



Ombudsman Report

**Investigation into whether
the Economic Development Committee for the
Township of McKellar
held illegal closed meetings on
May 5, 2015 and by email between
April 22 and 24, 2015**

**Barbara Finlay
Acting Ombudsman of Ontario
November 2015**

Complaint

- 1** In May 2015, the Office of the Ontario Ombudsman received a complaint that the Economic Development Committee for the Township of McKellar held an illegal meeting over email in April 2015, and engaged in discussions during a closed session on May 5 that did not fit within the exceptions to the open meeting requirements of the *Municipal Act, 2001* (the Act).
- 2** Under the Act, all meetings of council, local boards, and committees of either of them must be open to the public, unless they fall within prescribed exceptions.

Ombudsman jurisdiction

- 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 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.
- 4** The Ombudsman is the closed meeting investigator for the Township of McKellar.
- 5** In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

Committee procedures

- 6** McKellar's procedure by-law states that "committee" shall mean a standing or advisory ad hoc committee established by council. The Terms of Reference for the Economic Development Committee state that the committee shall exist and operate as a committee of council.
- 7** As a committee of council, the Economic Development Committee is subject to the open meeting rules in the *Municipal Act, 2001* and the township's procedure by-law.
- 8** The by-law governs the proceedings of committees of council and states that all meetings of a committee shall be open to the public, except in accordance with listed exceptions, which mirror those in s. 239(2) of the Act.

- 9** The by-law requires committees to pass a resolution before proceeding into a closed session stating the fact of the closed meeting and the general nature of the matter to be considered. It states that a vote can only be taken in a properly closed meeting for procedural matters or to give directions to staff.
- 10** The committee's Terms of Reference state that quorum shall consist of more than 50 percent of members. Each member has one vote and the Chair shall only vote in the case of a tie.
- 11** According to the Terms of Reference, council appoints by resolution all committee members, including the members of council appointed to the committee. Council has the power to remove any member(s) at any time.

Investigative process

- 12** Our Open Meeting Law Enforcement Team (OMLET) reviewed the committee's Terms of Reference, the township's procedure by-law, the meeting materials for the council meetings on April 20 and May 4, and the committee meeting on May 5. We obtained and reviewed emails exchanged by committee members. We interviewed the Reeve, the Clerk, the committee's Chair, and the committee's Secretary.
- 13** We received full co-operation in this matter.

Background

- 14** At the time of the meetings in question, the township's Economic Development Committee was comprised of a volunteer Chair and six volunteer members. Until April 20, 2015, two members of council also sat on the committee (Reeve Peter Hopkins and Councillor Mike Kekkonen).
- 15** The committee is an advisory committee of council and subject to the procedure by-law. It has a Terms of Reference that sets out the committee's purpose, composition, budget, and certain procedures. Its mandate includes promoting economic growth in the township, advancing the township's economic development strategic plan, and sustaining and enhancing the township's economic base.
- 16** The committee has been working on developing a strategic economic plan for the township for more than three years, but has faced ongoing opposition from

members of council..¹ Committee members are discouraged by this opposition, and at least one member of the committee has resigned since the meetings in question took place.

- 17** On April 20, 2015, council rescinded a prior resolution appointing two members of council to the Economic Development Committee, effectively removing both council members from the committee. Councillors told us they intended to reduce the number of councillors on the committee from two to one. However, a subsequent motion to appoint Councillor Mike Kekkonen to the committee was defeated, leaving the committee temporarily without a council representative.
- 18** During a council meeting on May 4, a councillor asked the committee's Chair whether the committee had a recommendation with respect to which member of council should be appointed to the committee. The Chair replied that the committee had decided unanimously over email that they would prefer council appoint Reeve Peter Hopkins.

Emails exchanged between April 22 and 24

- 19** The committee's Secretary told us that after the April 20 council decision to reduce the number of councillors on the committee, she discussed the matter with the committee's Chair. They agreed that it didn't seem as though council wanted the committee's input on the matter, but that they should poll the committee members in case council asked. The Secretary told the Chair over the phone that her vote was for Reeve Hopkins. They decided to poll the other members over email because the next council meeting was scheduled to occur before the next scheduled committee meeting.
- 20** On April 22, the Chair of the committee emailed the other six volunteer committee members, as well as Reeve Hopkins and Councillor Kekkonen. He stated:
- “... By a new resolution of Council from now on there will be only one Council member on the committee. By return please vote your preference on which council member should remain on the committee.”
- 21** Five members of the committee responded by email. Each said they voted for Reeve Hopkins to be the council representative on the committee.

¹ See Stephanie Johnson, “Arguments Take Over in McKellar”, *Parry Sound North Star* (29 April 2015), online: <<http://www.parrysound.com/news-story/5591954-arguments-take-over-in-mckellar/>>.

