven members, none of whom can be an employee of the municipality, council member, or candidate in the election for which the committee is established.¹⁵

- 39 While Hamilton's compliance audit committee has a greater degree of independence from the city than before the 2009 amendments, it nonetheless remains connected to and controlled by the municipality. As previously stated, Hamilton's Selection Committee recommended the members for the committee, and council appointed the recommended members. The committee posts its agendas, minutes, and decisions on the City of Hamilton's website and holds its meetings in the municipal offices. The City Clerk established the committee's administrative practices and procedures and the city pays all costs related to the committee's operation and activities.¹⁶ While the members of the Election Compliance Audit Committee are not councillors, the city nonetheless has a connection to and a degree of control over the operation of the committee.

4. There must be an element of autonomy

- 40 In the case law, this factor is relied on to differentiate an advisory committee without decision-making functions from an entity with some level of independent authority.¹⁷ The Election Compliance Audit Committee has independent authority to make decisions regarding the matters before it. These decisions are not subject to review or approval by Hamilton's council. This indicates that the committee is exercising independent authority and decision-making power.
- 41 The Election Compliance Audit Committee satisfies the four criteria of a local board and falls within the *Municipal Act's* open meeting requirements.

Practices of other compliance audit committees

- 42 We also conducted research into the meeting practices of compliance audit committees throughout the province. Many compliance audit committees

¹⁵ *Municipal Elections Act, 1996*, SO 1996 c 32, s. 88.37(1) and (2).

¹⁶ *Ibid* at s. 88.37(6 and 7).

¹⁷ *Mangano v Moscoe*, [1991] OJ 1257 at 4.

conduct their meetings and deliberations in accordance with the *Municipal Act's* open meeting requirements. For instance, procedures for compliance audit committees in the Cities of Toronto, Ottawa, Brampton, Markham, Greater Sudbury and Kawartha Lakes specify that their meetings are subject to the Act's open meeting requirements. In addition, six municipalities in the Waterloo area and 13 municipalities in the Niagara area make the same provision for their joint compliance audit committees. While these committees recognize that they are subject to the *Municipal Act's* open meeting requirements, that does not mean that all deliberations must occur in public. When a committee's discussion falls within a closed meeting exception – for instance, because the committee is obtaining legal advice – the committee is entitled to proceed in camera in accordance with the Act.

- 43 While there are many compliance audit committees that conduct their deliberations in accordance with the *Municipal Act's* open meeting requirements, the practice is not universal. During the course of the investigation, the City of Hamilton referred our Office to two compliance audit committees with procedures that allow the committee to “reserve” decisions following a hearing if further deliberation is required. Although the procedures do not explicitly state that these deliberations will occur in private, courts and administrative tribunals commonly equate reserving a decision with private deliberation.¹⁸
- 44 With 444 municipalities in Ontario that must each establish a compliance audit committee, there are likely other compliance audit committees with procedures that allow private deliberation either explicitly or by implication. However, the fact that some compliance audit committees may not comply with the Act's open meeting requirements does not change those requirements. Further, it is clear that numerous compliance audit committees have developed methods for complying with the Act's requirements, even in the context of deliberation amongst committee members.

Practices of analogous committees

- 45 Our Office is not aware of any other reports where a closed meeting investigator has considered whether a compliance audit committee is subject to the *Municipal Act's* open meeting requirements. However, several investigators have determined that a similar entity – a committee of adjustment – comes within the Act's open meeting requirements.

¹⁸ For instance, *Decision no. 90/081*, 2008 ONWSIAT 2195, online: <<http://canlii.ca/t/21wrr>>.

46 Under section 44(1) of the *Planning Act*, municipalities may pass a by-law appointing a committee of adjustment (sometimes referred to by other names, such as a minor variance committee) for the municipality. The Act empowers the committee to make various decisions and to grant minor variances.¹⁹ The Act prescribes procedural requirements for the committee, including the requirement to hold public hearings, to provide notice of hearings, and to provide written decisions with reasons.²⁰ Decisions of the committee may be appealed to the Ontario Municipal Board.²¹ However, there is one major difference between a committee of adjustment and a compliance audit committee; section 45(6) of the *Planning Act* specifically states that:

[t]he hearing of every application shall be held in public, and the committee shall hear the applicant and every other person who desires to be heard in favour of or against the application, and the committee may adjourn the hearing or reserve its decision.

