



Staff Report for Council Meeting

Date of Meeting: April 28, 2021

Report Number: SRCFS.21.023

Department: Corporate and Financial Services

Division: Office of the Clerk

Subject: **SRCFS.21.023 – Ombudsman Report – Investigation into meetings held on April 16, 2019; May 14, 2019; April 1, 2020; April 22, 2020; and May 14, 2020**

Purpose:

To make public the Ombudsman's investigation report titled "Investigation into meetings held by the City of Richmond Hill on April 16, 2019; May 14, 2019; April 1, 2020; April 22, 2020; and May 14, 2020."

Recommendation(s):

- a) That Ombudsman's March 2021 report, titled "Investigation into meetings held by the City of Richmond Hill on April 16, 2019; May 14, 2019; April 1, 2020; April 22, 2020; and May 14, 2020," Attachment A to staff report SRCFS.21.023 ("Ombudsman's Report"), be received.
- b) That Council address the Ombudsman's Report by approving the following:
 - (i) Council accepts and endorses all of the recommendations in the Ombudsman's Report.
 - (ii) Council directs that the open session portion of every electronic Council and committee meeting be broadcast or livestreamed (including the adoption of a resolution to go into closed session and any business conducted after arising from closed session); and,
 - (iii) Council directs where the City is prevented from broadcasting or livestreaming the open session portion of any electronic Council or committee meeting, or the broadcasting or livestreaming of a meeting ceases to function during the meeting, the meeting be delayed, deemed in recess or rescheduled as required.
- c) That Council enact By-law 23-21, a by-law to repeal and replace Article 12 of the Procedure By-law (By-law 74-12).

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- d) That the City Clerk be directed to send a copy of this resolution to the Ontario Ombudsman confirming compliance with Section 239.2(12) of the *Municipal Act, 2001*.

Contact Person:

Stephen M.A. Huycke, Director, Legislative Services/City Clerk, Extension 2529

Report Approval:

Submitted by: Sherry Adams, Commissioner of Corporate and Financial Services

Approved by: Mary-Anne Dempster, City Manager

All reports are electronically reviewed and/or approved by the Division Director, Treasurer (as required), City Solicitor (as required), Commissioner, and City Manager. Details of the reports approval are attached.

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Background:

On June 11, 2020, the Ontario Ombudsman (“Ombudsman”) notified the City that it had received a complaint that meetings held by Council on April 16, 2019; May 14, 2019; April 1, 2020; April 22, 2020; and May 14, 2020 did not comply with the open meeting rules in Section 239 of the *Municipal Act, 2001* (“Act”). The Ombudsman’s notice advised that he would be conducting an investigation of those meetings. The Ombudsman advised that the complaints were specifically in regards to closed session meetings held to consider the Yonge/Bernard Key Development Area appeals to the Local Planning Appeals Tribunal (“Yonge/Bernard KDA LPAT appeals”). The April 16 and May 14, 2019 meetings were in-person meetings that were held prior to COVID-19. The April 1, April 22 and May 14, 2020 were conducted electronically shortly after the start of COVID-19 pandemic.

Under Section 239.1 of the Act, anyone can request an investigation into whether or not Council has “complied” with the open meeting rules. The Ombudsman’s conducts closed meeting investigations in accordance with both section 239.2 of the Act and the *Ombudsman Act, R.S.O. 1990* (“*Ombudsman Act*”).

The City has received the Ombudsman’s final report, dated March 2021, titled “Investigation into meetings held by the City of Richmond Hill on April 16, 2019; May 14, 2019; April 1, 2020; April 22, 2020; and May 14, 2020.” Under Section 14.1(8) of the *Ombudsman Act*, the City is obligated to make this report public. Under Section 239.12(12) of the *Municipal Act, 2001*, Council is required to pass a resolution stating how it intends to address the report.

