



## **Ombudsman Report**

**Investigation into alleged closed meetings  
held by the Walkerton Business Improvement Area  
and the Municipality of Brockton  
on June 13, June 20, and September 27, 2016**

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Ombudsman of Ontario  
February 2017**

## Complaint

- 1 In September 2016, our Office received two complaints alleging that the Walkerton Business Improvement Area (the Walkerton BIA) and the Municipality of Brockton held three improperly closed meetings.
- 2 One complaint alleged that following the June 13, 2016 meeting of the Walkerton BIA, a quorum of board members continued to meet informally to discuss circulating a petition related to a matter recently considered by the BIA. The complaint further alleged that a closed session discussion held by council for the Municipality of Brockton on June 20, 2016, did not come within the closed meeting exception for “litigation or potential litigation”. At this meeting, the Walkerton BIA met with Brockton council to provide a delegation regarding the matter that was allegedly discussed following the BIA’s June 13, 2016 meeting.
- 3 The second complaint alleged that on September 27, 2016, a quorum of council for the Municipality of Brockton attended a meeting held by an engineer under the *Drainage Act*. The meeting was intended to provide affected residents with information about matters related to an ongoing drainage petition and provide them the opportunity to ask the engineer questions. The complaint alleged that this information session was a “meeting” under the *Municipal Act, 2001* and that the municipality failed to comply with the Act’s procedural open meeting requirements.

## The Municipality of Brockton and the Walkerton BIA

- 4 The Municipality of Brockton is a lower-tier municipality located in Bruce County.
- 5 Council for the Municipality of Brockton has designated a business improvement area in the Walkerton community, known as the Walkerton BIA. The boundaries of the BIA were established through a by-law passed by council. Business properties that fall within the geographic boundaries of the Walkerton BIA are required to pay a levy (“levied members”).<sup>1</sup> In addition, businesses that fall outside the geographic boundaries established by by-law are allowed to pay a fee to join the Walkerton BIA as voluntary “associate members” or “friends”.

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<sup>1</sup> *Municipal Act, 2001*, SO 2001, c 25, s 208(2).

- 6 In accordance with the *Municipal Act*, council also established a board of directors to act as the BIA's board of management. The board of directors (the "board") for the Walkerton BIA consists of nine members who represent a cross-section of business owners in the community. The members of the board are appointed by council for the Municipality of Brockton and serve two-year terms. One member of the board must also be a councillor for the Municipality of Brockton.
- 7 On December 2, 2016, our Office learned that all members of the board except the Brockton councillor had resigned, effective immediately. The former BIA manager also resigned effective December 31, 2016.

## Ombudsman jurisdiction

- 8 Under the *Municipal Act*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 9 The Act gives citizens the right to request an investigation into whether a municipality or local board has complied with the Act in closing a meeting to the public. Municipalities and local boards may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities and local boards that have not appointed their own.
- 10 Section 204(2.1) of the *Municipal Act* specifies that a board of management for a business improvement area is a local board of the municipality for all purposes. Accordingly, the board of directors for the Walkerton BIA is a "local board" and its meetings are subject to the Act's open meeting requirements.
- 11 The Ombudsman is the closed meeting investigator for the Municipality of Brockton and the Walkerton BIA.
- 12 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's or local board's procedure by-law have been observed.

## Prior review of Walkerton BIA closed meeting

- 13 Our Office previously investigated a complaint that the Walkerton BIA inappropriately relied on the "litigation or potential litigation" exception to

discuss various concerns about its structure and by-law in camera on June 8, 2016.<sup>2</sup>

- 14 Our review determined that during this meeting, the board discussed a staff report and accompanying legal opinion that responded to issues raised in a letter written by the solicitor of a local business owner. As part of the discussion, the board considered legal advice that commented on the board's current practices. Our investigation determined that the board had reason to believe that the local business owner would initiate legal proceedings related to the BIA if he were unsatisfied with the changes implemented in response to the letter from his solicitor.
- 15 In a letter dated August 5, 2016, our Office determined that the board's discussion fell within the "litigation or potential litigation" and the "advice subject to solicitor-client privilege" closed meeting exceptions. However, we identified various best practices that would help the board improve its open meeting procedures, including improved resolutions to proceed in camera, adopting the practice of reporting back, and revising the board's procedure by-law.

## Investigative process

- 16 On September 29, 2016, we advised the Municipality of Brockton and the Walkerton BIA of our intent to investigate these complaints.
- 17 We reviewed the municipality's and BIA's procedure by-laws and relevant portions of the Act, as well as the meeting agendas and open/closed meeting minutes from the June 13 and June 20, 2016 meetings.
- 18 For the June 13, 2016 meeting of the Walkerton BIA, we interviewed the then BIA manager and each BIA board member who was present at the meeting. We also reviewed a document titled "Summary of My Petition" that was prepared by a board member and references the alleged informal gathering on June 13, 2016.
- 19 For the June 20, 2016 meeting of council for the Municipality of Brockton, which included the delegation by the Walkerton BIA in closed session, we interviewed the then BIA manager, each BIA board member present at the meeting, the municipality's Clerk/CAO, and the Mayor.
- 20 During our investigation of the September 27, 2016 *Drainage Act* meeting,

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<sup>2</sup> Letter from Ombudsman of Ontario to Walkerton Business Improvement Area (5 August 2016), online: <[https://www.ombudsman.on.ca/Files/sitemedia/Documents/Walkerton-BIA--closing-letter--August-2-accessible\\_1.pdf](https://www.ombudsman.on.ca/Files/sitemedia/Documents/Walkerton-BIA--closing-letter--August-2-accessible_1.pdf)>.

we reviewed the notice that was mailed to affected landowners and meeting minutes prepared by the drainage engineer. We interviewed the municipality's Clerk/CAO and the Mayor.

21 We received full co-operation with our investigation.

## **Procedure by-laws – Municipality of Brockton and Walkerton BIA**

### **Municipality of Brockton**

- 22 Section 4.4 of the Municipality of Brockton's by-law<sup>3</sup> provides that public notice of regular and special meetings of council will be provided on the municipal website and also in accordance with the municipality's notice by-law (by-law 2007-90).<sup>4</sup> The notice by-law requires that notice be provided at least five days prior to the meeting.
- 23 The procedure by-law further provides that meetings of council shall be open to the public, subject to the listed exceptions. Prior to proceeding in camera, council must state by resolution the fact of the holding of the closed meeting and its general nature.
- 24 The by-law generally reproduces the closed meeting exceptions contained in the Act. However, the by-law has not been updated to reflect that discussions regarding an ongoing ombudsman or closed meeting investigation must occur in camera, one of the exceptions listed does not reflect the exact wording of the *Municipal Act*, and another is not a subject that can be considered in closed session. Brockton's CAO/Clerk acknowledged that the procedure by-law has not been updated and indicated that council relies on the current closed meeting exceptions when proceeding in camera.
- 25 Council for the Municipality should amend its procedure by-law to appropriately reflect the Act's closed meeting exceptions.

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<sup>3</sup> Corporation of the Municipality of Brockton, by-law no 2012-84, *Being a By-law to govern the calling, place and proceedings of the Council of the Corporation of the Municipality of Brockton and the Committees thereof* (13 November 2012), online:

<[http://www.brockton.ca/uploads/273/Doc\\_635222770570820009.pdf](http://www.brockton.ca/uploads/273/Doc_635222770570820009.pdf)>.

<sup>4</sup> Corporation of the Municipality of Brockton, by-law no 2007-90, *Being a By-law to establish procedures for the provision of notice as required under the Municipal Act, 2001 as amended by Bill 130* (29 October 2007), online:

<[http://www.brockton.ca/uploads/273/Doc\\_635218365304934428.pdf](http://www.brockton.ca/uploads/273/Doc_635218365304934428.pdf)>.