47 In a 2009 report regarding Vaughan’s Committee of Adjustment, Local Authority Services (LAS) determined that the committee was a local board for the purposes of section 238 and 239 of the *Municipal Act*.²² Our Office reached the same conclusion in a letter regarding the Minor Variance Committee for the Township of Russell.²³ In addition, the closed meeting investigator for the City of Cornwall determined that a committee of adjustment is subject to the Act’s open meeting requirements. After reaching this conclusion, he noted that:

such a committee has the authority – if it chooses to do so – to reserve and deliberate on a decision in a meeting closed to the public under the provisions of the *Planning Act*.²⁴

48 This conclusion flowed from the closed meeting exception in section 239(2)(g) of the *Municipal Act*, which allows a meeting to be closed to the public if the subject matter being considered is “a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act”. According to the report, the interaction of the *Planning Act* and the *Municipal Act* allows committees of adjustment to reserve and deliberate on a decision in a meeting closed to the public. In contrast, LAS’s 2009 report regarding Vaughan’s Committee of Adjustment reached a

¹⁹ *Planning Act*, RSO 1990, c P.13, s. 45(2-3).

²⁰ *Ibid* at s. 45(5-6) and (8).

²¹ *Ibid* at s. 45(12).

²² Local Authority Services, *Report to the Committee of Adjustment and the Council of the City of Vaughan* (17 March 2009).

²³ Letter from Ombudsman of Ontario to Township of Russell (2 September 2011).

²⁴ Stephen Fournier, *Report: Closed Meeting Investigation* (10 December 2013) at pg 11.

different conclusion, noting that section 45(6) of the *Planning Act* did not grant the committee “specific, express authority to hold closed meetings to deliberate its decisions”.²⁵ As a result, LAS determined that the committee had improperly deliberated in private.

- 49 It is outside the scope of this report to determine whether committees of adjustment may deliberate in private under the *Municipal Act*. However, in the case of compliance audit committees, there are no provisions in the *Municipal Elections Act* that permit the committees to reserve a decision or to deliberate in private. If parliament wished to grant this power to compliance audit committees, it could have done so expressly.

Arguments raised by the City of Hamilton and the Election Compliance Audit Committee

- 50 In the course of our investigation, the Clerk for the City of Hamilton provided our Office with submissions explaining why, in the city’s opinion, compliance audit committees are not local boards and not subject to the *Municipal Act*’s open meeting requirements. The Clerk advised our Office that the Clerk’s office worked with legal staff to prepare the document.
- 51 After reviewing a preliminary version of this report, the Clerk provided additional submissions to our Office. At the City of Hamilton’s request, OMLET and legal staff met with Hamilton’s City Solicitor, Solicitor, and Clerk to discuss the city’s comments on the preliminary report. The Election Compliance Audit Committee was also given the opportunity to review a preliminary version of this report and provided separate submissions to our Office.
- 52 Through its submissions and discussion, the City of Hamilton argued that based on the four criteria applied in our report, compliance audit committees are not local boards. It also believes that the four criteria we applied are not instructive and instead proposed its own “series of inquiries”, including:
- Does the entity carry on the “affairs of the municipality”? ;
 - How does the entity function? Is it an administrative tribunal?;
 - Does it have autonomous authority to make procedure, independent from Council and the *Municipal Act*?; and
 - Does it make a decision that is appealable only to court or another entity but not to Council or any local board?

²⁵ Local Authority Services, *Report to the Committee of Adjustment and the Council of the City of Vaughan* (17 March 2009) at 4.

