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REPORT ON CLOSED MEETING INVESTIGATION 2024-01

THE CORPORATION OF THE TOWN OF CALEDON

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THE CORPORATION OF THE TOWN OF CALEDON REPORT ON CLOSED MEETING INVESTIGATION 2024-01

I. INTRODUCTION

1. Aird & Berlis LLP is the Closed Meeting Investigator for the Town of Caledon (the “**Town**”).
2. In our capacity as Investigator, on January 19, 2024, we received a formal request for a closed meeting investigation (the “**Request**”). The Request is dated January 10, 2024.
3. The Request seeks an investigation concerning a closed session of a meeting held by the Town’s General Committee (the “**Committee**”) which took place on January 9, 2024 (the “**Meeting**”).
4. This is a report on our closed meeting investigation made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.¹

II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

5. The Town has appointed Local Authority Services (“**LAS**”) to provide closed meeting investigation services pursuant to section 239.1 of the *Municipal Act, 2001*. LAS has delegated its authority as Closed Meeting Investigator (“**Investigator**”) to Aird & Berlis LLP.
6. Prior to accepting any investigation mandate, Aird & Berlis LLP conducts a thorough legal conflict search and makes other conflict inquiries to ensure our firm is in a position to conduct an independent and impartial investigation.
7. Our jurisdiction as Investigator is set out in section 239.2 of the *Municipal Act, 2001*. Our function includes the authority to investigate, in an independent manner, a request made by any person to determine whether the Council for the Town has complied with section 239 of the *Municipal Act, 2001* or a by-law enacted under subsection 238(2) (i.e. a procedure by-law) in respect of a meeting or part of a meeting that was closed to the public.
8. Upon conducting an investigation, we report to Council on the outcome of the investigation, together with any recommendations, as may be applicable. Our role as Investigator does not include engaging with the merits of any particular item of municipal business, or questioning the policies or priorities of the Town.

III. STATUTORY FRAMEWORK

9. Ontario’s “open meeting” rule is enshrined in section 239 of the *Municipal Act, 2001*, which requires that “meetings” be open to the public, unless otherwise excepted.

¹ *Municipal Act, 2001*, S.O. 2001, c. 25.

10. Subsection 238(1) of the *Municipal Act, 2001* defines “meeting” broadly as:

“meeting” means any regular, special or other meeting of a council, of a local board or of a committee of either of them, where,

- (a) a quorum of members is present, and
- (b) members discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

11. Unless they deal with a subject matter falling within a specific enumerated exception in subsection 239(2), all meetings are required to be held in an open forum where the public is entitled to attend and observe local government in process.

12. The purpose of the “open meeting” rule is to foster democratic values, increase transparency, and enhance public confidence in local government. However, it has been long recognized that there are certain circumstances where open meetings, or full transparency in the immediate term, would not serve the public interest or the interests of the municipal corporation. In providing for certain limited exceptions to the general rule, section 239 seeks to balance the need for confidentiality in certain matters with the right of the public to information respecting the decision-making process of local government.

13. Subsection 239(2) lists eleven (11) matters that permit a council or a committee of council to hold a meeting that is closed to the public, including the following:

Exceptions

239 (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

...

- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

IV. THE REQUEST

14. The Request alleges that while part of the closed session of the Meeting was properly closed in order for the Committee to receive legal advice from the Town’s Commissioner of Corporate Services and Chief Legal Officer (the “**Chief Legal Officer**”), the name of the Council member who was the subject of the matter discussed in closed session and the amount of taxpayer money being requested should have been debated and discussed in open session after receiving the advice from the Town’s Chief Legal officer and his staff report.

15. The Request further alleges that much of the Meeting and the outcome was shielded from the public. The Request states that the final motion coming from the closed session seems deliberately worded to obfuscate. For example, the resolution which was passed by the Committee coming out of the closed session does not identify the member of Council who was subject of the discussion nor does it disclose the amount of taxpayer money committed by the Committee.

V. THE MEETING

16. The public agenda for the Meeting provided notice that part of the Meeting would be closed to the public. The closed session item is listed in the agenda under the heading “Confidential Session”:

11.1 Confidential Staff Report 2024-0032: Legal Remuneration Matter

Pursuant to Section 239(2)(f) of the *Municipal Act, 2001*, as amended, advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

17. The public minutes from the Meeting indicate that the Committee passed a motion to meet in closed session to discuss the above item:

11. CONFIDENTIAL SESSION

Moved by: Councillor C. Napoli **Seconded by:** Councillor D. Maskell

That Committee shall go into Confidential Session under Section 239 of the Municipal Act for the following purposes:

- Confidential Staff Report 2024-0032: Legal Remuneration Matter

Pursuant to Section 239(2)(f) of the *Municipal Act, 2001*, as amended, advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

18. The Committee adjourned the closed session and reconvened in open session after approximately one hour.

19. The public minutes of the Meeting indicate that once the Committee returned to open session, it passed the following motion:

11.1 Confidential Staff Report 2024-0032: Legal Remuneration Matter

Moved by: Councillor M. Russo **Seconded by:** Councillor T. Rosa

That the Chief Legal Officer be directed to reimburse the member of council’s legal costs as described in Staff Report 2024-0032 and pursuant to By-law 2007-128 section 15.

