

REPORT ON CLOSED MEETING INVESTIGATION NO. 2022-01

THE CORPORATION OF THE TOWN OF CALEDON

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REPORT ON CLOSED MEETING INVESTIGATION – 2022-01

INTRODUCTION

Our office received a request for a closed meeting investigation on April 7, 2022 (the “**Complaint**”) from the Clerk of The Corporation of the Town of Caledon (the “**Town**”) in our capacity as the closed meeting investigator (“**Investigator**”).

The Complaint alleges that the Town’s Council (“**Council**”) improperly held the Special Town Council Meeting on Monday October 4, 2021 (the “**Meeting**”) in contravention of the Town’s Procedure By-law No. BL-2015-18,¹ failed to properly convene into a closed session, and considered a subject matter that was not authorized under section 239 of the *Municipal Act, 2001*.²

CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

The Town appointed Local Authority Services Inc. (“**LAS**”) as its closed meeting investigator pursuant to section 239.1 of the *Municipal Act, 2001*. LAS has delegated to Aird & Berlis LLP its authority to act as the Investigator for the Town.

Our jurisdiction as Investigator is set out in section 239.2 of the *Municipal Act, 2001*. Among other things, we are authorized to investigate, in an independent manner, a complaint made by any person to determine whether 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, and to report on the investigation to Council, together with any recommendations as may be applicable.

THE COMPLAINT

The Complaint was filed pursuant to section 239.2 of the *Municipal Act, 2001*.

The requester did not file the Complaint in accordance with the Town’s procedure for Closed Meeting Investigations nor with the Town’s Closed Meeting Investigation Request Form, taking the position that only a written request is required.

The Complaint provided as follows:

As per the process outlined on the AMO/LAS [website](#) I am putting forward a written request for a closed meeting investigation surrounding the October 4, 2021 confidential meeting. While I understand that the communication was made public it is unclear to me if Council went into closed session and for what reasons.

[Special Town Council Meeting - October 04, 2021](#)

¹ Town of Caledon, Procedure By-law No. BL-2015-108 (Office Consolidation) [“**Procedure By-law**”].

² *Municipal Act, 2001*, S.O. 2001, c. 25.

Special Town Council Meeting – October 4, 2021***9. CONFIDENTIAL SESSION**

*9.1 Confidential Correspondence: Advice subject to solicitor-client privilege, including communication necessary for that purpose - Peel 2051 Regional Official Plan Review



**This item is being published as per Council direction*

When asked to provide the Closed Meeting Investigation Request Form, the requester responded that a “written request is the only provision” but did elaborate further by noting as follows:

As per the Ontario Ombudsman’s website it is not appropriate to go into closed session to discuss “growth”. That is the basis for the investigation request.

Security of municipal property – s. 239(2)(a)

Includes discussions about:

- Protection of municipally-owned property from physical loss or damage
- Loss or damage can be corporeal (like vandalism) or incorporeal (like fraud)

Does not include discussions about:

- The financial interests of the municipality
- Strategy with respect to municipal infrastructure or growth
- Strategy with regard to municipal property, including its purchase or sale³

The requester indicated they would provide additional information to the Investigator with respect to the basis of the Complaint.

We contacted the requester on April 12, 2022 and requested that they clarify the reason(s) for the request so that we could understand the specific grounds that were being asserted with respect to the alleged non-compliance with section 239 of the *Municipal Act, 2001* or the Procedure by-law.

The requester provided a written response on April 13, 2022 wherein the Complaint was clarified to allege the following primary instances of non-compliance:

- (i) the Town did not comply with Section 5.4.1 of the Procedure By-law with respect to the calling of the Meeting;
- (ii) Council failed to pass a resolution to hold a closed session contrary to subsection 239(4) of the *Municipal Act, 2001*;
- (iii) Council was not authorized to consider the matter that it convened *in camera* to discuss pursuant to section 239 of the *Municipal Act, 2001*.

³ Ontario Ombudsman, [Open Meetings – Guide for Municipalities](#) – “Exceptions to the Open Meeting Rules”.

In essence, the Complaint alleged that none of the closed meeting exceptions set out in section 239 of the *Municipal Act, 2001* authorized Council to discuss “growth” and that solicitor-client privileged advice could not have possibly related to the Region of Peel 2051 Official Plan “when there is no ongoing legal matter since there is no decision as of yet approving the Plan.”⁴

ISSUES

The Complaint raised the following issues with respect to the Meeting:

1. Was the Meeting held in contravention of Section 5.4.1 of the Procedure By-law?
2. Did Council pass a resolution to authorize the closed meeting in accordance with subsection 239(4) of the *Municipal Act, 2001*?
3. Was the subject matter of the Confidential Session a permitted exception under subsection 239(2) of the *Municipal Act, 2001*?

