

BY EMAIL

Mayor Jim Diodati
Council for the City of Niagara Falls
4310 Queen Street
Niagara Falls, ON L2E 6X5

May 5, 2022

Dear Mayor Diodati:

Re: Closed meeting complaint

My Office received a complaint alleging that council for the City of Niagara Falls (the “City”) violated the open meeting rules in the *Municipal Act, 2001*¹ (the “Act”). Specifically, the complaint alleged that meetings of the Board of Directors of the Niagara Falls Hydro Holding Corporation (“HoldCo”) are meetings of City council, and that these meetings do not comply with the Act’s open meeting requirements because they are not open to the public.

I am writing to share the outcome of my review. For the reasons set out below, I have concluded that HoldCo is not subject to the open meeting rules, and that council for the City therefore did not contravene the open meeting requirements under the Act. I have also found that HoldCo has not violated its own internal meeting rules in closing its Board meetings to the public.

Ombudsman’s role and authority

As of January 1, 2008, the Act gives anyone the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public.² Municipalities may appoint their own investigator. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own. My Office is the closed meeting investigator for the City of Niagara Falls.

¹ SO 2001 c 25.

² *Ibid* at s 239.1.

In addition, my Office has authority to review complaints regarding the administrative conduct of public sector organizations, including municipalities, local boards, and municipally-controlled corporations.

My Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman's decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of the Ombudsman's previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Background

By-law 2000-97 was passed by the City on May 8, 2000. It authorizes the incorporation of HoldCo and transfers the City's employees, assets, liabilities, rights and obligations with respect to the generation, transmission, distribution and retailing of electricity to HoldCo.

According to this by-law, HoldCo was incorporated under the *Ontario Business Corporations Act* pursuant to section 142(1) of the *Electricity Act, 1998*³ and sections 71 and 73 of the *Ontario Energy Board Act, 1998*.⁴ HoldCo acts as a holding company for other corporations, and is an asset held by the municipality. The City is its sole shareholder.

HoldCo's procedural by-law dictates that the City appoints each member of the Board of Directors. HoldCo's Board currently consists of eight directors, each of whom is a City councillor. When sitting as the Board of Directors for HoldCo, these individuals have a fiduciary duty to the corporation.⁵ In addition, the CAO of the City acts as the CEO of HoldCo.

The CEO of HoldCo told us that the corporation has a separate staff and separate legal representation from the City and that there is no operating agreement between HoldCo and the City. He also told us that HoldCo does not seek authorization or advice from council in its decision-making.

³ SO 1998, c 15, Sched A.

⁴ SO 1998, c 15, Sched B.

⁵ *BCE Inc., Re*, 2008 SCC 69 at para 37.



Board meetings are not public and reports from these meetings are not publicly filed. During these meetings, the Board does not discuss council matters.

Ombudsman review

My Office reviewed the City's procedural by-law, HoldCo's procedural by-law, and documents related to HoldCo's creation. We also spoke with the current CEO and previous CEO of HoldCo.

Municipal Act's open meeting requirement

Section 239 of the *Municipal Act* provides that all meetings must be open to the public unless they fall within one of the listed exceptions found in that section of the Act. The open meeting rules apply only to meetings of municipal councils, local boards, and committees of either of them. Therefore, the meetings of the Board of Directors for HoldCo must come within one of these categories in order for the open meeting rules to apply.

HoldCo is not a local board

As noted above, HoldCo was incorporated under the *Ontario Business Corporation Act* pursuant to section 142(1) of the *Electricity Act, 1998*⁶ and sections 71 and 73 of the *Ontario Energy Board Act, 1998*.⁷ Section 142(6) of the *Electricity Act, 1998*⁸ indicates that any corporation incorporated under that section is deemed not to be a local board for the purposes of any Act. Accordingly, HoldCo is not a local board subject to the *Municipal Act's* open meeting requirements.

HoldCo is not a committee of council under the Act

Section 238(1) of the *Municipal Act* defines a "committee" as any advisory or other committee, subcommittee or similar entity of which at least 50 per cent of the members are also members of one or more councils or local boards. The composition of HoldCo's Board meets this definition, but in assessing if an entity can be considered a committee, my Office also considers its role and function. My Office has found that a body that exercises delegated authority from council to make decisions or recommendations is

⁶ *Supra* note 3.

⁷ *Supra* note 4.

⁸ *Supra* note 3 at s 142(6).



likely to be a committee.⁹ A body is not likely to be a committee if it serves an administrative purpose, merely exchanges information, or advances previously decided positions.¹⁰

HoldCo was incorporated for the purposes of distributing and retailing electricity and associated business activities in lieu of the City. Rather than delegate its own authority to HoldCo, the City transferred its employees, assets, liabilities, rights and obligations relating to the distribution and retailing of electricity to HoldCo. HoldCo does not exercise delegated authority from council. Although the Board consists of councillors, it does not require approval from council, on behalf of the City, to make decisions. It also does not serve any kind of advisory role in relation to the City.

