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CONFIDENTIAL

May 11, 2023

SENT BY EMAIL TO: TDafoe@stratford.ca

Mayor and Members of Council
c/o Tatiana Dafoe, City Clerk
City of Stratford
1 Wellington Street
P.O. Box 818
Stratford, ON N5A 6W1

Dear Mayor and Members of Council:

**RE: Closed Meeting Investigation
Our File No.: 36684-2**

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.

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.

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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.

PRELIMINARY REVIEW

On April 19, 2023, our office received two closed meeting complaints, both made to the City on April 17, 2023. The complaints relate to closed sessions during meetings held March 27 and April 11, 2023; both closed sessions involved discussion of a proposal to designate a certain property within the City as a heritage property.

The *Municipal Act* provides the Closed Meeting Investigator with powers which include the ability to interview witnesses and review documents deemed relevant to the investigation process. In conducting the preliminary review, our process included:

- Reviewing the relevant provisions of the *Municipal Act*;
- Correspondence with the complainant; and
- Reviewing agendas, closed session resolutions, and similar documentation.

During the preliminary review we assume that the facts as set out in the complaint are true. We do this not for purposes of finding a breach, but to test the merit of the complaint. In other words, would the allegations, if true, amount to an illegally closed meeting? If so, we undertake a full investigation to determine whether the allegations are true. If the allegations, even if true, would not constitute an illegally closed meeting there is no reason to undertake a full investigation. It is important to understand that we make no finding of fact during the preliminary review - we simply assume the facts are true as a method to assess the merit of the complaint at this stage.

As part of our preliminary review process, we were provided copies of minutes from both meetings, as well as documents presented at the April 11 meeting. We also had the opportunity to interview the complainant. Our initial review of the materials provided indicated that, even if all of the facts alleged in the complaint were true, both meetings were properly held in closed session. That is to say, none of the allegations made in the complaint would result in a finding that either matter ought not have been discussed in closed session. For that reason, this matter was concluded without further investigation.

FACTS:

On March 27, 2023, Council was scheduled to discuss the potential heritage designation of a property within the City. Prior to public discussion of the matter, Committee of the Whole moved into closed session, a portion of which was dedicated to discussing the proposed heritage designation. The relevant sections of the motion to move into closed session read as follows:

Legal Opinion regarding Notice of Intent to Designate under the Ontario Heritage Act (Avon Crest) - Advice that is subject to solicitor client privilege, including communications necessary for that purpose (239.(2)(f))

During that part of the closed session, the City solicitor identified a need for a more thorough legal opinion. Council voted to seek that opinion.

At the April 11, 2023, meeting, Committee of the Whole received and considered the City Solicitor's legal opinion on the heritage designation matter. That opinion was provided in a written format, which included an expert report obtained by the solicitor. The motion to move into closed for this meeting was as follows:

Legal Opinion regarding Notice of Intent to Designate under the Ontario Heritage Act (Avon Crest) - Advice that is subject to solicitor client privilege, including communications necessary for that purpose (239.(2)(f)).

Following in-camera discussion, the heritage designation was then discussed in open session.

Municipal Act

- 239 (1) Except as provided in this section, all meetings shall be open to the public.
- (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;

- (4) Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution,
- (a) the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting; or
 - (b) in the case of a meeting under subsection (3.1), the fact of the holding of the closed meeting, the general nature of its subject-matter and that it is to be closed under that subsection.

ANALYSIS:

Under the *Municipal Act*, the default position is that meetings of Council and similar bodies are open to the public. This is an important rule, as it reinforces principles of open and accountable government. However, there will, naturally, be circumstances in which Council must address issues that should not be discussed in public; for this reason, the *Act* includes a number of exceptions.

The scheme of the *Act*, and previous decisions of closed meeting investigators, make clear that for a meeting to be properly closed to the public, the following requirements must be met:

1. The meeting must begin in open session, and a resolution must be passed to move into closed session;
2. The resolution to move into closed session must cite the section of the *Act* relied upon and must give a general description of the matters to be discussed; and
3. The content of the meeting must actually fall within the cited exception.

Even where an exception applies which permits a meeting to be held in closed session, the *Municipal Act* still imposes certain restrictions to ensure the possibility for a level of public scrutiny.

