



Ombudsman Report

**Investigation into whether Council for the
Township of Leeds and the Thousand Islands
held illegal closed meetings
to discuss Council's Code of Conduct**

**André Marin
Ombudsman of Ontario
June 2015**

Complaint

- 1 In March 2015, my Office received a complaint that a quorum of council for the Township of Leeds and the Thousand Islands engaged in discussions via email about a draft code of conduct.¹
- 2 The local media reported that at a council meeting on March 23, council debated a motion, brought by Councillor Liz Huff, to have a committee draft a code of conduct and to consider the appointment of an integrity commissioner.² One member of council, Cllr. John Paul Jackson, opposed the idea of having a committee draft the code. Cllr. Jackson brought forward a draft version of a code of conduct, which he had prepared, and advised that the code had been distributed to four other members of council.
- 3 The complaint alleged that the distribution and discussion of the code of conduct outside of council meetings constituted a violation of the open meeting provisions of the *Municipal Act, 2001* (the Act) and the township's own procedure by-law.

Ombudsman jurisdiction

- 4 Under the Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 5 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 or use the services of the Ontario Ombudsman. 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 Township of Leeds and the Thousand Islands.
- 7 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

¹ The Township is represented by six councillors and the Mayor, such that quorum is achieved by four councillors.

² <http://www.gananoquereporter.com/2015/03/24/tlti-mayor-complains-to-ombudsman-about-possible-secret-meeting-by-his-own-council>

Previous complaints

- 8 My Office released two previous public reports about township during the term of the previous council. In April 2012, I found that the township held an illegal closed meeting at which council members voted to give themselves a substantial pay increase. In November 2013, I found that councillors held illegal closed meetings in November 2012 and February 2013.
- 9 In November 2013, following the release of my report, the previous council voted to appoint Local Authority Services as the township's closed meeting investigator for one year, commencing December 2013. On January 12, 2015, the current council re-appointed my Office as the closed meeting investigator.
- 10 On January 26, 2015, my Office received a complaint about discussions that took place some time prior to the January 12 council meeting, at which the newly-elected council members allegedly discussed and decided on compensation for the Deputy Mayor for the upcoming term.
- 11 My report on that matter, released in June 2015, found that councillors-elect engaged in email discussions that laid the groundwork for future decision making, which is contrary to the spirit of the open meeting requirements. However, as the councillors had not yet been sworn in at the time the emails were exchanged, there was technically no quorum of the sitting council involved, and accordingly no violation of the Act.

Council procedures

- 12 The township's new procedure by-law (by-law 15-015) came into effect on March 9, 2015. The definition of "meeting" under the by-law is:

any regular, special or other meeting of Council or a Committee and may include email exchanges which are addressed to all members of Council, which contain factual information germane to the business of the Municipality.
- 13 The by-law states that the Mayor, at the advice of the clerk, shall decide agenda items for closed meetings. Prior to holding a meeting that is to be closed to the public, council shall state by resolution the fact of holding the closed meeting and the general nature of the subject matter to be considered.

Investigative process

- 14 My Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the municipality's procedure by-law and the Act, as well as emails exchanged amongst council members regarding the code of conduct. They also spoke with the mayor, council, and municipal staff.
- 15 My Office received full co-operation in this matter.

Email exchanges and discussions prior to the March 23 meeting

- 16 Cllr. Jackson independently contacted my Office before we received a complaint about this issue, as he understood from coverage in the local media that a complaint would be forthcoming. He acknowledged sending emails to some members of council, and provided copies to my Office.
- 17 Cllr. Jackson advised that any responses he received to his emails were "one-liners" and that there was no discussion about the substance of the code of conduct. He advised that the motion regarding the code of conduct was the subject of a substantial debate on March 23, and accordingly it was clear that the issue had not been decided in advance.
- 18 Other members of council and staff also provided my Office with several emails that were exchanged regarding the possibility of drafting a code of conduct and hiring an integrity commissioner.
- 19 Between February 14, 2015 and March 3, 2015, Cllr. Huff sent four emails to individual members of council, one of which also included members of staff, outlining her interest in creating a code of conduct and inquiring about the proper time and manner in which to raise the issue.
- 20 Cllr. Huff advised my Office that she also recalled having some one-on-one discussions with Cllrs. Gerry Last and Vicki Leakey, prior to a March 2 meeting, on why she believed it was important to have an integrity commissioner to enforce the code of conduct.
- 21 On March 17, Cllr. Jackson sent an email to Cllrs. Jeff Lackie, Leakey, and Last, attaching a code of conduct he had created, using similar documents from other municipalities as examples. The email stated that he had done this, in part, to explain that it was easy to create such a document, and to demonstrate that there

- was no need for council to strike a committee to provide input on the code of conduct.
- 22** Cllr. Jackson also noted that he did not believe it was necessary for the municipality to have an integrity commissioner, but that he had included related procedures in his draft code in case council ultimately decided that an integrity commissioner was needed.
- 23** Cllr. Leakey responded to all parties, advising that she would review the document, and that “it would be good to see if staff feel confident with examples we have brought forward to them to enable the preparation of a final draft, then we can go from there.” Cllr. Jackson then advised that he had spoken to the Chief Administrative Officer, and she indicated she would like to have a committee to put together the code, but did not say why. He noted, “my process offers all the ability to add/remove what they wish and then we all review a draft or final draft and move on.”
- 24** Cllr. Last also responded to all parties, advising that she had reviewed another code of conduct that was sent to her by Cllr. Leakey, and that it was similar to Cllr. Jackson’s draft code. She advised she would like to see the section on respect for the role of administration more clearly delineated.
- 25** During interviews, Cllr. Lackie advised my Office that he did not read these emails or the attached code of conduct, and that he did not have any discussions with council members about the code of conduct prior to the March 23 meeting. Cllr. Last advised that she felt Cllr. Jackson had prepared the code to save municipal staff from having to do extra work, and that she did not view it as a “big deal”. Cllr. Leakey advised that, despite the fact that the code was distributed prior to the March 23 meeting, there was no discussion on it.
- 26** Cllr. Harold Emmons advised my Office that he did not recall receiving any emails regarding the code of conduct, but that Cllr. Jackson did deliver a hard copy of the draft code to his home. He advised that he did not review the code, and that he and Cllr. Jackson did not discuss the code prior to the March 23 meeting.
- 27** Later in the day on March 17, Cllr. Jackson sent an email to all council members and several members of staff with the subject line “Code of Conduct”. Attached to the email was an article, entitled “The conduct of elected municipal officials – can

their behavior be regulated?”,³ that he advised he was circulating “for information purposes only.” Cllr. Jackson copied an excerpt from the article into the body of the email, which stated:

The law that purports to regulate the behaviour of local government representatives is essentially a patchwork of various pieces, many of which do not carry any meaningful or significant form of sanction or penalty. While some rights of recourse carry very substantial penalties (i.e. imprisonment, loss of office, disqualification from holding a seat on council), the burden of proof is significantly onerous and the scope of challenge is very narrow. Other remedies carry sanctions that amount to little more than a slap on the wrist, if they have any penalties at all while all the while being time-consuming and expensive to pursue.

28 Cllr. Jackson concluded:

To someone like myself, the loss of income for 90 days of Municipal Service is not even a slap on the wrist. While I will agree we do not get paid anywhere near what we should for the amount of service we give, that was not my reason for getting into this and so again – sanction me and take away \$3,000. I still get to sit at the Council table and do what I hoped to do when I ran, and that was to serve my Community.

We will create a Code I am sure – but please let us not drag this on. There is other just as important work to do that will directly benefit those we serve and that is where our collective focus should be.

29 On March 18, Cllr. Jackson sent an email to the Chief Administrative Officer attaching his draft code of conduct. On March 23, at the beginning of the council meeting, Cllr. Jackson emailed the draft code of conduct to all of council as well as members of staff.

³ Mascarin, John. The Conduct of Municipal Officials – Can Their Behavior be Regulated? Originally presented at the Law Society of Upper Canada Six-Minute Municipal Lawyer, May 13, 2014. Online: <www.cba.org/cba/sections_municipal/pdf/Paper_JohnMascarin_Aug2014.pdf>.

The March 23, 2015 meeting

- 30 The March 23 meeting was a regular council meeting that began at 7:00 p.m. The agenda indicated that council would be considering a motion, brought forward by Cllr. Huff, regarding the code of conduct.
- 31 The motion, which was attached to the agenda, requested staff prepare options and recommendations for the adoption of a code of conduct including complaint and reporting protocols, as well as for the appointment of an integrity commissioner for advice and rulings with respect to the code. The motion stated that the code should address “ethical matters”, such as conflict of interest, and that council should appoint a committee consisting of three members of council and two residents to work with staff in drafting the code of conduct.
- 32 The minutes for the March 23 meeting indicate that all council members were present, as well as several members of staff, including the Clerk and the Chief Administrative Officer.
- 33 During interviews, we were advised that Cllr. Jackson attempted to distribute copies of his draft code of conduct at the meeting, but the Mayor objected as he had not been provided with a copy in advance, and it was not on the agenda for consideration.
- 34 Some interviewees advised that, as had been reported in the local media, Cllr. Jackson mentioned that he had already distributed the draft code to four other members of council. Ultimately, the draft code of conduct was not considered at the meeting.
- 35 There is no mention in the March 23 minutes of Cllr. Jackson’s attempt to introduce his draft code of conduct.
- 36 As item nine on the agenda, council considered Cllr. Huff’s motion. The minutes only capture the motion and whether it was carried, but none of the discussion surrounding the motion. The original motion stated:

Resolution #141-15

WHEREAS Section 223.2 of the Ontario Municipal Act authorizes local municipalities to establish Codes of Conduct for members of council and members of Council-appointed boards;

AND WHEREAS Section 223.3 of the Ontario Municipal Act authorizes municipalities to appoint an independent Integrity Commissioner to be responsible for the application of Codes of Conduct and other policies, procedures and rules related to the ethical behaviour of members of council and appointed boards;

AND WHEREAS it is in the interest of the Corporation of the Township of Leeds and the Thousand Islands and its citizens to ensure due regard for proper conduct of Council and its appointed boards;

NOW THEREFORE Council requests staff to prepare options and recommendations for the adoption of a Code of Conduct including complaint and reporting protocols, and for the appointment of an Integrity Commissioner for advice and rulings with respect to the Code;

AND FURTHER that the Code address ethical matters including, but not limited to, non-pecuniary conflicts of interest, improper receipt of gifts and benefits, misuse and improper securing of confidential information, inappropriate use of municipal property, services and other resources, improper use of influence, and inappropriate behaviour towards other Councillors, staff, and members of the public.

AND FURTHER that Council appoint a Committee of Council consisting of 3 members of Council and two residents nominated by the Township Taxpayers' Association, to work with staff in drafting of the Code of Conduct.

As well the Code should address a communications policy including use of social media, email and other forms of documented information.

37 At the meeting, council passed a resolution, moved by Cllr. Last and seconded by Cllr. Jackson, to amend Cllr. Huff's motion by removing the reference to the appointment of an integrity commissioner, and also by removing the reference to having a committee of council work with staff in developing the code of conduct.

38 The motion carried in its revised form.

Analysis

Did consideration of the draft code of conduct violate the Act?

- 39** There is no absolute ban on council members sharing information informally, either in person or via email. As I noted in my 2014 report “Turning Tables”⁴:

The *Municipal Act, 2001* does not prohibit members of council, committees and local boards from ever discussing city business outside of a formal meeting. It is expected that some informal conversations about municipal business will take place amongst individual members of such bodies, and as I observed in *In the Back Room*⁵:

It is a healthy thing in a democracy for government officials to share information informally before making policy decisions. I agree that to expect council members never to talk to one another outside of a public meeting is unrealistic and would have the effect of unnecessarily chilling speech.

However, municipal officials must be cautious to ensure that informal private discussions do not transform into improper meetings. It is of particular concern when a quorum of a body is involved.

- 40** It is expected that some informal conversations will take place amongst individual council members before making policy decisions. Cllr. Huff’s earlier emails, wherein she corresponded with individual council members and staff about the code of conduct and integrity commissioner, seem to fall into this category.
- 41** Cllr. Jackson’s emails, however, were addressed to three other members of council. In addition, Cllr. Jackson provided a hard copy of the code to another council member in advance of the March 23 meeting. This means that, including

⁴ At paragraph 19, online: <<https://ombudsman.on.ca/Files/sitemedia/Documents/LondonTurningTables-ENaccess.pdf>>.

⁵ Ombudsman of Ontario, *In the Back Room*: Investigation into whether members of Council for the City of London held an improper closed meeting on February 23, 2013 (October 2013), online: <https://ombudsman.on.ca/Files/sitemedia/Images/Reports/London_BT_Final-EN_1.pdf>.

himself, five members of the seven-member council were part of a series of exchanges on the matter.