## Walkerton BIA

- 26** In October 2016, the Walkerton BIA repealed an outdated procedure by-law and amended its procedure manual in response to concerns identified by our Office in a letter dated August 5, 2016.<sup>5</sup> The board's revised procedure provides that notice of all meetings will be provided on the BIA's website. It further provides that meetings of the board shall be open to the public, subject to the listed exceptions. Prior to proceeding in camera, the board must state it is entering a closed session, the applicable closed meeting exception, and a general description of the subject matter. We commend the board for implementing these revisions.

### **June 13, 2016 – Walkerton BIA informal gathering**

#### June 13, 2016 board meeting

- 27** On June 13, 2016, 12:00 p.m., the board of directors for the Walkerton BIA met in its boardroom. Notice was provided in accordance with the board's standard practice. After calling the meeting to order, the board immediately proceeded in camera to discuss matters coming within the "litigation or potential litigation" closed meeting exception. The board returned to open session at 1:04 p.m. and resolved to request a closed session meeting with council for the Municipality of Brockton. The meeting adjourned immediately thereafter.

#### Alleged informal gathering after the meeting

- 28** The complaint to our Office alleged that after the meeting was over but before the board members dispersed, one of the BIA board members began discussing her intention to circulate a petition to the BIA membership regarding an issue discussed during the closed session.
- 29** Based on our discussion with the board member who initiated the petition, the purpose was to obtain a general idea of how the levied BIA members felt about the issue discussed during the board's meeting.

#### ***Information from interviews***

- 30** Our interviews determined that three of the board's nine directors participated in a conversation following the formal portion of the meeting.

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<sup>5</sup> Letter from Ombudsman of Ontario to Walkerton Business Improvement Area (5 August 2016), online: <[https://www.ombudsman.on.ca/Files/sitemedia/Documents/Walkerton-BIA--closing-letter--August-2-accessible\\_1.pdf](https://www.ombudsman.on.ca/Files/sitemedia/Documents/Walkerton-BIA--closing-letter--August-2-accessible_1.pdf)>.

A fourth member was present but did not participate because he is an associate member and felt it would be inappropriate to weigh in. Because the meeting occurred during lunch on a workday, most board members indicated that they needed to rush back to their job.

- 31 When asked whose decision it was to circulate the petition, all board members agreed that it was solely the decision of the board member who initiated the discussion.

### ***Information from subsequently prepared summary***

- 32 Approximately three months later, the board member who initiated the petition drafted a document, dated September 7, 2016, entitled “Summary of My Petition”. The summary document was briefly made public as an attachment to a BIA meeting agenda for its September 14, 2016 meeting. However, after concerns were raised about the content and accuracy of the summary, it was ultimately removed from the agenda.
- 33 In the summary, the board member provided the following explanation of the informal gathering following the June 13 meeting:

On June 13<sup>th</sup> a closed door meeting of the Walkerton BIA was called to discuss litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board. After this meeting was over, but before the Board had dispersed, I told my fellow Board members that I wanted to conduct a survey of the levied businesses with respect to whether they supported the inclusion of associates in our membership and, (sic) on our Board. **All Board members agreed it was a worthwhile survey** and some Board members offered to help with the collection of information. [emphasis added]

- 34 When asked how she concluded that all board members agreed to the survey/petition, the board member told our Office that she assumed the other members supported the idea after no one objected. The board member also said that she individually made the decision to circulate the petition; she never sought the approval from the board and had already determined she was going to proceed when she introduced the idea at the end of the meeting. She said that as a representative on the BIA board, she needed to know how the membership felt so that she could better represent them.



