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March 29, 2010

To: Executive Committee

From: Budget Committee

Subject: City Council – New Business – CC46.1 – Open Meeting Investigation: Request to Investigate 2008-2009 Budget Committee Process

Recommendations:

The Budget Committee recommends to the Executive Committee that:

- 1. City Council discontinue the Committee briefings stage of the budget process.**
- 2. City Council request the City Manager to report to the first meeting of the new Executive Committee on a process for the 2011 budget which will ensure compliance with COTA and the Procedures By-law.**
- 3. City Council request the City Manager in preparing his report, to also include some options in terms of the budget process, having canvassed interested Councillors.**

Background:

The Budget Committee on March 29, 2010, considered a letter (February 26, 2010) from the City Clerk, entitled " City Council – New Business – CC46.1 – Open Meeting Investigation: Request to Investigate 2008-2009 Budget Committee Process".

for City Clerk

Merle MacDonald/mh

February 26, 2010

BUDGET COMMITTEE:

**Subject : City Council - New Business – CC46.1
Open Meeting Investigation: Request to Investigate 2008-2009 Budget
Committee Process**

City Council on February 22 and 23, 2010 adopted this Item as amended, and in so doing requested the Budget Committee to consider several options to remedy the deficiency found in the 2009 Operating Budget process, including:

- a. converting the committee briefings into open meetings held in compliance with COTA and the Procedures By-Law;
- b. holding the committee briefings in a closed session of a meeting of the Budget Committee for the purpose of “education” in compliance with COTA and the Procedures By-Law, including opening and closing the meeting in public, providing notice, with the presence of staff of the City Clerk to monitor and take minutes; or
- c. discontinuing the committee briefings stage of the budget process, and adopting some other process, ensuring that such a process complies with COTA and the Procedures By-law.

City Council also requested the Budget Committee to submit its recommendations on this matter to the May 11, 2010 meeting of City Council, through the Executive Committee.

Background Information (City Council)

(February 16, 2010) report from the Open Meeting Investigator on an Investigation of 2008-2009 Budget Committee Process (CC46.1)

for City Clerk

M. Toft/gc

Attachment

Sent to: Budget Committee
City of Toronto Open Meeting Investigator



Open Meeting Investigation: Request to Investigate 2008-2009 Budget Committee Process

Date:	February 16, 2010
To:	City Council
From:	Open Meeting Investigator
Wards:	All
Reference Number:	

SUMMARY

This Report arises from a request to investigate into the Budget Committee meetings of 2008-2009, which were alleged to be improperly closed meetings under the terms of the *City of Toronto Act* (“COTA” or the “Act”). Based on my investigation, and applying the definition of the term “meeting” under COTA, I conclude that three committee briefings conducted between November 2008 and January 2009, in which a quorum of the Budget Committee was present, constituted improperly closed meetings.

Because the committee briefings in question were held in camera, without notice to the public, and with no City Clerk staff present, it is impossible to know precisely what was said or discussed at the these briefings. While the line between a “meeting” and a “briefing” is not always easy to draw, in this case, the briefings involved more than communicating information from City staff to Budget Committee members, and included substantive input from the Committee members, which would be interpreted by a reasonable observer as materially advancing the business of the Budget Committee. In these circumstances, I find that these three committee briefings constituted closed “meetings.”

My conclusion that three meetings of the Budget Committee were improperly closed is not tantamount to a finding that the Committee, or any of its members, or City staff, intended to do anything improper. I found that the Committee members and the City staff involved in the 2009 Operating Budget process acted in good faith, and with the genuinely held belief that they were complying with the open meeting obligations under COTA, and that they were acting in the best

interests of the City. Without exception, those who provided information in these interviews did so willingly and cooperatively. My findings are not intended to assign blame, but to provide clarity around provisions of COTA which are, by their very nature, open to interpretation. The purpose of this Report is both to respond to the request for an investigation, and to provide a clearer understanding of the distinction between “briefings” and “meetings” within the context of the open meeting requirements of COTA.

RECOMMENDATIONS

The Open Meeting Investigator recommends that City Council request the Budget Committee consider several options to remedy the deficiency found in the 2009 Operating Budget process, including:

1. Converting the committee briefings into open meetings held in compliance with COTA and the *Procedures By-Law*;
2. Holding the committee briefings in a closed session of a meeting of the Budget Committee for the purpose of “education” in compliance with COTA and the *Procedures By-Law*, including opening and closing the meeting in public, providing notice, with the presence of staff of the City Clerk to monitor and take minutes; or
3. Discontinuing the committee briefings stage of the budget process, and adopting some other process, ensuring that such a process complies with COTA and the *Procedures By-Law*.

