



## **Ombudsman Report**

**Investigation into whether  
Council for the Township of  
Leeds and the Thousand Islands  
held illegal meetings between  
October 30 and December 1, 2014**

**“Re: The Naughty Topic”**

**André Marin  
Ombudsman of Ontario  
May 2015**

## Complaint

- 1 On January 26, 2015, my Office received a complaint about a suspected closed session held by council for the Township of Leeds and the Thousand Islands.
- 2 According to the complainant, during a discussion about compensation for the Deputy Mayor at a public council meeting on January 12, one councillor stated that council had already discussed the matter in private. Based on that statement, the complainant believed council met behind closed doors to discuss and decide on the Deputy Mayor's compensation, in contravention of the open meeting provisions of the *Municipal Act, 2001* (the Act).

## Ombudsman jurisdiction

- 3 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.
- 4 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has properly closed 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.
- 5 The Ombudsman is the closed meeting investigator for the Township of Leeds and the Thousand Islands.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's procedure by-law have been observed.

## Previous complaints

- 7 My Office previously received six closed-meeting complaints about the Township of Leeds and the Thousand Islands and conducted reviews of three of those.
- 8 In April 2012, we found the township held an illegal closed meeting on January 23, 2012. At that meeting, it was reported council members voted themselves a 60 percent pay increase.

- 9** In November 2013, we found that councillors held an illegal closed meeting a year earlier when they discussed senior staff salaries while decorating a parade float. We also found that council met illegally in February 2013 after failing to provide public notice before a closed session.
- 10** Based on those reviews, I recommended that council:
- Carefully review subject-matter discussions prior to closing a meeting;
  - Disclose as much detail as possible about matters discussed in a closed session;
  - Adopt a written policy or guidelines requiring all council and committee members to be educated on the open meeting requirements under the *Municipal Act*;
  - Refrain from using social gatherings to conduct township business behind closed doors;
  - Be vigilant about adhering to the Act and the township’s by-laws; and
  - Record all in-camera meetings.
- 11** On November 25, 2013, following the release of my report, then-council for the Township of Leeds and the Thousand Islands voted to appoint Local Authority Services as its closed meeting investigator for a one-year period beginning on December 1, 2013. On January 12, 2015, new council members – who had been elected during the October 2014 municipal elections – re-appointed my Office as closed meeting investigator.

## **Investigative process**

- 12** On February 2, 2015, after completing a preliminary review, my Office advised council we would be investigating this complaint.
- 13** My Office’s Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the township’s procedural by-law and the Act, as well as relevant meeting agendas and minutes. They spoke with the Mayor, all members of council, the Clerk, and the Administrative Officer.

## Background

### The 2014 municipal election

- 14** The municipal election was held on October 27, 2014. Only one member of the previous council was re-elected. The new council was sworn in on December 1, 2014.
- 15** In this report, references to council and councillors refer to the new, current, council and Mayor. Between October 27 and December 1, 2014, councillors are referred to as councillors-elect.

### Decision on remuneration for Deputy Mayor

- 16** The township's Clerk prepared draft By-Law 15-001, "Being a By-law to Provide for the Remuneration of the Mayor, and Councillors", as well as a staff report called "Council Remuneration" for consideration at a regular council meeting on January 12, 2015.
- 17** The by-law did not provide for any additional compensation for the position of Deputy Mayor. During our investigation, we learned that the Deputy Mayor's duties had been reduced, since that person would no longer attend a number of county-level meetings. The Administration Report states:

The Deputy Mayor's position for the Township is essentially and [sic] "Acting Mayor" position. The Deputy Mayor fills in during Mayor's absence and chairs meetings, attends functions etc. As a result of the reduction in additional responsibilities of the Deputy Mayor, the proposed remuneration by-law does not provide for additional remuneration for this position.

