

SENT BY EMAIL

Board of Directors of the Hamilton Farmers' Market
c/o Elly Bowen, Chair
35 York Boulevard
Hamilton, ON L8R 3K1

January 5, 2022

Dear Chair Bowen:

Re: Complaints about the meeting practices of the City of Hamilton Farmers' Market

My Office received complaints about the meeting practices of the Board of Directors of the City of Hamilton Farmers' Market. I am writing to share the outcome of my review of these complaints.

The complainant alleged that the Hamilton Farmers' Market Board of Directors is a local board and therefore subject to the open meeting rules under the *Municipal Act, 2001* (the "Act"). They told us that the Board failed to provide public notice for a special meeting held virtually on September 28, 2020, contrary to the Act. The complainant also said that the Board held a "Marketing Advisory" meeting on March 23, 2021, which was neither advertised nor open to the public.

I am writing to advise that my review – in my capacity as closed meeting investigator for the City of Hamilton (the "City") – has determined the Hamilton Farmers' Market is a municipal services corporation. As municipal services corporations are deemed not to be local boards by section 21 of O. Reg 599/06 under the Act, the Hamilton Farmers' Market Board of Directors is not subject to the open meeting rules under the Act.

However, alongside its position as a municipal services corporation, the Hamilton Farmers' Market is also a municipally-controlled corporation, and as such, it is subject to Ombudsman oversight under my Office's general municipal jurisdiction. The Ombudsman's municipal jurisdiction enables us to promote good governance by making recommendations that enhance public administration. My review in this capacity revealed that while the Board is not subject to the open meeting rules under the Act, it

has adopted its own procedural rules that require it to hold meetings open to the public unless the discussion falls within a prescribed exception. However, these rules are silent on providing notice of meetings to the public. As a best practice, in order for the Board's meetings to be meaningfully open to the public, it should amend its rules to require that adequate notice be provided to the public in advance of meetings.

Ombudsman's role and authority

As of January 1, 2008, the *Municipal Act, 2001* gives anyone the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own. The Ombudsman is the closed meeting investigator for the City of Hamilton.

In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's governing procedures have been observed.

Our Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman's decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of many of the Ombudsman's previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Review

We notified the City of our investigation on November 27, 2020. My Office spoke with City staff and the former Board Chair, who provided us with documentation regarding the creation and governance of the Board. We reviewed the Board's incorporating documents, procedure by-law, operating agreement, and governance framework as well as meeting agendas and minutes. We also reviewed relevant sections of the Act and associated regulations.

483 Bay Street, 10th Floor, South Tower / 483, rue Bay, 10^e étage, Tour sud
Toronto, ON M5G 2C9

Tel./Tél. : 416-586-3300 Facsimile/Télécopieur : 416-586-3485 TTY/ATS : 1-866-411-4211
www.ombudsman.on.ca

Facebook : facebook.com/OntarioOmbudsman Twitter : twitter.com/Ont_Ombudsman YouTube : youtube.com/OntarioOmbudsman



Analysis

The Hamilton Farmers' Market Board is not a local board subject to the open meeting rules

The open meeting rules apply to municipal councils, local boards, and committees of either of them. Section 21 of O. Reg 599/06 under the Act states that a municipal services corporation is “not a local board for the purposes of any Act”.¹

City staff explained that the Hamilton Farmers' Market is a municipal services corporation, as it was established in accordance with specific requirements set out in O. Reg. 599/06 made under the Act. We reviewed documentation provided by the City confirming that the establishment of the Hamilton Farmers' Market complied with the statutory prerequisites to qualify as a municipal services corporation. As municipal services corporations are deemed not to be local boards, the Board is not a local board subject to the open meeting rules.

