



Ombudsman Report

**Investigation into whether
Council for the City of Greater Sudbury
held illegal closed meetings on
March 2, March 23, and April 26, 2016**

**Paul Dubé
Ombudsman of Ontario
January 2017**

Complaint

- 1 On June 1, 2016, my Office received a complaint about a closed meeting or meetings held by council for the City of Greater Sudbury prior to its May 31, 2016 open meeting.
- 2 The complaint was related to a vote during the May 31 open meeting, when council voted to write off an uncollectible account of more than \$500,000 related to contracts between the city and a transit ticket kiosk.
- 3 The complainant believed the decision to write off the account arose from a recommendation in a report prepared by Investigative Solutions Networks Inc. (ISN), an independent third party hired by council to review the matter.
- 4 Because there was no debate in open session prior to the May 31 vote, the complainant believed that council discussed and decided on the matter during a closed meeting prior to the May 31 open meeting.
- 5 The complainant alleged that neither the ISN report, nor the uncollectible account, were appropriate for closed session discussion and complained that council had therefore violated the open meeting requirements of the *Municipal Act, 2001* (the Act).

Ombudsman jurisdiction

- 6 Under the Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 7 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 8 The Ombudsman is the closed meeting investigator for the City of Greater Sudbury.

- 9 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

Council procedures

- 10 The city's procedure by-law (by-law 2011-235) states that meetings may be closed to the public in accordance with s. 239 of the *Municipal Act*. Council may only vote in closed session if the vote is for a procedural matter or to provide directions or instructions to staff, as outlined in s. 239(6) of the Act.

Investigative process

- 11 On June 20, 2016, after conducting a preliminary review, we provided the city with notice that we would be investigating this complaint.
- 12 Members of my Office's staff reviewed relevant portions of the city's procedure by-law and the Act, as well as the materials for the meetings in question, including the closed session minutes and the ISN report. They also spoke with the mayor and municipal staff.
- 13 My Office received full co-operation in this matter.

Background: The transit ticket issue

- 14 In 1999, the city entered into an agreement with the operator of Zio's In-Transit Café, a business already operating within Sudbury's Transit Centre, to sell lottery tickets and transit passes. The contract was in effect from April 1, 1999 to August 31, 2002, and then continued on a month-to-month basis while the city undertook a procurement process.
- 15 The operator of the Café was the only bidder in the procurement process, and in June 2004 the city entered into an agreement with the corporation, which was operating as Zio's Tuck Shop, to operate a ticket counter and information booth kiosk at the Transit Centre. The Tuck Shop was paid a fee to operate the kiosk and the city provided transit tickets on a consignment basis.

- 16 Over the years, the corporation fell behind on payments for the tickets. A 2011 review¹ conducted by then-city auditor (now Mayor) Brian Bigger discovered that when the contract was signed in June 2004 after the procurement process, the corporation already owed the city more than \$250,000.
- 17 That initial contract term ended January 31, 2006, at which point the debt had grown to \$340,000. The contract contained a renewable term, and was renewed yearly, until the contract was terminated on September 4, 2009, with the corporation owing \$866,537. Some of the funds were paid back, but the operator stopped making payments with more than \$500,000 still outstanding.
- 18 The matter came to be known as the “transit ticket scandal.” During the 2014 election campaign, now-Mayor Brian Bigger stated that, if elected, he would revisit the matter in detail. In September 2015, the city hired ISN to conduct an independent review of the issue.

The meetings

- 19 Municipal staff advised our Office that the ISN report was discussed at three closed meetings on March 2, March 23, and April 26, 2016.

March 2, 2016 special meeting

- 20 At the March 2 meeting, council went in camera to discuss two matters, one of which was the ISN investigation and report. This discussion was closed to the public under the “personal matters” and “solicitor-client privilege” exceptions found in ss. 239(2)(b) and (f) of the Act. Council passed a resolution to proceed in camera under these exceptions. No further information about this closed session discussion was provided in the resolution.
- 21 While in camera, council received both the full ISN report and a summary report. Redacted versions of the summary report and full report are now

¹ Audit Committee Report, *Audit of Greater Sudbury Transit Services*, (5 October, 2011) online: <https://www.greatersudbury.ca/linkservid/F491B16D-0F3C-2515-2C6BC5587F12EBC7/showMeta/0/>

available on the city's website², but had not been made available to the public at the time of the meeting.

- 22** The summary report outlined the focus of ISN's investigation, which included determining if any city employee was significantly negligent in the managing of the transit kiosk account, and determining if any city employee or council member may have committed a conflict of interest, breach of Ontario statute or breach of a federal statute relating to his or her relationship with the operator of the kiosk and/or his companies. Council also received an opinion on ISN's findings, prepared by legal counsel.
- 23** The interim chief administrative officer, who also clerked the meeting, and the acting city solicitor began taking council through a slide presentation, a copy of which was provided to our Office. ISN representatives were also present to answer questions from council.
- 24** The presentation summarized the ISN investigation and the legal opinion, as well as options for communicating ISN's findings to the public. The slide presentation also included an overview of new policies and initiatives, including a code of conduct for employees and a complaint resolution process, which had been established in light of the "transit ticket scandal." One slide, entitled "remove from doubtful accounts", mentioned the uncollectible account of more than \$500,000 and noted that the write-off for the amount occurred in 2009, but the amount still remained in allowance for doubtful accounts³.
- 25** There is no information in the closed session minutes about the substance of the discussion. Staff advised our Office that council was not able to get through the whole slide presentation, and only reviewed the first 11 pages of the ISN report, and some of the legal advice that applied to the report, at the March 2 meeting. Consequently, no discussion occurred about the doubtful account, the communication plan, or disclosure options for the report, and the remainder of the presentation was put over to the March 23 meeting.
- 26** According to both staff and the mayor, the discussion on March 2 involved council members receiving background information about the transit ticket issue, ISN's role and mandate, and ISN's findings.

² Investigative Solutions Network Inc., *City of Greater Sudbury – Transit Kiosk Contract Report*, online: www.greatersudbury.ca/inside-city-hall/open-government/transit-investigation/

³ Allowance for doubtful accounts is the provision made by the city in anticipation of an amount of debt that is classified as uncollectible, in whole or in part, that is likely to be experienced over the course of the fiscal period.

March 23, 2016 special meeting

- 27** At the March 23 meeting, council proceeded in camera to discuss two matters, one of which was the ISN investigation. The discussion about the ISN report was again closed to the public under the “personal matters” and “solicitor-client privilege” exceptions. Council passed a resolution to proceed in camera, citing these exceptions. No further information about this closed session discussion was provided in the resolution.
- 28** There is no information in the minutes about the substance of the closed session discussion. Staff advised our Office that this was a continuation of the March 2 meeting, with the same slides and the same documents before council.
- 29** The interim chief administrative officer, who was again clerking the meeting, took council through the legal advice the city received regarding ISN’s investigation, and reviewed options for disclosure of the findings.
- 30** With respect to the disclosure options, the mayor advised our Office that the city had to balance the desire to be transparent with the requirement to protect the privacy of employees involved. As it looked at the transit ticket matter, ISN had investigated the roles of various employees, and accordingly much of the information in the report was personal in nature. We were advised that the bulk of the in camera discussion involved employee performance issues.
- 31** With respect to the various policies referenced in the slides, the interim chief administrative officer advised our Office that these were not included for in camera discussion, but to remind council of steps that were being taken to address issues identified by ISN.
- 32** Both the mayor and staff advised our Office that the removal of the doubtful account was not discussed in camera. It was included in the slides because it related to the transit ticket issue, but it was going to be considered in open session.
- 33** The only closed session vote recorded in the minutes was a direction to the interim chief administrative officer. As this in camera vote was a direction to staff, it was permissible under both s. 239(6)(b) of the *Municipal Act* and the city’s own procedure by-law.

April 26, 2016 closed session

- 34 At the April 26 meeting, council went in camera to discuss a personal matter under s. 239(2)(b) of the Act. Council passed a resolution citing this section of the Act, but no further information was provided.
- 35 While in camera, the interim chief administrative officer discussed the implications of the ISN report, as it pertained to employment matters.
- 36 While in camera, council voted to direct the interim chief administrative officer/director of human resources to work with the mayor to verbally communicate the outcomes of the ISN review and that a redacted report be released to the public. Like the March 23 vote, this was a permissible in camera direction to staff.

May 31, 2016 open meeting

- 37 A closed session did occur on May 31 prior to the open council meeting, but the ISN report was not discussed during the in camera meeting that day.
- 38 Attached to the open meeting agenda was a report from the manager of accounting, regarding the debt that resulted from the transit ticket matter. The report noted that the debt, in the amount of \$578,909.53, dated back to 2009, and that choosing to write off the debt would not impede the city's ability to collect on the outstanding judgment against the corporation.
- 39 The write-off would result in the removal of the accounts receivable balance and the related allowance from the city's financial records. Both the acting treasurer and the acting city solicitor recommended that council write off the uncollectible account.
- 40 During the open session, council voted:

THAT the City of Greater Sudbury approves the write off of an uncollectible account in the amount of \$578,909.53 from 1211250 Ontario Inc.
- 41 There is no discussion on the matter captured in the minutes. The clerk advised our Office that there was no debate, because the threshold is fairly low for writing off uncollectible accounts. It is common for council to take the recommendation of the finance department on these matters.

Analysis

- 42 The complaint to our Office alleged that council discussed the decision to write off the uncollectible account related to the transit ticket matter in closed session, since there was no debate before the open session vote on May 31. The complainant believed that the decision to write off the debt came from the recommendations in the ISN report.
- 43 Our investigation found that the ISN report did not address the uncollectible account, and the evidence does not support that council discussed the account during a closed session. Staff advised our Office that in deciding to write off the account, council followed the recommendation outlined in the staff report, which was attached to the May 31 open session agenda.
- 44 The complaint also alleged that the ISN report was not an appropriate topic for in camera discussion. The ISN report was discussed at three closed meetings before May 31.
- 45 On March 2, 2016, council discussed the report under the personal matters and solicitor-client privilege exceptions. A copy of legal advice from outside counsel was provided to council members, and the advice was summarized in the slide deck presented by the interim chief administrative officer. The purpose of the March 2 closed session was to discuss ISN's mandate and to provide a broad overview of the investigative findings. As noted in the summary report, ISN was investigating several matters pertaining to potential employee negligence and conflict of interest.
- 46 The March 23 meeting was a continuation of the March 2 meeting and was again closed to the public under the personal matters and solicitor-client privilege exceptions. Council discussed employee performance issues detailed in the ISN report. Council also reviewed a legal opinion.
- 47 The April 26 meeting was closed under the personal matters exception, and at this meeting council discussed the implications of ISN's findings as they applied to specific members of staff.

The “personal matters” exception

- 48** In considering whether discussion of an individual’s employment fits within the “personal matters” exception, our Office has considered decisions of the Office of the Information and Privacy Commissioner (the IPC), outlining when professional information becomes personal in nature. Although not binding on my Office, these cases can be informative.
- 49** The IPC generally has found that in order to qualify as “personal information,” the information must be about an individual in their personal, rather than their professional, capacity (see IPC Order MO-2204). However, information about an individual in a professional capacity may still qualify as personal information if it reveals something of a personal nature, or if the information relates to the scrutiny of that individual’s conduct (see IPC Orders MO-2368 and MO-2519).
- 50** In a recent report regarding the Village of Burk’s Falls and Armour Township⁴, we noted that a discussion involving negative allegations about an employee’s conduct and job performance goes beyond the scope of professional information and into the realm of personal information. Similarly, a January 28, 2009 report of the closed meeting investigator for the City of Ottawa noted that discussions in which council members impugned the judgment of a named employee in the performance of his duties could be closed to the public under the personal matters exception.
- 51** Much of the information in the ISN report was personal in nature, because it involved scrutiny of the conduct of city employees vis-à-vis their role in the transit ticket matter. The information provided to our Office indicates that this personal information was the focus of the discussion at all three in camera meetings. The “labour relations” exception found in s. 239(2)(d) of the Act could also apply.
- 52** There was information in the slide deck considered at the March 2 and March 23 closed sessions that would not normally be appropriate for closed session discussion – namely, the communication policy, employee code of conduct, and removal of the doubtful account. However, both the mayor and staff advised that these items were included on the slides for

⁴ Ombudsman of Ontario, *Investigation into whether the Township of Armour and the Village of Burk’s Falls held an illegal closed meeting on January 16, 2015* (October 2015), online: <https://www.ombudsman.on.ca/Resources/Reports/Village-of-Burk-s-Falls--br-Armour-Township.aspx>

council's information, since they related to the transit matter, but were not discussed during the closed session.

- 53 The exception for personal matters applied to the relevant closed session discussions during the March 2, March 23 and April 26 meetings.

The “solicitor-client privilege” exception

- 54 As my Office has noted in several reports, including a recent report regarding the City of London⁵, this exception can only be used when some advice from a solicitor or related communication actually exists for council's consideration.
- 55 Communication will only be found to be subject to solicitor-client privilege if it is: (a) between a client and his or her solicitor, where the solicitor is acting in a professional capacity; (b) made in relation to the seeking or receiving of legal advice; and (c) intended to be confidential⁶.
- 56 At both the March 2 and March 23 meetings, specific legal advice from the solicitor was before council for its consideration. Accordingly, the s. 239(2)(f) exception applied to these meetings.

Procedural matters

Resolution to proceed in camera

- 57 Council did not provide any information at any of the three meetings in the resolution to proceed in camera about the discussions that were to take place, other than citing the section(s) of the Act authorizing the in camera discussions.
- 58 As noted by the Court of Appeal in *Farber v. Kingston City*⁷, “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.” In its

⁵Ombudsman of Ontario, *Investigation into whether the City of London's Strategic Priorities and Policy Committee held an illegal closed meeting on March 2, 2015* (June 12, 2015), online: [https://www.ombudsman.on.ca/Resources/Reports/City-of-London-\(6\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-London-(6).aspx)

⁶ *Solosky v. the Queen*, [1980] 1 S.C.R. 821 at p. 837.

⁷ [2007] O.J. No. 919, at page 151

resolutions to proceed in camera, council should provide a brief description of the subject matter to be considered in closed session, in addition to the wording of the specific exception(s) being relied upon.

Meeting record

59 The in camera minutes for these meetings did not provide any specific information about the discussions that took place. In accordance with s. 239(7) of the Act, a municipality is required to record, without note or comment, all resolutions, decisions, and other proceedings at both open and closed meetings. While the Act prohibits notes or comments from being included in the official record, this does not mean that the subjects discussed at a meeting should not be documented.

60 As discussed in our Office's July 7, 2010 report regarding council meetings in the Town of South Bruce Peninsula⁸, a record of a closed meeting should include reference to:

- where the meeting took place;
- when the meeting started and adjourned;
- who chaired the meeting;
- who was in attendance, with specific reference to the clerk or other designated official responsible for recording the meeting;
- whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
- a detailed description of the substantive and procedural matters discussed, including reference to any documents considered;
- any motions, including who introduced the motion and seconders;
- all votes taken, and all directions given.

61 More and more municipalities are opting to digitally record closed sessions for the sake of accuracy. My Office is aware of 17 municipalities in Ontario that currently do so, including the Cities of Brampton, Oshawa, and Niagara Falls, and the Municipality of Brighton. In October of this year, council for the City of London also voted to implement a practice of audio recording closed meetings.

⁸ Ombudsman of Ontario, *Open Conflict* (July 7, 2010), online: <https://www.ombudsman.on.ca/Resources/Reports/Town-of-South-Bruce-Peninsula-Council-br---Open-Co.aspx>

62 As noted in our Sunshine Law Handbook⁹, my Office strongly encourages municipalities to make audio or video recordings of council proceedings. This provides the most clear, accessible record for closed meeting investigators to review, and assists in ensuring that officials do not stray from the legal requirements during closed meetings.

Opinion

63 The complaint to my Office alleged that council for the City of Greater Sudbury improperly discussed a report prepared by Investigative Solutions Networks Inc. (ISN) in camera, and illegally voted during the closed session to write off an uncollectible account, based on the report's recommendations.

64 Council discussed the ISN report at three closed meetings prior to the May 31 open meeting: March 2, March 23, and April 26, 2016. My investigation found that council for the City of Greater Sudbury was permitted to rely on the exceptions contained in sections 239(2)(b) and 239(2)(f) of the Act when it went into closed session on March 2 and March 23, 2016. Council was permitted to rely on the exception contained in s. 239(2)(b) of the Act when it went in camera on April 26, 2016.

65 Council's decision on the uncollectible account took place in open session on May 31, 2016, as required by the Municipal Act, 2001. Accordingly, council for the City of Greater Sudbury did not violate the open meeting provisions of the Act during its in camera discussions of ISN's report, or during its May 31, 2016 vote.

Report

66 Council for the City of Greater Sudbury was given the opportunity to review a preliminary version of this report and provide comments. We received comments from two members of staff, which were taken into consideration when finalizing this report. Council elected to provide no comments.

⁹ Ombudsman of Ontario, *Sunshine Law Handbook*, online:
<https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/SLH2014-EN-acc.pdf>

67 I request that my final report be shared with council and the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario