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SENT BY EMAIL TO: samantha.yew@burlington.ca

Mayor and Members of Council
c/o Samantha Yew, Clerk
City of Burlington
426 Brant Street
P.O. Box 5013
Burlington, Ontario
L7R 3Z6

Dear Mayor and Members of Council:

RE: Closed Meeting Investigation
Our File No.: 38763-1

This public report of our investigation is being provided to Council in accordance with Section 239.2(1) of the *Municipal Act*. We note that Section 239.2(11) of the *Municipal Act* requires that Council make the report public. The Clerk should identify on the agenda for the next open session Council meeting that this report will be discussed. Staff should consider whether it is appropriate to place the full report on the agenda in advance of Council deciding how the report should otherwise be made public.

Should Council desire, the Closed Meeting Investigator is prepared to attend at the open session meeting to present the report and answer any questions from Council.

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At the meeting, Council must first receive the report for information. Council does not have the authority to alter the findings of the report, only consider the recommendations. Per section 239.2 (12), if the report contains a finding that all or part of a meeting was held in closed session contrary to the *Act*, then Council is required to pass a resolution stating how it intends to address the recommendations in the report.

The Closed Meeting Investigator has included only the information in this report that is necessary to understand the findings. In making decisions about what information to include, the Investigator is guided by the duties set out in the *Municipal Act*. Members of Council are also reminded that Council has assigned to the Investigator the duty to conduct investigations in response to complaints under the *Municipal Act*, and that the Investigator is bound by the statutory framework to undertake a thorough process in an independent manner. The findings of this report represent the Investigator's final decision in this matter.

COMPLAINT OVERVIEW

A Complaint was received regarding a resolution passed at a Special Council meeting on January 12, 2024. Specifically, the Complaint alleged that the City of Burlington (the "City") improperly waived the public notice requirements for meetings that occurred during the months of January and February for the purpose of selecting a new City Manager.

FINDINGS

January 12, 2024 Resolution (the "Resolution")

At the Special Meeting of Council on January 12, 2024, a Resolution was passed regarding Council proceeding into closed sessions during the months of January and February to conduct interviews and deliberations regarding the recruitment of the City Manager position.

The Complaint is specific to the portion of the Resolution that sought to waive the public notice requirements for these closed session meetings. That section of the Resolution states:

Waive the notice ... provisions of the Procedure By-law including sections 22.1, 24.5 and 24.5, and 27.2 for all meetings called for the purpose of City Manager interviews and deliberations;

Factual Findings

We reviewed minutes which indicate that Council met in closed session on January 12, 2024

(following the Special Meeting of Council) and February 13, 2024 to adjourn the closed meeting.

General Principles regarding Council Meetings

It is a fundamental principle that municipalities are required to hold meetings that are open to the public, except in limited circumstances.¹ The Court has noted:

The democratic legitimacy of municipal decisions does not spring solely from the periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law. When a municipal government improperly acts with secrecy, this undermines the democratic legitimacy of its decision...²

A municipality is permitted to meet in closed session under certain circumstances as detailed in the *Municipal Act*. However, these meetings are still required to be conducted in a certain manner with certain procedural requirements. For example, Section 239(4) of the *Municipal Act* requires that a resolution be passed specifying the fact of the holding of the closed meeting and stating the general nature of the matter to be considered; that resolution must be passed in open session.

Was public notice of the closed session meetings held January 12, 2024 and February 13, 2024 required?

The Complaint raises issues regarding the accessibility and transparency requirements regarding meetings of Council. We were required to determine whether public notice of the recruitment meetings was required, or if the Resolution waived the requirement to give notice.

The Procedural By-law contains several provisions mandating how and when notice will be given and the required content of such notice.

The Procedural By-law provides for the temporary suspension of its provisions in Section 2.2:

Any rules or regulations contained in this by-law may be temporarily suspended, except for those rules or regulations that are set out by legislation, with the consent of at least two-thirds of the Council members present.

¹ *Municipal Act, 2001*, ...

² *RSJ Holdings Inc. v London (City)*, 2007 SCC 29 at para 38.

Council cannot therefore waive or suspend any rule or regulation that is set out by legislation.

Section 238(2.1) of the *Municipal Act* requires the following:

(2.1) Notice – the procedure by-law shall provide for public notice of meetings.

The *Municipal Act* does not specify when or how notice should be given, it only requires that public notice of meetings be provided for in the Procedure By-law.

What constitutes “public notice” is not defined in the *Municipal Act*. However, this provision must be interpreted as requiring that a minimum level of substantive information be provided to the public regarding upcoming meetings. Otherwise, the requirement that a procedural by-law provide for “public notice” has no meaning.

This interpretation is consistent with the case law regarding the transparency and accessibility requirements for Council meetings. It is also supported by the Office of the Ombudsman of Ontario who has indicated the following:

In order to ensure that the public’s right to observe municipal government is not frustrated, the municipality must provide notice of the time and place of the meeting, and then proceed to meet at the time and place specified in the notice.³

We find that the City was not able to waive the requirement to give public notice of the time and place of the closed session meetings. The requirement to give public notice is a legislated requirement under Section 238(2.1) of the *Municipal Act* which cannot be waived by Council under the Procedural By-law.