Financial Impact

There are no financial implications arising from the adoption of this report.

DECISION HISTORY

On January 1, 2008, I was appointed as the City of Toronto’s Open Meeting Investigator under COTA. This is the first Report to Council involving a request to investigate under COTA’s open meeting requirements. COTA provides that a person may request that an investigation of whether the City or a local board of the City has complied with the Act in respect of a meeting that was closed to the public be undertaken. Both the powers and investigation protocol of the Open Meeting Investigator may be found at <http://www.toronto.ca/committees/open-closed-meetings/index.htm#open>

On March 3, 2009, I received a request from a Councillor “to investigate and report on the Budget Committee for having private budget meetings that were not accessible to other Members of Council or the public.”

Between March and June, 2009, I interviewed the Chair, all members of the Budget Committee and all of the leading staff members of the City responsible for budgetary decision-making and the

Budget Committee meeting process, including the City Manager, the Deputy City Manager, the City Clerk and the City Solicitor. In all, I interviewed over 30 City officials. Additional information was obtained from the Budget Committee and City Staff through follow-up correspondence.

Interviews with City staff were suspended due to the labour disruption at the City in the summer of 2009. The interviews were completed in August and September of 2009.

In October of 2009 and again in December of 2009, I was asked to include in my investigation additional material obtained by the Councillor and/or fellow Councillors.

As a result of the iterative nature of this investigation, it has taken longer than anticipated to conclude this Report. In noting the process which the investigation followed above, I wish to emphasize that, without exception, those who provided information in these interviews did so willingly and cooperatively.

ISSUE BACKGROUND

In order to decide whether the City's budget committee process breaches the open meeting requirements set out in COTA, it is first necessary to provide a broad outline of that process, and the basis for the allegation in this instance that meetings were held which were improperly closed to the public.

A. The Budget Process

The City of Toronto's budget process is divided into two spheres: (1) the capital budget; and (2) the operating budget. The focus of this request to investigate primarily relates to the operating budget of the City though it has implications for all activities of the Budget Committee.

The Toronto Operating Budget is developed through a complex process involving at different junctures input and decision-making from both elected officials and staff. The focus of this investigation is on the process of developing the Budget, prior to the Budget Committee's first open meeting to discuss the Budget, which in 2009 was held on February 10, 2009.

The current process reflects a new process adopted by Council in 2005. The new process was justified as based on a longer term view, emphasizing upfront priority setting, service reviews and public consultation, and focusing on a link between resource allocation decisions and results and outcomes. This revised process is often referred to by budget staff as a "mature budget process."

The new budget process is organized into six phases:

1. on behalf of Executive Committee, the Mayor provides direction to bring forward recommended capital and operating budgets which implement Council's strategic priorities;

2. prior to finalizing the recommended budget, the Budget Committee holds detailed reviews on individual City Program and ABC budgets to ensure that the Executive Committee's directions have been met – this includes briefings to which all Budget Committee members and senior staff involved in the budgeting process are invited to attend;
3. when finalized, staff formally present a recommended budget to the Budget Committee;
4. the Budget Committee holds formal meetings to receive public presentations and input from councillors;
5. the Executive Committee conducts a review of the budget focuses on major fiscal and policy issues and confirm the budget reflects a strategic financial plan implementing Council policies and priorities; and
6. The Mayor, as Chair of Executive Committee, presents the operating and capital budgets to City Council for decision.

The budget process was the subject of a Council decision on January 12, 2007. At that meeting, Executive Committee adopted EX2.1 "2007 Operating and Capital Budget Guidelines". The Executive Committee took the following action:

"The Executive Committee:

1. directed the Budget Committee to implement the following as part of the 2007 Budget Process:
 - a. to recommend annual capital and operating budgets that align services with the Mayor's mandate and Council's policy agenda;
 - b. to ensure the efficient use of resources to deliver service results and outcomes;
 - c. to recommend budgetary strategies to the Executive Committee;
 - d. to hear public presentations on behalf of the Executive Committee; and
2. received the communication from Mayor David Miller"

The item also included a reference to the Budget Meeting Schedule.

On January 8, 2007, the Mayor provided a memorandum to the Executive Committee and Budget Committee outlining the 2007 Operating and Capital Budget Guidelines. This memorandum outlined a mandate to "fix the structural deficit within the next four years." The memorandum specified that "proposed balanced [capital and operating] budgets will be presented to the Budget Committee on February 8th and March 19th, respectively." The memorandum also specified budgetary direction in a number of substantive areas.

The role of the Budget Committee was described in a background document to the new budget process in the following terms:

"The Budget Committee will play an instrumental role in supporting the Executive Committee to fulfill its responsibilities for sound, strategic financial planning and budgetary decision-making and performance. Further, the Budget Committee will support the legislative process by providing recommendations and advice on the financial implications of matters before the Executive Committee and Council."

