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REPORT ON CLOSED MEETING INVESTIGATION 2024-02

THE CORPORATION OF THE TOWNSHIP OF WILMOT

Aird & Berlis LLP

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December 4, 2024

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TOWNSHIP OF WILMOT REPORT ON CLOSED MEETING INVESTIGATION 2024-02

I. INTRODUCTION

1. This is a report on the investigation of a request made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.¹
2. A formal request for a closed meeting investigation, dated September 9, 2024 (the “**Request**”), was filed with the Clerk of The Corporation of the Township of Wilmot (the “**Township**”), and subsequently provided to our office, in our capacity as the closed meeting investigator (the “**Investigator**”) for the Township.
3. The Request seeks an investigation of the meetings of Council of the Township (“**Council**”) held on December 11, 2023 at 7:00 P.M. and December 18, 2023 at 5:30 P.M. (the “**Meetings**”), and more specifically, the closed session portions thereof.
4. Upon concluding our investigation, we have found that the allegations in the Request cannot be sustained.

II. CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

5. The Township appointed Local Authority Services Inc. (“**LAS**”) as its closed meeting investigator pursuant to section 239.1 of the *Municipal Act, 2001*. LAS has delegated its authority to act as closed meeting investigator to Aird & Berlis LLP pursuant to subsection 239.2(6) of the *Municipal Act, 2001*.
6. Aird & Berlis LLP was selected by LAS through a competitive procurement process to provide closed meeting investigation services to its participating municipalities. Aird & Berlis LLP was not directly selected by the Township to act in this particular matter or in general as its closed meeting investigator.
7. Prior to accepting any investigation mandate, Aird & Berlis LLP conducts a thorough legal conflict search and makes other conflict inquiries to ensure our firm is in a position to conduct an independent and impartial investigation.
8. Our jurisdiction as Investigator is set out in section 239.2 of the *Municipal Act, 2001*. Our function includes the authority to investigate, in an independent manner, a complaint made by any person to determine whether the Township 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.

¹ *Municipal Act, 2001*, S.O. 2001, c. 25.

9. Upon concluding an investigation, our office reports to Council on the outcome of the investigation, together with any recommendations as may be applicable.

10. Our role as Investigator does not include engaging with the merits of any particular item of municipal business, or questioning the policies or priorities of the Township.

III. REQUEST

11. The Request was properly filed pursuant to section 239.1 of the *Municipal Act, 2001*.

12. The Request alleges that Council contravened the *Municipal Act, 2001* in respect of both Meetings for the same reason. The Request asserts that the closed session portions of the Meetings were improperly closed to the public, in part, in reliance on clause 239(2)(d) of the *Municipal Act, 2001*, to consider the Township's ongoing compensation review process.

13. The Request asserts that the Meetings should have been open to the public because Council did not discuss individual salaries of Township employees, but rather, salaries for Township employees as a whole.

IV. REVIEW OF MATERIALS AND INQUIRY PROCESS

14. In order to properly consider the allegations in the Request and make our determinations, we have reviewed the following materials:

- Council's Procedural By-law 2023-43;
- the Agenda for the open session portion of the Meetings;
- the Minutes for the open session portion of the Meetings;
- the Closed Meeting Agenda for the closed session portion of the Meetings;
- the Closed Meeting Minutes for the closed session portion of the Meetings; and
- Staff reports and presentations from a consultant relevant to the subject matter considered at the Meetings.

15. In addition to our review of the materials referred to above, we spoke with the Clerk, who we had relevant information regarding the Meetings.

16. We have also had recourse to the provisions of the *Municipal Act, 2001*, and such secondary sources, case law, and reports of other closed meeting investigators we deemed necessary in order to make our determinations.

17. The Township and its representatives were fully cooperative and forthright during our investigation process. We commend their efforts in providing assistance to us as requested.