## Analysis

**35** Section 238(1) of the *Municipal Act* 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. Our Office has developed the following definition 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 the purpose of doing the groundwork necessary to exercise that power or authority.<sup>6</sup>

**36** Our Office has consistently stated that this definition is consistent with leading interpretations of the open meetings law and reinforces the right of the public to observe municipal government in process.<sup>7</sup>

**37** Both our Office and Local Authority Services (LAS) have determined that the *Municipal Act* does not prevent council members from ever discussing council business outside of a formal meeting.<sup>8</sup> As we concluded in our November 2015 report regarding a closed meeting in the City of Niagara Falls, it is expected that some casual conversations about municipal business will take place amongst individual members of such bodies.<sup>9</sup> In that case, four of nine council members participated in a discussion regarding council prayer between the end of the closed meeting and the start of the regular meeting. Other council members were present but did not participate in the discussion. Our Office determined that this exchange

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<sup>6</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: <[http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2\\_2.pdf](http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2_2.pdf)>.

<sup>7</sup> *London (City) v RSJ Holdings Inc*, [2007] 2 SCR 588, 2007 SCC 29 at para 32; *Southam Inc v Ottawa (City)* (1991), 5 OR (3d) 726 (Ont Div Ct) at paras 12-18; *Southam Inc v HamiltonWentworth Economic Development Committee* (1988), 66 OR (2d) 213 (Ont CA) at paras 9-12.

<sup>8</sup> Ombudsman of Ontario, *Investigation into whether Council for the Village of Casselman held an illegal closed meeting on January 8, 2015* (April 2015) at para 38, online: <<http://www.ombudsman.on.ca/Files/sitemedia/files/Casselman-Restaurant-Apr2015-EN.pdf>>; Local Authority Services, *Report to the Corporation of the Township of Carling* (March 2015) at 7, online: <<http://www.agavel.com/wp-content/uploads/2013/09/Carling-Investigation-Report-Final-March-2015.docx>>.

<sup>9</sup> Ombudsman of Ontario, *Investigation into whether Council for the City of Niagara Falls held an illegal closed meeting on April 28, 2015* (November 2015), online: <[https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls-\(3\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-Niagara-Falls-(3).aspx)>.



among council members did not constitute a meeting subject to the *Municipal Act*.

- 38 When determining if a meeting has occurred, the concept of a legal quorum is an important consideration. In an October 2015 report regarding the City of Elliott Lake, our Office noted that having a quorum of members present is not conclusive, but that quorum is a factor as it means a sufficient number of members is present to legally transact business.<sup>10</sup> Once a gathering constitutes a quorum of council, committee, or local board, the risk of those individuals collectively exercising their authority increases.
- 39 In the present case, three BIA board members discussed one board member's plan to circulate a petition. As the BIA board has nine members, less than a quorum of the board participated in the discussion. In addition, each person we spoke with indicated that the decision to circulate the petition was that of one board member, not the BIA board. Based on all the evidence, our Office is satisfied that this discussion was informal and did not rise to the level of exercising the board's authority or laying the groundwork for such an exercise. The informal discussion that occurred following the June 13, 2016 board meeting was not a "meeting" for the purposes of the *Municipal Act* and the board did not contravene the Act's open meeting requirements.

## June 20, 2016 – Meeting of council for the Municipality of Brockton

- 40 On June 20, 2016, 7:00 p.m., council for the Municipality of Brockton met for a regular council meeting. Notice of the meeting was provided in accordance with the municipality's procedure by-law.
- 41 At 8:31 p.m., council resolved to enter closed session to discuss:
- Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board – **Business Improvement Area**
- 42 Six members of the board, as well as the then BIA manager, were present for this discussion. The council representative to the BIA also attended in

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<sup>10</sup> Ombudsman of Ontario, *Investigation into whether Council for the City of Elliot Lake held illegal closed meetings in April 2015*, (October 2015) online: <[https://www.ombudsman.on.ca/Resources/Reports/City-of-Elliot-Lake-\(9\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-Elliot-Lake-(9).aspx)>.

his role as councillor.