Of note, the new process envisioned a role for Standing Committees in conducting service reviews as part of the budget process. Service reviews focus on the link between corporate and community objectives and service delivery plans. This element was part of the process approved by Council in 2006, and was intended to be implemented by 2008. This aspect was not part of the 2008-2009 Operating Budget process and does not yet appear to have been implemented.

B. The 2009 Operating Budget

1. Mayor's Priorities

The 2009 budget cycle began with the issuing of the budgetary priorities from the Mayor's office. The Mayor's priorities were issued in August, 2008.

2. Staff Proposals

The second phase of the Operating Budget process is City budget staff led. Based on the Mayor's mandates, and considering the other dynamics which contribute to shaping the budget (available revenues, required expenditures, etc), staff develop proposals in all the relevant areas of the Operating Budget. These proposals are presented by staff to the City Manager and Deputy City Manager/Chief Financial Officer.

3. Detailed Briefings

The third phase of the Operating Budget process engages the Budget Committee for the first time, and consists of "detailed briefings."

The seven members of the Budget Committee for 2009 were: Councillors Shelley Carroll (Chair), Paul Ainslie, Maria Augimeri, Adrian Heaps, Joe Mihevc, Gord Perks and Kyle Rae. For the detailed briefings, the Committee was divided up into teams of two Councillors and assigned to each of the various Budget Clusters. The Councillors meet with staff members from the Financial Planning Division to review the budget proposals presented by staff.

For example, Cluster "A" consisted of the following programs: 3-1-1 Customer Service Strategy; Affordable Housing; Children's Service; Court Services; Economic Development, Culture and Tourism; Emergency Medical Services; Long-Term Care Home & Services; Parks, Forestry and

Recreation; Shelter, Support & Housing Administration; Social Development, Finance & Administration; and Social Services. Budget Committee members were paired up with each Cluster “A” program, so that Councillors Heaps and Rae participated in the detailed briefing involving Economic Development, Culture & Tourism, while Councillors Augimeri and Perks were assigned to the detailed briefing for Social Services. In this fashion, at least one pair of Budget Committee members receives a briefing for the proposed Operating Budget for each program under each Cluster.

The detailed briefings occurred for the most part during October and November of 2008. Councillors indicate, and City budget staff confirm, that the Councillors’ role in these briefings is to ensure that the staff proposals are clear and intelligible, and to provide “political feedback” on the proposals. As one Budget Committee member stated, Committee members “peel back the onion” on the budget numbers during the detailed reviews and look for “what might stick out like a sore thumb.” Leaving the mixed metaphors aside, it is clear that the detailed briefings serve a valuable function both for staff and Budget Committee members to refine and enhance the quality of the budget documents which go forward. As these briefings do not involve a quorum of Committee members, and as there is no indication that Committee members coordinate their input at this stage of the Operating Budget process, in light of the analysis set out below, the detailed briefings, which are not open to the public, do not constitute closed meetings within the meaning of COTA or the *Procedural By-Law*.

4. Committee Briefings

The fourth stage of the Operating Budget process is first stage to involve a quorum of the Budget Committee, meeting together with senior City staff to review the budget proposal. These meetings are described by Budget Committee members as “broader briefings,” “committee briefings” or “briefing meetings.” For simplicity, I will use the term “committee briefings” when referring to them. The following three committee briefings involved a quorum of Budget Committee members:

i. The Operating Budget Overview on November 3, 2008

This committee briefing was attended by Budget Committee members, Carroll (Chair), Ainsle, Heaps, Mihevc and Perks, in addition to four senior City Financial Planning staff and a representative of the Mayor’s office.

ii. The Operating Budget Overview on December 22, 2008

This committee briefing was attended by Budget Committee members Carroll (Chair), Heaps, Mihevc, and Rae, in addition to the City Manager, Deputy City Manager, four senior City Financial Planning staff and a representative of the Mayor’s office.

iii. The Operating Budget Review of January 9, 2009

This committee briefing was attended by Budget Committee members Carroll (Chair), Ainsle, Heaps, Mihevc, Perks and Rae, in addition to the City Manager, Deputy City

Manager, one member of the senior City Financial Planning staff and a representative of the Mayor's office.

These committee briefings were not constituted as meetings within the meaning of COTA and the *Procedures By-Law*. No notice of the briefings was provided to the public or other Councillors, no official minutes were kept of these committee briefings, nor were any City Clerk staff present during the committee briefings. There is no record of any votes or decisions being taken by the Committee at or as a result of the committee briefings, and in fact the evidence from both the Committee members and City staff present was that no votes or decisions were taken at or as a result of the committee briefings in question.