As a result, we find that the City was required to give public notice indicating, at a minimum, the time and place of the closed session meetings.

Was the public given notice of the closed session meetings held January 12, 2024 and February 12, 2024?

Council met in closed session on two occasions:

1. immediately following the Special Meeting of Council on January 12, 2024; and
2. on February 13, 2024 to adjourn the meeting (the January meeting was not adjourned and therefore was technically continued).

Notice was provided for the open Special Meeting on January 12, 2024; the public had no notice of where and when the closed session meeting on January 12, 2024 or the closed session meeting on February 13, 2024 would be held.

³ *Russell (Town of) (Re)*, 2020 ONOMBUD 1 at para 41.

In the Agenda posted for the open Special Meeting on January 12, 2024, the Resolution stated:

That Council proceed into Special Council Closed Session meetings in January and February 2024, to conduct confidential interviews and deliberations related to the recruitment of the City Manager position...

We find that the above resolution does not constitute public notice of the closed session meetings as it does not detail the time and place of the meetings or provide any meaningful information necessary to inform the public.

We received submissions from the City that the public notice for the open Special Meeting of Council constituted notice for the closed session meeting of Council on the same date. We dismiss this argument as there was no notice provided that a closed session meeting would be occurring on the same date as the open meeting. The public could not discern from the open resolution that there was a closed session meeting on the same date – that does not constitute the necessary notice required by the Act.

We also received submissions from the City that the meeting on February 13, 2024 was merely a continuation of the meeting on January 12, 2024 and that no notice was required as it was not a separate meeting. This argument, if accepted, would lead to an absurd result. If a Council could contravene meeting notice requirements by simply stating that the prior meeting never ended and was simply being carried over to another date, then Council could effectively give notice for one meeting at the beginning of a term or year and then carry them over indefinitely with the public unable to know when meetings were being held. This is not the intention of the *Municipal Act*.

Burlington's Response

An initial copy of this report was provided to the City and the Complainant on August 7, 2024. The City requested the opportunity to provide a further response before the report was made public. We allowed this request, and on September 3, 2024, received the City's response. No substantive changes were made to the report or the outcome of our investigation as a result of the City's position. However, we do wish to address the City's submissions.

The City raises several substantive arguments in support of its decision not to provide public notice of these meetings. First, as background, the City raises the fact that these meetings occurred as part of a recruitment process for the City's highest position. It cites to a decision of the Ombudsman's Office, regarding a similar search in the City of Hamilton in 2019, and requests that the Closed Meeting Investigator consider the "City's motivations, and the challenges it faced". Second, the City argues that we have misinterpreted section 238(2.1), in that it does not require actual notice of meetings be provided to the public, but rather only requires that notice to the public be addressed in its procedural by-law. Finally, it argues that it did provide notice. We reject each of these positions.

The City's Motivation

The City asserts that we must consider its motivations in holding its meetings the way it did. It cites the Ombudsman's report on closed meetings held in Hamilton February 9 and 23, 2019. In particular, the City quotes paragraphs 91 and 92 of that report, where the Ombudsman discusses the importance of privacy and confidentiality in a recruitment process as justification for certain decisions taken by the City.

For context, the Hamilton Report pertains to two closed meetings which the City of Hamilton chose to hold at a resort conference room in Niagara-on-the-Lake. Both were meetings of a specific committee seeking to interview candidates for the City Manager position. Complaints received by the Ombudsman included complaints about the decision to hold the meetings in another municipality, complaints about the meeting time being incorrect on parts of the City website, and complaints that venue staff forcibly removed members of the public attempting to attend public portions of the meetings.

The paragraphs quoted by the City in its response were from the Ombudsman's analysis of the decision to hold the meetings outside of Hamilton. The Ombudsman is not, in the sections of the report quoted by the City, justifying an otherwise improper decision. Rather, the Ombudsman found that the committee was allowed, under the *Municipal Act* to hold its meetings in another municipality. The paragraphs appear to serve only as further explanation for the public on why this is acceptable practice. They do not stand for the proposition that motivation can justify an otherwise illegal decision.

More pertinent, however, are two later sections of the Hamilton Report. One concern raised, as noted above, was incorrect meeting times. Hamilton moved the start of the committee meetings – the public portion – to a half hour earlier, but only updated the timing on parts of its website, leaving the wrong time in other parts. The Ombudsman's Office recommended that the City ensure timings are correctly updated on its website.

Later in the report, the Ombudsman also addressed the fact that venue staff removed members of the public, preventing their presence at open portions of the meeting. Its investigation revealed that Hamilton had expressly told the recruitment firm it was using that members of the public must be permitted entry; the recruitment firm directly contravened these instructions and explicitly told the venue that staff should remove members of the public. Even though it was clear that removal of the public was contrary to the City's express instructions, the Ombudsman's Office found nonetheless that the City breached the *Municipal Act*, as it was the party responsible for ensuring public access.