20. The minutes indicate that this matter was recommended to Town Council for consideration of adoption at its meeting to be held on January 30, 2024.

VI. ANALYSIS

(1) *Exception for Solicitor-Client Privileged Advice*

18. The Request asserts that the member of Council who was the subject of the matter discussed in closed session, and the amount of taxpayer money being reimbursed, should have been debated and discussed in open session after receiving the advice from the Town’s Chief Legal Officer and his staff report.

19. The open meeting exception in clause 239(2)(f) allows a council or committee to meet in the absence of the public in order to consider advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

20. There is a tripartite test that is used for determining whether a verbal or written communication is subject to solicitor-client privilege in order for the exception under clause 239(2)(f) to apply. The communication must:

- (a) be between a client (i.e. the municipality) and its lawyer;
- (b) entail the seeking or giving of legal advice; and
- (c) be considered confidential by the parties.²

21. A review of the Meeting materials, including the Confidential Staff Report 2024-0032 and the closed session minutes, reveals that the Committee expressly received and considered legal advice that is subject to solicitor-client privilege, including communications necessary for that purpose (i.e. the Confidential Staff Report 2024-0032) at the closed portion of the Meeting.

22. The subject matter of the Meeting clearly fell within the scope of the closed meeting exception in clause 239(2)(f). As such, the Committee was entitled to consider the matter, in its entirety, in a closed session.

23. The Ontario Ombudsman has found in past cases that a council discussion regarding indemnification for legal fees on its own does not fit any of the exceptions in the *Municipal Act, 2001*.³ In this case, however, we find that it was appropriate for the quantum of the legal fees as well as the identity of the member to be concealed as these matters formed part of the entire matter considered by Council, which we find was covered by the exception in section 239(2)(f) of the *Municipal Act, 2001*.

(2) Entire Meeting Should Not have been Closed

21. The Request asserts that even if a portion of the Meeting did relate to solicitor-client privileged advice (which we have found that it did), the Committee should not have held the entire Meeting in closed session.

24. During the investigation, we questioned the Town's Chief Legal Officer, the Town's Clerk, and a Member of Council, all of whom were present at the Meeting, regarding the closed session and the primary or core discussion of the Committee. The Chief Legal Officer and the Clerk were both of the opinion that although there were instances in which the discussion veered away from the precise matter of legal advice, on the whole, the discussion was connected to the legal options presented by the Chief Legal Officer and the Committee's consideration of same. The Member of Council we interviewed took a different view of the discussions at the closed session. In this Member's opinion, following the receipt of legal advice, the majority of the ensuing discussion was not inextricably linked to the legal advice and related to a matter that was previously discussed by Council in open session.

² *Solosky v. R.* (1979), 105 D.L.R. (3d) 745 (S.C.C.).

³ [Letter from Ombudsman of Ontario to the Town of Midland](#), (February 4, 2014), [Norfolk \(County\)](#), 2016 ONOMBUD 7 at para. 33; [Amherstburg \(Town of\)](#), 2016 ONOMBUD 9 at para. 77.

25. The Ontario Ombudsman has explained the role of the investigator as follows:

As the closed meeting investigator for the Town, my role is to conduct an investigation, weigh the evidence, and make findings and recommendations where necessary. At times, I am presented with conflicting evidence. In such cases, I must weigh all the evidence and decide, on a balance of probabilities, which to accept.⁴

26. In this case, based on the concurring recollections of the Chief Legal Officer and the Clerk, we find it more likely than not that the entire meeting was properly covered by the closed meeting exception in clause 239(2)(f) of the *Municipal Act, 2001*.

27. The purpose of the closed session of the Meeting was for the Committee to receive the legal advice from its solicitor and to formulate its legal position. It is our finding that the central focus of the Meeting was on the legal advice that the Committee was receiving and considering. The Committee was provided with a legal opinion and the discussion *in camera* was concentrated on the contents of that opinion. We acknowledge that part of the discussion may have deviated into matters that are not covered by the exception however we are satisfied that these matters were closely related to the core matter at issue – advice that was subject to solicitor-client privilege.