- 42** In an April 2008 investigation, I considered whether sequential phone calls between the Mayor and individual councillors for the Township of Nipissing could be considered a “meeting” for the purpose of the open meeting requirements.⁶ In considering that complaint, I observed that the form a meeting takes should not be determinative, but rather its substance:

[A] meeting of council is not limited to a physical gathering of its members. Sequential telephone conversations of council members, for the purpose of exercising the power or authority of the council or for the purpose of doing the groundwork necessary to exercise that power or authority, may constitute a meeting...⁷

- 43** The technology used in a serial conversation is not determinative of whether a meeting has occurred. In my June 2015 report on another closed meeting in Leeds and the Thousand Islands, I found that a series of emails can constitute a serial meeting, where councillors come together over email to exercise the authority of council or lay the groundwork to do so.⁸
- 44** In the case at hand, Cllr. Jackson’s communications were a clear attempt to lay the groundwork for an upcoming decision of council. He distributed the information to four other council members, such that five of the seven members of council were provided with information regarding a code of conduct that was to be the subject of an upcoming council decision.
- 45** This situation came very close to crossing the line. The only reason that this did not rise to the level of a meeting for the purposes of the Act is that Cllr. Jackson was not successful in his attempt to reach two of the councillors he contacted, Cllrs. Lackie and Emmons.
- 46** If all members of council who received the documents had reviewed them, this would have opened the door for an exchange of information that would have laid the groundwork for future decision-making. In such a situation, I would have no choice but to find that the open meeting requirements of the Act had been violated.

⁶ Ombudsman Ontario, “Investigation into Council of the Township of Nipissing Special Meeting of April 25, 2008”, online: <ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/nipissingfinaleng.pdf>.

⁷ *Ibid* at paras 29-30.

⁸ Ombudsman Ontario, “Re: The Naughty Topic” (June 2015), online: <ombudsman.on.ca/Resources/Reports/Township-of-Leeds-and-the-Thousand-Islands--Re--Th.aspx>.

- 47 Serial communications intended to lay the groundwork for a decision of council must be avoided, whether they occur in person, over email, or by telephone.

Did consideration of the draft code of conduct violate the procedure by-law?

- 48 The municipality also has a new procedure by-law in place, which defines “meeting” as “any regular, special or other meeting of Council or a Committee and may include email exchanges which are addressed to all members of Council, which contain factual information germane to the business of the Municipality” (emphasis added).
- 49 In considering whether the email exchanges that took place prior to the March 23 meeting violated this provision, I note that there are two important requirements in order for emails to be captured as a “meeting” under the by-law: 1) There must be an email exchange and 2) the emails must be addressed to all members of council.
- 50 As noted above, in this case most of the emails were not addressed to all of council. The two exceptions are Cllr. Jackson’s email of March 17, attaching an article, and his email of March 23, which was sent during the council meeting, and attached his draft code of conduct. However, there was no evidence provided to my Office that members of council responded to these two emails, and accordingly, I cannot conclude that this rose to the level of an “exchange” for the purpose of the procedure by-law.

Opinion

- 51 My investigation found that council for the Township of Leeds and the Thousand Islands did not contravene the *Municipal Act, 2001* or its own procedure by-law by laying the groundwork for future decision-making through emails exchanges ahead of the March 23 council meeting.
- 52 However, I find that the information provided by email and in person prior to this meeting came very close to the line. The only reason Cllr. Jackson’s attempts to lay the groundwork for an upcoming decision of council did not rise to the level of a closed meeting for the purposes of the Act is that his attempt to discuss the matter with a quorum of council was not successful. Council members should

take care to comply with the Act's open meeting requirements in all communications with other councillors, including serial communications.

Recommendations

- 53 I make the following recommendations to assist council for the Township of Leeds and the Thousand Islands to improve its practices with respect to open meetings:

Recommendation 1

All members of council of the Township of Leeds and the Thousand Islands 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

Members of council for the Township of Leeds and the Thousand Islands should avoid laying the groundwork necessary to exercise the power or authority of council over email or through informal discussions.

Report

- 54 OMLET staff spoke with the Mayor and Clerk on June 8, 2015 to provide an overview of these findings, and to give the municipality an opportunity to comment. Any comments received were taken into account in preparing this report. Cllr. Jackson declined the opportunity to review the findings and provide comments.
- 55 My report should be shared with council for the Township of Leeds and the Thousand Islands and made available to the public as soon as possible, and no later than the next council meeting.



André Marin
Ombudsman of Ontario