In our opinion, both of these sections of the Report are directly applicable here. Respectfully, if the Ombudsman found against Hamilton for only updating meeting times on some portions of its website and for the unauthorized actions of a third party – taken specifically against Hamilton's instructions – then we do not see how Burlington can be justified in intentionally withholding from the public the dates and times of its meetings altogether.

Compliance with Section 238(2.1).

At the outset of its letter, the City alleges that it did not, in fact, take the position that notice of the January and February meetings was not required, but rather that it took the position

that sufficient notice was given. However, the bulk of the City's response letter does, in fact, make the assertion that explicit notice of those meetings was not required.

In making this assertion, the City provides a proposed analysis of section 238(2.1), which is the source of the obligation for notice of meetings. According to the City, the language of that section – that the Procedural By-Law must “provide for notice of meetings” – requires only that a procedural by-law address notice, not that notice actually be given. Specifically, the City states that 238(2.1) does not create an obligation to give notice of every meeting, as this is dealt with by the procedural by-law and city policies. The City then argues that, as it is authorized to waive its procedural by-law, it is authorized to waive the portions of that by-law dealing with public notice.

Respectfully, we again disagree with the City's interpretation of the statute. As identified in the City's letter, the Supreme Court has set out the modern approach to statutory interpretation, which requires that we consider words in their ordinary and grammatical usage, and in context within the statute.

In support of its contention that the procedural by-law can be waived, and therefore the requirement to give notice of a meeting can be waived, the City relies on the Ombudsman's report in the Township of Adelaide Metcalfe, dated March, 2013. In that case, the Mayor had called a meeting of council with no advance notice, whereas the procedural by-law required 24 hours' notice. It is true that the Ombudsman's office noted that the “curative” provision waiving compliance with the 24 hour notice requirement could have been used. However, the Ombudsman also states, two paragraphs later, that “By not providing any public notice of the August 1, 2012 meeting, the Township, in effect, closed the door to this meeting and did not allow the public the chance to attend.” We read this to mean that entirely forgoing notice of a meeting amounts to improperly holding the meeting in closed session.

It is true that a municipality can waive its procedural by-law, and that would include the procedures established for giving notice. However, we disagree that this means the municipality can waive giving *any* notice of the meeting. It may be, for example, that a municipality's procedural by-law has provisions like those in Adelaide Metcalfe requiring 24 hours' notice of meetings. We do not disagree that a municipality can waive that requirement and, for example, only give twelve hours' notice. Indeed, as the City points out, the *Municipal Act* does not say how much notice or what kind of notice must be given. We understand this to be what the Ombudsman's office mean when it referenced the “curative provisions” in Adelaide Metcalfe. In our opinion, what the City cannot do is entirely *forgo* notice.

Further, we note that section 2.2 of Burlington's Procedural By-Law explicitly states that rules required by statute cannot be waived. Again, it is not our conclusion that Burlington was required to provide any particular type of notice; it certainly could have waived its procedural by-law to, for example, reduce the time provided for notice or change the form of notice given.

However, the procedural by-law must still “provide for notice” in order to comply with the *Municipal Act*. We do not find that “providing for” notice can be done by providing any notice.

Providing Notice

Finally, the City alleges that it *did* provide notice of the meetings, just not the date, time, or location. We disagree that this provides sufficient notice, and would also draw attention to the fact that the City did not specify the number of meetings, simply stating that there would be “meetings” in “January and February”. A member of the public could not know even how many meetings were held. We cannot conclude that advising there will be “meetings” in two separate months complies with the requirement to “provide for notice of meetings”.

We also disagree with the City’s assertion that “[the public] would not have been able to attend” the meetings in question, as they were in closed session is a justification for not providing notice. Every closed session meeting must begin in open session, and then move into closed. This requirement is well-established. Indeed, both the Hamilton and Adelaide reports raised by the City clearly condemn those respective municipalities for preventing the public from attending the open session portions.

We find that public notice of the time and location of the closed session meetings held on January 12, 2024 and February 13, 2024 was required under the *Municipal Act*. The City failed to provide this minimum level of notice and, as such, we find that City was in contravention of the *Municipal Act* requirements.

We also find that these contraventions were not accidental or the result of mere oversight. The City deliberately created a process to ensure that the public was not aware of the time or location of the closed session meetings in order to enhance the confidentiality of the recruiting process. This directly contradicts the requirement that a municipality make decisions that are transparent and accessible to the public.

While we understand that recruitment of a City Manager is a sensitive process, it does not absolve the City of complying with legislated requirements for public notice of meetings.

CONCLUSION AND RECOMMENDATIONS

Based on the foregoing findings, it is our recommendation that:

- Council ensure in future that if there is a meeting that meets the definition of a Council meeting within the meaning of the *Municipal Act, 2001* that proper notice be given to the public;

This concludes the investigation and report in this matter.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP



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