First, the motion to proceed into closed session must itself be held in open session. That is to say, a member of the public must be able to enter or log-in to the meeting as it is called to order, and as the motion to move to closed session is moved and voted on. Only once the motion passes can the public be excluded.

Second, the motion to move into closed session must provide the “general nature” of what is to be discussed. In *Farber v. Kingston (City)* 2007 ONCA 173, the Ontario Court of Appeal described the contents of this requirement as follows:

I think that the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.

A member of the public, not having been permitted to be present during the closed session, must nevertheless be able to review the motion and have a general idea as to what was discussed except in limited circumstances. This is important, not least of all because, without this step, the public has no way to otherwise hold its Council accountable with respect to the closed meeting.

Did Committee of the Whole Pass an Appropriate Resolution in Open Session to Move into Closed Session

The minutes from both the March 27 and April 11 meetings, as reproduced above, indicate that Council began in open session and passed a resolution to move into closed. The resolution identifies the exception relied upon and provides a brief description of the matter to be discussed. Accordingly, Council properly moved into closed session.

Did the Meeting Actually Fall within the Cited Exception

Having determined that the resolution to move into closed session met the necessary form requirements, we must now consider the substance of the meetings.

March 27, 2023

In our opinion, the discussion in question clearly meets the requirements of the exception for advice subject to solicitor-client privilege. Council met briefly with the City solicitor, who provided an opinion based on the application of the law to the topic at hand. The end result of that discussion was that a more thorough opinion was needed. In our opinion, neither the brevity of the discussion, lack of written report, or need for follow-up advice has any impact on the applicability of this exception.

Although legal advice often does consist of lengthy opinion letters, it can also consist of a single word. Similarly, identifying legal questions which require a more thorough response before moving forward on a decision is itself a form of advice.

April 11, 2023

On the whole, we find that this meeting was properly held in closed session under the exception for advice subject to solicitor-client privilege. In both the written complaint and during our interview, the complainant raised a number of concerns which they believe warranted a finding that this meeting was improperly held in closed. Respectfully, we disagree with each of those concerns.

The April 11 meeting involved presentation and discussion of the legal advice sought at the March 24 meeting. That advice included a lengthy written opinion, to which an expert report was appended. Portions of that expert report were subsequently made public by City staff. The complainant raises the concern that, if portions of the report did not pertain to legal advice and should be made public, then the whole of the discussion should have been held in public.

It is important to note that, while Council is permitted to hold certain discussions in camera, it is never obliged to do so. If Council does choose to discuss a matter publicly later, that does not invalidate the decision to hold the initial meeting in closed session. This principle has been established by various closed meeting investigation reports, including our own report in *Re: Grey County*.

The City solicitor's written report provides legal advice, and is unquestionably appropriate for discussion in closed session under the appropriate exception. Courts have been clear that, while the discussion in closed session must remain germane to the topic falling under the exception, Council is not expected to move in and out of closed session every time the discussion briefly drifts outside the scope of the exception. The expert's report was not the subject of this closed session, and discussion of the expert's report pertained largely to legal advice stemming from its conclusion. Accordingly, we do not find that inclusion of this report brought the meeting outside the cited exception. In making this decision, I note that we do not draw any conclusions regarding whether the expert's report could also fall within solicitor client privilege; such a conclusion is not necessary.

The complainant also raised concerns regarding the impact of the legal advice on Council's decision. They feel that it was unfair that members of the public were not apprised of the legal advice Council received, and had no opportunity to refute it. Respectfully, there is simply no requirement that Council share privileged legal advice with members of the public, nor is there a prohibition on Council making decisions based on information received in closed. On the contrary, the purpose of closed session exceptions is to recognize that certain discussions ought not be held in public. It would undermine the purpose of closed meetings to find that the information provided in closed cannot inform Council's decision.

CONCLUSION AND RECOMMENDATIONS

We determined during our preliminary review of the complaint that the allegations of the complainant, even if true, would not result in a finding that either discussion was improperly closed. All of the facts alleged by the complainant, and the supporting documentation that they provided, supported a finding that the meetings were properly closed.

This concludes the investigation and report in this matter.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP



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