V. THE MEETINGS

(1) December 11, 2023 Regular Meeting

18. At its regular meeting held on December 11, 2023, Council convened a closed session meeting to consider four discrete matters. The open meeting minutes indicate that Council passed the following resolution before convening into closed session (modified as relevant to our Report):

2. CLOSED SESSION

Moved by: Councillor L. Dunstall

Seconded by: Councillor S. Cressman

THAT a Closed Meeting of Council be held on December 11, 2023, at 5:00 p.m. in accordance with Sections 239 (2)(b)(d)(f)(h) and (i) to consider the following:

...

4. Salary Negotiations – Section 239(2)(d) Labour relations or employee negotiations.

Motion Carried Unanimously

19. At the closed session portion of this meeting, Council considered Staff Report CAO 2023-12 from the Township's Chief Administrative Officer ("**CAO**") entitled, simply, "Pay" (the "**Report**"). The Report dealt with the Township's evaluation of its compensation plan for Township employees and recommendations regarding its wage and salary grid.

20. The Report was accompanied by a presentation, prepared in collaboration with an external human resources consultant, that summarized its independent review of the Township's compensation plan for employees, and made recommendations regarding the same. This presentation summarized the key challenges facing the Township and evaluated the Township's compensation plan against comparator employers. As a component of this review exercise, cost of living increases to compensation were also considered, and a recommendation was made.

21. During the closed session portion of this meeting, representatives of the Township's external human resources consultant attended and delivered a presentation on the compensation review exercise, including the recommendation being made to Council. Following this presentation, the CAO also provided a verbal report to Council on the reasons the Township was conducting a compensation review, and the justification for the recommendation being made.

22. Following the presentation, members of Council engaged in discussion on the compensation review and recommendation. A general concern was raised as to whether such decisions should coincide with the Township's budgetary process, which the CAO responded to. The CAO also indicated that Township staff could provide Council current budget data to assist with its consideration of the recommendations made.

23. At the conclusion of discussion, Council agreed to defer this item to a future closed session meeting.

24. Upon reconvening in open session, Council did not pass any resolution or make any decision in relation to this item.

(2) December 18, 2023 Special Meeting of Council

25. The matter of the Township's compensation review came back to Council for further consideration at the closed session portion of a special meeting of Council held on December 18, 2023. The open meeting minutes indicate that Council passed the following resolution before proceeding into closed session (modified as relevant to our Report):

2. CLOSED SESSION

Moved by: Councillor S. Martin

Seconded by: Councillor S. Cressman

THAT a Closed Meeting of Council be held on December 11, 2023, at 5:30 p.m. in accordance with Sections 239 (2)(b)(d) and (h) to consider the following:

...

3. Salary Negotiations – Section 239(2)(d) Labour relations or employee negotiations, Section 239(2)(b) Personal matters about an identifiable individual, including municipal or local board employees.

Motion Carried

26. At the closed session portion of this meeting, Council continued its consideration of the compensation review from its meeting on December 11, 2023 meeting. During the meeting, members of Council were provided a confidential "handout" from Township staff (i.e., a supplementary report) containing pre-budget data that had been requested by Council (the "**Supplementary Report**"). The Supplementary Report evaluated the budgetary impacts of the compensation review and options presented to Council therefrom, including cost of living increases.

27. The Supplementary Report was accompanied by a similar joint presentation from Township staff and the Township's external human resources consultant. This presentation was substantially similar to the one presented to Council at the meeting on December 11, 2023.

28. During this meeting, a portion of the presentation was delivered by the Township's human resources consultant, who summarized the recommended changes to the Township's salary grid, including cost of living increases. In addition, Township department heads made presentations to Council on department specific aspects of compensation review. The presentation also covered the topic of the Township's strategy in setting its compensation plan, how the proposed salary grid would be implemented, how cost of living adjustments would be factored into implementation of the salary grid, as well as employee benefits and pay equity. Township staff also provided Council with a verbal report on the impact of implementing the recommended changes to the salary grid on the budgetary process.