INVESTIGATION

In order to assess the Complaint and to make a proper determination on the issues, we have reviewed the following materials, in addition to the applicable law, as set out below:

- the Complaint, including additional correspondence and materials received from the requestor;
- the Procedure By-law;
- discussions with the Town Clerk; and
- the open and closed meeting minutes, agendas and reports for the Meeting.

We also reviewed, considered and had recourse to such applicable secondary source materials, including other closed meeting investigation reports, that we believe to be pertinent to the issues set out in the Complaint.

Our investigation was conducted in accordance with section 239.2 of the *Municipal Act, 2001* in a confidential, and independent and impartial manner.⁵

This is a report on the investigation of the Complaint made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.

⁴ Additional related grounds were also raised which will be addressed in the Findings below.

⁵ We had raised the issue of independence and impartiality with both the Clerk and the requester by expressly advising them that we have periodically acted both for and against the Town on numerous occasions and that the test for bias or reasonable apprehension of bias on the part of an investigator is a very high one: see [Chiarelli v. Ottawa \(City\)](#), 2021 ONSC 8256 (Div. Ct.), at paras. 74-76. Both the Clerk and the requester consented to our authority to act as investigator in this matter. Prior to accepting any investigation mandate, Aird & Berlis LLP conducts a thorough legal conflict search and makes other conflict inquiries to ensure we are in a position to conduct an independent and impartial investigation.

APPLICABLE LAW

1. *Municipal Act, 2001*

Subsection 239(1) of the *Municipal Act, 2001* provides that all meetings of Council are to be open to the public, unless otherwise excepted. This is often referred to as the “open meeting rule”.

All meetings of a council or a committee, unless they deal with a subject matter falling within a specific exception set out in section 239 are required to be held in the presence of the public.

There are fourteen (14) separate exceptions to the open meeting rule variously set out in subsections 239(2), (3) and (3.1) of the *Municipal Act, 2001*.

It is our view that the exception relevant to this Complaint is set out in clause 239(2)(f):

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 propose;⁶

Subsection 239(4) of the *Municipal Act, 2001* requires a procedural step prior to a council convening into a closed meeting for the consideration of any of the exceptions:

Resolution

239 (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.

Council must openly resolve to hold a closed session and to state the general nature of the matter that is to be considered at the closed session.

⁶ We note that the Complaint expressly noted that “growth” is not a matter that can be considered by a council in a closed setting by specific reference to the position of the Ontario Ombudsman pursuant to the closed meeting exception in clause 239(2)(a) of the *Municipal Act, 2001*, which addresses matters related to “the security of the property of the municipality.” This exception was not relied upon by Council to convene into a closed session, nor is it applicable to the subject matter of the Confidential Session.

2. The Procedure By-law

Subsection 238(2) of the *Municipal Act, 2001* requires the Town to pass a procedure by-law for governing the calling, place and proceedings of meetings. A procedure by-law is a mandatory by-law requirement that the Town complied with by enacting its Procedure By-law.

The Meeting referenced in the Complaint is subject to the Town's Procedure By-law.

The Complaint alleges a contravention of Section 5.4.1 of the Procedure By-law, which provides as follows:

5.4 Special Meetings

5.4.1 An *additional or emergency meeting* may be established by:

- a) a *Motion of Council or Committee at a meeting*;
- b) at the call of the *Mayor*, with appropriate notice of at least 48 hours prior to the date and time of the *special meeting*; or
- c) at the call of the *Mayor*, with appropriate notice of at least 24 hours prior to the date and time of the *emergency meeting*.

The Complaint indicated that the requester was not aware of a motion that had been passed to approve the Meeting although they noted that they had heard about the meeting from other residents who had received emails on October 1, 2021.

THE MEETING

Council met in a virtual setting for the Meeting on October 4, 2021, commencing at 10:00 a.m.

The Meeting was listed as a Special Town Council Meeting on the agenda.

