



ONTARIO'S WATCHDOG
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5.22

August 11, 2010

Mayor Fred Eisenberger and Members of Council
City of Hamilton
77 James St. North
P.O. Box 2040, LCD1
Hamilton, Ontario
L8R 2K3

Dear Mayor Eisenberger and Members of Council:

Re. Ombudsman Review of City of Hamilton Committee of the Whole Meeting on February 18, 2010

Attached is a copy of the July 29, 2010 letter that our Office sent to Peter Barkwell and Mary Gallagher for your review and consideration.

Should you have any questions, please feel free to contact me at (416) 586-3405.

Yours truly,

A handwritten signature in black ink, appearing to read 'Trish Coyle', written in a cursive style.

Trish Coyle
Investigator

Bell Trinity Square
483 Bay Street, 10th Floor, South Tower, Toronto, ON M5G 2C9
483, rue Bay, 10^e étage, Tour sud, Toronto (Ontario) M5G 2C9
Tel./Tél. : 416-586-3300
Facsimile/Télécopieur : 416-586-3485 TTY/ATS : 1-866-411-4211

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Ombudsman
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July 29, 2010

Peter Barkwell, City Solicitor
Mary Gallagher, Coordinator, Committee of the Whole/Council
City of Hamilton
77 James St. North
P.O. Box 2040, LCD1
Hamilton, Ontario
L8R 2K3

Dear Mr. Barkwell and Ms. Gallagher:

Re: Ombudsman Review of City of Hamilton Committee of the Whole Meeting on February 18, 2010

I am writing further to our telephone conversation of July 29, 2010, regarding the results of the Ombudsman's preliminary review of complaints received about the *in camera* session of the Committee of the Whole that was held by the City of Hamilton on February 18, 2010. The complaints alleged that some of the items discussed in closed session should have been considered in open session and also, that there was insufficient notice provided of the closed session. As we discussed on July 29, our Office has completed our review of the complaints received and will not be proceeding further.

As part of our Office's review, we spoke with you both, as well as Kevin Christenson, City Clerk. We also reviewed the City's Procedure By-law (03-301), relevant sections of the *Municipal Act, 2001*, and meeting materials for the February 18, 2010 Committee of the Whole meeting, including the meeting agenda, open and closed meeting minutes, the confidential staff report, "2015 Pan Am Games Update (CM09006(c))", and redacted versions of the appendices to the confidential staff report.

The City of Hamilton's Procedure By-law provides for public notice of meetings to be posted in advance on its website. The By-law also provides that the Clerk shall distribute the regular agendas of Council and Committee meetings to members of Council and Corporate Management Team at least 5 days prior to the scheduled meetings. The Clerk is to distribute Committee agendas to the media and the general public 24 hours after the agendas are provided to Committee members. We were also advised that it is the City's practice to post meeting agendas on its website.

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Ms. Gallagher confirmed that the meeting agenda for the February 18, 2010 Committee of the Whole meeting was circulated to Committee members on February 12, 2010 at 9 a.m., six days prior to the meeting. As Monday, February 15, 2010, was the Family Day holiday, Committee members agreed that instead of waiting for 24 hours to pass, the agenda and meeting materials could be released to the public right after the Committee members had received this information. As a result, notice of the February 18, 2010 Committee of the Whole meeting was provided to the media and the public by posting the agenda for the February 18, 2010 meeting on the City's website at 4:30 p.m. on Friday, February 12, 2010. Members of the media and the public who had signed up to be on the distribution list also received hard copies of the agenda and meeting materials on February 12, 2010. In addition, Ms. Gallagher advised that hard copies of the agenda were made available in the library and at the counter in City Hall on February 16, 2010.

The agenda for the February 18, 2010 Committee of the Whole meeting included an item referred to as "International Event Opportunities - 2015 Pan Am Games Update (CM09006(c))," under the heading "Private and Confidential." City staff confirmed that this is the way in which items to be discussed in closed session are designated on its agendas.

Based on this information, it appears that public notice of the February 18, 2010 Committee meeting and the agenda were provided in accordance with the City's Procedure By-Law.