The Agendas for the committee briefings varied in terms of their detail. For example, the agenda for the December 22, 2008 committee briefing consisted of three items:

1. Corporate Summary – Update,
2. Balancing Strategies, and
3. Next Steps

By contrast, the agenda for the January 9, 2009 committee briefing was detailed, including six items and seven sub-items. One item was labelled "Budget Committee Recommended Actions."

The materials for these committee briefings also varied, and consisted of Operating Budget briefing notes, drafts of budget documents entitled "2009 Staff Recommended Operating Budget," "2009 Operating Budget – New and Enhanced Services Summary of Administrative Review – Recommended," and spreadsheets with budgetary data marked "Confidential – For Discussion Purposes Only."

5. Introduction of the Operating Budget

The fifth and final stage of the Operating Budget process is the presentation of the proposed Budget by the Budget Committee. The 2009 Operating Budget was introduced by the Budget Committee on February 10, 2009, and further open meetings were conducted by the Committee on February 17, 2009 (for other Councillors) and on February 18, 2009 (for members of the public). The Executive Committee considered the Budget on March 24, 2009. At its meeting of March 31, 2009, Council approved the 2009 Budget Committee Recommended Tax Supported Operating Budget of \$8.701 gross and \$3,438 billion net, and related budget motions.

While the request for an investigation referred to the budget process generally, for the reasons set out below, only the three committee briefings described above contravene the open meeting requirements under COTA.

C. Analysis

My analysis takes as its point of departure the provision of COTA requiring that all meetings of committees of Council be open to the public.

Meetings open to public

190. (1) Except as provided in this section, all meetings shall be open to the public. 2006, c. 11, Sched. A, s. 190 (1).

Exceptions

(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

- (a) the security of the property of the City or local board;
- (b) personal matters about an identifiable individual, including a city employee or a local board employee;
- (c) a proposed or pending acquisition or disposition of land by the City or local board;
- (d) labour relations or employee negotiations;
- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the City or local board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose; or
- (g) a matter in respect of which the city council, board, committee or other body may hold a closed meeting under another Act. 2006, c. 11, Sched. A, s. 190 (2).

It is also important to keep in mind the City of Toronto's *Procedures By-Law*, which stipulates the process to be followed when a meeting of a committee is convened – this process includes a requirement that there must be notice of the meeting:

Article V, §27-26 Notice of meeting

A. Chapter 162 of the Municipal Code, Notice, Public.

Written notice of all meetings, and of cancelled meetings, must follow Chapter 162, Notice, Public.

B. 24-hour notice.

Members must be notified at least 24 hours before the scheduled beginning of the meeting.

C. Meeting details.

The notice must include the time, date, and location of the meeting.

D. Purpose.

The notice must state the purpose of the meeting.

E. Delivery modes.

The notice must be delivered either in person or sent by e-mail to each member.

F. Council policy requirements.

The notice must include any additional information that Council policy requires.

The *Procedures By-Law* also addresses the requirement that all meetings are open to the public, apart from the exceptions which are consistent with those set out under COTA:

§ 27-37. Meetings open to the public

Except for meetings as described in § 27-38, all meetings are open to the public, and no person is excluded from a meeting except for improper conduct under §§ 27-20 and 27-48.

§ 27-38. Closed meetings

A. Subjects for closed meetings.

Council or a committee may close a meeting to the public to discuss the following:

- (1) Security of the City's or a local board's property;
- (2) Personal matters about an identifiable individual, including City or local board employees;
- (3) A proposed or pending land acquisition for City or agency purposes;
- (4) Labour relations or employee negotiations;
- (5) Litigation or potential litigation, including matters before administrative tribunals, affecting the City or a local board;
- (6) Receiving advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- (7) A matter for which Council, a board, a committee or other body has authorized a meeting to be closed under another Act; or
- (8) A request under the *Municipal Freedom of Information and Protection of Privacy Act*.

Where one of the exceptions justifying a portion of a meeting being closed to the public, the *Procedures By-Law* sets out the process by which a closed meeting may be held, including the fact that such a meeting must always begin and end in open session:

§ 27-38. Closed meetings

B. Meeting's beginning and end always public.

A meeting begins and ends in public.

C. Motion details for closed meeting.

- (1) Before holding a closed meeting, Council or a committee passes a motion to hold a closed meeting.
- (2) The motion states:

- (a) That the meeting is a closed meeting;
- (b) The general nature of the matter Council or committee is considering at the closed meeting; and
- (c) The reasons the matter requires a closed meeting under Subsection A.

D. Closed meetings of Council are meetings of committee of the whole.

When Council considers a matter in a closed meeting, it does so in committee of the whole.