The public minutes of the Meeting indicate that Council convened in open session at 10:01 a.m. and discussed a number of matters under the topic listed as Item 5 on the agenda:

5. KEY CONTEXT – FUTURE CALEDON – OFFICIAL PLAN REVIEW.

One of the items sub-listed under the above item included the following:

- Region of Peel 2051 – Official Plan Review and Settlement Area Boundary Expansion

Council recessed at 12:03 p.m. and then reconvened at 12:36 p.m. for close to four (4) hours.

The public minutes of the Meeting indicate that a motion to convene into closed session (referred to as "Confidential Session" in the Town's documents) for Council to receive advice that is subject to solicitor-client privilege, including communications necessary for the purpose, was voted upon and passed.

The public minutes indicate that Council convened into Confidential Session at 4:15 p.m. The public minutes also note that Council adjourned the Confidential Session at 4:40 p.m. and reconvened into the open meeting.

At that time, Councillor deBoer moved and Councillor Innis seconded a motion which provided as follows:

That Council convened in Confidential Session under Section 239 of the Municipal Act for the following purpose of Confidential Correspondence, Advice that is subject to solicitor-client privilege, including communications necessary for that purpose – Peel 2051 Region Official Plan Review;

That the Correspondence marked as a confidential draft regarding Peel 2051 Regional Official Plan Review be released to the public as part of the Post-Agenda Package;

That the Correspondence be sent to the Region of Peel as the Town's comments regarding the scope of the Peel 2051 Region Official Plan Review;

That a copy be sent to the Honourable Steve Clark, the Minister of Municipal Affairs and Housing, the Honourable Sylvia Jones, MMP Dufferin / Caledon and all MPP's within the Region of Peel.

The motion was carried unanimously as Resolution 2021-151.

Council passed Confirmatory By-law 2021-77 and adjourned the Meeting at 4:43 p.m.

As set out in the Special Town Council Meeting Post-Meeting Agenda, a copy of the Confidential Correspondence that had been discussed in the Confidential Session was published as directed by Council at the closed session.⁷

FINDINGS

1. Was the Meeting held in contravention of Section 5.4.1 of the Procedure By-law?

A request may be made under section 239.1 of the *Municipal Act, 2001* to determine whether a municipality has complied with section 239 or a procedure by-law in respect of a meeting or part of a meeting that was closed to the public.

The above issue, as framed in the Complaint, relates to the Meeting and not specifically to the closed portion of the Meeting. We have nevertheless decided to answer the question since the Confidential Session was part to the Meeting.

The Complaint notes that it was unclear where the motion approving the Meeting was enacted. Section 5.4.1 of the Procedure By-law sets out “[a]n *additional* or *emergency meeting* may be established by: a) a *Motion of Council* or Committee at a *meeting*.”

⁷ The correspondences from the Town's external solicitor to the Regional Clerk re “Peel 2051 Regional Official Plan Review” is dated October 5, 2021 and is included in full at pages 51-54 of the Special Town Council Meeting Post-Meeting Agenda.

There is no definition for “additional meeting” in the Procedure By-law and, therefore, the phrase must be accorded its normal and ordinary meaning⁸ as being an “extra” or “added” meeting of Council.

The Planning and Development Committee passed a motion at its meeting on September 21, 2021 to adopt the following recommendation:

That a Council Workshop on the Town’s Official Plan be scheduled in the coming weeks.⁹

The Planning and Development Committee’s recommendation was ratified by Council at its meeting on September 28, 2021 by the enactment of Resolution No. 2021-145 to schedule a Council Workshop on the Region of Peel/Town of Caledon Official Plan Update.¹⁰

We were advised by the Clerk that members of Council were canvassed to determine available dates and that it was determined that the meeting would be scheduled for October 4, 2021. Notice of the Meeting was provided to all members of Council and to an external distribution list of subscribed persons. Notice was provided by email to both groups on the afternoon of September 30, 2021.

The Clerk advised us that notice of the Meeting was added to the Council Calendar on the Town’s website on September 29, 2022. A copy of the agenda was posted on the Council Calendar on September 30, 2022.

In addition, we understand that the addition of the Confidential Session as Item 9.1 to the Meeting was made at the call of the Mayor (and with the aforementioned prior notice of 48 hours) which accords with the clear intent of Section 5.4.1 b) of the Procedure By-law with respect to the scheduling of a special meeting.

To be clear, the Meeting – as an additional meeting of Council – was properly established by Council’s passing of Resolution 2021-145 at its meeting on September 28, 2022 pursuant to Section 5.4.1 a) of the Procedure By-law. The Confidential Session was simply an item that was added to the already properly scheduled additional meeting and it would, if it had been a stand-alone additional meeting to only consider the closed meeting item have complied with the requirements of Section 5.4.1 b).