The current CEO of HoldCo explained that Board discussions pertain solely to the routine decision-making of the corporation. Both the current CEO and previous CEO told my Office that the Board does not discuss municipal business in any capacity at its meetings.

Accordingly, our review indicates that HoldCo's Board is not a committee of council under the Act. While the membership of HoldCo's Board meets the requirement for a committee as defined in the Act (that is, at least 50 per cent of the members are also members of one or more councils or local boards), a review of its function and purpose indicates that it does not act like a committee by exercising delegated authority from council and it does not play an advisory role to council.

HoldCo is not a committee of council under the City's procedural by-law

Our Office has previously found that a body may also be subject to the open meeting requirements if it is a committee as defined in the municipality's procedural by-law¹¹ or is considered by the municipality to be a committee.¹²

⁹ Ombudsman of Ontario, *Investigation into whether Heads of Council in West Parry Sound have been holding illegal closed meetings including on February 19, 2015*, (December 2015), online.

¹⁰ *Hamilton (City of) (Re)*, 2014 ONOMBUD 11, online: <<https://canlii.ca/t/gtmh8>>; *Deep River (Town of) (Re)*, 2017 ONOMBUD 17, online: <<https://canlii.ca/t/hqspf>>.

¹¹ Ombudsman of Ontario, *Investigation into whether the Long Term Care Task Force for the Regional Municipality of Niagara held an illegally closed meeting on May 13, 2015*, (November 2015), online; Ombudsman of Ontario, *Investigation into a complaint about a meeting held by the Lesbian, Gay, Bisexual, Transgender and Queer Advisory Committee for the City of Hamilton on October 20, 2020*, (April 2021), online.

¹² Ombudsman of Ontario, *Investigation into a complaint about a meeting held by the Nuclear Waste Community Liaison Committee for the Township of Hornepayne on January 12, 2016*, (December 2016), online.



The City's procedural by-law defines a committee of council as "any board, commission or committee established by Council, which has at least one (1) Member appointed from Council. The Member(s) appointed by Council may be Member(s), staff of the City, and/or member(s) of the public."¹³

In interpreting whether a body is a "committee" under a municipality's procedural by-law, my Office also considers the function or purpose of the group, and whether the municipality has formally established the group as a "committee" subject to the Act's open meeting requirements.¹⁴

As noted above, HoldCo's Board does not function as a committee of council and it takes action without approval or delegated authority from council. Additionally, HoldCo has not been formally established as a committee by the City. Accordingly, it is not a committee of council under the City's procedural by-law.

As the Board is not a local board or a committee of council under either the Act or the City's procedural by-law, it is not subject to the Act's open meeting rules.

HoldCo is a municipally-controlled corporation

While the open meeting rules apply only to municipal councils, local boards, and committees of either of them, since 2016 my Office has had jurisdiction to review complaints about the administrative conduct of municipalities, local boards, and municipally-controlled corporations.

The Act defines a municipally-controlled corporation as "a corporation that has 50 per cent or more of its issued and outstanding shares vested in the municipality or that has the appointment of a majority of its board of directors made or approved by the municipality, but does not include a local board as defined in subsection 1 (1)."¹⁵

The City is HoldCo's sole shareholder and the City also appoints the entirety of HoldCo's Board of Directors. As HoldCo is also not a local board, it meets the definition of a municipally-controlled corporation.

¹³ City of Niagara Falls, Procedural By-Law 2019-04 (15 January 2019) online: <<https://niagarafalls.ca/pdf/by-laws/procedural-by-law.pdf>> at s 1.

¹⁴ *Lucan Biddulph (Township of) (Re)*, 2021 ONOMBUD 17 at paras 24-28, online: <<https://canlii.ca/t/jjq6h>>.

¹⁵ *Supra* note 1 at s 223.1.



Municipally-controlled corporations are not subject to the open meeting rules, which only apply to meetings of councils, local boards and their committees. However, the meeting practices of these corporations must align with their own internal by-laws. HoldCo's procedural by-law does not require notice of meetings to be provided to the public. It also does not require meetings to be open to the public or for any information from these meetings to be provided to the public. As such, HoldCo has not contravened its internal regulations in failing to hold open meetings and in declining to make meeting records public.

Conclusion

Council for the City of Niagara Falls has not contravened the open meeting requirements in closing meetings of HoldCo's Board of Directors to the public. Additionally, the meeting practices of the Board of HoldCo do not contravene its internal procedural requirements.

I would like to thank the City of Niagara Falls for its co-operation during my review. The Clerk has confirmed that this letter will be included as correspondence at an upcoming council meeting.

Sincerely,



Paul Dubé
Ombudsman of Ontario

Cc. Bill Matson, Clerk
Jason Burgess, CAO

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