E. When a closed meeting becomes public.

(1) If the matter Council or committee is considering at a closed meeting no longer falls into one of the categories set out in Subsection A, the meeting is no longer a closed meeting and continues in public.

(2) Council or committee in a closed meeting do not vote or keep minutes except for:

- (a) A procedural matter; or
- (b) Giving directions or instructions to City officials or agents, agencies, or persons retained by, or under a contract with, the City or a local board.

Finally, the *Procedures By-Law* also sets out the role of the City Clerk in relation to recording, monitoring and supervising the process of moving from open to closed meetings, and from closed to open meetings:

§27-49. Clerk's Responsibilities.

A. The Clerk is the meeting manager of Council and of all committees, and may assign any of his or her duties to an employee in the Clerk's office.

B. The Clerk is responsible for:

(1) Managing agenda deadlines.

Establishing and enforcing deadlines for agenda business.

(2) Managing agenda and meeting notices.

Preparing, publishing, and distributing an agenda for each meeting, and providing appropriate notice.

(3) Standing in for Chair.

In the absence of the Chair or any other member designated to Chair in the Chair's absence, calling the meeting to order and presiding until Council or committee immediately elects a meeting Chair.

(4) Giving members advice.

Providing procedural advice to members on agenda business and on preparing motions.

(5) Managing agenda additions or removals.

Informing the Chair and Council or committee when items need to be added to or removed from the agenda.

(6) Advising on parliamentary procedures.

Serving as the parliamentary expert to Council and committees by advising the Chair on the meeting rules and on matters of parliamentary procedures.

(7) Advising on errors in procedures.

Calling to the attention of the Chair any error in proceedings that may affect the rights of any member, Council, or committee.

(8) Advising Council on rules.

Advising Council, committee, or members on matters of procedure subject to the duty of the Chair to make the final ruling.

(9) Advising on closed meeting rules.

Informing the Chair, if, in the Clerk's opinion, an issue that Council or a committee is discussing in a closed meeting is not procedurally appropriate under the Act or the procedures by-law.

(10) Recording all Council and committee business.

Taking minutes and keeping a record of all the proceedings, including the votes, of Council and committees.

(11) Certifying copies.

Certifying copies of by-laws.

(12) Maintaining all documents.

Maintaining records of the by-laws, special rules of order, standing rules, and minutes, including any amendments to these documents.

(13) Recording all members' appointments.

Maintaining a record of Council's appointments of persons to committees, public advisory bodies, agencies and other bodies.

(14) Allowing access to records.

Making the minutes and records of Council meetings and committee meetings available to members and the public on request, in accordance with any applicable law and subject to receiving payment of any fee Council has approved.

(15) Council-assigned duties.

Performing other duties that Council assigns.

The *Procedures By-Law* also sets out the responsibilities and composition of Special Committees of Council. Appendix B-II, 4 establishes the Budget Committee, and provides:

4. Budget Committee.

The Budget Committee is a Special Committee of City Council established until City Council decides otherwise.

A. Responsibilities.

The responsibilities of the Budget Committee include, but are not limited to:

- (1) Co-ordinating the preparation of the capital and operating estimates while the annual capital and operating budgets are being developed;
- (2) Making recommendations on the capital and operating budgets; and
- (3) Reviewing other matters that may have a significant impact on a future budget, upon request from the Executive Committee.

B. Composition.

The Budget Committee consists of seven members, including a Chair that the Executive Committee elects from its members.

C. Reporting.

The Budget Committee reports to the Executive Committee.

D. Meeting Support.

The Clerk provides meeting support to the Budget Committee

There are few factual disputes arising from this investigation. There is no disagreement as to when the committee briefings occurred, who attended, and the subject-matter discussed at the briefings. Because the committee briefings were not perceived by the Budget Committee or City staff as “meetings,” no attempt was made to comply with the procedure set out in the *Procedures By-Law*. The Clerk was not consulted on the process used for convening the committee briefings, nor was notice of the briefings provided to the public. It is not in dispute that if the committee briefings were “meetings,” within the meaning of that term under COTA and the *Procedures By-Law*, then those meetings were improperly closed to the public. Therefore, the key issue to resolve in this vein is whether the committee briefings constitute a “meetings.”

The term “meeting” is not defined under the COTA. However, in drawing a distinction between a meeting and a training or education session (in s.190(3.1)), COTA provides that a meeting may be closed if it is held for the purpose of educating or training, and “at the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of council, local board or committee.” (Emphasis added.)

From this passage, I interpret that a “meeting” in this context requires a gathering of or communication between Budget Committee members, where a matter is dealt with in a way that materially advances the business or decision-making of the Budget Committee.