For the foregoing reasons, the Meeting was properly called and scheduled with prior notice of the proposed Confidential Session.

⁸ In accordance with the “modern rule of statutory interpretation” from Elmer Driedger, *Construction of Statutes*, (2nd Edition, 1983) at 83:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of parliament.

Cited by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 & *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559.

⁹ Planning and Development Committee Meeting Report, September 21, 2021 at page 2.

¹⁰ Town Council Meeting Minutes, September 28, 2021 at page 7.

2. Did Council pass a resolution to authorize the closed meeting in accordance with subsection 239(4) of the *Municipal Act, 2001*?

The approved and adopted public minutes of the Meeting note that prior to Council convening into Confidential Session at 4:15 p.m. that Council passed Resolution 2021-150. The minutes expressly provide as follows:

CONFIDENTIAL SESSION

Moved by: Councillor C. Early – Seconded by: Councillor L. Kiernan 2021-150

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

Confidential Correspondence – Advice that is Subject to solicitor-client privilege, including communications necessary for that purpose – Peel 2015¹¹ Regional Official Plan review

A recorded vote was taken as follows:

| Recorded Vote | YES | NO | CONFLICT | ABSENT |
|------------------------|------------|-----------|-----------------|---------------|
| Mayor A. Thompson | | | | X |
| Councillor I. Sinclair | X | | | |
| Councillor L. Kiernan | X | | | |
| Councillor J. Downey | X | | | |
| Councillor C. Early | X | | | |
| Councillor J. Innis | X | | | |
| Councillor N. deBoer | X | | | |
| Councillor A. Groves | | X | | |
| Councillor T. Rosa | | | | X |
| Total | 6 | 1 | 0 | 2 |
| | | | | Carried |

We note that advance notice to the public of the Confidential Session was provided in the agenda for the Meeting at Item 9.1.

A resolution to convene into a closed meeting is required to provide the public notice that the open meeting will cease in so far as there will be discussion, debate and consideration of a matter in the absence of the public. The resolution above identified that the topic for consideration would be confidential correspondence and advice related to solicitor-client privilege pertaining to the Peel 2051 Regional Official Plan review. The resolution did not simply parrot the statutory exception – it provided additional context to note that the solicitor-client advice related to correspondence with respect to the review respecting the Peel 2051 Regional Official Plan.

Based on the foregoing, Council satisfied the statutory prerequisite for the holding of the Confidential Session in accordance with the requirements of subsection 239(4) of the *Municipal Act, 2001* by passing Resolution 2021-150 which stated that:

¹¹ This is a typographical error as all other references are to the Peel **2051** Regional Official Plan Review.

- (i) Council would be going into closed session;
- (ii) to receive confidential correspondence related to the Peel 2051 Regional Official Plan Review;
- (iii) which constituted advice subject to solicitor-client privilege.

Based on the foregoing, it is our view that Council properly passed a resolution to authorize the Confidential Session in accordance with subsection 239(4) of the *Municipal Act, 2001*.

3. Was the subject matter of the Confidential Session a permitted exception under subsection 239(2) of the *Municipal Act, 2001*?

As noted above, Council resolved to go into the Confidential Session to receive advice that is subject to solicitor-client privilege. This is an explicitly permitted exception to the open meeting rule that is listed in subsection 239(2) of the *Municipal Act, 2001* as follows:

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 propose;

Also as noted above, the Complaint objects to this action on the basis that “growth” is not a subject matter that can be considered by Council. Specific reference is made in the Complaint to the exception in clause 239(2)(a) of the *Municipal Act, 2001* which pertains to “the security of the property of the municipality.” However, Council did not rely upon this exception to convene into the Confidential Session – Council expressly cited clause 239(2)(f) as the exception.

We appreciate that the requester has viewed the subject of the correspondence from the Town’s legal counsel as “growth” or a “planning matter” which should have been considered only in an open session. However, this ignores the fact that the correspondence was prepared by legal counsel and that legal counsel presented the draft correspondence to Council at the Confidential Session. This is plainly set out in the Confidential Special Town Council Meeting Minutes. In fact, the minutes indicate that a member of Council indicated that the “matter should be discussed in open session” to which legal counsel explained why it was being presented *in camera*.