- 53 In addition, the city asserted that the procedures for the committee allow it to deliberate in private, and that the procedures for other compliance audit committees allow the committees to reserve decisions when further deliberation is required. Further, the city contended that the committee's deliberations may not meet the definition of "meeting" under the *Municipal Act* and therefore may not need to be open to the public.
- 54 The Election Compliance Audit Committee also asserted that it is not a local board of the municipality and that it is not carrying on the "affairs of the municipality." Rather, the committee said it addresses "public affairs" at the request of a citizen. It also argued that while there are links for practical administrative purposes, there is no substantive control by or connection to the City of Hamilton. The committee said it has complete autonomy from the city and that the city has no input on the committee's decisions. It feels that its ability to establish its own procedures support this assertion. The committee also indicated that its members receive no compensation, and therefore the members have no obligation to the city. In addition, the committee said that, by statute, its decisions can be appealed to court; it indicated that statutory appeal rights do not exist for decisions of local boards.
- 55 I have considered the submissions of the city and the committee and while I understand the committee's expressed need to be able to deliberate in private, I cannot find that the open meetings provisions of the *Municipal Act* do not apply in this case. When the criteria considered by the courts in the context of analogous cases are applied, it is clear that compliance audit committees are local boards. The lack of committee member compensation and the existence of statutory appeal rights are not factors that courts have considered when determining whether a body is a local board. In addition, section 238(2) of the *Municipal Act* requires all local boards to adopt their own procedure by-law; accordingly, the committee's ability to establish its own procedures does not mean it cannot be a local board. Although there are some similarities between the series of enquiries proposed by the city and the criteria considered by courts, the enquiries proposed by the city are not supported by existing jurisprudence.
- 56 Further, the committee's private deliberations clearly fall within the Act's definition of "meeting". Section 238(1) of the *Municipal 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". This definition is circular and not particularly helpful in determining whether a meeting has actually occurred. In a 2008 report regarding closed meetings in the City of Greater Sudbury, our Office developed the following definition of "meeting" to assist in the interpretation of the definition contained in the Act:

Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or the purpose of doing the groundwork necessary to exercise that power or authority.²⁶

- 57 At the deliberation session on July 15, 2015, the committee discussed applications that were before the committee and decided whether to grant or deny those applications. The members were exercising the power or authority of the committee. This is clearly the type of decision-making intended to fall within the Act's definition of meeting.
- 58 The city also submits that the ability for tribunals to deliberate in private is protected at common law. It asserts that the court in *Lancaster v Compliance Audit Committee et al.*²⁷ established that compliance audit committees are administrative tribunals, and that numerous other cases have determined that tribunals are entitled to retire to deliberate pursuant to the common law principle of deliberative secrecy. The City notes that this principle is crucial to ensuring that judicial and quasi-judicial processes are conducted fairly and referred our Office to various cases that consider this principle. During its meeting with our Office, the city suggested that given the importance of deliberative secrecy to the proper functioning of tribunals, our Office should depart from the established interpretation of the open meeting requirements and, in effect, read in a new exception to the *Municipal Act*. The city envisioned that this exception would allow any administrative tribunal that otherwise falls within the Act's open meeting requirements to deliberate in camera.
- 59 The committee also contended that the ability to privately deliberate is important in carrying out its functions. It indicated that it needs to engage in confidential discussions with other committee members to reach an informed decision. In addition, the committee emphasized that its hearings are open to the public and that its decisions are recorded in writing.
- 60 In the context of provincial administrative bodies, our Office has recognized and respected the purpose of deliberative secrecy. However, clear statutory language overrides common law principles.²⁸ As compliance audit committees fall within the Act's definition of a "local board", the statute

²⁶ Ombudsman of Ontario, *Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 2008) at para 92, online: <http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2_2.pdf>.

²⁷ 2013 ONSC 7631 at para 36, online: <<http://canlii.ca/t/g2b30>>.

