



Ombudsman Report

**Investigation into a complaint about
closed meetings held in 2016 by
Council for the Township of Alfred and Plantagenet**

**Paul Dubé
Ombudsman of Ontario
May 2017**

Complaint

- 1 In October 2016, my Office received a complaint about several closed meetings of council for the Township of Alfred and Plantagenet.
- 2 The complaint alleged that council for the township held illegal closed meetings in 2016 to discuss an organizational study of the municipality. The complaint also alleged that council improperly voted by email to approve funding related to a grant application.

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001*, all meetings of council, local boards, and committees of council of either of them 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 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 Alfred and Plantagenet.
- 6 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the applicable procedure by-law have been observed.

Investigative process

- 7 On January 5, 2017, my Office issued notice in accordance with section 18(1) of the *Ombudsman Act* that we would be investigating this complaint.
- 8 Members of my Office's staff reviewed relevant portions of the township's by-laws and policies, and the Act. We reviewed the agenda and minutes of the open and closed portions of twelve council meetings between February

2016 and December 2016 during which an organizational study was discussed. In addition, we reviewed documentation related to the organizational study process commissioned by the municipality, which included three informal gatherings of council on June 22, July 12 and September 12, 2016.

- 9 We also reviewed emails shared among council members in September 2016 with respect to a grant application.
- 10 The Mayor, CAO-Clerk, former Deputy Clerk, and organizational review consultant were interviewed by my Office.
- 11 My Office received full co-operation in this matter.

Council procedures

- 12 The township's procedure by-law (2007-77) states that all meetings shall be open to the public except as provided in the by-law "and generally at law". The by-law incorporates the exceptions to open meetings contained in the Act. It also provides for notice of regular and special meetings on the municipal website.
- 13 Prior to proceeding in camera, council must state by resolution the fact of holding a closed meeting and the general nature of the subject matter to be considered. The procedure by-law permits the taking of an in camera vote where the meeting is required or permitted to be closed under the procedure by-law or otherwise at law, and the vote is for a procedural matter or for giving directions or instructions to municipal employees or persons retained by the municipality.
- 14 The procedure by-law goes on to state that the presiding officer of a closed meeting may, after its adjournment, report to council the decisions made at the meeting. Council is then to consider the decisions, and either adopt or reject them without debate or amendment.

Organizational study

Background

Vote on organizational study proposal

15 The public agenda for the April 4, 2016, regular meeting indicated at item 20.1 that there was to be a “declaration of part of a meeting to be closed.”

16 The minutes of the regular meeting record the following resolution:

Be it resolved that this portion of the meeting be closed to the public in order to consider personal matters about identifiable individuals as well as a proposed or pending acquisition or disposition of land by the municipality pursuant to subsections 239(2)(b) and (c) of the Municipal Act, 2001.

17 On April 4, 2016, during the in camera portion of its regular meeting, council for the township passed a resolution to retain a consultant to conduct an organizational study of the municipality. The resolution was worded as follows:

BE IT RESOLVED that the Council of the Township of Alfred and Plantagenet accept the services proposal submitted by Performance Concepts Consulting Inc. at a cost of \$35,000, plus taxes, and allow 3 months to complete the Organizational Study.

18 The open meeting minutes do not record any reporting back of the in camera proceedings upon their conclusion, other than a resolution that the “meeting be reopened to the public.”

19 According to the minutes of the closed session, council amended the in camera agenda to include the organizational study, among other matters, after it had already passed the resolution to go in camera noted above.

Working sessions

20 The organizational study proposal considered by the township during the April 4, 2016, meeting indicated that, among other activities, the consultant would conduct semi-structured interviews and group working sessions of councillors, senior staff and frontline/professional staff.

21 The consultant's draft report, to which council responded in open session at its December 19, 2016 meeting, describes the results of the operational review. It notes that the consultation that took place with the Mayor and council members included “[t]hree facilitated working sessions with the

Mayor and Council exploring strategic priorities, corporate management improvement, service delivery efficiency trends, and organization design options".

- 22 The report covers a number of issues. Some of the findings and recommendations in the report make specific reference to the township's management and to the relationship between council and management. The report later proposes that the township adopt a new management structure and seek outside expertise to develop a new compensation model.
- 23 Our office found that three working sessions with the consultant and all members of council took place on June 22, July 12 and September 12, 2016. No staff members were present at these working sessions. There was no notice to the public of these sessions and no minutes were taken.
- 24 When asked why there was no notice of these sessions, the Mayor stated that the organizational review had been discussed during council meetings. In addition, all of council was aware that there would be working sessions since they had approved the contract based on the consultant's proposal. According to the Mayor, no council members had raised objections that these sessions might be contrary to the rules.
- 25 When asked if the sessions were meetings of council, the Mayor stated that they were not. They were sessions organized by the consultant. The Mayor stated that confidentiality between a consultant and a client was important, similar to solicitor-client privilege. Moreover, the sessions needed to take place without staff present to ensure that the consultant could take council's pulse and determine the way forward. The Mayor stated that no decisions were made during these sessions.

