



Ombudsman Report

Investigation into complaints about
closed meetings held by the Municipality
of Temagami

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Ombudsman of Ontario
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Complaints

- 1 My Office received complaints that council for the Municipality of Temagami (the “Municipality”) held meetings on June 13 and November 7, 2019 that did not fit within the closed meeting exceptions in the *Municipal Act, 2001*¹ (the “Act”). The complaint about the June 13 closed session alleged that council’s discussion about a harassment complaint did not fit within the exceptions. The complaint about the November 7 meeting alleged that council’s discussion about an integrity commissioner investigation did not fit within the exceptions.
- 2 My Office also received a complaint that seven council meetings in 2019 and 2020 did not adhere to the open meeting rules. The meetings took place on June 13, August 8, October 17, November 7, and November 28, 2019, and January 28 and March 12, 2020. In particular, the complaint alleged that notice for the meetings was insufficient and that the meeting minutes were incomplete.

Ombudsman jurisdiction

- 3 Under the *Municipal Act*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 4 As of January 1, 2008, the Act gives citizens 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.
- 5 The Ombudsman is the closed meeting investigator for the Municipality of Temagami.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.
- 7 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

¹ SO 2001, c 25.

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 procedure. Summaries of the Ombudsman's previous decisions can be found in the digest:
www.ombudsman.on.ca/digest.

Investigative process

- 8 On November 26, 2019, we advised the Municipality of our intent to investigate the November 7, 2019 meeting, which was a special meeting of council. On February 26, 2020, we advised the Municipality of our intent to investigate the June 13, 2019 meeting. On October 22, 2020, we advised the Municipality of our intent to investigate the meetings on August 8, October 17, and November 28, 2019, as well as on January 28 and March 12, 2020.
- 9 Members of my Office's open meeting team reviewed relevant portions of the Municipality's by-laws and policies, and the Act. We reviewed the meeting records from the meetings in question. We interviewed members of council, the Clerk, and the Treasurer/Administrator.
- 10 The Municipality audio records its open and closed council meetings. We obtained and reviewed the recordings of the meetings, which greatly assisted in our investigation. We commend the Municipality of Temagami for its practice of audio recording closed meetings, as this provides investigators with an accurate and complete meeting record.
- 11 My Office received full co-operation in this matter.

June 13, 2019 closed meeting of council

- 12 Council held a regular meeting on June 13, 2019. According to the meeting agenda, a closed session was scheduled to occur prior to the meeting's open session.
- 13 The audio recording of the meeting does not capture council's resolution to proceed *in camera*. In addition, the open session minutes do not record the resolution to move *in camera*, but state that "having passed the appropriate resolution in open session, Mayor O'Mara called the closed session to order".

- 14 The closed session minutes record that council discussed two items under the “personal matters” and “litigation or potential litigation” exceptions to the open meeting rules. One of the items discussed was a staff report titled “Harassment Claims Update”. The Clerk told our Office that the exception for litigation or potential litigation applied to the agenda item “Update on Freedom of Information Process”, while the exception for personal matters about an identifiable individual applied to the item “Harassment Claims Update”.
- 15 The audio recording of the closed meeting captured council’s discussion regarding the harassment claims update. The Mayor informed council that the Municipality had received a workplace harassment complaint and the complaint would be referred to an external investigator. The Mayor indicated that the nature of the complaint and the identity of the individuals involved were confidential. He stated that he could not provide any further information to council in order to protect the integrity of the complaint process.
- 16 The discussion also included a brief period of questions from council members. One council member asked about potential costs associated with an external investigation. Another council member asked about the status of other ongoing investigations into harassment complaints. The Mayor and staff responded to the questions.
- 17 The identities of the persons involved in the harassment complaint were not disclosed during the closed session. However, five individuals we interviewed told us that they knew who was involved, including who made the complaint. Some of the people we interviewed said they were already aware of the facts surrounding the complaint, and others told us they were able to “read between the lines” of the Mayor’s comments. Two interviewees had no knowledge of the nature of the harassment complaint or who was involved.
- 18 After returning to open session, council reported that it had received an update on a harassment claim while *in camera*.

Applicability of the “personal matters” exception

- 19 The Municipality cited s. 239(2)(b), personal matters about an identifiable individual, when it moved into closed session to discuss the harassment complaint on June 13, 2019.

- 20 The Information and Privacy Commissioner (IPC) has found that information will only qualify as personal for the purposes of the Act if it pertains to an individual in their personal capacity, rather than their professional capacity. However, information about a person in their professional capacity may still qualify if it reveals something personal about the individual.² Discussions about an individual's conduct will generally be considered personal.³
- 21 In a report to the Town of Amherstburg, my Office found that a discussion about a harassment complaint involving two employees fit within the personal matters exception. In that case, the closed session discussion included named individuals involved in the complaint and specific information about the harassment allegations, such as concerns about the individuals' working environment.
- 22 In this case, council's discussion did not involve personal information about identifiable individuals. The identity of individuals involved in the harassment complaint and details about the complaint were kept confidential during the *in camera* discussion. The discussion focused on the fact that a complaint had been made and would be referred to an external investigator. Although some members of council were either already aware of or had strong suspicions about the nature of the harassment complaint, that information did not form part of the discussion. Further, it is not reasonable to expect that the individuals involved in the complaint would be identifiable if council's discussion, in the manner it was conducted, had been held in public.
- 23 Accordingly, council's closed session discussion did not fit within the personal matters exception.

November 7, 2019 special council meeting

- 24 Council held a special meeting on November 7, 2019. The meeting agenda contained one item for closed session consideration: "Harassment Investigation Procedure/Integrity Commissioner Complaint".
- 25 According to the audio recording of the open session, the Clerk delegated her responsibility to record meeting minutes to the Municipality's Integrity Commissioner for the closed session. At 7:03 p.m., council passed a resolution to proceed into closed session under the exception for advice

² *Aylmer (Town) (Re)*, 2007 CanLII 30462 (ON IPC), online: <<https://canlii.ca/t/1scqh>>

³ *Madawaska Valley (Township) (Re)*, 2010 CanLII 24619 (ON IPC), online: <<https://canlii.ca/t/29p2h>>

subject to solicitor-client privilege. The resolution is recorded in the open session minutes. In addition to members of council, the Integrity Commissioner, the Municipality's solicitor, and an investigator from the Integrity Commissioner's office were present at the closed session.

- 26 The audio recording of the closed meeting captured council's discussion. The Integrity Commissioner and the investigator provided council with a detailed report on the findings of three investigations. One of the investigations involved a code of conduct complaint against all of council. The other two investigations involved harassment complaints concerning members of the public and municipal employees. Council discussed the investigations and asked detailed questions about the findings. The Integrity Commissioner and the investigator answered these questions and provided advice to council.
- 27 Throughout the discussion, council sought legal advice from the Municipality's solicitor. Council members asked for the solicitor's opinion on the investigations and asked for advice with respect to the Municipality's response to the findings. The solicitor provided council with legal advice and answered questions about that advice.
- 28 At one point during the *in camera* session, council sought advice regarding the Municipality's meeting practices. The municipal solicitor provided legal advice to council on this topic.
- 29 Council adjourned the closed session at 10:08 p.m.

Applicability of the "personal matters" exception

- 30 The personal matters exception applies to discussions that reveal personal information about an identifiable individual. In order to qualify as "personal information" it must be reasonable to expect that an individual could be identified if the information were disclosed publicly.
- 31 Council did not cite the personal matters exception when it moved *in camera* to discuss the investigations and findings. However, our review indicates that some of the information discussed during the closed session related to the conduct of members of the public and municipal employees who were the subject of the investigations. This discussion involved personal information and was appropriate for consideration in closed session under the personal matters exception.
- 32 I have found previously that information relating to a council member in their official capacity does not qualify as personal information. For example, in a

letter to the Town of Fort Erie, council met *in camera* to discuss a code of conduct complaint made against a member of council.⁴ In that case, the subject matter involved the member of council in his professional capacity and did not include any personal information about the individual.

- 33 In this case, part of council's *in camera* discussion was about the Integrity Commissioner's investigation and findings related to a code of conduct complaint against all of council. The discussion related to council members in their professional capacity and did not reveal anything inherently personal about them. Accordingly, this portion of the discussion did not fit within the personal matters exception.

Applicability of the exception for advice subject to solicitor-client privilege

- 34 The Municipality cited s. 239(2)(f), advice subject to solicitor-client privilege, when it moved into closed session to discuss the Integrity Commissioner's report and findings with respect to three complaints.
- 35 Section 239(2)(f) of the Act allows a municipality to proceed *in camera* to discuss "advice subject to solicitor-client privilege, including communications necessary for that purpose." This closed meeting exception applies to discussions between a municipality and its solicitor while seeking or receiving legal advice intended to be confidential.⁵
- 36 The Supreme Court of Canada has found that solicitor-client privilege extends when three pre-conditions are met: (1) there is a communication between a lawyer and a client; (2) which entails the seeking or giving of legal advice; and (3) which is considered to be confidential by the parties.⁶
- 37 The November 7 closed session was almost three hours long and council's discussion primarily involved the investigations and findings into the code of conduct and harassment complaints. At one point, council briefly discussed its meeting practices. Our review of the audio recording of the closed session indicates that the advice provided by the Municipality's solicitor was interspersed throughout the meeting. This advice meets the test for solicitor-client privilege set out above because the communication involved

⁴ Letter from the Ombudsman of Ontario to the Town of Fort Erie (May 9, 2013), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2013/town-of-fort-erie>>

⁵ *Timmins (City of) (Re)*, 2017 ONOMBUD 4, online : <<http://canlii.ca/t/h4rwt>>

⁶ *Solosky v. The Queen*, 1979 CanLII 9 (SCC), online: <<https://canlii.ca/t/1mjtq>>

confidential legal advice between the Municipality's solicitor and council. Accordingly, this advice fits within the exception for solicitor-client privilege.

- 38 The Integrity Commissioner and the investigator extensively reported to council on their findings and provided information to council regarding the investigations. This information was not provided by a lawyer and does not qualify as legal advice.
- 39 My Office has previously found that in some cases, topics that on their own do not fit within a closed meeting exception may be discussed *in camera*. In *St. Catharines v. IPCO, 2011*, the Divisional Court found that it is unrealistic to expect municipal councils to split up discussions to ensure that nothing which can be discussed in open session is ever discussed in a closed meeting. This applies to discussion on a single topic, where splitting the information would require interrupting the conversation.⁷
- 40 In this case, the information supplied by the Integrity Commissioner and the investigator is not legal advice. However, the information was received in relation to council seeking legal guidance on how to respond to the Integrity Commissioner's findings. The information was necessary for council to discuss the issues with the municipal solicitor in a meaningful way.
- 41 Accordingly, council's closed session discussion fits within the exception for advice subject to solicitor-client privilege.

Procedural matters

- 42 My Office received a complaint about the Municipality's meeting notice practices and record-keeping practices. The complaint pointed to several 2019 and 2020 council meetings as examples.
- 43 My Office also identified issues with the resolutions to proceed *in camera* adopted by council during the June 13 and November 7, 2019 meetings.

Resolution to proceed *in camera*

- 44 Section 239(4)(a) of the Act provides that before moving into closed session, a municipality must state by resolution that a closed meeting will be held and the general nature of the matter to be considered. In *Farber v. Kingston (City)* (2007 ONCA 173), the Ontario Court of Appeal determined that the resolution to go into a closed meeting should provide a general

⁷ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346, online: <<https://canlii.ca/t/fkqfr>>

description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.⁸ My Office has also stated that the resolution should include a brief description of the subject matter to be considered in closed session in addition to the specific exceptions being relied upon to go into closed session.⁹

- 45 Both the June 13 and November 7 resolutions to proceed *in camera* reference the exceptions relied upon by council, but do not include a general description of the matters to be discussed.
- 46 In future, the Municipality should ensure that its resolutions to proceed *in camera* provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public. As a best practice, the Municipality should continue to also include the exception relied upon to discuss each matter.

Meeting minutes

- 47 My Office received a complaint that the Municipality failed to record the fact of a closed session in the open session minutes during meetings in 2019 and 2020: June 13, August 8, October 17, November 7, and November 28, 2019, as well as January 28 and March 12, 2020.
- 48 Section 239(7) of the Act requires that all resolutions, decisions and other proceedings that take place during a meeting be recorded without note or comment. This requirement applies whether the meeting is open or closed.
- 49 The records from these meetings demonstrate that the Municipality has an inconsistent practice of recording resolutions to proceed into closed session. We were told by the Clerk that whenever a council meeting starts with a closed session, council holds a brief open session and passes a resolution to move *in camera*. If any members of the public are present during the open session, they are asked to leave.
- 50 The open session minutes for council's meetings on June 10, August 8, September 30, and November 7, 2019, and January 28 and March 12, 2020 do record a resolution indicating that council moved *in camera*.

⁸ *Farber v. Kingston (City)*, 2007 ONCA 173 (CanLII), online: <<https://canlii.ca/t/1qtzl>>

⁹ *Niagara (District Airport Commission) (Re)*, 2016 ONOMBUD 22 (CanLII), online: <<https://canlii.ca/t/h2stf>>

- 51 The resolution to proceed into closed session during the June 13 meeting is not recorded in any publicly available document. It is not captured by either the open session minutes or the audio recording of the open session, which only includes council's discussion after returning from the closed meeting.
- 52 The open session minutes for council's meetings on October 17, November 7, and November 28, 2019 record a report out from a closed session held on a previous date. However, according to the Municipality, council did not hold a closed session on those dates.
- 53 While it is the general practice of the Municipality to pass a resolution to proceed into closed session in public, there is no record of that occurring on June 13. In future, the Municipality should ensure that a resolution to proceed *in camera* is recorded in the open session minutes for the meeting. It is imperative that meeting minutes are complete and accurate to ensure that the meeting takes place in accordance with the open meeting rules. As my Office's June 2017 letter to the Township of Tehkummah notes:

Keeping complete and accurate minutes of closed session meetings ensures that members of the public feel confident that matters dealt with in closed session were appropriate for *in camera* discussion and that requirements of the *Municipal Act* and local by-laws have been followed.¹⁰

Meeting notice

- 54 My Office received a complaint that the Municipality provides insufficient notice of its council meetings and pointed to the following meetings as examples: June 13, August 8, October 17, November 7, and November 28, 2019, and January 28 and March 12, 2020. The complaint alleged that notices for those meetings stated that a closed meeting would be held by council, but failed to indicate that an open session would precede the closed meeting. The complainant told my Office that by wording the notice in such a manner, the public is unaware that they could have attended the open session before council closed the meeting.
- 55 The *Municipal Act* does not specify what the public meeting notice should say. In previous reports, my Office has suggested that, as a best practice,

¹⁰ Letter from the Ombudsman of Ontario to Township of Tehkummah, "*Complaint received by the Ontario Ombudsman regarding closed meetings in the Township*", (June 16, 2017), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2017/township-of-tehkummah>>

public notice should include the date, time, and place of the meeting, as well as the meeting's agenda.

- 56 Section 238(2.1) of the Act requires that a municipality provide for public notice in its procedure by-law. The Municipality of Temagami's procedural by-law does not have any requirements with respect to the contents of public meeting notice.
- 57 As stated above, when a council meeting begins with a closed session, council holds a short open session, which the public is entitled to attend. As a best practice, the Municipality should craft the meeting notice to alert members of the public that an open meeting will occur prior to a closed session.

Audio recording

- 58 The Municipality should be commended for adopting the practice of audio recording its council meetings, including closed sessions. Audio recordings provide the most accurate and complete record of a meeting.
- 59 As noted above, the Municipality does not begin to audio record its council meetings until after council has commenced in closed session – despite holding a brief open session before proceeding *in camera*. As a result, council's resolution to proceed *in camera* is not captured by the audio recording. The Municipality should consider amending its audio recording practices in order to capture council's open session resolution to move into closed session.