29. Following this presentation, members of Council asked Township staff questions relating to the issues underlying compensation strategy. Similar to Council's earlier meeting, concerns were expressed regarding whether it would be appropriate for Council to make a decision without having considered the Township's full budget and overall tax increase.

30. During the closed session portion of the meeting, Council requested that all members of Township staff, except the Clerk, vacate Council chambers to permit further consideration of the matter.

31. Members of Council then proceeded to express concerns that Council did not have a sufficient amount of financial information to make an informed decision on employee compensation review, particularly the larger issue of the upcoming municipal budget.

32. Following a brief recess, the CAO was invited to return to the closed session, who then provided Council a further verbal report to justify the recommended changes to the Township's salary grid.

33. After concluding discussion, Council voted to give direction to Township staff.

34. Upon reconvening in open session, and considering other items of business listed on the open session agenda, Council voted on the following resolution:

8. BUSINESS ARISING FROM CLOSED SESSION

Moved by: Councillor S. Cressman

Seconded by: Councillor S. Martin

THAT Council approve the new wage grid, as presented by Pesce & Associates at the P60 percentile, and that the wage grid be further adjusted by a Cost-of-Living Adjustment of 3.1% effective January 1, 2024.

For (4): Mayor N. Salonen, Councillor S. Cressman, Councillor L. Dunstall, and Councillor S. Martin

Against (2): Councillor K. Wilkinson, and Councillor H. Sidhu

Motion Carried (4 to 2)

VI. ANALYSIS

35. The sole issue raised in the Request is as follows:

- Was Council entitled to consider the Township's compensation review in closed session at the Meetings pursuant to the exception in clause 239(2)(d) of the *Municipal Act, 2001*?

36. The Requestor takes the position that the matters discussed during the Meetings should have been available to the public.

37. The Requestor also takes issue with the application of the closed meeting exception cited by Council; given Council did not discuss individual salaries, but rather, "pay as whole," the Requestor asserts the Meetings should not have been closed to the public.

(1) Statutory Framework

38. The “open meeting rule” is enshrined in section 239 of the *Municipal Act, 2001*, which requires that all meetings of a municipal council be held in an open forum where the public is entitled to attend and observe local government in process. However, there are exceptions to this rule which balance the need for confidentiality in certain matters with the public’s right to information about the decision-making process of local government.²

39. To this end, subsection 239(2) sets out eleven separate subject matter exceptions that entitle Council to hold a meeting that is closed to the public, including the following:

Exceptions

239 (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

...

(b) personal matters about an identifiable individual, including municipal or local board employees;

...

(d) labour relations or employee negotiations;

(2) Exception for Labour Relations or Employee Negotiations

40. The closed meeting exception in clause 239(2)(d) recognizes the position of municipalities as employers: municipalities must employ professional staff and employees to carry out their programs and services, and, as an employer, must effectively manage the workforce. Affording municipalities a sphere of privacy for matter related to labour relations and employee negotiations is intended to protect the municipality’s relationship with employees.³ If a municipal council were required to discuss potential changes to the terms of employment in a public setting, this could undermine the relationship between the municipality and its employees, which could pose knock-on effects to the programs and services it delivers to the public.

41. The exception in clause 239(2)(d) applies to both unionized workforces and related labour relations issues, but also to non-unionized employees. This exception has also been interpreted as including a range of aspects of managing a workforce, including negotiating contracts and collective bargaining agreements, but also qualifications, terms of employment, and remuneration of specific employees.

42. Notably, the exception for “labour relations and employee negotiations” has been found to include discussions involving changes to municipal compensation plans (i.e., salary grids). This was exemplified in the Ontario Ombudsman’s closed meeting investigation report regarding the Township of Russell.⁴

² Stephen Auerback & John Mascarin, *The Annotated Municipal Act*, 2nd ed., (Toronto, ON: Thomson Reuters Canada Limited, 2017) (e-loose leaf updated 2021 – rel 1) annotation to s. 239.