- 22** On April 29, the Chair wrote to all members of committee, the Reeve, and Councillor Kekkonen, stating:

“Thank you for your response regarding the preferred council representative on our ED committee. The results are by unanimous vote Reeve Peter Hopkins. Again thank you for your response.”

- 23** Later that day, the Chair emailed all members of committee, the Clerk, the Reeve, and Councillor Kekkonen. This email was forwarded to council.

“It is my understanding that currently we do not have a council representative on Council. **Our vote is the committee's recommendation to council**, council must still decide and vote on the representative.”
[emphasis added]

- 24** Following the vote over email, the Chair attended the council meeting on May 4 and communicated the results of the vote.

Analysis

What is a meeting?

- 25** The definition of “meeting” in s. 238(1) of the Act is circular and not particularly helpful: “‘meeting’ means any regular, special or other meeting of a council, of a local board or of a committee of either of them”.

- 26** To assist in the determination of whether a gathering constitutes a meeting for the purposes of the open meeting rules, our Office developed the following definition of “meeting”:

Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or the purpose of doing the groundwork necessary to exercise that power or authority.²

- 27** There is no restriction on informal communications between members of council or a committee. Local Authority Services (LAS) and the Ombudsman’s Office have both stated that it is healthy in a democracy for government officials to share information informally, and officials are not expected to never talk with one

² Ombudsman of Ontario, *Don’t Let the Sun Go Down on Me: Investigation into City of Greater Sudbury City Council Closed Meeting of February 20, 2008* (April 2008), online: <https://ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2_2.pdf>.

another outside a formal meeting.³ However, officials must be cautious to ensure that discussions do not evolve into illegal meetings, particularly when a quorum of the body participates and council, committee, or local board business is discussed.

Did a meeting occur?

28 It is not necessary for all members of a group to meet together in person or at the same time in order for a meeting to occur. A series of emails exchanged by a quorum of a committee can constitute a meeting, which is subject to the open meeting requirements of the Act.

29 In a 2014 report regarding the County of Bruce, LAS noted that a meeting can include “telephonic or electronic gatherings”.⁴ In an April 2008 report on a complaint about the Township of Nipissing, our Office stated that sequential phone calls between the Mayor and individual councillors could be considered to be a meeting for the purposes of the open meeting rules.⁵ Our report noted that the substance, rather than the form, of a meeting is the determinative factor:

[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...⁶

30 In a May 2015 report on a meeting held over email by councillors-elect from the Township of Leeds and the Thousand Islands, our Office clarified that the technology used to hold a serial meeting is also not a determinative factor. A

³ Local Authority Services, Report to the Council of the City of Greater Sudbury Regarding an Investigation into Complaints about an Alleged Closed Meeting of Members of Council held on or before February 12, 2013 (August 2013) at 8, online: <http://www.agavel.com/wp-content/uploads/2013/09/Greater_Sudbury_2013.docx>; Ombudsman of Ontario, In the Back Room (October 2013), online:

<http://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/London_BT_Final-EN_1.pdf>; Ombudsman of Ontario, Turning Tables (September 2014) at para 19, online:

<<https://ombudsman.on.ca/Files/sitemedia/Documents/LondonTurningTables-ENaccess.pdf>>.

⁴ Local Authority Services, Report to the Corporation of the County of Bruce Regarding the Investigation of Alleged Improperly Closed Meetings of County Council (July 2014) at 5, online: <<https://www.brucecounty.on.ca/assets/files/Amberley%20Gavel%20Meeting%20Investigation%20Report%20July,%202014.pdf>>.

⁵ Ombudsman of Ontario, *Investigation into Council of the Township of Nipissing Special Meeting of April 25, 2008* (February 2009), online:

<ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/nipissingfinaleng.pdf>.

⁶ *Ibid* at para 29-30.

series of emails can constitute a serial meeting, if councillors come together over email to exercise the authority of council or lay the groundwork to do so.⁷

- 31** At the time of the poll, there were seven members of McKellar's Economic Development Committee. All members of the committee received the emails regarding the Chair's poll, and five of the seven voted for their preferred candidate by email. The sixth voted by phone during a discussion with the Chair.
- 32** While a quorum of the committee came together over email to decide on this matter, the analysis does not end there. We must next consider whether the committee exercised its power or authority, or laid the groundwork to do so.
- 33** The committee's role is limited by its Terms of Reference to advising council on tourism and economic development in McKellar, advancing the township's Economic Development Strategic Plan, and implementing economic development projects. The Terms of Reference explicitly give council the power to appoint committee members, with no provision for the committee to provide input.
- 34** Both the committee and council considered it within the authority of the committee to review applications for membership and make recommendations to council. We were told that the committee regularly considered whether individuals should be invited to join the committee, usually after an individual had shown interest and attended a number of committee meetings. As noted below, in May 2015, the township's Clerk forwarded an application for membership to the committee and advised that they should consider it in camera. In his email to the committee's Chair, the Clerk wrote:

[T]he Township has received the attached application for membership on the EDC and Council is requesting that your committee review the application and make a recommendation to Council regarding this appointment.

- 35** In the past, this has been the committee's practice with respect to volunteer committee members, rather than councillor members. In this case, the committee decided to come together to decide on a recommendation to council regarding a councillor representative. It forwarded that recommendation to the township's Clerk and communicated that recommendation to council when asked at a council meeting. Making recommendations to council regarding membership on the committee was treated by the committee, council, and municipal staff as within the role of the committee.

⁷ Ombudsman of Ontario, *Re: The Naughty Topic* (June 2015), online: ombudsman.on.ca/Resources/Reports/Township-of-Leeds-and-the-Thousand-Islands--Re--Th.aspx.

- 36** A quorum of McKellar’s Economic Development Committee came together over email between April 22 and 24 to exercise the power and authority of the committee by voting on a recommendation to council regarding an appointment to the committee. These communications constituted an illegal meeting for the purposes of the Act and the township’s procedure by-law.

The May 5, 2015 committee meeting

- 37** The Economic Development Committee had a meeting scheduled for May 5, 2015. That morning, the township’s Clerk sent an email to the committee Chair advising that a member of the public had applied for membership on the committee. The Clerk attached the application and advised the Chair that “any discussion regarding this application should take place “in camera”... due to privacy concerns as it deals with “personal matters about an identifiable individual”. The Clerk further advised that council had rescinded its appointments to the committee, and that “Council is looking to the Committee for a recommendation on whether or not the size of the Committee should be increased to accommodate the current and/or future appointments”.
- 38** The committee’s May 5 meeting began at 6:30 p.m. at council chambers. The Chair and five members attended.⁸ The open session was attended by three members of council and three members of the public. The township’s intern attended both the open and closed session.
- 39** Item 10 on the agenda was, “Closed, discussion regarding identifiable individuals”.
- 40** The committee moved into closed session from 8:30 to 9:00 p.m.

Discussions in camera

- 41** According to the closed session minutes, the committee originally scheduled a closed meeting to discuss negative comments about the committee made on an ongoing basis at council meetings. Based on the advice of the Clerk, the committee also decided to consider a proposed committee appointment during the closed meeting.

Summary of recent council proceedings and request for information from a councillor

- 42** The Secretary began the closed meeting by summarizing council’s April 20

⁸ Peter Brewster was absent.

decision to rescind the resolution appointing two councillors to the committee. She noted that a motion to appoint Councillor Kekkonen to the committee had been defeated. It was further noted that, in order to provide a recommendation to council, the Chair polled committee members by email and the “unanimous vote was for Reeve Peter Hopkins”. The Secretary told the committee that the matter was considered again at the May 4 council meeting, but no decision was made, such that there would be no councillors on the committee until the issue was decided.

- 43** The Chair told the group that Councillor Bonnie Beier had asked for a copy of this poll and responses to it. The committee decided not to comply unless the request came through official channels.

Analysis

- 44** This summary consisted of information already in the public record, including the fact that the committee took a poll and its recommendation, which had been disclosed publicly at the May 4 council meeting. No personal matters about identifiable individuals were discussed during this part of the meeting.
- 45** When asked about this part of the discussion, committee members acknowledged that all the information was public at the time of the meeting and that it could have been discussed in open session. It was discussed to bring everyone up to speed, as not all members of the committee attend council meetings. This discussion did not fit within any of the exceptions in s. 239 of the Act.

Negative relations with council

- 46** The Secretary next read a letter to council that she had drafted. The letter outlined concerns about the recent decision-making by council around representation on the committee. It noted that the committee had unanimously agreed that the Reeve should be the representative, and asked council to explain why the matter couldn't be resolved.
- 47** The Secretary told us that this part of the discussion was focused on the ongoing negative comments about the committee from two councillors and two private citizens who attend most council and committee meetings. The committee members discussed how the four individuals make what they felt were regular negative comments at council meetings about the committee.
- 48** The Secretary said that the committee members were feeling discouraged and frustrated. They talked about whether to continue as a committee in light of the negative comments and whether to address the negativity directly with council.

- 49** The committee decided not to send the letter to council, and instead work with whatever changes council initiated. It decided to continue its work as a committee, noting that the committee has a lot to offer the township.