June 22, 2016 session

- 26 In a May 27, 2016 email, the consultant proposed to the Mayor and CAO-Clerk:

A 2-3 hours training session with all of Council to investigate/establish a short list of 3 'Wildly Important Goals' that will provide strategic focus for the municipality for the remainder of this Council term. The training session should be offsite and informal – no staff are required. This is not a Council meeting.

- 27 In a June 6, 2016 email, the consultant asked the CAO-Clerk for assistance “in scheduling council for a 2-hour off-site working session to develop a set of 3 Township-wide strategic priorities for the remainder of the term”.
- 28 In a June 7, 2016 email, the consultant asked the CAO-Clerk to inform council that an “off-site working session” would take place at a councillor’s home on June 22, 2016 at 7 pm. This was reiterated in a June 16, 2016, email from the host councillor to the CAO-Clerk requesting that an email be sent to all councillors to inform them of the June 22 meeting, now at 9 pm.
- 29 At the June 22, 2016 working session, the consultant presented materials, included documents evaluating the township in comparison to its peer municipalities and exploring council priorities. The proposed priorities included governance reform, consolidation of township professional staff, and development of a township service hub.
- 30 The consultant told us that during this session council discussed its “change agenda”. Council discussed how to successfully guide change, including frank assessments of senior staff at the municipality and council’s confidence in staff to deliver the change management agenda. Council also discussed issues related to the working relationship between council and staff.

July 12, 2016 session

- 31 On July 8, 2016, the CAO-Clerk sent an email to all members of council to let them know that a teleconference with the consultant had been organized for July 12 at 7:00 p.m. The email stated that council members could gather in the CAO-Clerk’s office for the call. The email string from the CAO-Clerk in preparation for the teleconference contained correspondence from the consultant. The consultant indicated in a July 6, 2016 email to the CAO-Clerk that the intent of the teleconference was “to conclude business from our previous meeting held in June”.
- 32 The consultant told us that by this time, he had already prepared a series of draft recommendations. Three strategic priorities had been set out, including operational changes involving process streamlining, principles of good government and good management, and a change management package. The focus was on recommendations and “stress testing” them with council.

- 33 According to the consultant, there was discussion around the need for the council and management to work together to ensure that the direction of council would be implemented. The consultant noted that his recommendations would fundamentally restructure the senior management team. The team would be reduced in size by consolidating departments and having general managers report to council.

September 12, 2016 session

- 34 On August 30, 2016, the CAO sent an email to all members of council, with the consultant copied, inviting them to a meeting with the consultant to review the organizational study on Monday, September 12 at 9:00 a.m., at the Village of Plantagenet Community Hall.
- 35 In a related email dated September 6, 2016, sent to the Mayor by the consultant, the consultant notes, "There are HR aspects of the report that require In Camera review." The draft report was attached to the email, which the Mayor forwarded to council members on September 7, 2016.
- 36 According to the consultant, the September 12, 2016 working session was a process discussion. Council was invited to provide input about the management team and staff structure, as set out in the draft report. Council then provided feedback on the report narrative, final set of recommendations, and implementation strategy.
- 37 The CAO-Clerk and former Deputy Clerk told our office that they considered this session to be a meeting of council because a quorum of council was participating. Both the CAO-Clerk and the former Deputy Clerk stated that they had told the Mayor on the morning of the meeting that it would have to be held as a special meeting of council, or it would be considered an illegal closed meeting. According to the CAO, the Mayor allegedly responded that it was a matter of "client-consultant privilege".
- 38 The Mayor had no recollection of such a discussion. He stated that, regardless, it was a working session organized by the consultant.

Analysis

- 39 The complaint to my Office alleged that council's working sessions with the consultant during the organizational review were in fact closed meetings of council and were therefore held contrary to the *Municipal Act, 2001*.
- 40 My Office reviewed the April 4, 2016 meeting to understand the context in which the working sessions took place.

The April 4, 2016 meeting

Resolution to proceed in camera

- 41 As noted above, council's resolution to proceed in camera on April 4, 2016 read as follows:

Be it resolved that this portion of the meeting be closed to the public in order to consider personal matters about identifiable individuals as well as a proposed or pending acquisition or disposition of land by the municipality pursuant to subsections 239(2)(b) and (c) of the Municipal Act, 2001.

- 42 This resolution did not provide meaningful information to the public about the issues to be discussed during the closed session, which included the organizational study proposal.
- 43 Subsection 239(4) of the Act requires that the resolution to proceed in camera include the general nature of the subject matter to be considered. The city's procedure by-law has equivalent requirements.
- 44 The Court of Appeal in *Farber v. Kingston (City)*¹ stated that:

the resolution to go into closed session should 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.

- 45 My Office has also recommended that councils provide more substantive detail in resolutions authorizing closed sessions. For instance, in our Office's 2015 review of closed meetings in the Municipality of South Huron, we noted that council's resolution "should provide a brief description of the subject matter to be considered in closed session".²

Personal matters exception

¹ *Farber v. Kingston (City)*, 2007 ONCA 173 at para 21.

² Ombudsman of Ontario, *Investigation into closed meetings held by council for the Municipality of South Huron* (February 2015) at para 58, online: https://www.ombudsman.on.ca/Files/sitemedia/files/SouthHuronFinal_2015.pdf

- 46 The April 4, 2016, meeting was closed under the "personal matters" exception in subsection 239(2)(b) of the Act. This exception provides for council to discuss personal matters about an identifiable individual in a closed meeting.
- 47 The Information and Privacy Commissioner has established a two-part test to distinguish personal information from professional for the purposes of the open meeting rules.³ The test is as follows:
- 1 In what context do the names of individuals appear? Is it in a personal or business context?
 - 2 Is there something about the particular information that, if disclosed, would reveal something of a personal nature about the individual?
- 48 The Commissioner found that information outside the scope of the personal sphere and within the scope of profit-motivated business activity does not constitute personal information. In order for the information to be considered personal in the second stage of the test, one must consider what the information reveals. Information that speaks to a business arrangement is not considered personal information.
- 49 In this case, the discussion with respect to the organizational study was about contracting with a consulting firm in the context of a proposed professional relationship with the township. While the individuals working at the firm and their qualifications were identified in the proposal documents, this was strictly in a business context.
- 50 Accordingly, the discussion was limited to business information and did not fit within the personal matters exception under the Act.

Acquisition or disposition of land exception

- 51 The acquisition or disposition of land exception is intended to protect a municipality's bargaining position in property negotiations.⁴

³ PO-2225 (12 January 2004) [online: IPC](#); Order MO-2368 (26 November 2008) [online: IPC](#).

⁴ See *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information*, Toronto: The Committee, July 1984; S. Makush & J. Jackson, *Freedom of Information in Local Government in Ontario*, Toronto: Commission on Freedom of Information and

- 52 While other matters discussed during the closed session may have come under this exception, the organizational study proposal did not relate to any property matters.
- 53 Accordingly, the discussion did not fit within the exception under the Act for acquisition or disposition of land.

Vote during closed session

- 54 Sections 239(5) and (6) of the *Municipal Act* prohibit municipal councils and local boards from voting in a closed session, except where the meeting discussions fall within one of the exceptions in the Act, and the vote is for a procedural matter or to give directions to staff.
- 55 Council for the township voted by resolution to award a contract to a consultant for an organizational study. That decision was not procedural, nor was it a direction to staff.
- 56 The Act only permits voting in closed session in limited circumstances during a properly closed meeting. I have already found that council's discussions regarding the award of the consulting contract do not fit within any of the closed meeting exceptions. Accordingly, council's vote in closed session was contrary to the *Municipal Act* provisions.

Reporting back

- 57 Following its closed session discussion on April 4, 2016, council did not report back in open session about its in camera meeting.
- 58 Numerous closed meeting investigators, including our Office, have recommended that municipalities adopt the best practice of reporting back.⁵

Individual Privacy, 1979, as cited in Final Order MO-2468-F, *Re: City of Toronto*, [2009] O.I.P.C. No. 171.

⁵ Ombudsman of Ontario, Investigation into whether council for the Municipality of Magnetawan held illegal closed meetings (June 2015) at para 54, online: < https://www.ombudsman.on.ca/Files/sitemedia/files/FinalReport-Magnetawan_2015.pdf>; Local Authority Services, A Report to the corporation of the County of Essex (September 2009) at 17, online: < http://www.agavel.com/wp-content/uploads/2013/09/Essex_County_Report_Sep_18_Final.doc>; Douglas R Wallace, Report to the council of the City of Ottawa, online: < <http://ottawa.ca/en/city-hall/accountability-and-transparency/accountability-framework/december-19-2008-january-6-2009>>.

- 59 The township's current practice of not reporting back fails to provide even a general idea of what was discussed in camera. As a best practice, the township should report back after closed sessions and provide general information about what occurred in camera. Public reporting might consist of a general discussion in open session of subjects considered in closed session, together with information about any decisions, resolutions, and directions given to staff.

The "working sessions"

- 60 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." This definition is circular and not particularly helpful in determining whether a meeting has actually occurred.
- 61 In a 2008 report,⁶ through review of the relevant case law and keeping in mind the underlying objectives of open meeting legislation, our Office developed a 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.

- 62 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.
- 63 The Act does not prevent council members from meeting informally outside of council chambers. However, when a group of council members comes together informally, there is an increased danger that they, intentionally or otherwise, may obtain information and enter into discussions that lay the groundwork to exercise their power and authority.

⁶ 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: http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/Sudbury/ReportEng2_2.pdf.

- 64 In the case of Alfred and Plantagenet, all of council came to together to conduct strategic planning for the municipality. During these sessions, council discussed strategic priorities and goals as well as organizational restructuring in the municipality, and set specific goals and priorities. Council's discussions clearly advanced the business of the municipality.
- 65 The working sessions of June 22, July 12 and September 12 were therefore meetings under the Act.
- 66 The Mayor told us he believed the subject matter of the working sessions was confidential, akin to solicitor-client privilege.
- 67 The *Municipal Act* does not contain any exceptions to protect confidential discussions with consultants who are not solicitors representing the municipality. As noted in several of my Office's reports,⁷ the exception for advice subject to solicitor-client privilege can only be used when council is considering specific advice, or a related communication, from a solicitor. Council did not receive advice from a solicitor during the working sessions. As such, this exception to the open meeting rules could not apply.
- 68 The information gathered by our Office indicates that some portions of the working session discussions related to the organization of staff in the township, as well as to the working relationships among staff and between staff and council. The consultant himself indicated that the September 12, 2016 working session would be related to human resources matters and would need to be held in camera.
- 69 The labour relations or employee negotiations exception is to protect discussions about the relationship between a municipality and its employees. Generally, this exception does not apply to discussions about an organizational review or restructuring of the municipality. However, my Office has found that the exception may apply to a discussion about reorganization as it affects individuals and their roles.⁸

⁷ See, for example: Ombudsman of Ontario, *Investigation into whether Council for the City of Greater Sudbury held illegal closed meetings on March 2, March 23, and April 26, 2016* (January 2017), online: < [https://www.ombudsman.on.ca/Resources/Reports/City-of-Greater-Sudbury-\(5\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-Greater-Sudbury-(5).aspx)>.

⁸ Town of Amherstburg, December 9, 2013:
<https://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Amherstburg-Closing-Letter-Dec-9.pdf>

- 70 As discussed above, information that pertains to an individual in their professional capacity will not fit within the personal matters exception. However, in some cases information about a person in their professional capacity may still fit within the exception if it reveals something personal.⁹ For example, information about an employee’s job performance is considered personal information.¹⁰ Generally, discussion of an individual in their professional capacity will take on a more personal character if it relates to scrutiny of an individual’s conduct.¹¹
- 71 While some of the discussions during the working sessions may have fallen within the labour relations or personal matters exceptions to open meetings, council for the Township of Alfred and Plantagenet was required to follow the requirements of the Act and its own procedure by-law when it held these meetings. It failed to do so.

Grant application

Background

- 72 On July 18, 2016, council passed a resolution in open session “that a financing application be submitted under the Ontario 150 Community Celebration Program for the organization of Canada Day 2017 activities which will be held on the site of the former school in Lefavre.”
- 73 In an email dated September 2, 2016, the township’s Recreation Coordinator emailed all council members, with the CAO-Clerk copied, requesting approval to go ahead with making the grant application to the Ontario150 Community Celebration Program. The cost to the township would be \$7,500, with an expected \$12,500 in sponsorship. The Recreation Coordinator indicated that the event organizers were seeking a commitment of \$7,500 from the township regardless of the outcome of the grant application. It was noted that time was of the essence, as the grant application was due the same day.