A “meeting” of Council, a local board or a committee also implies that quorum must be present, and this requirement is reinforced by both by COTA and the *Procedures By-Law*, which sets out that the quorum requirement for a meeting is a majority of the committee’s members.

Without a quorum of Budget Committee members present, in other words, there can be no “meeting” of the Budget Committee. For the Budget Committee in 2009, this would mean the quorum requirement was four members. Therefore, as mentioned above, none of the detailed briefings attended by staff and teams of two Committee members would constitute quorum. In other words, even if the two Committee members did attempt to advance the business of the Committee, a briefing or other gathering with only two members present could not constitute a meeting. That said, if the Committee met or communicated in order to coordinate an approach to the detailed briefings, they could violate the open meeting requirements under COTA. For example, hypothetically, if the Committee members took the view that a ceiling on the number of new employees approved in the operating budget should be enforced, and all Committee members agreed to follow this approach in their individual detailed briefings, the act of coordinating a shared approach may well constitute a “meeting” even if these communications were conveyed in separate phone calls, emails, and conversations involving one or two members at a time.

While quorum is significant, the determining feature of whether a meeting has taken place is whether the business of the committee has been materially advanced. In my investigation, I found no evidence of this kind of coordinated approach or attempt to influence the “detailed briefing” third phase of the Operating Budget process.

A quorum of the Budget Committee was present in each of the three committee briefings which I have identified as the fourth phase of the Operating Budget process. The Committee members with whom I spoke indicated that the committee briefings were not “meetings” of the Committee in their view because they were led by City staff and their purpose was to advance the staff-led part of the Operating Budget process. The Committee members asserted that the committee briefings did not result in or advance any decision-making by the Committee. City staff with whom I spoke echo the Committee members’ characterization of the committee briefings.

While the Committee members’ and staff impression of the committee briefings is relevant to my investigation, it is not determinative of the issue of whether the committee briefings were “meetings.”

In his report entitled, “Don’t Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal,” the Ontario Ombudsman investigated whether a “meeting” had taken place when group of Sudbury Councillors talking in a hallway about how to give back Elton John tickets which had been set aside for and purchased by Councillors without having to go through the ordinary process. In that Report, the Ontario Ombudsman offered the following observation on the judicial consideration of the definition of a meeting for purposes of the open meeting requirements of the *Municipal Act, 2001* (provisions which are substantially similar to those set out under COTA):

"There are cases where it is obvious that a get-together is being undertaken by a council or a committee in its capacity as such. This will ordinarily be obvious because of the formal trappings surrounding the event, such as where the event in issue is a regularly scheduled meeting, or where actions consistent with the conduct of meetings by that body, such as singing O Canada, or taking minutes, or appointing a chair, have been complied with. In the *Southam Inc. v. Ottawa Council* case, in finding that a meeting of council had occurred, the Court observed that councillors had met "to discuss [matters] in a structured way." Similarly, in *City of Yellowknife Property Owners Assn. v. Yellowknife (City)*, the decision that weekly "briefing sessions" conducted by council were actually subject to open meeting legislation was aided by the fact that there were agendas, there was someone to serve as meeting chair, minutes were taken, as were straw polls and show-of-hands votes. The meetings were structured in the way the body would ordinarily be expected to act as a body, making the finding that they were "meetings" subject to open meeting legislation easier.

In *Hamilton-Wentworth*, Justice Grange relied on the fact that members of council were summoned formally to find that it was a meeting of a municipal council. He observed that "when all members [of a committee] are summoned to a regularly scheduled meeting and there attempt to proceed in camera, they are defeating the intent and purpose of [secret meeting rules.]" It was in this context that Justice Grange suggested that a meeting is "a gathering to which all [committee members] are invited."

But if the legislation is to be applied effectively, the formality of an invitation cannot be a necessary condition. To so hold would exempt impromptu gatherings by the relevant body, such as a spontaneous decision to deal with business not revealed on a formal agenda after the public leaves. The defect in Justice Grange's insistence on the formality of invitation was recognized by the Divisional Court in *Southam Inc. v. Ottawa Council*. There, the definition offered by the majority of the court provided that a meeting could be held in the absence of a request, where councillors or committee members do attend without summons. As the Court made clear, "it is not a question of whether ... the ritual trappings of a formal meeting of council are observed." (Footnotes omitted)¹

While the findings of the Ombudsman are not binding on my interpretation of COTA, I find a similar approach is warranted in the context of the scope of a "meeting" for the purposes of the open meeting requirements under COTA. It is clear to me that the mere characterization of the coming together of the Budget Committee members and City staff as "briefings" does not answer the question as to whether they were meetings for the purpose of the open meeting provisions COTA. Similarly, the fact that no formal votes or minutes were taken is not determinative of whether the committee briefings constituted "meetings." Rather, the test I have adopted is whether, in light of all the circumstances, a reasonable observer would conclude that a gathering of, or communication between a quorum of committee members, whether characterized as a meeting or

¹ Ontario Ombudsman, "Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal" at <http://www.ombudsman.on.ca/media/32463/sudburyreporteng2.pdf>, at paras. 62-5.

not, materially advanced the business of the committee. I now turn to applying this test to the circumstances of this investigation.

The concerns of the Councillor who requested this investigation include both the allegation that the Budget Committee participated in improperly closed meetings, but also a broader perception that the important work of fashioning the City's Operating Budget takes place in secret, with senior City staff and Budget Committee Councillors working in tandem to craft a budget away from the "prying eyes" of Councillors who are not on the Budget Committee, and away from the scrutiny of the media and the public.

The Budget Committee's response is that no meetings were held by the Budget Committee prior to the open, public meetings in February 2009, and that the many occasions in which members of the Committee came together with senior staff or each other, all constituted briefings of one kind or another, as part of the staff-led, mature budget process. The Committee members believe the input they provide at the committee briefings, as in the earlier detailed briefings, provide City staff with valuable political perspective.

Specifically, the Committee and staff participants at the briefing sessions described the input from Committee members in slightly different terms. Councillors described their own role as "to become better educated about the budget proposals," "to provide political feedback on what would be difficult to see to Council or to the public," "to test the justifications and probe the basis for the proposals," "to identify anomalies," "to clarify the areas which are not communicated clearly or accessibly," and so forth. Staff described Committee members as providing a "political read" on proposals. Both the Committee members and City staff acknowledged that it was not uncommon for the staff Operating Budget proposals to be modified as a result of the discussions occurring during the committee briefings. Where such modifications occurred, those who attended the committee briefings emphasized that they were the result of staff decision-making on the Operating Budget proposal.

Based on my investigation, I have found no basis on which to doubt the truth of the accounts provided by Budget Committee members and City staff who participated in the committee briefings. In other words, I accept that no votes and no decisions were taken by the Budget Committee at the three briefing meetings which are the focus of this investigation.

The purpose of the open meeting provisions of COTA is to enhance public confidence in City government, to ensure accountability for City decision-making, and to express a commitment to transparency and openness in the exercise of power by the City. The purposive nature of the open meeting requirements under COTA militate for interpreting the scope of a "meeting" in a broad and functional rather than narrow and technical manner.

With this legislative intent in mind, I conclude that where a quorum of the Budget Committee is present, and there are substantive discussions between Committee members and staff regarding the content and rationale for the Operating Budget which either result in changes to the outcome of the budget proposals, or may have such an influence, a presumption is established that a "meeting" has taken place in which the business of the Committee has been "materially advanced." Once this

presumption has been established, it falls to the Budget Committee to demonstrate that notwithstanding the presence of a quorum of the Committee, and notwithstanding the substantive discussions which include the active input of Budget Committee members, the business of the committee was not in fact materially advanced during these briefings.

To rebut this presumption, it is insufficient for the Committee to say, in effect, "trust us, we did not materially advance the business of the Committee." The Committee must point to objectively verifiable indications that the business of the Committee was not materially advanced. Since no official notes or minutes were taken at the committee briefings, and since there is no way to be certain what precisely was or was not discussed (and recollections appear to vary as to the nature of particular exchanges between staff and committee members), and since those present at the committee briefings all indicated that it is not uncommon for certain aspects of the proposed Operating Budget to be modified as a result of the Committee members' feedback through the committee briefings, I cannot find in these circumstances a basis on which to rebut the presumption that the committee briefings constituted meetings of the Budget Committee.

Other circumstantial factors also lead to the impression that the committee briefings materially advanced the business of the Budget Committee. In correspondence surrounding the scheduling of these sessions, for example, the committee briefings are routinely referred to as "meetings" of the Budget Committee. In one instance, where a staff member of a Budget Committee member asked whether it was important that his boss attend the Operating Budget Overview on December 22, 2008, the response was, "If [the Councillor] absolutely cannot make the meeting, that is fine. However, it is suggested that he try to attend this meeting, as there will be some important discussions re. the operating budget and his insight would be useful." This example is indicative of a range of correspondence between Councillors, their staff, the Mayor's staff, Financial Planning staff and others, all referring to "discussions" of the Operating Budget, and the importance of the "insight" and "input" of Committee members. The notes taken by Committee members in the margins of the material circulated by staff at the committee briefings further reinforces the view that the purpose of the committee briefings was to discuss the Operating Budget proposal and, if possible, to resolve points of potential, political contention, rather than simply to convey information from the City staff to Councillors.

