



Ombudsman Report

**Investigation into a complaint about a meeting
of council for the City of Kitchener
on August 14, 2023**

**Paul Dubé
Ombudsman of Ontario**

June 2025

Complaint

- 1 My Office received a complaint about a special meeting of council for the City of Kitchener (the “City”) held on August 14, 2023. The complaint alleged that council’s closed session discussion described as “City Owned Performing Arts and Entertainment Facilities” on the meeting agenda did not fit within the cited exception for information supplied in confidence by a third party at section 239(2)(i) of the *Municipal Act, 2001* (the “Act”).¹
- 2 My investigation determined that council for the City of Kitchener did not contravene the *Municipal Act, 2001* on August 14, 2023. Parts of council’s discussion fit within the cited exception for information supplied in confidence by a third party, as well as the exceptions for labour relations and employee negotiations at section 239(2)(d), and plans and instructions for negotiations at section 239(2)(k) of the Act.
- 3 Although other parts of council’s discussion did not fit within the exceptions to the open meeting rules on their own, I determined that council was not required to parse these parts of the discussion from the closed session. Accordingly, council’s entire closed session discussion was permitted under the Act.

Ombudsman jurisdiction

- 4 Under the Act, all meetings of council, local boards, and committees of either must be open to the public, unless they fall within prescribed exceptions.
- 5 As of January 1, 2008, the Act gives anyone the right to request an investigation into whether a municipality or local board has complied with the Act in closing a meeting to the public. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 6 The Ombudsman is the closed meeting investigator for the City of Kitchener.
- 7 When investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the applicable governing procedures have been observed.
- 8 Our Office has reviewed and investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an

¹ SO 2001, c 25.

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: <https://www.ombudsman.on.ca/en/info-public-bodies-and-officials/municipal-government/municipal-meeting-digest>.

- 9 The Ontario Ombudsman also has the authority to conduct impartial reviews and investigations of hundreds of public sector bodies. This includes municipalities, local boards, and municipally-controlled corporations, as well as provincial government organizations, publicly funded universities, and school boards. In addition, the Ombudsman's mandate includes reviewing complaints about the services provided by children's aid societies and residential licensees, and the provision of French language services under the *French Language Services Act*. Read more about the bodies within our jurisdiction here: <https://www.ombudsman.on.ca/en/make-complaint/what-we-can-help-you/organizations-you-can-complain-about>.

Investigative process

- 10 On November 29, 2023, my Office advised the City of our intent to investigate this complaint.
- 11 We reviewed materials from the August 14, 2023 meeting, including the agenda, open and closed meeting minutes, a closed session staff report, and a related closed session PowerPoint presentation. We also reviewed closed session materials from a previous special council meeting held on June 26, 2023, and relevant portions of the Act.
- 12 My Office spoke with the Director of Legislated Services/City Clerk and interviewed the Chief Administrative Officer (CAO), the Executive Director of Economic Development, and the Mayor.
- 13 My Office received full co-operation during our investigation.

Background

- 14 In August 2023, the City announced plans to take a new leadership role regarding four City-owned arts and entertainment facilities: the Kitchener

Memorial Auditorium, the Registry Theatre, the Conrad Centre for the Performing Arts, and the Centre in the Square.

- 15 The City directly operates the Kitchener Memorial Auditorium, and contracts out operation of the Registry Theatre and the Conrad Centre for the Performing Arts. The Centre in the Square is managed and operated by The Centre in the Square Inc., a corporation established under the *City of Kitchener Act, 1981*.² The Centre in the Square Inc. is a municipally-controlled corporation within the definition of section 223.1(1) of the *Municipal Act, 2001*, because the City appoints all members of its board of directors.
- 16 In 2022, the City retained a consultant to review these arts and entertainment facilities and their operations. During the consultant's review process, the organizations operating the Registry Theatre, Conrad Centre, and Centre in the Square (collectively, the "facility operators") provided the consultant with information related to their operations, including information about revenue, expenses, ticket sales, and staffing. The CAO made a commitment to the facility operators that the information would be kept confidential, since the City had requested more detailed information than it normally would.
- 17 The consultant presented a report and recommendations to council in closed session at a special council meeting on June 26, 2023, including with respect to a City-led "centralized model" for operations.

