



Ombudsman Report

**Investigation regarding a closed meeting held by Loyalist
Township on July 8, 2019**

**Paul Dubé
Ombudsman of Ontario
September 2020**

Complaint

- 1 My Office received a complaint about a closed meeting held by council for Loyalist Township (the Township) on July 8, 2019. The complaint alleged that during the closed meeting, council improperly voted to enter into an agreement related to a wind turbine project located in the Amherst Islands. The complaint also raised concerns about the amount of information that council shared in its report back following the closed session.

Ombudsman jurisdiction

- 2 Under the *Municipal Act, 2001*¹ (the Act), all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 3 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.
- 4 The Ombudsman is the closed meeting investigator for Loyalist Township.
- 5 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's procedure by-law have been observed.
- 6 To assist municipal councils, staff, and citizens, we have developed an online digest of open meeting decisions that contains summaries of the Ombudsman's open meeting cases. This searchable repository was created to provide easy access to the Ombudsman's past 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 a matter should or may 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.

¹ SO 2001, c 25.

Investigative process

- 7 In December 2019, I advised the municipality of our intent to investigate this complaint.
- 8 We reviewed relevant portions of the municipality's by-laws and policies, as well as the agenda package, minutes, and meeting materials relevant to the closed session discussion. In addition, we reviewed relevant portions of the audio recording of council's in camera meeting.
- 9 We interviewed all members of council, as well as the municipal Clerk, the Chief Administrative Officer (CAO) and the Township solicitor.
- 10 My Office received full co-operation in this matter.

Background

The Amherst Island Wind Project

- 11 Windlectric operates a number of wind turbines on private agricultural and municipal land on Amherst Island. It entered into a Community Benefit Agreement with the Township in 2016 related to this wind project.
- 12 In early 2019, Windlectric advised the municipality it may have grounds under the Community Benefit Agreement to stop making contributions to the Township. As a result, Windlectric requested that the parties enter into a tolling agreement related to the wind project.

The July 8, 2019 meeting

- 13 Council met for a regular meeting on July 8, 2019. According to the meeting minutes, council resolved to proceed in camera at 6:14 p.m. to discuss, among other things, "[t]he receiving of advice that is subject to solicitor-client privilege, including communications necessary for that purpose: **Solicitor Client - Windlectric.**"
- 14 According to the closed session recording and those we spoke with, the Township's solicitor was present in the closed session and provided council with advice and explanations regarding the proposed tolling agreement.

- 15 After receiving this information, council considered various motions related to the tolling agreement, ultimately passing the third motion put forward. Following the successful motion, the Township solicitor confirmed that council's direction was sufficient and that he would take steps to effect it.
- 16 Council returned to open session at 7:04 p.m. The minutes of this open session indicate that the Mayor reported that council provided "[d]irection to staff and Township solicitor regarding Windlectric" during the closed session.
- 17 However, councillors we interviewed had conflicting understandings and memories about what they had voted on during the closed session. A majority felt council had voted to direct the Township solicitor to take action related to the tolling agreement, while others believed council had voted on the agreement itself. Councillors generally agreed that there was confusion regarding the exact wording of what they were voting on, especially since multiple motions were put forward and defeated before council agreed to a course of action. Some councillors also struggled to recollect details of the discussion given the passage of time.
- 18 Our review of the closed session minutes indicate that council's resolution was a decision on the agreement itself, rather than a direction to the solicitor about how to proceed with the agreement. In his interview, the Township solicitor said that he understood council had voted to provide him with direction regarding the agreement and that he took action on that direction following the meeting. The Clerk and CAO also indicated that they believed council had voted to direct the Township solicitor and staff.