Open Meeting Rules

Council is required to comply with the open meeting rules in Section 239 of the Act. An extract of Section 239 is attached as Attachment B. The rules require that all meetings be open to the public unless one of the exceptions in Sections 239(2), 239(3) or 239(3.1) apply to the matter under discussion. Prior to holding a closed session meeting, Section 239(4) of the Act requires Council pass a resolution stating “...the fact of the holding of the closed meeting and the general nature of the matter to be considered...” Section 239(6) of the Act provides that a meeting cannot be closed to the public during the taking of a vote except for a procedural matter or for giving instructions to officers, employees or agents of the City.

Summary of Ombudsman’s Report

The Ombudsman’s Report is a review and analysis of the procedural history of each of the meetings investigated, as well as the City’s Procedure By-law and, in particular, the electronic meeting rules. The findings in the report can be summarized as follows:

1. Council was permitted to discuss the Yonge/Bernard KDA LPAT appeals in closed session under the following open meeting exemptions:

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- a. Section 239(2)(e) - Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board; and
 - b. Section 239(2)(f) - advice that is subject to solicitor-client privilege, including communications necessary for that purpose, when the City Solicitor or external legal Counsel is present to answer question on the matter.
2. Council did not discuss the Yonge/Bernard KDA LPAT appeals in closed session on April 1, 2020.
 3. The City did not comply with the open meeting rules during the electronic meetings held April 1, April 22, and May 14, 2020, when all or part of the open session parts of the meetings were not livestreamed to the public.
 4. The Electronic Meeting Rules in the Procedure by-law should be amended based on the findings in the report.

Electronic Meetings

The Ombudsman's opinion that the open session portions of the meetings held April 1, April 22, and May 14, 2020, did not comply with the open meeting rules are a result of the implementation of electronic meetings in response to the COVID-19 pandemic. Electronic Council meetings were unprecedented at the time that the April 1, April 22 and May 14, 2020 meetings were held.

On March 18, 2020, the Government of Ontario declared a state of emergency related to COVID-19. Bill 187, the *Municipal Emergency Act, 2020*, came into effect on March 19, 2020, permitting Ontario municipal council's to meet electronically during the state of emergency. On March 25, a mere six days after the new legislation came into effect, Council passed By-law 40-20 to enact electronic meeting rules (Article 12 of the Procedure By-law). The rules and processes were developed and implemented in mere days to ensure that Council could continue to meet to maintain City governance which was very important in the initial pandemic response.

Besides the need to develop electronic meeting rules in mere days, the rules were also developed without any play book or best practice guides, including any guides or past open meeting because fully electronic meetings of Council and committees had never been permitted before. Because there was no guidance or rules to fall back on, Section 12.4.2 of the Procedure by-law included specific rules to ensure the public could be kept informed of Council's actions. Section 12.4.2 specifically states:

12.4.2 Manner in Which Meetings are Open to the Public

- (a) For the purpose of an Electronic Meeting held during an Emergency, the manner in which a meeting is open to the public is by:
 - (i) permitting delegations in writing pursuant to section 12.4.3;
 - (ii) the posting of the records of the Open Session portion of the Meeting to the City's website in a timely manner following the

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meeting; and

(iii) making such records available for inspection by the public.

(b) For the purpose of this section, the records of the meeting includes any audio-only or audiovisual recording of the Meeting, and any minutes of the Meeting, including minutes that have not yet been adopted.

In addition to the procedural by-law amendments, the City was required to implement the technology required to run electronic meetings. As with all new technology, security considerations were extremely important. Security considerations for closed session meetings were especially important given that Council is permitted to discuss topics such as personal matters about identifiable individuals and solicitor-client advice in closed session meetings.

It is within this extraordinary context that the 2020 closed session meetings happened. Any non-compliance with the open meeting rules was not intentional and exclusively the result of implementing unprecedented processes in an extraordinary situation.

Response to the Ombudsman's Report

It is recommended that Council formally accept and implement all the recommendations in the Ombudsman's Report. It is also recommended that Council enact By-law 23-21 (Attachment C) to amend the Procedure By-law's electronic meeting rules (Article 12) to implement the recommendations. The report provides the necessary guidance to comply with the open meeting rules while conducting electronic meetings that was not, as discussed above, available when Council started to hold electronic meetings at the beginning of the COVID-19 pandemic.