August 14, 2023 council meeting

- 18 Council met in council chambers on August 14, 2023, at 5:00 p.m. The public agenda listed the following item for closed session discussion: "City Owned Performing Arts and Entertainment Facilities (Commercial Information/Contractual or Other Negotiation - Section 239 (2) (i))." We were told that this item was an update to council from City staff on the implementation of the centralized model.
- 19 At 5:45 p.m., council passed a resolution to move into closed session to discuss four agenda items. For the arts and entertainment facilities item, council referred to the exception for information supplied in confidence by a third party.
- 20 The discussion about the arts and entertainment facilities item consisted of a presentation by the CAO for council's information, based on the staff report. First, the CAO gave a brief overview of the vision and purpose of the centralized

² SO 1981, c 90 [*City of Kitchener Act, 1981*].

model. The CAO then discussed implications for both City operations and facility operators, including staffing. The CAO next presented revenue and expense forecasts related to the implementation of the centralized model, including potential impacts to facility operators, based on information provided by the operators. Finally, the CAO outlined the next steps in the process, including steps related to negotiating agreements with facility operators.

- 21 After the CAO's presentation, there was a question-and-answer period where council asked questions about the centralized model. The questions concerned topics like the City's required investment, staffing, communications, and specific ongoing negotiations. City staff responded to council's questions.
- 22 Council did not pass any resolutions related to this item before returning to open session at 7:15 p.m.

Analysis

- 23 Under the Act, all meetings of council, local boards, and committees of either of them must be open to the public, unless they fall within a prescribed exception under section 239 of the Act.

Exception for information supplied in confidence by a third party

- 24 Council's resolution to proceed into closed session cited the exception for information supplied in confidence by a third party at section 239(2)(i) of the Act, which permits a meeting to be closed if the subject matter is a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence to the municipality or local board, which, if disclosed, could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.
- 25 The purpose of this exception is to protect confidential information that belongs to a third party.³ I have previously found that the exception will apply when:
 - i. The information discussed falls into one of the listed types: trade secret, scientific, technical, commercial, financial, or labour relations information;

³ *Brockton (Municipality of) (Re)*, 2023 ONOMBUD 13 at para 20 [*Brockton*], online: <<https://canlii.ca/t/k11jq>>.

- ii. The information discussed was supplied confidentially, whether explicitly or implicitly, to the municipality by a third party; and
- iii. If disclosed, the information discussed could reasonably be expected to cause harm, either by prejudicing significantly the competitive position or interfering significantly with the contractual or other negotiations of a person, group of persons or organization.⁴

The information discussed fell into the listed types

- 26 The Clerk, CAO, Executive Director of Economic Development, and the Mayor indicated that the CAO's presentation and council's discussion included commercial, financial, and labour relations information.
- 27 I have previously determined that "commercial information" is information related to the buying, selling or exchange of merchandise or services.⁵ The CAO's presentation and council's discussion included information about commercial matters related to the implementation of the centralized model. This information qualifies as commercial information.
- 28 "Financial information" is information relating to the use or distribution of money, containing or referring to specific data.⁶ The CAO's presentation and council's discussion included financial information about the facilities' operations.
- 29 I have not previously adopted a definition for "labour relations information" for the purposes of the exception for information supplied in confidence by a third party. However, my Office has extensively interpreted the phrase "labour relations" in the context of the open meeting exception for labour relations and employee negotiations at section 239(2)(d) of the Act. For example, I have found that discussions about labour relations may include:
 - Unionized or non-unionized staff, and changes to staffing, workload, and roles of particular employees;⁷

⁴ *Bruce (County of) (Re)*, 2022 ONOMBUD 7 at para 67, online: <<https://canlii.ca/t/jpbf9>>.

⁵ *Leeds and the Thousand Islands (Township of) (Re)*, 2022 ONOMBUD 5 at para 31, online: <<https://canlii.ca/t/jnkk9>>.

⁶ *Ibid* at para 33.

⁷ *Niagara Falls (City of) (Re)*, 2022 ONOMBUD 3 at para 35, online: <<https://canlii.ca/t/jn3rj>>; *Welland (City of) (Re)*, 2014 ONOMBUD 7 at paras 39–40, online: <<https://canlii.ca/t/gtmhx>>; *Burk's Falls / Armour (Village of / Township)*, 2015 ONOMBUD 26 at para 60, online: <<https://canlii.ca/t/gtp6w>>.

- Municipal reorganization as it affects individuals and their roles, and the hiring or firing of staff;⁸ and
- Organizational reviews affecting named individuals or when the individuals or roles are potentially identifiable in small departments with few staff.⁹

30 I am satisfied that “labour relations information” for the purpose of the exception for information supplied in confidence by a third party includes, but may not be limited to, the same type of information as the exception for labour relations.

31 In this case, parts of the CAO’s presentation and council’s discussion were about staffing with respect to the centralized model. This information qualifies as labour relations information.

32 Accordingly, the CAO’s presentation and council’s discussion considered commercial, financial, and labour relations information, and the first criterion is satisfied.

The information discussed was supplied in confidence by third parties

33 This criterion has two elements: whether the information was supplied in confidence, either explicitly or implicitly, and whether the supplier of the information was a third party to the municipality.