Opinion

- 60 My investigation found that council for the Municipality of Temagami did not contravene the *Municipal Act, 2001* when it went *in camera* on November 7, 2019 to discuss the findings of the Integrity Commissioner and harassment investigations. The discussion fit within the closed meeting exceptions for "advice subject to solicitor-client privilege" and "personal matters".
- 61 However, council violated the *Municipal Act* on June 13, 2019 when it discussed a harassment complaint in closed session. The discussion did not fit within the exception cited under the *Municipal Act* for "personal matters", or any other exception to the closed meeting rules.
- 62 Council for the Municipality of Temagami contravened the requirements of section 239(4)(a) of the *Municipal Act*, by failing to state by resolution the

general nature of the matters to be considered *in camera* on June 13 and November 7, 2019.

- 63 In addition, council failed to ensure that the resolution to move *in camera* was recorded in the meeting minutes on June 13, 2019.
- 64 Council should consider including the open session held prior to the closed meeting in its audio recording to ensure that the resolution to move *in camera* is captured by the recording.

Recommendations

- 65 I make the following recommendations to assist council in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of council for the Municipality of Temagami should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

The Municipality of Temagami should ensure that no subject is discussed in closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 3

The Municipality of Temagami should ensure that meeting records are complete and accurately reflect all of the substantive and procedural items that were discussed, as well as all votes and resolutions.

Recommendation 4

The Municipality of Temagami should ensure that its resolution to proceed *in camera* provides a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.

Recommendation 5

The Municipality of Temagami should ensure that its resolution to proceed *in camera* is passed during an open session, recorded in the meeting minutes, and captured by the audio recording of the meeting.

Recommendation 6

The Municipality of Temagami should ensure that it provides notice of its meetings, including open sessions that precede *in camera* meetings.

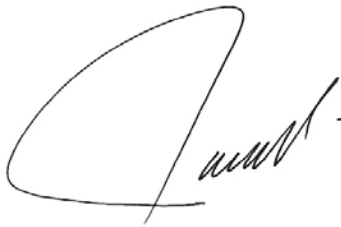
Report

- 66 The Municipality was given the opportunity to review a preliminary version of this report and provide comments to our Office. We received comments from council and from the Municipality's Mayor. Comments received were considered in the preparation of this final report.
- 67 In its response, council for the Municipality of Temagami accepted my Office's recommendations and stated that it would endeavor to meet these expectations going forward. Council agreed to record each open session held prior to a closed meeting and to review its meeting notice practices contained in the procedure by-law. I commend council for these steps.
- 68 Mayor O'Mara provided comments to my Office about the June 13, 2019 closed meeting. The Mayor indicated that the Municipality's harassment policies require that details about harassment complaints be kept confidential. He submitted that he believed that the Municipality's obligations under the open meeting rules are, in this instance, incompatible with its obligations with respect to its harassment policies. The Mayor stated that the meeting could not have been held in public since "everyone" knew the identity of the complainant.
- 69 The exceptions in the *Municipal Act* are paramount to municipal by-laws and policies, and are to be interpreted and applied narrowly, to maximize the information discussed in public. The exceptions do not extend to discussions about sensitive information, or to information that might lead the public to speculate about otherwise confidential information. As stated in my Office's 2014 report about the City of Welland:

Although there may have been a desire to maintain confidentiality in order to protect various interests of the city, I must emphasize again that council cannot bring a matter *in camera* simply because it is considered sensitive or confidential or potentially against the city's interests to discuss it publicly. Matters can only be discussed *in camera* if they fit squarely within the exceptions to the open meeting requirements.¹¹

¹¹ *Welland (City of) (Re)*, 2014 ONOMBUD 7 (CanLII), online: <<http://canlii.ca/t/gtmhx>>

- 70 As noted above, my investigation concluded that the closed session on June 13, 2019 did not include any personal information about an identifiable individual and only some council members were aware of the nature of the harassment complaint, including the identities of those involved. The information conveyed during the closed session was limited to basic facts that a harassment complaint was made and that the complaint would be referred to an external investigator. As such, the personal matters exception was not applicable to the discussion.
- 71 My report should be shared with council and made available to the public as soon as possible, and no later than the next council meeting. In accordance with s.239.2(12) of the *Municipal Act, 2001*, council should pass a resolution stating how it intends to address this report.



Paul Dubé
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