²⁸ For example, *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at para 41 and *Horsefield v Ontario (Registrar of Motor Vehicles)*, [1999] OJ No 967 (ONCA) at para 59 and 65.

displaces the common law principle of deliberative secrecy and requires that compliance audit committees comply with the Act's open meeting provisions. The city's and committee's concerns about the practical difficulties of deliberating, reaching consensus, and producing a written decision in open session are understandable. However, compliance audit committees in other municipalities have overcome these difficulties and restrict closed session discussions to those permitted under the *Municipal Act*. Similarly, municipal councils sitting as administrative decision-makers on various issues routinely deliberate in open session.²⁹

- 61 When acting as closed meeting investigator, our role is to apply the *Municipal Act* as it is written. The Act does not contain a closed meeting exception for the deliberation of administrative tribunals and we cannot read this exception into the Act's enumerated exceptions. The Legislature, not the Ombudsman, is the appropriate mechanism for achieving this statutory change.
- 62 The Ministry of Municipal Affairs and Housing is currently conducting a legislation review that includes consideration of the *Municipal Act*. The city made submissions about this legislation, recommending that the Ministry amend the Act's open meeting requirements as follows:

Section 238

- Clarify the definitions to ensure that meetings of administrative tribunals appointed by Council (e.g. committee of adjustment, election compliance audit committee) are not included.³⁰
[emphasis added]

- 63 In addition, the Legislature recently passed Bill 181, which amends the *Municipal Elections Act* in various ways and comes into effect on April 1, 2018. While the bill was before the Legislature's Standing Committee on Finance and Economic Affairs, the city made the following submission regarding the provisions of *Municipal Elections Act* that govern compliance audit committees:

Recognizing the function of the compliance audit committee, the [Act] should set out that: the hearing of every application shall be held in public; the committee shall hear the applicant and the candidate; and the **committee may adjourn the hearing or**

²⁹ For example, *Pattison Outdoor Advertising LP v City of Toronto*, 2016 ONSC 2419.

³⁰ City of Hamilton, City Council Minutes 15-023, online:

<<http://www2.hamilton.ca/CityDepartments/CorporateServices/Clerks/AgendaMinutes/MinutesReports/Council/2015/Oct28CouncilMinutes15023.pdf>>; City of Hamilton, Appendix "A" to Report LS15030, online:

<<http://hamilton.siretechnologies.com/sirepub/cache/2/5zw0h52z3waoephc3dke4w44/9729201142016114551754.PDF>>.

reserve its decision. This is currently set out in the Planning Act with respect to the committee of adjustment.³¹ [emphasis added]

- 64 On May 19, 2016, the Standing Committee completed its clause-by-clause review of the Act. The committee did not address this submission, and the amended *Municipal Elections Act* does not provide compliance audit committees with the powers requested by the city.

Opinion

- 65 The Election Compliance Audit Committee for the City of Hamilton falls within the *Municipal Act's* definition of a "local board" and is subject to the Act's open meeting requirements. The committee contravened the Act on July 15, 2015, when it met in private to deliberate on various applications that were before the committee. Notice of the meeting was not provided, no procedure was followed to close the meeting to the public, and even if this procedure had been followed, the committee's discussion did not fall within any of the Act's closed meeting exceptions.

Recommendations

- 66 I make the following recommendations to assist the city in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

The City of Hamilton should formally recognize that the Election Compliance Audit Committee is a local board subject to the open meeting requirements of the *Municipal Act, 2001*.

Recommendation 2

All members of the Election Compliance Audit Committee for the City of Hamilton should be vigilant in adhering to their individual and collective obligation to ensure that the committee complies with the open meeting requirements of the *Municipal Act, 2001* and its own procedures.

³¹ Letter from the City of Hamilton (Tony Fallis, Manager of Elections/Print & Mail) to the Standing Committee on Finance and Economic Affairs (3 May 2016).

Recommendation 3

The Election Compliance Audit Committee should ensure that no subject is discussed in closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements. The committee's procedure should be amended to provide that the committee will only proceed in camera for matters that fall within the statutory closed meeting exceptions.

Recommendation 4

The Election Compliance Audit Committee should amend its procedure to clearly specify which portions of the council's procedure by-law and/r the *Statutory Powers Procedures Act* are applicable to the committee.

Report

- 67 As previously noted, council for the City of Hamilton and the Election Compliance Audit Committee were given the opportunity to review a preliminary version of this report and provide comments. All comments received were considered in the preparation of this final report.
- 68 My report should be shared with the Election Compliance Audit Committee and Council for the City of Hamilton. The report should be made available to the public as soon as possible, and no later than the next council and committee meeting.



Paul Dubé
Ontario Ombudsman