

City of Mississauga

Corporate Report



Date: October 6, 2021

To: Chair and Members of Governance Committee

From: Andra L. Maxwell B.A., LL.B., CIC.C, City Solicitor

Originator's files:

Meeting date:
November 15, 2021

Subject

Options for Closed Meeting Investigation Services

Recommendation

1. That the Corporate Report from the City Solicitor dated October 6, 2021, entitled "Options for Closed Meeting Investigation Services" be received for information.
2. That the Governance Committee provide direction to staff regarding the options outlined in this report regarding closed meeting investigation services.
3. That if the Governance Committee directs staff to continue with the appointment of Local Authority Services Limited as the City of Mississauga's closed meeting investigator, then:
 - a. The Investigator Services Agreement, dated December 12, 2007, between The Corporation of the City of Mississauga and Local Authority Services Limited be renewed for the 2022 term in accordance with the automatic renewal provisions contained therein; and,
 - b. The City Solicitor be authorized to approve further renewal terms as well as changes to the retainer (administrative) fee or investigation fee amounts and be authorized to execute any amendments or addendums to the Investigator Services Agreement, dated December 12, 2007, between The Corporation of the City of Mississauga and Local Authority Services Limited between now and December 31, 2024, after which time the City Solicitor shall report to Council and obtain authorization for any further renewals or execution of amendments/addendums.

Report Highlights

- Meetings of City Council and its committees must be open to the public unless a matter falls within an exception that permits it to be considered in a closed session. Under the *Municipal Act, 2001*, a municipality must appoint a closed meeting investigator to respond to complaints that a matter ought to have been public, or the Ontario Ombudsman will be

the default appointed investigator.

- In 2007, Council appointed Local Authority Services (“LAS”), owned by the Association of Municipalities of Ontario, to act as the City’s closed meeting investigator and on February 3, 2021, Council approved the renewal of the City’s agreement with LAS for the 2021 term.
- On March 24, 2021, Council directed the City Solicitor that, prior to the 2022 renewal of the agreement with LAS, a report should be brought to Governance Committee outlining options for closed meeting investigation services, including using the Ontario Ombudsman.
- The City has received an invoice from LAS for the 2022 term and staff are now seeking direction from Governance Committee regarding future closed meeting investigator services.
- In appointing a closed meeting investigator, Council must have regard to the investigator’s independence, impartiality, confidentiality and credibility of the investigative process. A private closed meeting investigator, such as LAS, and the Ontario Ombudsman generally have the same powers under the *Municipal Act, 2001*, but the Ontario Ombudsman has certain additional powers under the *Ombudsman Act*. In contrast to a private investigator such as LAS, the Ombudsman has broad powers of entry to inspect records. Further, the *Ombudsman Act* includes penalties, including for making false statements or failing to comply with an investigation of the Ombudsman, which can result in a fine of up to \$500 and/or imprisonment of up to three months.
- There is a split of GTA municipalities using LAS and the Ontario Ombudsman, with slightly more using LAS.
- LAS charges a \$200 annual administrative fee and will charge an hourly fee of \$350-\$795 in the event of a closed meeting investigation in 2022 (the current 2021 hourly fee is \$325-\$375/hour). The Ontario Ombudsman’s closed meeting investigation services are free.
- Since 2007, the City has not been the subject of any closed meeting investigations and has incurred only the LAS annual administrative fee.

Background

In 2007, Council appointed LAS as the City’s closed meeting investigator, should an investigation be requested. Since appointing LAS in 2007, the City has not received any requests for a closed meeting investigation.

LAS was created in 1992 by the Association of Municipalities of Ontario (“AMO”) and has offered its Closed Meeting Investigator Program since 2008. The City entered into an Investigator Services Agreement (the “Agreement”) with LAS in 2007. In 2020, LAS’s service provider for the Closed Meeting Investigator Program changed from Amberley Gavel Ltd. to Aird & Berlis LLP. The Agreement automatically renews at the start of each year unless terminated by either Party by giving 90 days prior written notice.