- 43 Council's closed session discussion related to the same matter considered by the Walkerton BIA's board during its June 8 and 13, 2016 in camera meetings. As noted in our letter regarding the board's June 8 closed session, the Municipality of Brockton had previously received a letter written by the solicitor of a local business owner raising concerns about the legality of the BIA's practices and structure. The solicitor's letter formally asked that the municipality take various corrective actions and requested a reply within 30 days. In response to this letter, the municipality received legal advice regarding the BIA's current practices. While the letter from the business owner's solicitor did not explicitly threaten litigation, our investigation determined that the board had reason to believe that the local business owner would initiate legal proceedings if he were unsatisfied with the response he received from the municipality.
- 44 According to the closed session minutes, once in camera, the BIA board members distributed a letter to council expressing their views on the matters discussed during the June 8 and June 13, 2016 closed meetings. Our Office reviewed a copy of this letter.
- 45 After receiving this letter, various councillors asked board members how they wished to deal with the specified matter and expressed concern that certain approaches could result in litigation. According to the closed session minutes, the Deputy Mayor specifically asked what level of legal exposure would exist if certain decisions were made.
- 46 Councillors and the BIA board members concluded by discussing its intended response to the letter from the business owner's solicitor.
- 47 The closed session adjourned at 9:49 p.m.

## Analysis

### ***Litigation or potential litigation closed meeting exception***

- 48 Council relied on the "litigation or potential litigation" exception to discuss its proposed response to the concerns raised in the letter from the local business owner's solicitor.
- 49 The meaning of "litigation or potential litigation" is not explicitly defined in the *Municipal Act*. However, as the courts have explained with respect to litigation privilege:

[i]t is not necessary that litigation have been commenced, nor is it

necessary that it be created at a time when there is a certainty of litigation but merely that litigation is a reasonable prospect. On the other hand, there must be more than a mere suspicion that there will be litigation.<sup>11</sup>

- 50 In a report regarding the Village of Westport, our Office found that, although litigation had not been initiated at the time of the in camera discussion, there was sufficient reason for the municipality to anticipate that it was a realistic possibility.<sup>12</sup> Accordingly, council's closed session discussion came within the "litigation or potential litigation" closed meeting exception.
- 51 In this case, a business owner's solicitor sent a letter to the municipality alleging that various actions and policies of the Walkerton BIA and the municipality were contrary to the *Municipal Act*. The solicitor's letter formally asked that the municipality take various corrective actions and requested a reply within 30 days. In their discussions with our Office, Brockton's CAO/Clerk and the Manager of the BIA said that they believed the business owner would initiate legal proceedings if he were unsatisfied with the changes implemented in response to the letter. They indicated that council's closed session discussion on June 20, 2016, was intended to update councillors on the status of the matter and to discuss what changes the municipality wished to implement in response to the letter. Our Office previously found that a closed meeting of the Walkerton BIA to discuss the same topic on June 8, 2016 was properly closed to the public under the "litigation or potential litigation" closed meeting exception. While two additional weeks had passed since that meeting, there was still sufficient reason for council to anticipate that litigation was a realistic possibility.
- 52 Accordingly, council was entitled to rely on the closed meeting exception for "litigation or potential litigation" during its June 20, 2016 meeting.

## **September 27, 2016 – *Drainage Act* meeting attended by Brockton council**

- 53 On September 27, 2016, a quorum of council for the Municipality of Brockton and municipal staff attended a meeting held by an engineer under the *Drainage Act*. The meeting was intended to provide affected residents information about matters related to an ongoing drainage petition and provide them the opportunity to ask the engineer questions.

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<sup>11</sup> *Carlucci v Laurentian Casualty Co of Canada*, [1991] OJ No 269 (SCJ).

<sup>12</sup> Village of Westport, January 2015, online:

<[http://www.ombudsman.on.ca/Files/sitemedia/files/Westport\\_2015\\_Final.pdf](http://www.ombudsman.on.ca/Files/sitemedia/files/Westport_2015_Final.pdf)>.

The complainant alleges that this information session was a “meeting” under the *Municipal Act* and that the municipality failed to comply with the Act’s open meeting requirements.

### *Drainage Act* process and the Russell municipal drain

- 54** The *Drainage Act* provides a procedure for the construction, improvement and maintenance of drainage works. The entire process is lengthy, but for the purpose of this closed meeting complaint, the following steps are relevant:
1. The landowner desiring drainage works circulates a formal petition and obtains a specified level of support from other landowners in the area.
  2. The landowner presents the signed petition to council. Council considers the petition and within 30 days, decides whether or not to proceed. If council decides to proceed, it must appoint an engineer.
  3. The engineer organizes an on-site meeting in the area where the drainage is desired. Notice must be provided to various affected individuals and groups. The engineer can also conduct further information sessions, although these are not required under the *Drainage Act*.
  4. The engineer prepares a report and files it with the municipality’s Clerk.
  5. Council must review the report and determine whether to proceed with the petition. If they wish to proceed, they must pass a resolution confirming this decision.
  6. Following this resolution, a council meeting is scheduled to consider the drain. Prior to the meeting, council must send copies of the engineer’s report and notice of meeting to various individuals and groups affected by the drain. Landowners who previously supported the drain can change their mind and withdraw their support at this time.
  7. At the meeting, council may adopt the report, by provisional by-law, if the petition still has sufficient signatures supporting the drain.
  8. After the report is adopted, there is a process for determining how much each landowner will have to pay for the drain, as well as permit processes and appeal mechanisms.
- 55** Once these steps have been completed, construction on the drain can begin.
- 56** The drainage petition relevant to this investigation – the Russell municipal drain petition – had partially completed this process as of September 27, 2016. According to our discussion with the Clerk/CAO and Mayor, one

landowner owned sufficient land to initiate the petition by himself. The petition was presented to council and council resolved to appoint an engineer. The engineer held an on-site meeting, which was attended by some councillors and various landowners. The engineer also held a follow up “information session”, which was attended by various landowners, but no council members. The engineer subsequently called another “information session” to discuss the draft report and answer any remaining questions from affected landowners. This is the meeting that occurred on September 27, 2016.

- 57 Ultimately, the draft report discussed at the meeting will be filed with the Clerk and presented to council. Council will need to decide whether to proceed with the petition, and if they do, a meeting will be scheduled to consider the drain petition. At that meeting, if the petition still has sufficient support, council may pass a provisional by-law to proceed with the next steps in the drainage process.

### September 27, 2016 information session

- 58 On September 27, 2016, at 3:30 p.m., an information session regarding the Russell municipal drain was held in council chambers. The meeting was held in council chambers because the municipality does not have another meeting room. The meeting was chaired by a project engineer at R.J. Burnside & Associates Limited. The engineer was hired by the municipality pursuant to the *Drainage Act* and was accompanied by a colleague who prepared meeting minutes.
- 59 According to the attendance sheet, the meeting was attended by six of Brockton’s seven councillors, members of municipal staff, and various landowners who were affected by the drainage petition.
- 60 Brockton’s CAO/Clerk told our Office that the meeting was arranged at the request of the engineer, who coordinated with the Clerk’s office to administratively schedule the meeting and send out notices to landowners affected by the petition. These notices were required pursuant to the *Drainage Act*. Although the Clerk/CAO initially believed that notice of the meeting had been provided to the public through the municipality’s website, she later determined that this had not occurred. However, the Clerk/CAO told our Office that any member of the public would have been allowed to attend the meeting.

### Discussion

- 61 The engineer began the meeting by reviewing a draft report regarding the

proposed drain. The drainage plan presented by the engineer had been revised at the request of landowners following the previous information session. The engineer discussed various aspects of the proposed drain, such as its location, whether it would be an open or closed drain, relevant setbacks, and whether there would be grading or a straight edge. He next shared a preliminary assessment schedule, which set out how much the municipality and each landowner would be required to pay for their portion of the drain. There was also discussion about various financial grants available to the landowners.

- 62** Throughout the meeting, landowners were encouraged to ask questions and voice their concerns. Some landowners raised concerns about the validity of the petition, which were addressed by the engineer. There was also some general discussion about the Saugeen Valley Conservation Authority and a specific wetland that fell within the watershed. One landowner requested clarification on the option of routing the drain differently than in the proposal, and the engineer agreed to follow up directly with that landowner. The meeting concluded with a general discussion from the landowners on the overall benefit of the proposed drain.
- 63** When asked what role councillors played in this meeting, the CAO/Clerk indicated that they were primarily silent, although she remembered two specific questions asked by councillors. One councillor asked for clarification regarding the legally required level of support for the petition. Another councillor asked how the municipality would benefit from a proposed road crossing related to the drain. The engineer responded to each of these questions and there was no discussion amongst councillors.
- 64** The CAO/Clerk and the Mayor agreed that the councillors did not make any decisions during the session. They each emphasized that the purpose of the session was to answer the questions of the landowners and that the landowners left the session satisfied with the proposed drain.

## Council's presence

- 65** When asked how six councillors decided to attend the information session, the Clerk/CAO said that residents who were being assessed on the drain had previously approached council with various questions and concerns about the *Drainage Act* process. During a council meeting on September 12, 2016, council heard a delegation regarding these concerns. During the meeting, the Mayor told the residents that their questions would best be answered by the project engineer at the upcoming information session. The minutes from this meeting said that the Mayor told the resident council would attend this information session, and the Deputy Mayor



agreed to follow up with Saugeen Valley Conservation Authority to obtain additional information. These actions were not formally recorded in a resolution of council. According to the Clerk/CAO, councillors decided to attend the information session because they were interested in the explanation that would be provided to the affected landowners. The Mayor told our Office that council attended at the request and invitation of a constituent.

- 66 The Clerk/CAO indicated that the information session was viewed as a learning opportunity for both council and municipal staff.

## Analysis

- 67 As previously discussed, our Office has interpreted the *Municipal Act's* definition of meeting as follows:

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.<sup>13</sup>

- 68 In an August 2012 letter regarding council for the City of Elliot Lake, our Office determined that council's attendance at a presentation of the Nuclear Waste Management Organization constituted a "meeting" for the purposes of the *Municipal Act*.<sup>14</sup> The presentation was arranged by the organization to allow various communities to obtain further information about its deep geological repository project for northern Ontario. Our Office concluded that at the presentation, a quorum of Elliot Lake council came together to receive information that would inform the future decision-making of council. In the same letter, we also concluded that council's attendance at a meeting organized by the Elliot Lake Residential Development Commission constituted a meeting for the purposes of the open meeting rules because council discussed council business. We noted that the fact the meeting was arranged and hosted by a third party did not relieve council of its obligations under the *Municipal Act*.
- 69 During the September 27, 2016 *Drainage Act* information session, a quorum of council received information about an ongoing drain petition in the municipality. The councillors attended at the request of constituents,

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<sup>13</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: <[http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2\\_2.pdf](http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2_2.pdf)>.

<sup>14</sup> Letter from Ombudsman Ontario to City of Elliot Lake (August 10, 2012), online: <<https://www.ombudsman.on.ca/Resources/Reports/Town-of-Elliot-Lake.aspx>>.



who had voiced concerns about the process through a prior delegation to council. While the meeting was not led by council and there was no discussion amongst councillors about the presentation, the engineer provided specific information about the proposed drain and details about how the petition complied with the Act's requirements. Because council is ultimately responsible for evaluating and approving the drain petition, this presentation related to an issue that will come before council for consideration and provided council with information that laid the groundwork for future decision-making.

- 70** Accordingly, the attendance of a quorum of council at the information session was a “meeting” for the purposes of the *Municipal Act*. While there was no intention to exclude members of the public from the meeting, the Municipality of Brockton should have considered whether council’s attendance at the information session would qualify as a “meeting” under the Act, provided public notice of the information session, and observed the other meeting requirements contained in its procedure by-law.
- 71** It was suggested to my Office that because the meeting complied with the requirements of the *Drainage Act*, the open meeting requirements in the *Municipal Act* and Brockton’s procedure by-law were not relevant. It was also noted that attendance at the information session was not mandatory and that staff had no way to know in advance whether a quorum of council would attend.
- 72** The *Municipal Act* applies to all meetings of municipal councils, even if those meetings are also governed by other legislation. The Act acknowledges that meetings may need to comply with different statutory frameworks and there is a specific closed meeting exception that allows a meeting to be closed to the public if council is considering “a matter in respect of which a council...may hold a closed meeting under another Act.”<sup>15</sup> The *Drainage Act* does not contain any provisions allowing council to hold a closed session. Similarly, certain meetings under the *Planning Act* must comply with procedural requirements in that Act as well as the *Municipal Act*.<sup>16</sup> The municipality’s compliance with the procedural requirements of the *Drainage Act* does not relieve it from also complying with the *Municipal Act*’s open meeting requirements.
- 73** Regarding staff’s uncertainty over whether a quorum of council would attend the information session, Brockton may consider implementing procedures to confirm councillor attendance at events that may lay the groundwork for future council decision-making.

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<sup>15</sup> *Municipal Act, 2001*, SO 2001, c 25, s 239(2)(g).

<sup>16</sup> *Planning Act*, RSO 1990, c P13, s 26(3) and (4).

74 The *Municipal Act* prescribes various procedural requirements before a meeting can be closed to the public, and it is important to remember that these procedural requirements are not a mere formality. Open meeting legislation ensures effective democracy. The Act's provisions are intended to increase the public's confidence in the integrity of local government and ensure that municipal power is exercised in an open and transparent manner.

## Opinion

75 The board of directors for the Walkerton Business Improvement Area did not contravene the *Municipal Act, 2001* on June 13, 2016 following the formal BIA board meeting. The discussion between three board members was not a "meeting" under the Act and was not subject to the Act's open meeting requirements.

76 In addition, council for the Municipality of Brockton did not contravene the Act on June 20, 2016 when it met in camera to discuss matters that were subject to "litigation or potential litigation".

77 However, council for the Municipality of Brockton did contravene the Act on September 27, 2016 when a quorum of councillors attended an information session related to a *Drainage Act* petition. Council's attendance at this information session constituted a "meeting" under the *Municipal Act*. While notice of the meeting was provided to affected landowners in compliance with the *Drainage Act* and members of the public were welcome to attend the meeting, the Municipality of Brockton was also required to comply with the *Municipal Act's* open meeting requirements. Council for the Municipality of Brockton should have provided public notice of the information session and observed the other meeting requirements contained in its procedure by-law.

## Recommendations

78 I make the following recommendations to assist the Municipality of Brockton in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

### Recommendation 1

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

### **Recommendation 2**

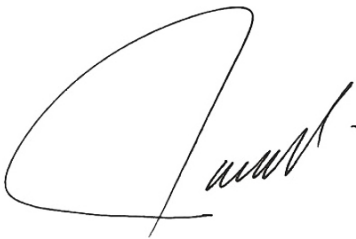
The Municipality of Brockton should carefully evaluate whether council's attendance at information sessions and other similar meetings would nonetheless come within the definition of "meeting" contained in the *Municipal Act, 2001* and, where appropriate, conduct these meetings in accordance with the requirements of the Act and the municipality's procedure by-law.

### **Recommendation 3**

The Municipality of Brockton should amend its procedure by-law to accurately reflect the closed meeting exceptions in the *Municipal Act, 2001*.

## **Report**

- 79 The Municipality of Brockton and the Walkerton Business Improvement Area were given the opportunity to review a preliminary version of this report and provide comments to our Office. We received comments from the BIA's former manager, two municipal councillors, and Brockton's CAO/Clerk. All comments received were considered in the preparation of this final report.
- 80 My report should be shared with the Municipality of Brockton and the Walkerton Business Improvement Area. The report should be made available to the public as soon as possible, and no later than each organization's next meeting.



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**Paul Dubé**  
**Ombudsman of Ontario**