The concern that the Budget Committee process was too secretive did not surface with this investigation. That concern became part of the budgetary debate over the 2009 Operating Budget. For example, on February 18, 2009, in response to criticisms of the budget process in the media, the Chair of the Budget Committee was quoted as stating that in camera sessions of the Budget Committee are not meetings if no votes or minutes are taken. In response to this claim, the City Clerk reiterated to the Chair that,

"The test for whether something constitutes a meeting involves many factors. Chief among these are the presence of quorum of Members and whether the body advanced any business or decision-making within its mandate. It is possible to advance business without taking votes or minutes."

The Clerk has also reiterated to all Councillors that COTA and the *Procedures By-Law* provide a clear and transparent process for meetings to be closed so as to provide education and training for Committee members.

Where a meeting is closed in order to provide education and training, it also means that safeguards are in place to ensure that education and training is the only purpose of the meeting. In his report entitled, "The ABCs of Education and Training," the Ontario Ombudsman considered the scope of the "education" exception to the open meeting requirements, and provided this helpful caution:

"While there are an infinite number of topics that could potentially form the subject of an education session, it must be clear that the purpose of such a meeting relates to education only. Any attempt to rely on this exception must be carefully scrutinized. A municipality cannot simply circumvent the open meeting law by characterizing a subject normally considered in open session as "educational." If the committee doors are closed on the basis that an education session is taking place, other topics that are not strictly educational in nature cannot be discussed." (Emphasis in original)²

Arguably, if the main purpose of the committee briefings is to inform the Budget Committee of the development of the proposed Operating Budget, such briefings fall within the contemplated scope of the education exception to the open meeting requirement. Further, where a meeting is closed on this basis, there is notice provided, minutes taken, and a City Clerk staff member present to monitor the closed session of the meeting. This process was used recently by the Economic Development Committee which sought a briefing from leading business experts on the implications of the recession on Toronto. This process provides for exactly the objective standards of compliance with COTA and the *Procedures By-Law* which I have concluded are missing in the committee briefing process.

While my conclusion is that committee briefings constituted meetings which were improperly closed, I do not conclude that the Budget Committee cannot participate in a briefing from City staff on a proposed budget. Rather, if the Budget Committee wishes to do so, it must decide between three options: (1) continue the existing committee briefing process but conduct such sessions as open meetings of the Committee; (2) modify the existing, confidential briefing process and follow the process for moving from an open meeting into a properly closed meeting for purposes of "education," following the steps set out in the *Procedures By-Law*; or (3) adopt a different budget process, with or without the committee briefings, which complies with the open meeting requirements under COTA and the *Procedures By-Law*.

My conclusion that three meetings of the Budget Committee were closed in a manner not in compliance with COTA is not tantamount to a finding that the Committee, or any of its members, or City staff, intended to do anything improper. To the contrary, my investigation revealed that both the Committee members and the City staff involved in the budget process and the committee briefings in particular, acted in good faith, and with the genuinely held belief that the briefings

² Ontario Ombudsman, "The ABCs of Education and Training," at <http://www.ombudsman.on.ca/media/44626/oshawamay08final.pdf>, At para. 29.

were consistent with the open meeting obligations under COTA, and in the best interests of the City and the budgeting process. I also wish to reiterate that, without exception, those who provided information in these interviews did so willingly and cooperatively. My findings are not intended to assign blame, but to provide clarity around provisions of COTA which are, by their very nature, open to interpretation. The purpose of this Report has been both to respond to the request for an investigation, and to provide a clearer understanding of the distinction between “briefings” and “meetings” within the context of the open meeting requirements of COTA.

Conclusion

- Based on my investigation, and for the reasons set out in this Report, I find that the three committee briefings held on November 3, 2008, December 22, 2008 and January 9, 2009, with a quorum of Budget Committee members present, were closed meetings which were not in compliance with COTA. No other aspect of the 2009 Operating Budget process was inconsistent with the open meeting requirements of COTA.

Recommendations

- The Budget Committee may consider several options to remedy the deficiency in the 2009 Operating Budget process described in this Report, including:
 - (1) converting the committee briefings into open meetings held in compliance with the *Procedures By-Law*;
 - (2) holding the committee briefings in a closed session of a meeting of the Budget Committee for the purpose of “education” in compliance with COTA and the *Procedures By-Law*, including opening and closing the meeting in public, providing notice, with the presence of staff of the City Clerk to monitor and take minutes; or
 - (3) discontinuing the committee briefings, and adopting some other process, ensuring that such an alternative process complies with COTA and the *Procedures By-Law*.

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SIGNATURE

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