28. In any event, the courts have recognized that it may be difficult for a council or committee to “toggle” back-and-forth between open and closed meeting discussions. The Ontario Divisional Court considered the issue in *St. Catharines (City) v. Ontario (Information & Privacy Commissioner)* and commented with respect to the unrealistic nature of expecting a municipal council to “parse” its discussions:

The decision determined that only parts of the meeting could be closed. How is such a meeting to be conducted? Whenever a participant interrupts the consideration of the disposition of land to refer to any other option being considered or to review any part of the history or background, the meeting would have to adjourn to go into a public session and then close again when the discussion returned to consider the sale of property. It is not realistic to expect the members of a municipal council to parse their meetings in this way. At a minimum, it would detract from free, open and uninterrupted discussion. It could lead to meetings that dissolve into recurring, if not continuous, debate about when to close the meeting and when to invite the interested public to return.⁵

29. Based on our discussions with the Chief Legal Officer and the Clerk, it is our opinion that it would not have been realistic for the Committee to parse its discussion to allow parts of that meeting to take place in open session.

22. The *Municipal Act, 2001* does not contain any requirement to “report back”, “report out” or “rise and report” from a closed session. The Town’s Procedural By-law 2015-108 also contains no requirement for Council or committees to report decisions made in closed session.

23. In our opinion, the Committee’s “report out” resolution, while sparse, was authorized to be drafted and passed in that manner.

⁴ [Plympton-Wyoming \(Town of\) \(Re\)](#), 2021 ONOMBUD 4 at para. 49.

⁵ *St. Catharines (City) v. Ontario (Information & Privacy Commissioner)* (2011), 81 M.P.L.R. (4th) 243 (Ont. Div. Ct.).

24. Despite the absence of any statutory requirement, reporting out is considered to be a best practice to enhance transparency in the municipal decision-making process.⁶ It is generally recommended that a municipality “report out” from a closed session as much information as possible, while avoiding disclosing such information that it would negate the very reason for having held the closed meeting in the first place.

25. We note that following the closed session of the Meeting, Chair Early read the “report out” motion in open session and asked if there was any discussion on the motion. There was none.

26. At its meeting on February 9, 2024, however, Council passed the following resolution:

6.1 January 9, 2024 General Committee Closed Session Meeting Report

Moved by: Councillor N. de Boer **Seconded by:** Councillor M. Russo 2024-003

That the Municipal Clerk amend the closed session minutes to add the rationale used to come to its decision; and

That the closed session minutes be released pending a review by the Chief Legal Officer to conduct a review for solicitor-client privilege information.

27. In our opinion, the Town’s decision to amend the closed session minutes to reveal additional information regarding the Committee’s decision at the Meeting is in keeping with the objectives of open and transparent government.

28. In summary, we cannot conclude that Council’s “report out” resolution contravened the *Municipal Act, 2001*. In accordance with the recommendations of the Ontario Court of Appeal, we encourage Council to report out as much of the details of its closed sessions as possible. We support Council’s decision to amend the closed session minutes from the Meeting to provide additional details to the public.

VII. FINDINGS

29. Upon concluding our investigation we have made the following findings regarding compliance with the open meeting provisions of the *Municipal Act, 2001*:

- The Committee was authorized to convene into closed session at the Meeting to receive legal advice and to discuss reimbursement of a member’s legal costs pursuant to clause 239(2)(f) of the *Municipal Act, 2001* – advice that is subject to solicitor-client privilege. In this case, we find the subject matter of the Meeting, including the name of the member and the amount of the reimbursement, to form part of the matter being discussed and discussion of these matters was, therefore, properly within the exemption to the open meeting rule contained in 239(2)(f) of the *Municipal Act, 2001*.
 - As Investigator, we have no jurisdiction over what Council discusses (or not) in open session. In this case, following the closed session, Council was under no obligation to discuss or disclose any further details regarding the closed session matter.

⁶ [Oshawa \(City of\) \(Re\)](#), 2016 ONOMBUD 10 at paras. 58 and 59; [The Nation \(Municipality of\) \(Re\)](#), 2019 ON OMBUD 4 at para. 82; [Cornwall \(City\) \(Re\)](#), 2023 ONOMBUD 4 at para. 97.

- Council's "report out" motion from the closed session of the Meeting, while rather bare of detail, did not contravene the *Municipal Act, 2001* which contains no requirement for reporting on the subjects considered in closed session. In any event, we support the Town's decision to provide additional information to the public regarding Council's decision at the closed portion of the Meeting, by amending the Meeting minutes.

VIII. CONCLUSIONS

30. This Report has been prepared for and is forwarded to Council for its consideration. Given that we have not found a contravention of the *Municipal Act, 2001*, no Council action is required.

31. We note that subsection 239.2(11) of the *Municipal Act, 2001* provides that this Report is to be made public.

Respectfully submitted,

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