

## SENT BY EMAIL

Hamilton Waterfront Trust  
Board of Trustees  
c/o Councillor Cameron Kroetsch, Chair  
47 Discovery Drive  
Hamilton, Ontario L8L 8K4

June 5, 2023

Dear Board of Trustees for the Hamilton Waterfront Trust:

### **Re: Closed meeting complaint**

My Office received a complaint regarding the February 21, 2023 meeting of the Board of Trustees (the “Board”) for the Hamilton Waterfront Trust (the “Waterfront Trust”). The complaint alleged that the Board violated the open meeting rules in the *Municipal Act, 2001*<sup>1</sup> (the “Act”) when it went into closed session to discuss a letter from my Office dated February 6, 2023 about previous closed meeting complaints.

I am writing to share the outcome of my review of this complaint. For the reasons set out below, I have concluded that the Waterfront Trust contravened the open meeting rules when it discussed my Office’s letter *in camera* on February 21, 2023. In the course of my review, staff at the Waterfront Trust explained how this error occurred, and I commend the Waterfront Trust for its ongoing commitment to improving its open meeting practices.

### **Ombudsman’s role and authority**

As of January 1, 2008, the Act gives anyone the right to request an investigation into whether a municipality or a local board has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own. The Ombudsman is the closed meeting investigator for the Hamilton Waterfront Trust.

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<sup>1</sup> SO 2001, c 25.

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 closed 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](http://www.ombudsman.on.ca/digest).

## Review

On April 13, 2023, my Office advised the Waterfront Trust of our intent to investigate this meeting. My Office reviewed the relevant procedure by-law and the open and closed meeting agenda and minutes for the Waterfront Trust's February 21, 2023 meeting. We also spoke with the Waterfront Trust's Administrative Assistant/Interim Executive Director.

## Background

### *Previous investigation*

My Office previously investigated complaints alleging that meetings of the Hamilton Waterfront Trust's Board of Trustees were not open to the public in accordance with the Act.<sup>2</sup> On February 6, 2023, after completing my investigation, I sent the Waterfront Trust's Board of Trustees a final letter setting out my opinion and the reasons for it. I ultimately found that the Waterfront Trust is a local board of the City, and is therefore subject to the open meeting rules. As I noted in my letter, the Waterfront Trust was required to make the letter public, and to pass a resolution stating how it intended to address the letter, in accordance with section 239.2(12) of the Act. As I also explained, we would be publishing the letter on my Office's website. It was made public on our website on the same day, February 6.<sup>3</sup> We were told that the Trust published the letter on its website on February 9, 2023.

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<sup>2</sup> s. 239.1(b).

<sup>3</sup> Letter from the Ontario Ombudsman to Hamilton Waterfront Trust (6 February 2023), online: <https://www.ombudsman.on.ca/resources/reports,-cases-and-submissions/municipal-meetings/2023/city-of-hamilton-en>.



### *February 21, 2023 meeting*

On February 21, 2023, the Waterfront Trust's Board of Trustees met electronically at 5:00 p.m. After discussing various matters, the Board resolved to move to closed session to discuss a number of items, including my Office's letter. The meeting agenda described this item as follows:

#### Ongoing Ombudsman Inquiry

Pursuant to Section 9.2, Sub-section (b) of the City's Procedural By-law 21-021, as amended; and Section 239(3), Sub-section (b) of the Ontario Municipal Act, 2001, as amended, as the subject matters pertain to an ongoing investigation respecting the City or a municipally-controlled corporation by the Ombudsman appointed under the *Ombudsman Act*.

During the course of our review, the Waterfront Trust's Administrative Assistant/Interim Executive Director explained that the "Ongoing Ombudsman Inquiry" closed session item was carried over from the Board of Trustees' previous meeting agendas, and that it was an oversight to include it on the February 21, 2023 closed meeting agenda.

The resolution to proceed *in camera* states:

That the Board move into Closed Session respecting Items [...] [9(c)] [...] pursuant to [...] 9.2, Sub-section (b) of the City's Procedural By-law 21-021, as amended; and Section [...] 239(3), Sub-Section (b) of the Ontario Municipal Act, 2001, as amended, as the subject matters pertain to [...] an ongoing investigation respecting the City or a municipally-controlled corporation by the Ombudsman appointed under the *Ombudsman Act* [...].

Our discussion with the Administrative Assistant/Interim Executive Director and review of the closed meeting minutes confirmed that once *in camera*, the Board received my February 6, 2023 letter and passed a resolution relating to the letter. We were told that the Board did not otherwise discuss my Office's investigation or final letter in closed session. The Administrative Assistant/Interim Executive Director acknowledged that it was an oversight for the Board to consider the letter in closed session, and advised that it was always the Board's intention to pass a resolution relating to the letter in open session.

After discussing other items, the Board returned to open session. Once in open session, the Board discussed various matters before passing the following resolution:

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## Ongoing Ombudsman Inquiry

That the HWT Board has received the letter from the Ombudsman with regards to the Closed Meeting Complaints; and,

That the letter be made public by posting on the HWT website; and,

That in doing so, the board acknowledges that it has been the practice of the HWT Board to have our meetings open and made available to the public since April 2021.

The Board then considered various other matters in open session and adjourned the meeting.

## Analysis

Subsection 239(1) of the *Municipal Act, 2001* requires that all meetings of a municipal council, local board, or committee of either be open to the public, subject to prescribed exceptions.

The Board of Trustees cited the exception for “ongoing investigations by an ombudsman or appointed investigator” at section 239(3)(b) of the Act as the basis for discussing my letter *in camera* on February 21, 2023. Section 239(3)(b) of the *Municipal Act* states that a meeting or part of a meeting shall be closed to the public if the subject matter under consideration is an ongoing investigation by an ombudsman or appointed investigator. This exception applies only to an “ongoing” investigation.

The *Ombudsman Act* states that if after completing a closed meeting investigation, I am of the opinion that a meeting or part of a meeting was improperly closed to the public, I shall report my opinion and the reasons for it to the municipality or local board.<sup>4</sup> Because the *Ombudsman Act* clearly states that I can report such an opinion only after completing an investigation, my investigation was necessarily complete at the time that I sent the Waterfront Trust the February 6, 2023 letter. Accordingly, my investigation was not “ongoing” when the Board of Trustees met *in camera* and its discussion did not fit within the “ongoing investigations by an ombudsman or appointed investigator” exception, or any other exception to the open meeting requirements of the Act.

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<sup>4</sup> s. 14.1(7).



The Waterfront Trust's Administrative Assistant/Interim Executive Director acknowledged that it was an oversight to carry over the "Ongoing Ombudsman Inquiry" closed session item from previous meeting agendas to the February 21, 2023 meeting agenda and to consider the final letter in closed session. I am encouraged by the Waterfront Trust's response to this complaint and its ongoing commitment to improving its open meeting practices.

## Conclusion

The Chair of the Board of Trustees and the Administrative Assistant/Interim Executive Director of the Hamilton Waterfront Trust were given the opportunity to review these findings and provide comments to my Office. All comments we received were considered in the preparation of this final letter. I would like to thank the Waterfront Trust for its co-operation during my review. This letter will be published on my Office's website, and should also be made public by the Waterfront Trust. In accordance with section 239.2(12) of the *Municipal Act, 2001*, the Waterfront Trust is required to pass a resolution stating how it intends to address this letter.

Sincerely,



Paul Dubé  
Ombudsman of Ontario

Cc: Council for the City of Hamilton, c/o Andrea Holland, City Clerk  
Mary-Ann Cuthbert, Administrative Assistant/Interim Executive Director, Hamilton Waterfront Trust

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