It is our view that a municipal council is entitled to receive advice from its solicitor and that the *Municipal Act, 2001* recognizes that this is something that can be accommodated in a meeting that is closed to the public in order to protect solicitor-client privileged advice. The purpose of the exception in clause 239(2)(f) is to protect the municipality as a client who seeks legal advice.

The subject matter of the exception in clause 239(2)(f) relates to the provision of legal advice not to what the legal advice relates to. For example, none of the exceptions in section 239 pertain to business licensing but a council would be able to meeting in a closed setting to receive advice from its lawyer on a matter related to business licensing. We appreciate that there is a strong imperative for openness and public participation in the municipal land use planning process, including matters related to municipal official plans. However, a municipality is entitled to seek the advice of its legal counsel on matters related to land use planning and it is recognized that solicitor-client privileged advice is to be safeguarded.

There have been a number of closed meeting investigation reports and determinations noting that matters related to land use planning can be considered in a closed setting under the exception related to solicitor-client privileged advice.¹²

The foregoing is expressly noted by the Ontario Ombudsman and its previously cited document, [Open Meetings – Guide for Municipalities](#) – “Exceptions to the Open Meeting Rules”:

Advice subject to solicitor-client privilege – s. 239(2)(f)

Includes discussions about:

- Communication between the municipality and its solicitor, to seek or receive legal advice intended to be confidential (to ensure municipal officials can speak freely with their lawyer without fear of disclosure)

This is precisely the stated reason that Council passed its resolution to hold the Confidential Session.

The Complaint notes that there is no ongoing legal matter since “there is no decision as of yet approving the [Regional] Plan.” This assertion may have had some application if the exception being considered was clause 239(2)(e) relating to “litigation.” However, as the correspondence from the Town’s legal counsel makes manifest, the Town takes issue with the process followed and the amendments being proposed as part of the Region of Peel 2051 Official Plan Review. The fact that there is no decision approving the Regional Official Plan is the very reason for the correspondence – that is, to make the Region of Peel aware of the concerns that the Town has with respect to how it is processing, and what amendments it proposes to make, to the Regional Official Plan. The mere fact that the Regional Official Plan has not been approved does not mean that the Town cannot seek and obtain legal advice on the matter.

The Complaint sets out various reasons why Council went into closed session. Having reviewed the Confidential Special Town Council Meeting Minutes, the discussion appeared to be focused specifically on the communication prepared by legal counsel that was subsequently publicly released in accordance with Council’s direction.

The Complaint also speculates that if Council sought to “receive advice on the Bolton SABE should it have been added to this meeting agenda since it was a special meeting called specifically for the Region’s ongoing OP review.” There was no evidence that Council received legal advice on the Bolton SABE during the Confidential Session.

Based on our review of the evidence, the subject matter of the Confidential Session related solely and exclusively to advice that is subject to solicitor-client privilege, including communications necessary for that purpose, which is a specifically enumerated exception under clause 239(2)(f) of the *Municipal Act, 2001*. Council considered advice from its legal counsel and communications related thereto for precisely the reason that Council passed Resolution 2021-150 to convene the Confidential Session.

¹² Ontario Ombudsman, *Re Township of Russell* (February 23, 2021); *Re Norfolk County* (November 7, 2016), *Re Township of Ryerson* (November 8, 2013); *Re Township of North Dumfries* (October 23, 2013); *Re Township of Tiny* (February 1, 2013).

CONCLUSIONS

For all of the reasons set out above, we conclude that Council complied with its requirements under the *Municipal Act, 2001* and the Procedure By-law with respect to the Meeting and, in particular, in regards to the Confidential Session.

Based on our review of all of the materials, we have determined that:

- the Meeting was properly called – there was no breach of Section 5.4.1 of the Procedure By-law;
- Council passed a proper authorizing resolution to convene into the Confidential Session at the Meeting in accordance with subsection 239(4) of the *Municipal Act, 2001*; and
- the subject matter of the Confidential Session related to solicitor-client privileged advice which was authorized subject to the exception set out in clause 239(2)(f) of the *Municipal Act, 2001*.

We have found no contravention of section 239 of the *Municipal Act, 2001* nor any breach of the Procedure By-law arising from the Meeting or the Confidential Session.

This Report has been prepared for and is forwarded to Council for its information.

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

AIRD & BERLIS LLP



John Mascarin

Closed Meeting Investigator for The Corporation of the Town of Caledon

Dated this 22nd day of April, 2022