It should also be noted that Council was previously provided an opportunity, as required by the *Ombudsman Act*, to provide comments on a preliminary report prepared by the Ombudsman. In response to the preliminary report, the City has already implemented most of the advice and recommendations in the Ombudsman's report, including:

1. Ensuring that all the open session portions of a meeting (including the passing of the resolution to go into closed session and any business after closed session) is livestreamed.
2. Ensured that Council and committee agenda's provide specific information on where the public can access the livestream of a meeting.
3. Holding the closed session portion of meetings during regular electronic council meetings (except for Special Council meetings to deal with a closed session matter on a different date and time).
4. Maintaining security when holding closed session meetings by sending meeting participants separate Zoom invites: The first for the portion of the meeting leading up to the passing of the resolution to go into closed session, and the second for the closed session portion of the meeting.

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By-law 23-21

Attached as Attachment C is draft By-law 23-21 to repeal and replace Article 12 of the Procedure-by-law (electronic meeting rules). The amendments in the revised Article 12 accomplish the following:

1. Implement the recommendations in the Ombudsman's Report to ensure compliance with the open meeting rules in Section 239 of the Act when conducting electronic meetings.
2. Implement specific rules for hybrid meetings (electronic and in-person) as authorized by Council on March 24, 2021 when it adopted the recommendations in Staff Report SRCFS.21.014.
3. Formalize the process used by the Clerk to determine when a Member of Council is participating in electronic meeting conducted using audio-visual technology.

Financial/Staffing/Other Implications:

There are no financial/staffing or other implications as a result of receiving and responding to the Ombudsman's Report

Relationship to Council's Strategic Priorities 2020-2022:

The receipt, acceptance and implementation of the Ombudsman's closed meeting investigation report helps to fulfill Council's Strategic Priority of A Strong Sense of Belonging by ensuring that Council and committees are open to the public unless specifically authorized to be closed to the public under the *Municipal Act, 2001*.

Climate Change Considerations:

Climate change considerations are not applicable to this staff report

Conclusion:

The City has received an Ontario Ombudsman's meeting investigation report into several meetings held by Council to consider the Yonge/Bernard KDA LPAT appeals. The Ombudsman has confirmed that Council is permitted to discuss an ongoing LPAT appeal in closed session. The Ombudsman has determined, however, that some of the City's electronic meeting rules and practices do not comply with the open meeting rules in the *Municipal Act, 2001*. Council is required to adopt a resolution stating how it will address the findings in the report. It is recommended that Council accept all the recommendations and amend the electronic meeting rules as suggested in the report.

Attachments:

The following attached documents may include scanned images of appendixes, maps and photographs. All attachments have been reviewed and made accessible. If you require an alternative format please call the contact person listed in this document.

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- Attachment A – Ombudsman’s Report, dated March 2021, titled “Investigation into meetings held by the City of Richmond Hill on April 16, 2019; May 14, 2019; April 1, 2020; April 22, 2020; and May 14, 2020
- Attachment B – Section 239, Municipal Act, 2001.
- Attachment C – draft By-law 23-21

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Report Approval Details

Document Title:	SRCFS.21.023 - Ombudsman's Report - Investigation of various closed session meetings in 2019 and 2020.docx
Attachments:	- SRCFS.21.023 - Attachment A - Ontario Ombudsman final report Richmond Hill March 2021 EN.pdf - SRCFS.21.023 - Attachment B - Municipal Act Section 239.pdf - SRCFS.21.023 - Attachment C - Draft By-law 23-21.pdf
Final Approval Date:	Apr 12, 2021

This report and all of its attachments were approved and signed as outlined below:

Sherry Adams - Apr 12, 2021 - 5:09 PM

MaryAnne Dempster - Apr 12, 2021 - 7:10 PM