Supplied in confidence

34 The CAO told my Office that he made an implied commitment to the facility operators that the information they provided to the City’s consultant would be kept confidential. We were told that other City staff also relayed this commitment to everyone the consultant spoke with, and that City staff had spoken with a representative of one of the facility operators regarding confidentiality about the labour relations information shared with the City.

35 The CAO explained that he had made this commitment because of the level of detail the City was requesting from the facility operators that they would not normally be able to provide. I am satisfied based on our investigation that the commercial, financial, and labour relations information was supplied to the City in confidence.

⁸ *Sault Ste. Marie (City of) (Re)*, 2016 ONOMBUD 13 at para 22 [*Sault Ste. Marie*], online: <<http://canlii.ca/t/h2sst>>.

⁹ *Norfolk (County of) (Re)*, 2021 ONOMBUD 6 at paras 24–27, online: <<https://canlii.ca/t/jdr8d>>.

Third parties

- 36 The second element for this criterion is whether the information was supplied by a third party to the municipality. Based on the text of the exception, a third party includes “a person, group of persons, or organization.”
- 37 At the time of the August 14, 2023 meeting, the Registry Theatre and Conrad Centre were operated by incorporated community organizations. These organizations were third parties.
- 38 The Centre in the Square is operated by The Centre in the Square Inc., a municipally-controlled corporation established under special legislation with a board of directors appointed by council that includes council member appointees. The Centre in the Square Inc. has a distinct legal personality from the City.
- 39 The Centre in the Square Inc. has the capacity to sue and be sued, contract, and acquire, hold, and dispose of personal property,¹⁰ and is an “organization” in the plain sense of the meaning. It is also an institution for the purposes of the *Municipal Freedom of Information and Protection of Privacy Act*.¹¹
- 40 I am satisfied that the Centre in the Square Inc. is a third party for the purposes of this exception. Accordingly, the second criterion that the information was supplied confidentially to the municipality by a third party is satisfied.

The information, if disclosed, could reasonably be expected to cause harm

- 41 The third criterion for this exception requires a municipality to show that the disclosure of a third party’s information could reasonably be expected to cause harm.
- 42 I have previously interpreted this criterion to place the onus of establishing a reasonable expectation of harm on the municipality seeking to withhold the information. Although a municipality does not need to prove on a balance of

¹⁰ See *Legislation Act, 2006*, SO 2006, c 21, Sched 5, s 92(1); *City of Kitchener Act, 1981*, *supra* note 2, s 16.

¹¹ The Centre in the Square Inc. is prescribed in O Reg 372/91, s 1(1)(3) for the purposes of paragraph (c) of the definition of “institution” at s. 2(1) of the *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56.

probabilities that harm will result from disclosure, the risk of harm has to be well beyond merely possible or speculative.¹²

- 43 In this case, the CAO and the Executive Director of Economic Development identified specific harms that could result in significant interference with contractual or other negotiations, if information discussed during parts of the closed session were disclosed to the public. These potential harms were more than speculative. The third criterion is therefore satisfied.
- 44 Accordingly, the parts of the CAO's presentation and the question-and-answer period that dealt with third party commercial, financial, and labour relations information fit within the exception for information supplied in confidence by a third party. Because some parts of the discussion did not concern these types of information, we considered whether other open meeting exceptions applied to the remainder of council's discussion.

Exception for labour relations and employee negotiations

- 45 Although not cited by council in its resolution to proceed into closed session, those we interviewed suggested that the exception for labour relations and employee negotiations at section 239(2)(d) of the Act applied because council discussed implications for staffing. My Office therefore also assessed whether the exception for labour relations could have applied to council's discussion.
- 46 The purpose of the exception for labour relations is to protect discussions relating to the relationship between a municipality and its employees.¹³ While this exception does not generally apply to organizational reviews or restructurings, it may apply to discussions relating to reorganization as it affects individuals and their roles.¹⁴
- 47 In a 2018 report to the Town of Petrolia, I determined that this exception applied to a council discussion about how a proposed transfer of the operation of a community centre to a not-for-profit organization could affect the employees.¹⁵

¹² *Brockton*, *supra* note 3 at para 30; see also *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 52, online: <<https://canlii.ca/t/q6lzb>>.

¹³ *St. Catharines (City of) (Re)*, 2019 ONOMBUD 1 at para 24 [*St. Catharines*], online: <<https://canlii.ca/t/hxrk5>>.

¹⁴ *Sault Ste. Marie*, *supra* note 8 at para 22.

¹⁵ *Petrolia (Town of) (Re)*, 2018 ONOMBUD 6 at paras 48–50, online: <<https://canlii.ca/t/hvmtw>>.

- 48 In this case, the CAO's presentation and the question-and-answer period considered specific staffing implications of the centralized model. Accordingly, those parts of the CAO's presentation and the question-and-answer period fit within the exception for labour relations and employee negotiations.