⁹ City of Elliot Lake, 2014: <https://www.ombudsman.on.ca/Files/sitemedia/Documents/Elliot-Lake-Sept-8-2014.pdf>

¹⁰ IPC Order MO-2519

¹¹ Municipality of South Huron, 2015:

<https://www.ombudsman.on.ca/Resources/Reports/Municipality-of-South-Huron.aspx>

- 74 Three councillors indicated their go-ahead to the Recreation Coordinator's proposal by email. The Mayor's response proposed that the \$7,500 requested be included in the 2017 budget regardless of the outcome of the grant application. One councillor provided his assent by telephone.
- 75 When asked about the emails, the Mayor told us that council had already provided its approval to make the grant application. The emails were to propose the addition of \$7,500 to the 2017 budget, which had not yet been approved. No current year funds were being allocated. It was simply a proposal to discuss the matter further.
- 76 According to the CAO, the emails did not represent a decision of council. They were just housekeeping given the time constraints. The actual commitment of funds was to be confirmed by council at a later date.
- 77 The \$7,500 contribution by the township was ultimately discussed by council at its November 7, 2016 budget meeting and included in the proposed recreation department budget. The township's 2017 budget was adopted on February 6, 2017.

Analysis

- 78 The complaint alleged that council violated the *Municipal Act, 2001* when it voted by email to allocate funds in support of a grant application.
- 79 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 constitute a meeting for the purposes of the Act's open meeting requirements. This was reinforced in two of the Ombudsman's reports about closed meetings in the Township of Leeds and the Thousand Islands.¹²

¹² Ombudsman of Ontario, *Re: The Naughty Topic: Investigation into whether Council for the Township of Leeds and the Thousand Islands held illegal meetings between October 30 and December 1, 2014* (June 2015), online: <<https://ombudsman.on.ca/Resources/Reports/Township-of-Leeds-and-the-Thousand-Islands--Re--Th.aspx>>; Ombudsman of Ontario, *Investigation into whether Council for the Township of Leeds and the Thousand Islands held illegal closed meetings to discuss Council's Code of Conduct* (June 2015), online: <<https://ombudsman.on.ca/Resources/Reports/Township-of-Leeds-and-the-Thousand-Islands-%283%29.aspx>>.

- 80 In the case of Alfred and Plantagenet, a quorum of council approved in principle, by email and by telephone, the Recreation Coordinator's proposal to have the township make a \$7,500 contribution in support of the grant application.
- 81 The fact that council had already resolved to make a grant application at its July 18, 2016 meeting does not absolve council of its obligations under the Act.¹³ A quorum of council clearly laid the groundwork for future decision-making, as evidenced by the November 7, 2016 decision to include the \$7,500 in the township's budget.
- 82 I acknowledge that council was trying to act quickly to respond to a matter it felt was urgent. Council and staff acted in good faith. In their haste, however, they failed to turn their minds to the need for transparency and the open meeting requirements contained in the Act.

Opinion

- 83 Council for the Township of Alfred and Plantagenet contravened the *Municipal Act, 2001* and the township's procedure by-law when it voted in closed session on April 4, 2016 to award the contract for the organizational study.
- 84 Council for the Township of Alfred and Plantagenet contravened the *Municipal Act, 2001* and the township's procedure by-law when it held meetings on June 22, July 12 and September 12, 2016 without following the procedural requirements for meetings of council.
- 85 Moreover, council for the Township of Alfred and Plantagenet contravened the *Municipal Act, 2001* when it approved the municipality's \$7,500 contribution for the grant application by email and by telephone.

¹³ Ombudsman Ontario, Letter to the City of Elliot Lake regarding meetings of April 16, 2012 and April 26, 2012 (August 10, 2012): <https://ombudsman.on.ca/Resources/Reports/Town-of-Elliot-Lake.aspx>

Recommendations

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

Recommendation 1

All members of council for the Township of Alfred and Plantagenet 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

Council for the Township of Alfred and Plantagenet should ensure that gatherings or meetings of a quorum of council where council will exercise its decision-making authority or lay the groundwork for doing so be held in accordance with the requirements of the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 3

Council for the Township of Alfred and Plantagenet 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 4

Council for the Township of Alfred and Plantagenet should ensure that its in-camera votes comply with sections 239(6) of the *Municipal Act, 2001* and its own procedure bylaw.

Recommendation 5

The Township of Alfred and Plantagenet 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.

Recommendation 6

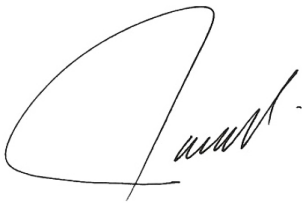
The Township of Alfred and Plantagenet should adopt the best practice of reporting back in open session following an in camera meeting as provided for in its procedure by-law.

Recommendation 7

Members of council for the Township of Alfred and Plantagenet should avoid exercising the power or authority of council or laying the groundwork necessary to do so through serial email or telephone communications.

Report

- 87 The Township of Alfred and Plantagenet was given the opportunity to review a preliminary version of this report and provide comments. Any comments received were considered in the preparation of this final report.
- 88 My report should be shared with council for the Township of Alfred and Plantagenet. My report should be made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario