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CONFIDENTIAL

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Delivered by email: todd.coles@vaughan.ca

City of Vaughan
Mayor and Members of Council
c/o Todd Coles, City Clerk
2141 Major Mackenzie Drive
Vaughan, Ontario
L6A 1T1

Dear Mayor and Members of Council:

**RE: Closed Meeting Investigation
Our File No.: 21594-5**

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

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closed session contrary to the *Act*, then Council is required to pass a resolution stating how it intends to address 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.

PRELIMINARY REVIEW

On May 2, 2022, our office received a complaint alleging that Council had met in closed session twice, contrary to the *Municipal Act*. The closed sessions in question took place on May 5, 2021, and March 22, 2022. Both sessions were purportedly closed under section 239 (3.1) of the *Municipal Act*, which allows for a closed session for the delivery of education and training to Council.

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 City's complaint protocol;
- Reviewing the relevant provisions of the *Municipal Act*;
- Speaking with the complainant;
- Reviewing the slide decks used during the closed sessions of Council; and
- Reviewing agendas, closed session resolutions, and similar documentation as provided by the City Clerk

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.

Our initial review of the materials provided indicated a possibility that the meetings had been closed contrary to the *Municipal Act*. Therefore, a full investigation was undertaken.

FACTS:

The facts in this matter are quite simple. On the two occasions referred to in the complaint, Council met in closed session for the stated purpose of receiving education or training.

On May 4, 2021, the Committee of the Whole adopted a report recommending that Council move into closed session on May 5, 2021, for a Council education training session. At the May 5, 2021, closed meeting, Council received training on the authorities of the Clerk and Council under the Municipal Elections Act, and on Diversity, Equity, and Inclusion. On May 18, 2021, Council voted to ratify the recommendation from the Committee of the Whole calling for Council to move into closed session on the 5th.

On March 8, 2022, the Committee of the Whole recommended that Council resolve into Closed Session on March 22, 2022, at 9:30 A.M. for the purpose of an education and training session. Topics were to include a municipal election update, and techniques and procedures for effective chairing of meetings. At the March 22, 2022, closed meeting, Council received training on election year best practices under the Code of Conduct, and on chairing meetings. Council then adopted the recommendation to move into closed session, during the open session meeting held in the afternoon of the same day.

Minutes from both meetings indicate that no topics outside of these training sessions were discussed. This was confirmed by the City's Clerk, who advised that he was present at both meetings, and that the City is cautious to ensure that discussions beyond the education sessions do not take place at closed meetings.

Municipal Act

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

(3.1) A meeting of a council or local board or of a committee of either of them may be closed to the public if the following conditions are both satisfied:

1. The meeting is held for the purpose of educating or training the members.
2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

(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.

Procedure By-Law #07-2011

- (3) Open Meetings:

All meetings must be open to the public.

- (4) Closed Meetings:

- a. Notwithstanding Section 2.1(3), a meeting may be closed to the public if the subject matter being considered relates to those subject matters identified in Sections 239(2), (2.1) and (3) of the *Municipal Act*, 2001. (amended by By-law 166-2017)
- b. Before all or part of a meeting is closed to the public, a resolution shall be passed by Council, the body proposing to hold the meeting, or the Standing Committee in session immediately prior to the commencement of the closed meeting, which shall state:
 - i) The fact of the holding of the closed meeting; and
 - ii) The general nature of the matter to be considered at the closed meeting.

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 principals of open and responsible 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.

This structure is essentially mirrored in the City of Vaughan's own procedural by-law. We do note that the By-Law explicitly states that closed meetings may be held relating to subject matters covered in Sections 239(2), (2.1) and (3) of the *Municipal Act*, while these sessions were in fact held under section 239 (3.1) of the *Act*. In our opinion, while it is advisable that the City amend its procedure by-law to alleviate any confusion, this omission is not determinative. The by-law, though updated in recent years, initially pre-dates the addition of section 239(3.1), which indicates that this is not a deliberate omission. Further, the By-Law explicitly provides that it is to be interpreted in accordance with applicable law. In these circumstances, we are satisfied that the Procedure By-Law allows for closed meetings under section 239(3.1).

Did Council Pass a Resolution in Open Session to Move into Closed Session

It is well established that Council must pass a resolution prior to moving into closed session. It would appear that the City of Vaughan's practice is to adopt a resolution in Committee of the Whole recommending a closed session, and then to adopt that recommendation at Council. This is a rather unusual, and perhaps cumbersome, method of proceeding. It results in motions to move into closed session occurring, formally, after the actual closed session – in this case, up to two weeks after.

We find that this procedure meets the requirement to pass a resolution in open session to move into closed session, as found in the *Act*. We come to this conclusion for several reasons. First, neither the *Act*, nor the City's Procedure By-Law defines or further prescribes what is required to constitute a "resolution". The *Act* merely requires that the municipality, local board, or committee of either state certain information by resolution. Second, and perhaps most importantly, the spirit of this section of the *Act* – to promote transparency and ensure the maximum public oversight of Council – is certainly met by Vaughan's procedure. The reports recommending a closed session are, in fact, highly detailed, and the particular way of proceeding resulted in the two impugned meetings being discussed not once but twice in open session.

Did the Resolution Contain the Necessary Details

It is not enough that Council pass a resolution to move into closed session – that resolution must also contain certain information. Per s. 239(4)(b), in the case of educational sessions under subsection (3.1), that information consists of "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"

The resolutions described the timing of the closed session, the reason for holding the closed session, and the nature of the presentations to be given. The resolutions did not specifically refer to s.239(3.1) of the *Municipal Act*; however, we consider this to be a minor and technical detail. On review of the resolution, any person would have a clear understanding of the nature of the meeting, and the basis on which it was closed. Accordingly, we find that this requirement was met.

Did the Meeting Actually Fall within the Cited Exception

Having determined that Council's resolution to move into closed session met the necessary form requirements, we must now consider the substance of the meeting. Where a meeting is held in closed session for the purposes of education, the business of the municipality must not be advanced – this is a clear requirement in section 239(3.1). This means that the education session cannot be used for purposes like promoting viewpoints on live issues, or gathering more facts or information to assist in Council decision making. Councillors also should not use the session to discuss municipal business or provide or obtain updates.

We have had the opportunity to review the slide decks used in the presentations and the meeting minutes, as well as hear from the Clerk, who was present at the meetings. The slide decks do not reveal any information that would advance the business of Council; rather, they clearly focus on providing Council with more generalized education on important topics. Neither the minutes nor the information provided by the Clerk provide any indication that discussions were had beyond appropriate questions relating to the education session.

In our discussions with the complainant, a concern was raised that the education programming pertaining to the municipal election – which was addressed during both of the impugned meetings – was such that Councillors seeking re-election would have an unfair advantage vis-à-vis those who had not received the training, and that it should have been available to the public. It is understandable why it may appear this way to a member of the public, given the limited information available. Having had the opportunity to review the presentations in question, however, we do not share this concern. The municipal election was addressed through the lens of responsibilities of existing Council members – and other City staff – during an election. Topics were wholly appropriate and related specifically to the changing nature of Councillors' roles during an election year, addressing such matters as restrictions on use of City resources during this period. This was important education for sitting Members of Council and actually served to create a level playing field by educating Councillors to ensure they did not take undue advantage of their position to the disadvantage of other candidates.

As such, we find that the content of the closed sessions was within the cited exception.

CONCLUSION AND RECOMMENDATIONS

As our investigation revealed that all requirements under the *Act* and the Procedure By-Law were met, it is our finding that the meetings on May 5, 2021, and March 22, 2022, were properly held in closed session.

Nonetheless, given our observations above, we would recommend that Council consider adjusting its procedure regarding moving into closed session, in order to eliminate any ambiguity as to whether it complies with the *Act*. This would include beginning in open session and resolving to move into closed, and specifically citing the particular section of the *Act* relied upon in so doing. We also recommend that Council amend its Procedure By-Law to explicitly

reference section 329(3.1) of the *Act*, and consider choosing wording that would eliminate the need for frequent amendments following changes to the *Act*. These recommendations should be seen not as an indication that the City's procedure falls short of the requirements in any way, but rather as a form of "housekeeping" suggestion aimed at improving clarity.

This concludes the investigation and report in this matter.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP



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