Exception for plans and instructions for negotiations

- 49 Although not cited or contemplated by council, my Office assessed whether the exception for plans and instructions for negotiations at section 239(2)(k) of the Act could have applied to council's closed session discussion.
- 50 The purpose of this exception is to protect information that could undermine the municipality's bargaining position or give another party an unfair advantage during an ongoing negotiation. In order for the exception to apply, the following criteria must be satisfied:
- i. The *in camera* discussion was about positions, plans, procedures, criteria, or instructions;
 - ii. The positions, plans, procedures, criteria, or instructions are intended to be applied to negotiations;
 - iii. The negotiations are being carried on currently, or will be carried on in future; and
 - iv. The negotiations are being conducted by or on behalf of the municipality.¹⁶
- 51 During the latter portion of the CAO's presentation, and during the question-and-answer period, the CAO provided council with an update on various negotiations related to the centralized model, including the positions the City would be taking during these negotiations. My Office was told that at the time of the August 14, 2023 council meeting, some negotiations had commenced, while others were set to start shortly.
- 52 Parts of the CAO's presentation and the question-and-answer period fit within the exception for plans and instructions for negotiations.

Parsing the discussion

- 53 Only parts of council's discussion fit within one or more open meeting exceptions. However, the CAO's initial overview of the centralized model and

¹⁶ *St. Catharines*, *supra* note 13 at paras 30–31.

parts of the question-and-answer period did not fit within any of the open meeting exceptions. Accordingly, it is necessary to determine whether the discussion could have been parsed.

- 54 In *St. Catharines v IPCO, 2011*, the Divisional Court found that it is unrealistic to expect municipal councils to split up discussions between open and closed sessions where it would “detract from free, open and uninterrupted discussion.”¹⁷ In other words, where it would be unrealistic to expect council to parse intertwined subjects, topics that do not otherwise fit within an open meeting exception may still be discussed *in camera*.¹⁸ However, if the topics can be separated, council is expected to return to open session for those portions of the discussion that do not fit within an open meeting exception.
- 55 In a 2024 report to the Municipality of Temagami, I found that a discussion of general information about two properties could not have been parsed from a discussion of tax information that fit within the exception for personal matters because the discussion consisted of foundational background information that was intertwined with the update regarding tax information.¹⁹
- 56 In this case, those we interviewed explained that the CAO’s initial overview and the question-and-answer period provided essential contextual information which informed council’s discussion and could not be separated out.
- 57 I am satisfied that the CAO’s overview of the centralized model was foundational background information that prefaced the information that was then the focus of council’s discussion. The overview was relatively brief and expecting council to have parsed it would not have been realistic.
- 58 Similarly, some of council’s questions during the question-and-answer period did not fit within the exceptions. Requiring council to have parsed these parts of the discussion would have detracted from free, open, and uninterrupted discussion.
- 59 Accordingly, because the information was intertwined and could not realistically have been parsed, council’s entire discussion fit within the exceptions for information supplied in confidence by a third party, labour relations and employee negotiations, and plans and instructions for negotiations.

¹⁷ *St. Catharines (City) v IPCO, 2011* ONSC 2346 at para 42, online: <<https://canlii.ca/t/fkqfr>>.

¹⁸ *Plympton-Wyoming (Town of) (Re)*, 2021 ONOMBUD 4 at para 26, online: <<https://canlii.ca/t/jd49k>>.

¹⁹ *Temagami (Municipality of) (Re)*, 2024 ONOMBUD 6 at para 22, online: <<https://canlii.ca/t/k4j1b>>.

Opinion

- 60 Council for the City of Kitchener did not contravene the *Municipal Act, 2001* on August 14, 2023, when it met in closed session to discuss an update on the implementation of the centralized model for the City-owned arts and entertainment facilities. As I have determined that it would have been unrealistic to have required council to parse its discussion, the entire discussion fit within the exceptions for information supplied in confidence by a third party, labour relations and employee negotiations, and plans and instructions for negotiations.
- 61 While I have determined that the City satisfied the criteria for the exception for information supplied in confidence by a third party, my Office did not receive clear documentation setting out that the information was supplied in confidence.
- 62 As a best practice going forward, before relying on the exception for information supplied in confidence by a third party at section 239(2)(i), the City should confirm with the third party whether or not the information was supplied in confidence, and, where appropriate, inquire into what concrete harms could be expected if the information were disclosed publicly.

Report

- 63 Council and staff for the City of Kitchener were given the opportunity to review a preliminary version of this report and provide comments to my Office. All comments we received were considered in the preparation of this final report.
- 64 The Director of Legislated Services/City Clerk indicated that my report would be shared with council and made available to the public at an upcoming council meeting. This report will also be published on our website at www.ombudsman.on.ca.



Paul Dubé
Ombudsman of Ontario