The Committee minutes indicate that the open session of the Committee's February 18, 2010 meeting commenced at 9:30 a.m. and that during that session the Committee considered a staff report entitled "Internal Event Opportunities - 2015 Pan Am Games Update (CM09006(b))". It is recorded that following a vote relating to approval of the West Harbour precinct as the site for the new Pan Am stadium, the Committee resolved to go *in camera* to consider the "private and confidential" item on the agenda listed as "International Event Opportunities - 2015 Pan Am Games Update (CM09006(c))." The Committee cited three statutory exceptions for holding the discussion in closed session; (1) proposed or pending acquisition or disposition of land; (2) litigation or potential litigation; and (3) solicitor-client privilege. The minutes record that three councillors opposed moving into closed session for this discussion.

The minutes for the closed meeting indicate that it commenced at 3:40 p.m. and that during this *in camera* session City staff and the City's outside legal counsel provided the Committee with an overview of a confidential staff report, and Decommissioning Consulting Ltd. presented a PowerPoint presentation. Decommissioning Consulting Ltd. is the environmental engineering firm that was retained by the City's outside legal counsel, to provide advice on the environmental assessment aspects of the City's proposed acquisition of the West Harbour lands.



The minutes also record that one councillor lodged an objection to the presentation of Decommissioning Consulting Ltd. being discussed in closed session. The minutes note that after considering the information presented, the majority of the Committee approved a direction to staff concerning the acquisition of the West Harbour precinct lands, which was opposed by three councillors. The Committee minutes indicate that the Committee reconvened in open session at 5:35p.m, at which point the Committee approved staff recommendations concerning the acquisition of the West Harbour precinct lands for the Pan Am stadium. The meeting adjourned at 5:40 p.m.

Ms. Gallagher indicated that she could not recall whether members of the public were in attendance when the Committee reconvened in open session. She advised that the Mayor at times notifies the public that they can return after the closed session, but could not recall if this happened on February 18, 2010.

We have reviewed the confidential staff report presented to the Committee at the closed meeting on February 18, 2010 and have confirmed that it contains information relating to the acquisition of properties in the West Harbour precinct, including information relating to expropriation. We also reviewed a redacted version of the PowerPoint presentation by Decommissioning Consulting Ltd., "City of Hamilton Pan Am Stadium & Velodrome Complex: Environmental Site Preparation Program", which includes an outline of approaches to managing environmental liabilities in connection with brownfield sites in the West Harbour precinct lands. Mr. Barkwell explained that this presentation was considered in closed session because it was connected to the acquisition of property and also, as it was used by legal counsel in providing legal advice to the Committee relating to the proposed land acquisition.

The *Municipal Act, 2001* provides that municipalities may consider certain subjects in closed session as exceptions to the general requirement that meetings be held in public. These exceptions include situations where the municipality is considering a proposed or pending acquisition of land, litigation or potential litigation affecting the municipality and advice that is subject to solicitor-client privilege.

Based on the information our Office has received, it appears that the 2015 Pan Am Games Update considered by the Committee during the February 18, 2010 closed session, which included consideration of the confidential staff report, the external legal counsel's advice as well as the external consulting firm's PowerPoint presentation could be generally considered to have come within the exceptions that the Committee relied on to close the session to the public.

We note, however, that the subject of the location for the 2015 Pan Am games is of considerable public interest to the public in Hamilton. Under these circumstances, it is not surprising that concerns arose about the closed session discussion relating to this topic. In the past, the Ombudsman has emphasized that, particularly where there is a



significant public interest component, municipalities should carefully consider whether the public might be better served by discussing a matter openly rather than relying on the statutory exceptions to engage in discussion behind closed doors.

We also discussed that the Ombudsman encourages municipalities, as best practices, to make it clear that the public are welcome to attend when open session resumes following a closed session and to report out to the public on the closed session when open session resumes. While the Committee appears to have reported out publicly in this case, it is not clear that the public was advised of their right to return for the conclusion of the open portion of the meeting.

You indicated general agreement with the observations and suggestions made by our Office. We encourage you to discuss our review and suggestions with Council publicly, and request that you notify our Office when this occurs.

Under these circumstances, we will not be pursuing further review of the complaint we received and we will be notifying the complainant of the results of our informal review, including your commitment to share our suggestions with Council.

I would like to thank you both for your cooperation during our review. Should you have any questions or concerns, please feel free to contact me at (416) 586-3325.

Yours truly,



Laura Pettigrew
Senior Counsel