On February 3, 2021, Council adopted General Committee’s January 27, 2021 recommendation (GC-0042-2021) to renew the Agreement for the 2021 term in accordance with its automatic

renewal provisions and for staff to draft a corporate report on the options for closed meeting investigation services to a future Governance Committee meeting.

The City Solicitor brought a subsequent corporate report to the March 1, 2021 Governance Committee meeting, dated February 18, 2021, entitled “Options for Closed Meeting Investigation Services” and on March 24, 2021, Council adopted the General Committee’s recommendation (GC-0145-2021) and referred the corporate report to staff “to report back on Ontario Ombudsman options prior to the 2022 renewal.”

The City has received an invoice from LAS for the 2022 term. LAS has made only minor amendments to the Agreement, which are set out in Appendix 1 to this report. The purpose of this report is to receive direction from Governance Committee regarding future closed meeting investigator services.

Comments

Applicable Legislation

Section 239.1 of the *Municipal Act, 2001* provides that a person may request an investigation into whether a municipality, a local board, or a committee of either has complied with the closed meeting provisions of the *Municipal Act, 2001*. Such an investigation may be undertaken by:

- (a) an investigator appointed by the municipality; or
- (b) the Ontario Ombudsman appointed under the *Ombudsman Act*, if the municipality has not appointed an investigator.

The *Municipal Act, 2001* requires that, in carrying out his or her functions, the investigator shall have regard to:

- (a) the investigator’s independence and impartiality;
- (b) confidentiality with respect to the investigator’s activities; and
- (c) the credibility of the investigator’s investigative process.

A closed meeting investigator appointed by a municipality, such as LAS, and the Ontario Ombudsman generally have the same powers under the *Municipal Act, 2001*, with the Ontario Ombudsman having certain additional powers under the *Ombudsman Act*. Closed meeting investigators derive their powers from the *Municipal Act, 2001*, whereas the Ontario Ombudsman derives its authority from both the *Municipal Act, 2001* and the *Ombudsman Act*. This means that the Ontario Ombudsman has all of the powers of closed meeting investigators set out in the *Municipal Act, 2001*, as well as its own broad powers in the *Ombudsman Act*.

The investigation powers of either an independent investigator or the Ontario Ombudsman include the following:

- to hear or obtain information and make inquiries as deemed necessary;
- to require any officer, employee, or member of a municipality that, in their opinion, is able to give information relating to any matter being investigated to furnish information and produce any documents or things in their possession or under their control; and
- to summon and examine on oath any complainant, officer, employee or member of a municipality that is able to give relevant information and any other person who the investigator thinks is able to provide relevant information.

Once a closed meeting investigation is over, both independent investigators and the Ombudsman must report their opinions, including their reasons. Both may make recommendations as they deem fit. The reports must be made public by the municipality; however, the Ombudsman may also publish or make a report available itself on its own website.

In addition, the Ontario Ombudsman has the following broad powers under the *Ombudsman Act*:

- the power to make an investigation on his/her own motion;
- the ability to refuse to investigate certain matters;
- the power to refer a matter to the appropriate authority if, during or after an investigation, the Ombudsman is of opinion that there is evidence of a breach of duty or of misconduct on the part of any officer or employee of any public sector body; and,
- the power to enter the premises of any public sector body and conduct an inspection.

The *Ombudsman Act* also establishes offences under its broad powers for those who interfere with investigations of the Ombudsman. The *Ombudsman Act* provides that it is an offence to:

- wilfully obstruct, hinder or resist the Ombudsman in the performance of its functions;
- refuse or wilfully fail to comply with any lawful requirement of the Ombudsman; or
- wilfully make any false statement to, or mislead or attempt to mislead, the Ombudsman in the exercise of its functions.

These offences are punishable by a fine of not more than \$500, a term of imprisonment of not more than three months, or both.

A more detailed comparison between the closed meeting investigation powers under the *Municipal Act, 2001* and the *Ombudsman Act* can be found in Appendix 2 to this report.

Closed Meeting Investigators in other Municipalities

Within the GTA, there appears to be a split amongst municipalities using LAS and the Ontario Ombudsman, with slightly more using LAS. The Region of Peel, City of Brampton and Town of Caledon all use LAS. According to the City of Toronto's website, it is currently taking steps to

retain a closed meeting investigator and in the interim, the Provincial Ombudsman will investigate complaints.¹

The chart below provides an overview of closed meeting investigators for GTA municipalities, as outlined on the Ontario Ombudsman's website at the time of writing.

Closed Meeting Investigator- GTA Municipalities

LAS	Ontario Ombudsman	Other
City of Brampton Township of Brock City of Burlington Township of Caledon Municipality of Clarington City of Markham Town of Milton City of Mississauga Town of Oakville Township of Uxbridge City of Vaughan Town of Whitby Regional Municipality of Halton Regional Municipality of Peel Regional Municipality of Durham Town of Whitchurch-Stouffville	Town of Ajax Town of East Gwillimbury Town of Georgina Town of Halton Hills Township of King Town of Newmarket City of Oshawa City of Pickering City of Richmond Hill Township of Scugog City of Toronto Regional Municipality of York	Town of Aurora (Principles Integrity)

There also appears to be a split between municipalities using LAS or other closed meeting investigators and those using the Ontario Ombudsman outside of the GTA. Some of the larger municipalities that use LAS include Kingston, Waterloo, and Barrie. Larger municipalities that use the Ontario Ombudsman include London, Hamilton, Sudbury, and Niagara Region.

The chart below provides an overview of closed meeting investigators for select municipalities outside of the GTA, as outlined on the Ontario Ombudsman's website at the time of writing.

¹ The City of Toronto has appointed its own Ombudsman pursuant to section 170 of the *City of Toronto Act, 2006*. However, Toronto's Ombudsman is not the City of Toronto's closed meeting investigator.

Closed Meeting Investigator- Select Other Municipalities

LAS	Ontario Ombudsman	Other
City of Brantford City of Cambridge City of Waterloo City of Windsor Town of Lincoln Town of Niagara-on-the-Lake Township of Wainfleet City of Stratford City of Kingston City of Peterborough City of Barrie Regional Municipality of Waterloo	City of Brockville City of Greater Sudbury City of Kitchener City of Hamilton City of Niagara Falls City of Port Colborne City of St. Catharines City of Thorold City of Welland Town of Fort Erie Town of Grimsby Town of Pelham Township of West Lincoln City of London Town of Orangeville City of Owen Sound City of Belleville City of Pembroke City of Sarnia City of Cornwall Town of Collingwood Regional Municipality of Niagara	City of Ottawa (Robert Marleau) City of St. Thomas (Independent Resolutions Inc. - Mark McDonald) City of Woodstock (Gregory F. Stewart) City of Orillia (Principles Integrity) City of Thunder Bay (Paul S. Heayn) City of Guelph (Aird & Berlis LLP)

Options

In appointing a closed meeting investigator, a municipality is to consider the investigator's independence, credibility and impartiality. An investigator must also ensure confidentiality with respect to their activities. As such, an investigator with legal training, or knowledge and experience with the *Municipal Act, 2001* and Council procedures, is recommended.

The options available to the City are to:

- 1) continue with the City's appointment of LAS;
- 2) appoint another independent closed meeting investigator (following a Request for Proposals); or
- 3) default to the Ontario Ombudsman as the closed meeting investigator.

1) Continuing with the appointment of LAS into 2022

According to LAS's 2020 Annual Report, 113 municipalities subscribed to LAS's closed meeting services in 2019. LAS is a reputable service provider that provides closed meeting investigation services to many other municipalities, including Brampton, Caledon and the Region of Peel.

For 2021, LAS's annual administrative fee is \$200 and its hourly investigation fee ranges between \$325 and \$775 per hour in the event of an investigation. The City is also responsible for reasonable actual expenses incurred in the course of conducting an investigation. LAS offers a sizeable roster of experienced investigators from the law firm Aird & Berlis LLP. The hourly rate of the investigator depends on their seniority and level of experience.

LAS offers a cost effective, defined and confidential process for handling closed meeting investigations, as well as the availability of on-going education and information for municipalities. There is cost associated with using its Closed Meeting Investigator Program, as opposed to using the Ontario Ombudsman, whose closed meeting investigation services are free. While LAS's administrative fee was reduced from \$330 to \$200 in 2020, its hourly investigation fee increased from \$225/hour in 2019 to \$325-\$725 per hour in 2020. A small increase in the investigation fee to \$325-\$775/hour was made in 2021.

For 2022, the investigation fee will increase to \$350.00-\$395.00/hour in the event of a closed meeting investigation.

2) Appoint an another private closed meeting investigator

The City may also wish to explore the services of another private closed meeting investigator and issue a Request for Proposals. The cost of appointing a specific individual with the same level of experience in law and municipal government as LAS's review officers may exceed the cost of retaining LAS.

3) The Ontario Ombudsman as Closed Meeting Investigator

The Ontario Ombudsman offers closed meeting investigator services at no charge. Its 2019-2020 Annual Report states that the number of municipalities using the Ombudsman for closed meeting investigations was 239 during this period. Its 2020-2021 Annual Report states that the number of municipalities using the Ontario Ombudsman as their investigator reached a new high of 256. The Ontario Ombudsman's 2012-2013 Annual Report stated that 189 municipalities used the Ontario Ombudsman in 2012-2013, which suggests an upward trend towards municipalities using the Ontario Ombudsman.

The Ontario Ombudsman's Open Meetings Guide for Municipalities states:

"In the field of open meetings, the Ombudsman makes findings on whether or not municipal meetings complied with the open meeting rules, and may make recommendations or suggest

best practices for improvement. Ombudsman staff who specialize in open meetings can also provide guidance and education to municipalities and members of the public on the open meeting requirements and best practices.”

The Ontario Ombudsman’s investigation services are free, transparent, and independent, with confidentiality being maintained throughout the process. As noted earlier in the report, any closed meeting investigation by the Ontario Ombudsman would also trigger the broader Ombudsman powers under the *Ombudsman Act*, including the broad powers of entry to inspect records. Further, the *Municipal Act, 2001* does not contain a penalty provision such as that found in the *Ombudsman Act*, which imposes penalties for wilfully obstructing, hindering or resisting the Ombudsman in the performance of his or her functions; failing to comply with any lawful requirements of the Ombudsman; or wilfully making false statements. Such offences can result in a fine of up to \$500 and/or imprisonment of up to three months.

Financial Impact

The City currently has a contract with LAS to provide closed meeting investigation services in 2021. The City pays an annual administrative fee of \$200.00 to LAS. In the event that an investigation was required, the investigation fee would range from \$325 to \$775 per hour, depending on the seniority of the investigator appointed from the roster. In 2022, the investigation fee will range from \$350 to \$795 per hour, plus reasonable expenses. All proposed costs can be accommodated in the proposed 2022 Operating Budget in cost center 22705. Since appointing LAS in 2007, the City has not been the subject of any closed meeting investigations and has paid only the annual administrative fee.

If the City were to use the Ontario Ombudsman instead, there would be no cost to the City.

Conclusion

The purpose of this report is to receive direction from Governance Committee regarding future closed meeting investigator services. Under the *Municipal Act, 2001*, a municipality must either appoint a closed meeting investigator or the Ontario Ombudsman will act as the municipality’s default investigator. Many municipalities have decided to rely on the Ontario Ombudsman, whose services are free, to carry out closed meeting investigations; however, a large number of municipalities have either appointed their own investigator or are utilizing the services offered by LAS, which is owned by AMO.

In 2007, Council opted for the latter option, and has appointed LAS as the City’s closed meeting investigator since January 1, 2008. The City’s agreement with LAS has been renewed for the 2021 term in accordance with the automatic renewal provisions in the Agreement.

Attachments

Appendix 1: LAS Correspondence, dated September 27, 2021 - *2022 Term - LAS Closed Meeting Investigator Program Amendments to Agreement*

Appendix 2: Comparison between the closed meeting investigation powers under the *Municipal Act, 2001* and the *Ombudsman Act*



Andra L. Maxwell B.A., LL.B., CIC.C, City Solicitor

Prepared by: Nupur Kotecha, Legal Counsel