

BY EMAIL

January 18, 2023

Council for the City of Hamilton
c/o Mayor Andrea Horwath
Hamilton City Hall
71 Main Street West
Hamilton, ON L8P 4Y5

Dear Mayor Horwath,

Re: Closed meeting complaint

My Office received a complaint alleging that the Working Group (the “Working Group”) of the Physician Recruitment and Retention Steering Committee (the “Steering Committee”) violated the open meeting rules in the *Municipal Act, 2001*¹ (the “Act”) when it held meetings on January 12, September 14, October 14, October 29, November 23, and December 14, 2021. The complaint alleged that the meetings were improperly closed to the public because there was no notice of the meetings, the public could not attend the meetings, and the meeting agendas and minutes were not public.

I am writing to share the outcome of my review of this complaint. For the reasons set out below, I have concluded that the Working Group is not subject to the open meeting rules in the Act.

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. 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 Hamilton.

¹ 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 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.

Review

My Office reviewed relevant documentation including the City's procedural by-law, the Steering Committee and Working Group's terms of reference, correspondence from the City, the City's website, meeting records for the six meetings, and a report authored by the Working Group titled "Proposal to Transfer Program into the Greater Hamilton Health Network & Formalize Existing Funding Relationships". We also spoke with the City's Legislative Coordinator.

Background

The Steering Committee is responsible for providing the overall direction for the City's Physician Recruitment and Retention Program (the "Program"). The Steering Committee reports to council through the City's Board of Health. The Steering Committee is composed of seven members, three of whom are City councillors.

The Working Group is responsible for providing the Program with operational support and oversight. The Working Group reports to the Steering Committee.

According to its terms of reference, the Working Group advises Program staff, reviews budgets, and brings information on matters pertaining to physician recruitment to the Steering Committee, either on an as-required basis or on an annual basis. The Working Group provides support and guidance to the Director of Physician Recruitment on issues including performance, budget, funding, conferences/events, contracts, economic climate, Ministry and Ontario Medical Association policies, and local factors influencing physician recruitment.

Four members of the Steering Committee sit on the Working Group, one of whom is a City councillor.

Analysis

The Physician Recruitment and Retention Steering Committee is a committee subject to the open meeting rules

In order to assess whether the Working Group is subject to the open meeting rules, my Office first examined whether the Steering Committee is a committee that is subject to the open meeting rules.

Under s. 238 of the Act, a committee is “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[.]” My Office has found that a body can also be a committee if deemed so by municipal by-law,² and 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-law³ or if it is considered by the municipality to be a committee.⁴

Under its terms of reference, the Steering Committee’s membership is made up of seven members, only three of whom are City councillors. Based on its terms of reference, the committee does not meet the Act’s 50% membership threshold.

The City’s procedural by-law defines committee and sub-committee as:

“Committee” means a Standing Committee, Sub-Committee, Selection Committee or an Advisory Committee or Task Force established by Council from time to time.

“Sub-committee” means a Committee established by Council, comprised of some- Members of Council and in certain circumstances also citizen members. Sub-committees report up to an assigned Standing Committee with members of Sub-committees being appointed by Council.

We were advised by the City that it classifies the Steering Committee as a sub-committee of the Board of Health and that it is subject to the open meeting rules. Accordingly, the Steering Committee meets the definition of a “committee” under the City’s procedural by-law and is subject to the open meeting rules.

² *Hamilton (City of) (Re)*, 2021 ONOMBUD 9, online: <<https://canlii.ca/t/jfi02>>.

³ *Niagara (Regional Municipality of) (Re)*, 2015 ONOMBUD 37, online: <<https://canlii.ca/t/gtp7n>>; *Ibid.*

⁴ *Hornepayne (Township of) (Re)*, 2016 ONOMBUD 20, online: <<https://canlii.ca/t/h2st9>>.

The Working Group is not a committee subject to the open meeting rules

The Working Group does not meet the Act's 50% membership threshold, as only one of its four members is a City councillor.

The City's procedural by-law does not include working groups in the definition of committee, nor is the term contemplated in the procedural by-law. There is no other by-law that deems the Working Group to be a committee or that requires it to hold open meetings.

My Office has previously considered whether working groups are committees under the Act.

In assessing if a body is a "committee," my Office may also consider its role and function, as the Act defines a committee as an advisory or other committee or similar entity. My Office has found that a body that exercises delegated authority from council to make decisions or recommendations is likely to be a committee.⁵ A body is not likely to be a committee if it serves an administrative purpose, merely exchanges information, or advances previously decided positions.⁶

In a 2017 report to the Town of Deep River, my Office found that a police service consultation working group was not a committee of council and was therefore not subject to the open meeting rules.⁷ In arriving at this conclusion, my Office noted that despite being made up entirely of members of council, the working group did not advance council business, nor did it lay the groundwork for such.⁸ Instead, my Office found that the working group exercised an administrative function and assisted in implementing a consultation plan that had been previously approved by council.⁹

In a report to the City of Kawartha Lakes, my Office found that an "off-road vehicle task force" was a committee and obligated to comply with the open meeting rules.¹⁰ The task force did not meet the membership threshold of 50% under the Act. However, it was mandated to provide advice and recommendations to council on off-road vehicle usage. Further, the task force was designated as a committee of council by the municipality's procedural by-law.

In this case, the Working Group does not function as a committee. The Working Group does not exercise delegated authority to make decisions or recommendations to council – rather, the Steering Committee exercises delegated authority from council to direct the Physician Recruitment and Retention Program. The Working Group implements the Steering Committee's directions, and functions in an information-gathering role for the Steering

⁵ *West Parry Sound (Heads of Council in) (Re)*, 2015 ONOMBUD 38, online: <<https://canlii.ca/t/gtp7q>>.

⁶ *Ibid*; *Hamilton (City of) (Re)*, 2014 ONOMBUD 11, online: <<https://canlii.ca/t/gtmh8>>; *Deep River (Town of) (Re)*, 2017 ONOMBUD 17 [*Deep River*], online: <<https://canlii.ca/t/hqspf>>.

⁷ *Deep River*, *supra* note 6.

⁸ *Ibid* at para 62.

⁹ *Ibid*.

¹⁰ *Kawartha Lakes (City of) (Re)*, 2022 ONOMBUD 6, online: <<https://canlii.ca/t/jnnx9>>.

Committee, either on an as-required or on an annual basis, but it does not have any authority to make decisions.

Similar to the working group in the Town of Deep River, the Working Group's primary role is administrative: Providing the Program with operational support and oversight by advancing previously decided positions.

As such, the Working Group is not a committee, and is therefore not subject to the open meeting rules of the Act. Accordingly, the Working Group did not contravene the Act when it met on January 12, September 14, October 14, October 29, November 23, and December 14, 2021.

Conclusion

The Working Group of the Physician Recruitment and Retention Steering Committee is not subject to the open meeting rules. Under the circumstances, my Office will not be taking further steps regarding this complaint.

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

Sincerely,



Paul Dubé

Ombudsman of Ontario

cc: Andrea Holland, Clerk, City of Hamilton