The Hamilton Farmers' Market is a municipally-controlled corporation subject to the Ombudsman's jurisdiction under the Ombudsman Act

While the open meeting rules apply only to municipal councils, local boards, and committees of either of them, my Office has had jurisdiction to review complaints about municipalities since January 1, 2016. Under the *Ombudsman Act*, my Office can review and investigate complaints about municipal sector entities, which includes municipalities, local boards, and municipally-controlled corporations.

“Municipally-controlled corporation” is defined as a corporation that has 50 per cent or more of its issued and outstanding shares vested in a municipality or that has the appointment of a majority of its board of directors made or approved by a municipality.

The Hamilton Farmers' Market letters patent establish it as a not-for-profit corporation, without share capital. The City is the sole shareholder and voting member of the corporation. In addition, the City appoints the entire Board of Directors. Accordingly, the Hamilton Farmers' Market is a municipally-controlled corporation, and thus within the Ombudsman's general municipal jurisdiction.

¹ O Reg 599/06: Municipal Services Corporations, s. 21 under *Municipal Act, 2001*, S.O. 2001, c. 25.



The Board's operating agreement and procedure by-law impose obligations on the Board with respect to meetings

The Hamilton Farmers' Market has adopted procedural rules governing the meetings of the Board. These are set out in its operating agreement with the City and its procedure by-law. Under its operating agreement with the City of Hamilton and procedure by-law, the Hamilton Farmers' Market Board of Directors' meetings are to be open to the public, except where otherwise permitted under the Act. Before closing a meeting, the Board must pass a resolution stating the general nature of the matter to be considered in closed session. The Board is not permitted to vote in closed session unless it is for a procedural matter or for giving directions or instructions. These provisions mirror the open meeting rules under the Act.

The procedure by-law contains provisions relating to notice of Board meetings. Notice of regular meetings is given to Board members by providing a copy of the resolution fixing the place and time of regular meetings. Special meetings may occur with not less than 48 hours' notice (excluding Sundays and holidays) to each Board member.

In light of the clear intention that Board meetings be open to the public unless they fall within an exception under the Act, I encourage the Board to amend its procedure by-law to reflect its practice of providing public notice, setting out the date, time and location of each Board meeting.

As I have previously noted, the public does not have the opportunity to attend and observe a meeting if no notice about the time and location of the meeting is provided in advance. In such circumstances, the meeting is effectively closed to the public contrary to the open meeting requirements.²

Conclusion

As a municipal services corporation, the Hamilton's Farmers' Market Board of Directors is not subject to the open meeting rules under the *Municipal Act, 2001*. However, the Board has adopted its own procedural rules which require it to hold Board of Directors' meetings open to the public.

² *Kirkland Lake (Town of) (Re)*, 2017 ONOMBUD 19, online: <<https://canlii.ca/t/hqspk>>; *Hornepayne (Township of) (Re)*, 2016 ONOMBUD 20, online: <<https://canlii.ca/t/h2st9>>; *Magnetawan (Municipality of) (Re)*, 2015 ONOMBUD 20, online: <<https://canlii.ca/t/gtp6h>>.



To improve accessibility, transparency and accountability, I urge the Board to amend its procedure by-law to require that public notice be given for all meetings, setting out the date, time and location of the meeting.

I would like to thank the Board for its co-operation during my investigation. The Chair has confirmed that this letter will be included as correspondence at the next available meeting of the Board and will be shared with the City of Hamilton.

Sincerely,



Paul Dubé
Ombudsman of Ontario

Cc: Council for the City of Hamilton, c/o Andrea Holland, City Clerk

483 Bay Street, 10th Floor, South Tower / 483, rue Bay, 10^e étage, Tour sud
Toronto, ON M5G 2C9

Tel./Tél. : 416-586-3300 Facsimile/Télécopieur : 416-586-3485 TTY/ATS : 1-866-411-4211
www.ombudsman.on.ca

Facebook : facebook.com/OntarioOmbudsman Twitter : twitter.com/Ont_Ombudsman YouTube : youtube.com/OntarioOmbudsman