- 18** The January 12 meeting was a regular council meeting beginning at 7:00 p.m. All council members were present, as well as the CAO, the Clerk, the Deputy Clerk, a human resources staff person, and the Director of Public Works.
- 19** The meeting agenda listed items dealing with the staff report on council remuneration, the appointment of the Deputy Mayor, and the new remuneration by-law.
- 20** We were told that during the meeting, council members considered the staff report on remuneration and discussed the Deputy Mayor position. They agreed it should

be a rotating position and appointed Councillor Jeff Lackie as the first Deputy Mayor. Councillor Lackie then recused himself from the compensation discussion.

- 21** Councillor John Paul Jackson suggested the compensation issue be considered by a committee of four councillors who would report back on whether there was an extra burden on the Deputy Mayor that merited extra compensation.
- 22** Councillor Gerry Last responded that council had already discussed the matter in private. Councillor Jackson said he had not been part of any such conversation.
- 23** We were told that council voted to receive the staff report, pass a resolution to appoint Councillor Lackie as Deputy Mayor, and pass the remuneration by-law that did not include extra compensation for the Deputy Mayor position.

## **Council procedure**

- 24** The township's Procedural By-Law (13-022) states that the inaugural meeting of a newly elected council shall take place on the first Monday following an election. Regular council meetings will be scheduled for the second and fourth Mondays of each month, except in the case of holidays or major events.
- 25** While the Act does not specify how notice of meetings must be provided to the public, it does state that every municipality must pass a procedure by-law that provides for public notice of meetings. The by-law for the Township of Leeds and the Thousand Islands requires notice of meetings and agendas be posted on the township's website.
- 26** The township's procedural by-law also states that meetings may be closed to the public if the subject matter being considered relates to one of the exceptions in section 239(2) of the Act.
- 27** Before closing a meeting to the public, the by-law requires council to state by resolution that it will be holding a closed session and provide the general nature of the matter to be considered.

## Gatherings on November 11 and 17, 2014

### November 11, 2014 gathering

- 28** On November 3, 2014, the Mayor-elect wrote to the five newly-elected councillors and one returning councillor, stating:

“We have not been sworn in officially, so it means that any meetings we have are not considered council meetings. As such I would suggest that we co-ordinate a couple of evening sessions together to build our team, have some discussion and get off to a great start.”

- 29** On November 11, 2014, the newly-elected Mayor and councillors met for dinner at Councillor-elect Lackie’s home from approximately 6:00 p.m. to 8:00 p.m. In attendance were Mayor-elect Joe Baptista and five councillors-elect, John Paul Jackson, Gerry Last, Liz Huff, Vicki Leakey, and Jeff Lackie. Councillor-elect Lackie’s family was also in the home during the dinner. Returning councillor Harold Emmons did not attend the event as he had other plans that evening.
- 30** Various councillors had different understandings of the intended purpose of the gathering. While some believed it was purely a social occasion, others told us they had planned to use the occasion to discuss issues they hoped council would address in the coming term.
- 31** Councillor Jackson told our Office that council meetings are restrictive and formal, so he was hoping the councillors-elect could discuss issues before taking office and “get a consensus” for moving forward.
- 32** Councillors told us they remembered discussing the reinstatement of the Ombudsman as closed meeting investigator, videotaping meetings, repairing the sound system, an upcoming training session, and details of the swearing-in ceremony.
- 33** Councillor-elect Huff raised the issue of compensation for the Deputy Mayor and it was discussed briefly. Councillor Lackie remembered others asking him about his past experiences on council, including whether the Deputy Mayor position involved enough extra work to justify additional compensation.
- 34** The Mayor told our Office that it was a high-level discussion, stemming from the fact that the responsibilities of the Deputy Mayor’s position had recently been reduced. He told us that someone said the position should rotate amongst councillors, while someone else said the extra pay should be eliminated.

- 35** Councillor Huff told us that it was a short conversation, and that the Mayor-elect and Councillors-elect Lackie, Last, and Leakey indicated their general agreement with eliminating the extra pay for the Deputy Mayor. She told us that Councillor-elect Jackson expressed strong opposition to the change.
- 36** Councillors Jackson and Leakey told us they didn't remember discussing the issue of the Deputy Mayor's compensation. Councillor Last told us that she remembered the conversation, but that it "didn't mean much" to her at the time and she "wasn't really paying attention".
- 37** There were no votes or show of hands at the gathering. No one took notes.
- 38** As they were leaving the house, the councillors-elect agreed to meet again on November 17, 2014. Councillor Leakey remembers talking about how they would not be able to speak freely without being scrutinized once council was sworn in, so they wanted to meet to ensure they were ready to act collectively and make decisions.

## November 17, 2014 gathering

- 39** On November 17, 2014, certain councillors-elect met at the township office from approximately 5:30 p.m. to 7:00 p.m. In attendance were the Mayor-elect and councillors-elect Huff, Leakey, and Last. We received conflicting evidence with respect to whether Councillor-elect Lackie and Councillor Emmons attended, but most accounts indicate they were present. Councillor-elect Jackson did not attend this gathering because he was frustrated by the lack of progress during the November 11 discussion.
- 40** According to the Mayor and Councillors Huff and Leakey, the issue of compensation for the Deputy Mayor was not discussed at this gathering.
- 41** There were no votes or show of hands at the gathering. No one took notes.

## Analysis

- 42** The *Municipal Act, 2001* defines a “meeting” as “any regular, special or other meeting of a council, of a local board or of a committee of either of them.”<sup>1</sup> This definition is circular and not particularly helpful in determining whether a meeting has actually occurred.
- 43** In a 2008 report,<sup>2</sup> in accordance with the underlying objectives of open meeting legislation and relevant case law, I developed a working definition of “meeting” to assist in the interpretation of the definition contained in the Act:

Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.<sup>3</sup>

- 44** This definition remains consistent with leading interpretations of the open meetings law and reinforces the right of the public to observe municipal government in process.<sup>4</sup>
- 45** The gatherings held in Leeds and the Thousand Islands are reminiscent of the situation in the Town of Kearney,<sup>5</sup> where the newly-elected mayor and councillors gathered informally on two occasions to discuss council business. Discussions included setting priorities for the upcoming term of council, committee appointments, possible amendments to the procedure by-law, and changes to the municipality’s voting procedure. As only two of those present were sitting councillors, I could not conclude that the meetings were held in contravention of the open meeting requirements. However, the discussions contributed to setting the groundwork for future decision-making. Accordingly, while not a technical violation of the Act, these gatherings appeared inconsistent with the principles of transparency, accountability, and openness underlying the open meeting requirements.

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<sup>1</sup> *Municipal Act, 2001*, S.O. 2001, Ch. 25, s. 238(1).

<sup>2</sup> Ombudsman of Ontario, *Don’t Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 25, 2008), online: <[Don’t Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal](#)>.

<sup>3</sup> *Ibid* at paras 54-60.

<sup>4</sup> *London (City) v. RSJ Holdings Inc.*, [2007] 2 S.C.R. 588, 2007 SCC 29 at para. 32; *Southam Inc. v. Ottawa (City)* (1991), 5 O.R. (3d) 726 (Ont. Div. Ct.) at paras. 12-18; *Southam Inc. v. Hamilton-Wentworth Economic Development Committee* (1988), 66 O.R. (2d) 213 (Ont. C.A.) at paras. 9-12.

<sup>5</sup> Ombudsman Investigation, Town of Kearney, January 17, 2011, online: <<https://ombudsman.on.ca/Resources/Reports/Town-of-Kearney-%281%29.aspx>>.

- 46** As in Kearney, there was no quorum of council at these two gatherings in Leeds and the Thousand Islands because councillors had not yet been sworn in. However, councillors-elect for Leeds and the Thousand Islands discussed specific issues they planned to pursue during the upcoming council term. While no decisions were made during these two gatherings, councillors-elect laid the groundwork for council decision-making by identifying issues to pursue and attempting to find consensus on those issues.
- 47** While the open meeting requirements do not prevent councillors from holding social gatherings or informal discussions, the discussions in this case went beyond social, as their purpose was to discuss and arrive at consensus regarding municipal business.

## **Discussions by email between October 27 and December 1, 2014**

- 48** After the October 27, 2014 election, but prior to taking office on December 1, 2014, councillors-elect for the Township of Leeds and the Thousand Islands began to exchange emails about their visions and priorities for the upcoming term. Some included “wish lists” of items they hoped council would address.
- 49** An item on one councillor-elect’s “wish list” addressed the issue of extra compensation for the Deputy Mayor, and read: “Deputy Mayor function – expectations, eliminate ‘extra’ pay?, rotate.” Another councillor-elect responded by email to say that he did not support eliminating the extra compensation for the Deputy Mayor position.
- 50** On November 27, Councillor-elect Jackson wrote an email to the other councillors-elect, the CAO, and other staff suggesting they discuss the by-law that governs compensation for the Mayor and councillors, which was set to expire at the end of 2014. The subject line of this email was, “Re: The Naughty Topic”. Councillor-elect Jackson wrote that they should address the issue before being sworn in so they could talk about it informally. He suggested setting up a committee to review remuneration levels for similar municipalities in the area, and said he hoped they would not implement more than a cost-of-living adjustment (COLA) increase.
- 51** Councillor-elect Leakey replied that she thought remuneration should stay the same and be reviewed at the end of the council term, though she noted that COLA increases and reimbursements for travel costs are normal. Councillor-elect Jackson responded that council shouldn’t wait to address the issue because the compensation by-law was expiring.

- 52** Councillor-elect Lackie wrote to say he believed staff were aware of the issue and would provide options to Council. Councillor-elect Jackson responded that staff would only provide them with information, and it was up to council to decide how to direct staff, who would make the changes to the by-law. He said the purpose of his email was to “informally offer staff our input”.
- 53** The Clerk responded that council could pass a resolution directing staff to pay council based on the old by-law, and then direct staff to prepare a new remuneration by-law for “the Mayor and Councillors, no separate allowance for the Deputy Mayor position”, to be considered at a future council meeting.
- 54** Councillor-elect Huff wrote that she thought council should confirm they wanted the treasurer to make a COLA increase for each of the next four years, and there should be no further discussion or consultation. She wrote:

I also agree with dropping the extra amount for the Deputy Mayor position, because I am of the view that we should rotate this role and that there are no significant extra costs associated with that position that are not covered by the current policy...

- 55** On December 1, 2014, council was sworn in during a ceremony held from 11 a.m. to 1 p.m.
- 56** After the swearing-in ceremony, the CAO wrote to the councillors to say that the issue of remuneration would be on the agenda for the December 8 council meeting, at which time council members could make a decision about compensation for the Deputy Mayor role. She said council should pass a resolution indicating the changes they wanted to see. Staff would make those changes to the by-law and bring the amended by-law back to council on January 12 for approval. She stressed that direction from council should come through a formal resolution made during a council meeting.
- 57** Councillor Leakey responded to offer her opinion on the remuneration level and recommend council review it comprehensively during its first meeting.
- 58** The CAO replied to say:
- “[Y]ou agree to COLA increases and that changes to the Deputy Mayor remuneration is to be reduced to that of the rest of the Councillors [sic]... Accordingly, the resolution for the 8<sup>th</sup> will direct staff to pay Council January 1<sup>st</sup> based on the existing remuneration and that Council direct staff to change the remuneration for the DM.”

## Analysis

- 59** A meeting of council is not limited to a physical gathering of its members. Instead, a meeting may occur whenever council exercises its authority, including over email.
- 60** 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.<sup>6</sup> In that case, the Mayor convened a special meeting of council and proceeded to telephone one councillor at a time. A quorum of council was never present in the same room or on the phone during any of the conversations. However, as a result of the calls, council collectively came to a consensus to approve additional costs related to the purchase of a fire vehicle.
- 61** In considering these circumstances, I observed:
- It is not necessarily the form that a meeting takes that should be determinative, but its substance. In my view, 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...<sup>7</sup>
- 62** In the same way, a series of emails between council members for the purpose of exercising the power or authority of council, or for the purpose of laying the groundwork necessary to exercise that power or authority, may also constitute a meeting for the purposes of the Act’s open meeting requirements.
- 63** The Act does not prevent council members from meeting informally outside of council chambers, whether in person or by email. However, when a group of council members comes together informally, there is an increased risk that they, intentionally or otherwise, may obtain information and enter into discussions that lay the groundwork to exercise their power and authority.
- 64** The councillors-elect laid the groundwork for a decision with respect to the issue of the Deputy Mayor’s compensation during their pre-term email exchange. The

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<sup>6</sup> Ombudsman Ontario, Investigation into Council of the Township of Nipissing Special

<sup>7</sup> *Ibid* at paras 29-30.

email from the CAO on December 1 indicates that, prior to the swearing-in ceremony, the councillors-elect had agreed to reduce the compensation for the Deputy Mayor to be equal to that of the other councillors. This change was implemented through the compensation by-law adopted by Council on January 12, 2015.

- 65** When the emails were exchanged, the Mayor and five of the six participating councillors had not yet been sworn-in. Accordingly, as in the Kearney case, I cannot find that a technical violation of the Act occurred.
- 66** However, these discussions were clearly not simply of a social nature. Had council already been sworn in, the discussion and the decision to change the remuneration level for the Deputy Mayor position would have required an open meeting under section 239 of the Municipal Act.
- 67** The serial email discussion regarding remuneration for the Deputy Mayor position involved a subject that all councillors knew would be addressed at one of their first council meetings. Councillors also acknowledged and clearly knew that this type of business could not be conducted via email once they were sworn in. They chose to take advantage of the situation to discuss the matter ahead of time. Although not technically in violation of the Act, the discussions were inconsistent with its underlying principles of openness and transparency.

## Opinion

- 68** At the in-person discussions at gatherings on November 11 and 17, 2014, councillors-elect discussed specific items of council business they hoped to address after being sworn in.
- 69** The discussions held over email went further. Councillors-elect discussed eliminating extra compensation for the position of Deputy Mayor to such an extent that the township's CAO believed they had agreed to make the change by the time they took office.
- 70** These gatherings and emails did not constitute an illegal meeting because the majority of council members had not yet been sworn in and therefore there was technically no quorum of the sitting council involved. However, the discussions did lay the groundwork for a future decision of council. Accordingly, they violated the spirit of the open meeting provisions in the *Municipal Act, 2001*.

## Recommendations

- 71** I make the following recommendation 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

- 72** OMLET staff spoke with the Clerk and Mayor on May 7, 2015 to provide an overview of these findings and an opportunity to comment. The township's comments were taken into account in preparing this report.
- 73** The Mayor and Clerk told my office that they disagree with my finding about communications regarding changing the compensation for the Deputy Mayor's position prior to council being sworn in. The Mayor believes that the councillors-elect had not come to a consensus on the issue, and interprets the email from the CAO to mean that she planned to create a report on the matter. However, my review of the evidence, particularly the CAO's email, indicates that the councillors-elect had come to a consensus on the matter prior to being sworn in.
- 74** The Mayor also disagreed with my finding that the actions of the councillors-elect violated the spirit of the open meeting rules. As indicated above, the only reason I did not make a finding that council violated the Act in this case was due to a technicality, namely that the members of council had not been sworn in and were thus not acting in their official capacity at the time. Council's actions were, however, clearly contrary to the spirit and intention of the open meeting requirements of the Act.

- 75** The recommendations contained in this report are made to assist the township in improving its meeting practices and ensure that the open meetings law is respected in the future.
- 76** 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.



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André Marin  
Ombudsman of Ontario