Analysis

Applicability of the advice subject to solicitor-client privilege exception

- 19 Council cited the exception in s. 239(2)(f) to discuss advice subject to solicitor-client privilege related to Windlectric during its July 8, 2019 closed session.
- 20 The solicitor-client privilege exception covers discussions that include communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential. Communication will only be found to be subject to solicitor-client privilege if it is:

1. Between a client and his or her solicitor, where the solicitor is acting in a professional capacity;
2. Made in relation to the seeking or receiving of legal advice; and
3. Intended to be confidential.²

21 In the present case, the Township's solicitor was present at the closed session on July 8, 2019, and provided council with specific legal advice related to the tolling agreement. This information formed the basis of council's decision related to the agreement. As a result, council's discussion fit within the exception for advice subject to solicitor-client privilege.

Procedural matters

Voting

- 22 Section 244 of the *Municipal Act* states that votes must be taken in open session, subject to the narrow exception outlined in section 239(6) of the Act, which permits voting in camera for procedural matters or for giving directions to staff.
- 23 In this case, the closed session resolution clearly indicates that council voted on the substance of the tolling agreement, which is neither a procedural matter nor a direction to staff. Some members of council told our Office this resolution matches their understanding of what occurred. However, council's report back in open session indicates that council provided direction to the Township solicitor regarding the tolling agreement. The majority of councillors and all municipal staff we interviewed indicated that this was their understanding of what had occurred. There was general agreement that the exact wording of the resolution council voted on was unclear during the meeting, and the closed session audio recording reflects this confusion. In practice, the Township solicitor acted based on his understanding that he had been given direction regarding the tolling agreement and the negotiated agreement was ultimately presented to council in open session for approval.
- 24 Because the recorded resolution in the closed meeting minutes indicates that council voted on the substance of the tolling agreement, council for Loyalist Township technically violated the *Municipal Act's* voting prohibition. The recorded resolution was not regarding a procedural matter or for giving direction to staff.

² *Canada v. Solosky* [1980] 1 S.C.R. 821.

Report back

- 25 The complaint to our Office also alleged that council did not provide sufficient information about the subject matter of its July 8 closed session discussion when it reported back following the in camera meeting. As noted above, council reported that it provided “Direction to staff and Township solicitor regarding Windlectric.”
- 26 Although there is no requirement under the *Municipal Act* for municipal councils to report back in public after the conclusion of a closed meeting, the Ombudsman recommends this practice to increase transparency of the closed meeting process.
- 27 A report back in open session may contain similar information as a resolution authorizing the session, together with information about any decisions, resolutions, and directions given to staff in closed session. In other cases, the nature of the discussion might allow for considerable information about the closed session to be provided publicly.
- 28 In this case, council’s report back following the July 8, 2019 closed session provided the public with information about the outcome of council’s discussion. I commend the Township for adopting this best practice and encourage it to continue providing, as appropriate, information to the public about the outcome of its closed session discussions.

Opinion

- 29 Council for Loyalist Township did not contravene the *Municipal Act, 2001* when it proceeded in camera on July 8, 2019, to discuss a tolling agreement with Windlectric. This discussion was permissible under the Act’s closed meeting exception for advice subject to solicitor-client privilege in section 239(2)(f).
- 30 However, council for Loyalist Township contravened the Act by voting on a resolution that was neither procedural nor a direction to staff. My investigation found that this occurred due to confusion and inadvertence, and that in practice the resolution was treated as a direction to staff.

Recommendations

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

Recommendation 1

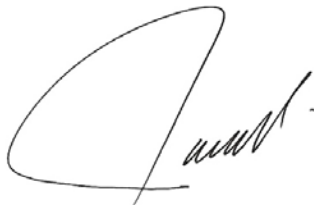
All members of council for Loyalist Township should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

Council for Loyalist Township should ensure that its in camera votes comply with sections 239(6) of the *Municipal Act, 2001*.

Report

- 32 Council for Loyalist Township was given the opportunity to review a preliminary version of this report and provide comments to our Office. In light of the restrictions in place related to COVID-19, some adjustments were made to our normal preliminary review process and we thank council members for their co-operation and flexibility. All comments received were considered in the preparation of this final report.
- 33 This report will be published on my Office's website, and should be made public by Loyalist Township as well. 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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