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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 contrary to the *Municipal Act*. The closed session in question took place on March 22, 2022. The complaint is specific to item four on the agenda for this particular closed session, which was titled "Update on Sports Village" per the exemption for matters subject to solicitor client privilege.

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 meeting had been closed contrary to the *Municipal Act*. Therefore, a full investigation was undertaken.

FACTS:

The facts in this matter are quite simple. On March 22, 2022, Council resolved into closed session to discuss several agenda items. Amongst those was “Update on Sports Village”.

In order to conduct a full review, we interviewed the Clerk of the City, who was present at the meeting. He advised that a closed session on this particular agenda item had not been planned, but was added at the request of a member of Council, who sought an update on ongoing negotiations relating to the Sports Village. We were advised that while several lawyers were present, no legal questions were asked, and some limited legal advice was provided. Beyond this, City staff provided a brief update as to the negotiations, which were ongoing, and Council reaffirmed its position in negotiations. The Clerk confirmed that the meeting was relatively brief.

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 principles 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.

Even where an exception applies which permits a meeting to be held in closed session, the *Municipal Act* still imposes certain restrictions in order 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. 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.

The *Municipal Act* provides limited exceptions which can be invoked to resolve into closed session. The agenda indicates that the meeting was closed under subsection (f), “advice that is subject to solicitor-client privilege, including communications necessary for that purpose”. Reported decisions on this exception indicate that the presence of a lawyer is not sufficient; rather, there must be a discussion pertaining to legal advice.

Although not binding on us, we refer to the decision in Port Colborne (City of), 2015 ONOMBUD 32, where the Ontario Ombudsman’s office defined the solicitor-client privilege exception as follows:

The open meeting exception for discussions of advice subject to solicitor-client privilege is limited to instances where some advice from a legal advisor or related communication actually exists and is considered as part of the discussion. As the Information and Privacy Commissioner set out in Order 49, in order for the privilege to apply:

1. There must be a written or oral communication;
2. The communication must be of a confidential nature;

3. The communication must be between a client (or his agent) and a legal advisor; and
4. The communication must be directly related to seeking, formulating or giving legal advice.

In addition, it was suggested during our investigation that the meeting could also have been closed under subsection (k), “a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.” Given the nature of the discussion, we agree that it is prudent to analyze whether this exception applies. In order to apply, the discussion must specifically relate to matters currently under negotiation. The test used by the Ombudsman’s office was described in *Grey Highlands (Municipality of) (Re)*, 2021 ONOMBUD 11:

- i. The *in camera* discussion was about positions, plans, procedures, criteria, or instructions;
- ii. The positions, plans, procedures, criteria, or instructions are intended to be applied to negotiations;
- iii. The negotiations are being carried on currently, or will be carried on in future; and
- iv. The negotiations are being conducted by or on behalf of the municipality

Although not binding on us, we agree that this is the appropriate test in these circumstances.

Did Council Pass an Appropriate Resolution in Open Session to Move into Closed Session

The minutes of March 22, 2022, indicate that Council began in open session at 1:00 P.M., and resolved to move into closed session at approximately 1:46 P.M. The relevant portion of the resolution read

That Council resolve into Closed Session for the purpose of discussing the following matter:

[...]

4. UPDATE ON SPORTS VILLAGE
(Addendum 3)
(solicitor-client privilege)

The resolution provides a brief description of the topic to be discussed, and the reason it will be discussed in closed session. The description is, in our opinion, sufficient to provide a member of the public with a general idea of what is being discussed, while maintaining the intent of the closed meeting. Accordingly, we find that Council passed an appropriate resolution to move into closed session.

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.

We have had the opportunity to review the agenda and minutes used in closed session, and to speak with the Clerk regarding the contents of the meeting. As noted above, although the meeting was ostensibly closed under the exception for solicitor-client privilege, we have also considered whether the meeting could be closed under the exception for negotiations.

The evidence provided was unclear as to the extent and nature of legal advice given at the meeting. It was clear that no specific questions were asked. Nevertheless, it was the evidence of the Clerk that the City solicitor provided advice as to the framework for negotiations, provided advice on the settlement, and the public reporting requirements to move forward. On a balance of probabilities, I find that the City Solicitor did provide some advice at the meeting. Accordingly, the cited exception applied.

Additionally, we have considered the exception applicable to negotiations. As noted above, this exception protects discussions of a plan to be used in ongoing negotiations, with the intent of protecting the City's bargaining position from being known publicly, and in particular to the other negotiating parties. In this case, our review of the minutes and subsequent discussion with the Clerk makes clear that Council had previously provided staff with instructions as to the City's bargaining position, and reaffirmed those instructions. Accordingly, the definition of a "plan", as outlined in other reported decisions, has been met. Staff provided an update as to where negotiations presently stood, and Council reaffirmed its position. This is clearly within the ambit of the exception under subsection (k).

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 discussion of the Sports Village in closed session on March 22, 2022, was properly held within the closed session.

Notwithstanding the above, it was noted in our investigation that, while privileged advice was indeed provided, the exception under subsection (k), pertaining to negotiations, was also applicable. We would encourage Council to review the circumstances in which a matter may

be closed due to solicitor-client privilege, and carefully consider whether other subsections may be more applicable.

This concludes the investigation and report in this matter.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP



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