Analysis

- 50** Discussions under the exception in s. 239(2)(b), “personal matters about an identifiable individual”, must be about an individual in his or her personal capacity, rather than his or her official capacity. However, information about the individual in an official capacity can take on a more personal nature if it relates to scrutiny of that individual’s conduct.⁹
- 51** In this case, the committee’s discussion focused on the conduct and comments of two councillors and two private citizens. The committee discussed the conduct and opinions of the two private individuals and discussed how best to respond to that conduct. This fell within the exception for personal matters in the Act.
- 52** The discussion about the councillors differed from that about the private citizens, as it related to individuals in their official roles. The discussion about the two members of council was limited to their comments about the committee during council meetings. The councillors were acting in their official capacities when they made the comments, and they were made on the public record. The discussion did not go so far as to reveal something personal about the councillors. Normally, this part of the discussion would not fit within the exception for personal matters in the Act. However, it is unrealistic to expect the committee to have parsed the discussion by separating it from the discussion about comments made by the private individuals, when such discussions were directly related.

Committee appointment

- 53** The committee next discussed an application from a member of the public to join the committee. The committee had received a written application from the individual that included his name, address, and why he hoped to join the committee. As discussed above, it had been the committee’s practice to consider applications in order to inform council of the committee’s opinion.
- 54** In camera, the committee talked about the individual’s personality, skills, and conduct at council and committee meetings. It discussed the implications, both negative and positive, of accepting the application. The committee decided to table the decision until council decided if the composition of the committee would change.

⁹ Order MO-2519 (29 April 2010), online: IPC <www.ipc.on.ca>.

Analysis

- 55** This discussion fit within the exception for “personal matters about an identifiable individual”, as it was in regards to the individual’s application and personal characteristics. As noted above, in order to constitute personal information for the purposes of s. 239(2)(b), something personal must be revealed about the individual.
- 56** In Order MO-1909, then-Assistant Information and Privacy Commissioner, Brian Beamish, found that deliberations about applications for volunteer positions with a municipality, including the appointment of individuals to committees of council, constitute “personal matters” for the purposes of s. 239(2)(b) of the Act.¹⁰ He found that even disclosing the names of individuals who applied for such volunteer positions would reveal personal information, as the public would know who applied and if their application had been approved.
- 57** In this case, the discussion about the appointment went beyond the fact of the individual’s application and the information on his application form. The committee members discussed personal factors related to the conduct issues reviewed above. They scrutinized the individual’s conduct and questioned whether he would be a positive or negative addition to the committee. By considering this individual’s conduct, the committee revealed inherently personal information.
- 58** This discussion fit within the exception for personal matters in the Act.

Opinion

- 59** The Economic Development Committee for the Township of McKellar contravened the *Municipal Act, 2001* and the municipality’s procedure by-law by holding a closed meeting and vote over email between April 22 and 24.
- 60** On May 5, 2015, the committee violated the Act and McKellar’s procedure by-law when it discussed an item in camera that did not fit within the exceptions to the open meeting requirements.
- 61** In making the above findings, I want to acknowledge that the committee was composed entirely of volunteer community members who were acting in good

¹⁰ Order MO-1909 (March 2005), online: IPC <www.ipc.on.ca>.

faith while trying to deal with a difficult relationship with town council. This was the first time that the committee had ever closed a meeting. The committee members also did not have the necessary staff support or advice to assist them in ensuring that the proper meeting procedures were followed.

Recommendations

- 62** I am making the following recommendations to assist the Township of McKellar's Economic Development Committee to improve its practices with respect to open meetings.

Recommendation 1

The Township of McKellar should provide the Economic Development Committee with support and training regarding the closed meeting provisions of the *Municipal Act, 2001* and the township's procedure by-law, and their application to the committee.

Recommendation 2

All members of the Township of McKellar's Economic Development Committee should be vigilant in adhering to their individual and collective obligation to ensure that the committee complies with its responsibilities under the *Municipal Act* and the township's procedure by-law.

Recommendation 3

The McKellar Economic Development Committee should ensure that no subject is discussed in a closed session unless it clearly fits within one of the statutory exceptions to the open meeting requirements.

Recommendation 4

Members of the McKellar Economic Development Committee should refrain from exercising the power or authority of the committee or laying the groundwork necessary to do so through serial email communications.

Report

- 63** OMLET staff spoke with the township's Reeve and Clerk on November 13, and with the committee's Chair and Secretary on November 16, to provide an overview of these findings, and to give the municipality an opportunity to

comment. Any comments received were taken into consideration in preparing this report.

- 64** This report should be shared with council for the Township of McKellar and made available to the public as soon as possible, and no later than the next council meeting.



Barbara Finlay
Acting Ombudsman of Ontario