³ Ontario Ombudsman, [Investigation into a complaint about a closed meeting held by the City of St. Catharines on June 25, 2018](#) (February 2019), at para. 24.

⁴ Ontario Ombudsman, [Investigation into the closed meeting held by council for the Township of Russell on December 7, 2015](#) (April 2016); [“Township of Russell”].

43. In that report, the council of the township held a special closed meeting to deal with the topic of a review of its salary grid. During the closed meeting, council considered a report entitled “Designing a Salary Structure for the Future: Township of Russell” and received a presentation from an external consultant summarizing their review of the township’s remuneration structure. The report summarized the township’s then-current salary structure and recommended changes to align with the township’s market competitors. Following the presentation, members of council engaged in discussion on the proposed salary grid as a whole, and its impacts on specific township employees.

44. The Ombudsman determined that council’s discussion of the employee salary grid was a proper closed meeting topic. While council only cited and relied upon the exception in clause 239(2)(b) for “personal information,” the Ombudsman also found that this discussion could have also been held in closed session in reliance on the exception for “labour relations and employee negotiations.” The Ombudsman found as follows:

During the December 7 special meeting, council for the Township of Russell discussed the township’s compensation strategy and specific recommended changes to the existing salary grid. The recommended changes would affect the compensation structure applicable to every township employee. This discussion fell within the closed meeting exception for labour relations or employee negotiations.⁵

45. Based on our review of the evidence in our investigation, Council’s discussions of the proposed salary grid and review process did fall within the ambit of the “labour relations and employee negotiations” exception, and it has been interpreted and applied.

46. The predominant purpose of Council’s discussions at the closed session portion of the Meetings was to receive information related to the Township’s review of its current salary grid and proposed modifications to the same. A large component of this was consideration of the strategy to be applied in developing an appropriate salary grid within a range of options and with a view to constraints facing the Township. This discussion, if held in a public forum, could have had the potential to compromise the Township’s interests as an employer, which include not only attracting and retaining qualified municipal staff, but also competing with other employers for the same candidates.

47. That Council also considered cost of living increases to salary does not change this conclusion. This aspect of the discussion was similarly a component of employee remuneration, and important to the Township’s strategy in addressing employee retention.

48. As such, we find that the Township did not contravene the *Municipal Act, 2001* by considering its compensation review in closed session.

49. The Requestor takes the position that Council should have held these discussions in public, and was not entitled to close the Meetings because Council “did not discuss individual salaries, but rather pay as a whole.” This argument conflates the exception the Township primarily relied upon, being “labour relations and employee negotiations,” with the exception for “personal matters” (discussed further below).

⁵ Township of Russell, *supra* note 4, at para. 34.

50. The former exception has been interpreted to cover discussions about a proposed salary grid for municipal employees, which necessarily relates to the municipality's role as an employer and unique challenges facing municipalities with respect to attracting and retaining employees. It does not necessarily require consideration of the salary of a specific and identifiable employee.

(3) Exception for "Personal Matters"

51. The Township also relied upon the exception in clause 239(2)(b) relating to "personal matters about an identifiable individual" to discuss its compensation review process in closed session, albeit as a secondary ground and only at its December 18, 2023 meeting. Although we have already found that the Township was entitled to consider the matter of its compensation review in closed session, we wish to briefly address the scope of this closed meeting exception.

52. The exception for "personal matters about an identifiable individual" allows a council to close a meeting to the public in order to protect the privacy of the individual or individuals who may be the topic of discussion. While, generally speaking, salary ranges for all positions may not constitute personal information, discussion of a particular employee's salary or wages may fall within the ambit of this closed meeting exception. The Ontario Ombudsman has previously found that discussions about remuneration of a specific, identifiable employee, or discussions about a salary grid, can fall within the ambit of this discussion.⁶

53. In our opinion, Council was entitled to rely on this exception for part of its discussion during the closed session meeting held on December 18, 2023. During this meeting, department heads were invited to present to Council on the compensation review process, which included discussion of specific members of Township staff that would be impacted by Council's decisions on the proposed salary grid.

54. Although these discussions took place within the overall context of a compensation review exercise, the discussion of the remuneration paid to an identifiable employee of the municipality does constitute personal information. As such, Council was entitled to cite and rely on this closed meeting exception for a portion of its discussion at its December 18, 2024 meeting.

(4) "Parsing" Discussion

55. Although this issue was not raised in the Request, we note that at its December 18, 2023 meeting, Council considered financial information relating to the budgetary impacts of its decision on the proposed salary grid. There may be some argument that this information, in and of itself, did not fall within the scope of the closed meeting exceptions cited by Council, and, as such, should not have been considered in closed session. We would disagree with the assertion that Council should have considered this information in a public forum.

56. Matters that come before a municipal council are often complex and multi-faceted. In many instances, it would be difficult for members of council to fully consider and dispose of a matter that qualifies for closed session discussion without necessarily considering other topics or information that may not neatly fit within an enumerated closed meeting exception.

⁶ Ontario Ombudsman, [Investigation into complaints about a special meeting held by council for the Township of Springwater on May 3, 2023](#) (May 2024), at para. 39.

57. To this end, the courts and other closed meeting investigators have recognized the practical difficulties and unintended consequences that may result in the strict application of the open meeting rule: a council may validly begin discussion in closed session, but every time a member wishes to mention some ancillary detail that does not qualify for the exception relied upon, council must move back into open session to discuss the comment, and subsequently reconvene in closed session to continue. This would have the unintended consequence of inhibiting free and efficient discourse by interrupting council deliberations.

58. Municipalities therefore have some limited authority to discuss in closed session matters that are incidental to the core matter to which the closed meeting exception applies.⁷ As such, Council has some latitude to consider and discuss information or topics incidental to the main closed meeting topic.

59. At its meeting on December 18, 2023 meeting, Council was provided with and discussed financial information and pre-budget data related to the impact of its compensation review exercise. While financial information about a municipality's budget does not necessarily qualify for discussion in closed session, in the circumstances of the Meetings, we find that this information was necessarily incidental to the main topic of discussion, being the proposed salary grids.

60. In fact, the Council discussion indicates there was some concern over whether a decision could be made in advance of the full budgetary process, and this information was provided to Council in order to enable it to make an informed decision on the proposed salary grid options.

61. As such, it is our opinion that Council did not contravene the *Municipal Act, 2001* by considering this information in closed session.

VII. CONCLUSION

62. Based on the foregoing, we find that Council did not contravene the *Municipal Act, 2001* by discussing the Township's compensation review exercise in closed session.

63. Council was entitled to close both Meetings to the public in reliance on the exception for "labour relations and employee negotiations," given the matter related to the management of its workforce.

64. Moreover, Council was also entitled to close a portion of its December 18, 2023 meeting to the public in reliance on the exception for "personal matters about an identifiable individual" in order to discuss departmental concerns about specific employees.

65. This Report has been prepared for and is forwarded to Council for its consideration pursuant to subsection 293.2(10) of the *Municipal Act, 2001*.

66. We recommend that this Report be made public by publishing it on a Council agenda.

67. As Investigator, we have discretion under the *Municipal Act, 2001* to disclose in our report such matters as, in our opinion, ought to be disclosed in order to establish our conclusions and

⁷ *St. Catharines (City) v. Ontario (Information & Privacy Commissioner)* (2011), 81 M.P.L.R. (4th) 243, at para. 42 (Ont. Div. Ct.).

recommendations.⁸ We have exercised that discretion to disclose only those matters we felt necessary in order to consider and assess the issues raised in the Request.

Respectfully submitted,

AIRD & BERLIS LLP

John George Pappas

Closed Meeting Investigator for The Corporation of the Township of Wilmot

Dated this 4th day of December, 2024

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⁸ *Municipal Act, 2001*, s. 223.15(2), as applicable by virtue of s. 239.2(9).

