



## **Ombudsman Report**

Investigation into complaints about  
closed meetings held by  
the Township of The North Shore  
on December 13, 2017, February 7, 2018 and  
February 14, 2018

**Paul Dubé**  
**Ombudsman of Ontario**  
**June 2018**

## Complaints

- 1 In February 2018, my Office received complaints about three closed meetings held by the Township of The North Shore.
- 2 The complaints alleged that:
  - the township held a closed meeting on December 13, 2017, that did not fit within the cited exception for “personal matters” in section 239(2)(b) of the *Municipal Act, 2001* (the “Act”) and that all of the matters discussed were not included on the resolution to proceed into closed session;
  - the township held a closed meeting on February 7, 2018, that did not fit within the closed meeting exception for “personal matters”; and
  - the township did not give public notice of a special meeting of council on February 14, 2018.

## Ombudsman jurisdiction

- 3 Under the Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 4 As of January 1, 2008, the Act gave 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.
- 5 The Ombudsman is the closed meeting investigator for the Township of The North Shore.
- 6 In investigating closed meeting complaints, the Ombudsman considers whether the municipality has observed the open meeting requirements of the Act and the municipality’s governing procedures.

## Council procedures

- 7 The township’s procedure by-law (by-law no. 17-31) states that all meetings will be open to the public except as provided in the Act, and that

only business related directly to the agenda items shall be transacted at a closed meeting.

- 8 The procedure by-law also sets out the public notice requirements for regular meetings of council but does not address when the public notice should be posted. The procedure by-law is also silent on how notice of special meetings will be provided to the public.

## **Investigative process**

- 9 On February 20, 2018, we advised the municipality of our intent to investigate the complaints about the December 13, 2017 and February 7, 2018 meetings. On February 23, 2018, we advised the municipality of our intent to investigate the complaint about the February 14, 2018 meeting.
- 10 My Office reviewed relevant portions of the township's procedure by-law and the Act, as well as the meeting agendas and minutes of the closed meetings on December 13, 2017 and February 7, 2018. We also reviewed the notice provided for the February 14, 2018 special meeting of council.
- 11 My Office interviewed the clerk and members of council who were present at the closed meetings, as well as a member of staff who is responsible for posting meeting notices.
- 12 My Office received full co-operation in this matter.

## **The facts**

### **The December 13, 2017 closed meeting**

- 13 On December 13, 2017, council held a regular meeting at the township offices. Council proceeded into an in camera session at 8 p.m. under the "personal matters" exception found in subsection 239(2)(b) of the Act.<sup>1</sup> The resolution for the in camera session specified that the subject matter of discussion was the "firefighters honorarium" for the township's volunteer firefighters.
- 14 The Mayor, the clerk, and all councillors, except for Councillor Brenda Wilson, were present during the in camera session.

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<sup>1</sup> There is a typographical error in the minutes, which refer to s.392(2)(b))

15 The interviewees told my Office that during the in camera meeting, council discussed three matters:

- the firefighter honorarium;
- firefighter employment conditions relating to securing vulnerable persons checks and driver's licence abstracts; and
- the communication protocol between the fire department and township staff.

16 Those present at the meeting told us that when discussing the firefighter honorarium, council reviewed the amount to which individually named firefighters were entitled.

17 Council also discussed payment of the honorarium to firefighters who had not fulfilled certain conditions of their employment, namely providing a vulnerable persons check and a driver's licence abstract to the township. During this discussion, council considered previously provided advice from the township's lawyer about the payment of the honorarium.

18 Council also discussed the communication protocol between the fire department and township staff. We were told that an individual firefighter had been appointed as a communications officer for the fire department without council approval. Council considered the appointment and reviewed the formal communication protocol that exists between the fire chief and the clerk. The individual firefighter and his employment duties were raised during the discussion.

19 The in camera session lasted 30 minutes. After returning to open session, council passed the following resolutions:

BE IT RESOLVED THAT Council approves Firefighters Honorarium for June 1, 2017 to Nov. 30, 2017.

BE IT RESOLVED THAT COUNCIL directs the Fire Chief, in accordance with Policy 7 Criminal Record Check of the Township of the North Shore, to require Vulnerable Persons Checks from every Volunteer Firefighter on or before Jan. 15, 2018. Failing which every non-complying firefighter will be suspended.

BE IT RESOLVED THAT COUNCIL directs the Clerk/Treasurer/CAO to communicate with the Fire Department about Fire Department issues ONLY by communication with the Fire Chief and vice versa.

The Fire Chief is the department head and should be the ONLY person communicating with the Clerk.

## The February 7, 2018 closed meeting

- 20** Councillor Wilson tendered her resignation from council during a council meeting on January 17. The minutes of that meeting note that council had 60 days to fill the vacancy either by appointment or by holding a by-election.
- 21** Council held a regular meeting on February 7, 2018. Council proceeded into an in camera session at 8 p.m. under the “personal matters” exception in subsection 239(2)(b) of the Act.<sup>2</sup> The resolution to go into closed session specified the subject matter as “councillor replacement”. The in camera session lasted 25 minutes.
- 22** We were told by the council members present during the closed meeting that council discussed the merits of filling the vacant seat by appointment or by by-election and decided to proceed by way of appointment. However, the Mayor and the clerk told us that this discussion and decision did not happen. According to the Mayor and the clerk, council had decided to fill the vacancy by way of appointment sometime prior to the February 7 meeting.
- 23** Everyone we spoke to recalled that council also discussed the desired qualifications of a potential councillor and at least one name was put forward for consideration as an appointee. The recollections of those present as to the number of individuals considered for the position vary: two people we interviewed recalled discussing only a single person, one person recalled that two people were discussed, one recalled three to four names, and another person recalled four names. While the number of names raised as potential appointees varied, those present in the meeting all agreed that at least one person was discussed.
- 24** According to the closed meeting minutes and those we spoke to, council came to a consensus on a specific individual. Council then directed the mayor to approach the individual to see if they would be interested in filling the council vacancy.
- 25** The minutes do not reflect a formal vote for any of the actions taken by council.

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<sup>2</sup> There is a typographical error in the minutes, which refer to s.392(2)(b))

## The February 14, 2018 meeting

- 26 The complaint about the February 14, 2018 special meeting alleged that the township failed to provide public notice of the meeting.
- 27 The township posted notice of the meeting on three community bulletin boards. The notice consisted of the agenda for the special meeting including the time, date and location of the meeting. The township did not post notice on its website, which is part of its normal practice, because the staff member who is usually responsible for updating the website was absent.

## Analysis

- 28 I have analyzed each meeting sequentially including reference to the applicable exceptions cited by the municipality and any related procedural issues.

## December 13, 2017 meeting

- 29 The township cited the “personal matters” exception when it moved into closed session on December 13. Although not relied on by the township, we have also considered the applicability of the “labour relations” and “advice related to solicitor-client privilege” exception to the closed meeting.
- 30 We also considered procedural matters related to the closed meeting resolution and the agenda.

### ***Applicability of the “personal matters” exception***

- 31 The “personal matters” exception permits discussions about personal matters relating to an identifiable individual to take place in closed session. The majority of attendees at the in camera session told my Office that they relied upon the personal matters exception because the discussion would involve specific firefighters identified by name.
- 32 Although not binding on our Office, the case law of the Information and Privacy Commissioner (IPC) about what constitutes “personal information” in the *Municipal Freedom of Information and Protection of Privacy Act* is useful in interpreting the “personal matters” exception. The IPC has found that information will only qualify as personal for the purposes of the Act if it pertains to the individual in his or her personal, rather than professional,

capacity. However, information about a person in his or her professional capacity may still qualify as personal information, if it reveals something personal about that individual.<sup>3</sup> Discussions about an individual's conduct will generally be considered personal.<sup>4</sup>

- 33 On December 13, council reviewed the specific amount of the honorarium to be paid to each firefighter. Council also discussed payment of the honorarium to firefighters who had not satisfied their employment conditions relating to vulnerable persons checks and driver's licence abstracts. These firefighters were referenced by name.
- 34 My Office has specifically considered whether discussion of an individual's remuneration comes within the "personal matters" exception. In a report to the Municipality of South Huron, my Office found that discussion about an individual's remuneration could qualify as personal information.<sup>5</sup> Similarly, in a report to the Township of Russell, my Office found that a discussion involving the amount of remuneration that specific identified employees would receive under a new salary grid fit within the personal matters exception<sup>6</sup>.
- 35 In the report regarding the Township of Russell, my Office found that discussions about employee performance were inherently personal in nature. In the case in The North Shore, council's discussion included whether or not individual firefighters had fulfilled certain employment conditions. This information is personal in nature.
- 36 Accordingly, the portion of the in camera discussion about the firefighter honorarium fit within the "personal matters" exception.
- 37 Council's discussion about the communication protocol between the fire department and township staff did not include any personal information. During the discussion, council identified a specific firefighter who had been appointed as a communications officer for the fire department. Council referred to this individual in his professional capacity as a firefighter and his employment duties in that role. Council's discussion did not include any information that was personal in nature.

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<sup>3</sup> Aylmer (Town) (Re), 2007 CanLII 30462 (ON IPC)

<sup>4</sup> Madawaska Valley (Township) (Re), 2010 CanLII 24619 (ON IPC)

<sup>5</sup> South Huron (Municipality of) (Re), 2015 ONOMBUD 6 (CanLII), online: <<http://canlii.ca/t/gtp80>> at para 19

<sup>6</sup> Russell (Township of) (Re), 2016 ONOMBUD 5 (CanLII), online: <<http://canlii.ca/t/gt8dk>>.

38 Accordingly, council's discussion about the communication protocol did not fit within the personal matters exception.

***Applicability of the "labour relations" exception***

39 Although not cited by the Township, the "labour relations" exception also applies to the December 13 in camera discussion.

40 The Ontario Court of Appeal has found that the ordinary meaning of the phrase "labour relations" in the *Freedom of Information and Protection of Privacy Act* extends to relations and conditions of work beyond those of collective bargaining, including remuneration outside of a traditional employment arrangement.<sup>7</sup>

41 In a 2013 investigation into closed meetings in the Township of Leeds and the Thousand Islands, my Office determined that "compensation matters relating to the Township's [non-unionized] workforce" fell within the exception for "labour relations" because remuneration is a term of employment.<sup>8</sup>

42 The December 13 discussion focused on honorarium amounts and conditions of employment for the firefighters. These topics relate to the employment relationship between the township and its firefighters. Accordingly, the discussions fit within the "labour relations" exception.

43 Council's discussion about the communication protocol between the fire department and township staff also fit within the "labour relations" exception. The discussion examined the appointment of an individual firefighter as a communications officer without council approval and the appropriate communication channel between the fire department and township staff.

44 In a report to the Village of Burk's Falls and Armour Township, my Office found that discussions about whether to expand the duties of an employee fit within the "labour relations" exception.<sup>9</sup> In this case, council discussed information that related to the employment duties of a firefighter and the

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<sup>7</sup> Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner), 2003 CanLII 16894 (ON CA), [2003] O.J. No. 4123 (C.A.) considering s. 65(6)3 of the *Freedom of Information and Protection of Privacy Act*.

<sup>8</sup> Leeds and the Thousand Islands (Township of) (Re), 2013 ONOMBUD 4 (CanLII), online: <<http://canlii.ca/t/qtmhn>> at para 82

<sup>9</sup> Burk's Falls / Armour (Village of / Township), 2015 ONOMBUD 26 (CanLII), online: <<http://canlii.ca/t/gtp6w>>



reporting relationship amongst township staff. This type of information fits within the “labour relations” exception.

### ***Applicability of the “advice related to solicitor-client privilege” exception***

- 45 While the township did not rely on the “advice subject to solicitor-client privilege” exception, it also applies to council’s December 7 discussions. The “advice subject to solicitor-client privilege” exception permits closed session discussion where legal advice is considered by council.<sup>10</sup> My Office has consistently found staff conveying previously received legal advice to council fits within the exception.<sup>11</sup> Nor is it necessary that a lawyer be present during the meeting for the exception to apply.<sup>12</sup>
- 46 In this case, while in closed session council discussed legal advice that had been previously given by the township’s lawyer about the payment of the honorarium to firefighters who had not satisfied employment conditions.
- 47 Accordingly, the “advice related to solicitor-client” privilege also applies to the December 13 closed session discussion.

### ***Procedural matters***

#### Closed meeting resolution

- 48 The Act requires municipal council, before holding a closed meeting, to state “the fact of holding a closed meeting and the general nature of the matter to be considered at the closed meeting”.<sup>13</sup> The Ontario Court of Appeal noted in *Farber v. Kingston (City)*<sup>14</sup> that
- [t]he 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.
- 49 In this case, the resolution to proceed in camera described the subject matter to be considered as “firefighters honorarium.” The resolution did not

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<sup>10</sup> Emo (Township of) (Re), 2008 ONOMBUD 2 (CanLII), online: <<http://canlii.ca/t/gttgg>>.

<sup>11</sup> Owen Sound (City of) (Re), 2015 ONOMBUD 36 (CanLII), online: <<http://canlii.ca/t/gtp7l>>.

<sup>12</sup> Timmins (City of) (Re), 2017 ONOMBUD 4 (CanLII), online: <<http://canlii.ca/t/h4rwt>>.

<sup>13</sup> *Municipal Act, 2001*, s. 239(4)(a).

<sup>14</sup> 2007 ONCA 173 (CanLII), 2007 CarswellOnt 1473, 156 A.C.W.S. (3d) 463, 222 O.A.C. 32, 279 D.L.R. (4th) 409, 31 M.P.L.R. (4th) 31.

include information about council's discussion relating to the communication protocol between the fire department and staff.

### Agenda

**50** Section 2.4.5 of the township's procedure by-law provides that

No business except business dealing directly with the agenda shall be transacted at a closed meeting.<sup>15</sup>

**51** The township's agenda for the December 13 meetings only lists one topic – the “firefighters honorarium”. Based on the information we received, council's discussion about the vulnerable persons check and driver's licence abstracts was related to the honorarium and was therefore included on the agenda.

**52** On the other hand, council's discussion about the communication protocol between the fire department and township staff was separate and unrelated to the honorarium. Accordingly, discussion of the communication protocol was not permitted at the meeting under the township's procedure by-law.

### February 7, 2018 meeting

**53** The township cited the “personal matters” exception when it moved into closed session on February 7.

**54** Those interviewed by my office had different recollections of the discussion that took place in the closed session. These differences are noted below, followed by an analysis of the applicability of the exception cited. Finally, I comment on the decisions made by council in closed session.

#### ***Different version of events***

**55** Three councillors we interviewed recalled a discussion during the closed session about if they should proceed by by-election or appointment to fill the seat vacated by Councillor Wilson. These councillors also recalled

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<sup>15</sup> By-law 17-31, Being a by-law to Regulate the Procedures of the Council of the Corporation of the Township of The North Shore, at para. 2.4.5.

- council making a decision to proceed by appointment. The minutes also capture this discussion and decision.
- 56 The clerk recalled that the decision to proceed by appointment was made during the open meeting when Councillor Wilson's resignation was received.
- 57 The Mayor recalled that a discussion about whether to proceed by by-election or appointment was held in an open session prior to the February 7 meeting. He said that if any discussion on this subject was held during the February 7 closed session, it would have been to recap the discussion that had already taken place.
- 58 Councillor Wilson's resignation was received by council on January 17 during a council meeting. The minutes of that meeting do not record any consideration on whether to proceed to fill the vacancy by by-election or appointment, or a decision to proceed by appointment.
- 59 My Office also reviewed the minutes of the subsequent council meetings held on January 24 and February 7. Despite the recollections of the Mayor and clerk, none of those meeting minutes record a decision or resolution of council about whether to fill Councillor Wilson's seat by by-election or appointment. Notably, the Mayor is recorded as being absent from the January 24 council meeting.
- 60 On the other hand, the other three council members present during the February 7 meeting recalled discussing how to fill the vacancy and the decision to proceed by appointment. One council member told my Office that council had a "really good discussion" in the closed session about whether to proceed by by-election or appointment.
- 61 On a balance of probabilities, I find that council discussed the process by which the vacant council seat would be filled and made a decision to proceed by appointment during the closed session on February 7.

***Applicability of the "personal matters" exception***

- 62 The February 7 meeting was closed under the "personal matters" exception. As outlined above, this exception provides for council to discuss personal matters about an identifiable individual in a closed meeting.

- 63 My Office has consistently found that discussions relating to an identifiable individual's employment history and qualifications for a particular job fit within the personal matters exception of the Act.<sup>16</sup>
- 64 While those interviewed differed in their recollections as to the number of potential appointees to the council vacancy discussed, all agreed that council discussed at least one individual's qualifications and experience for the council vacancy.
- 65 Accordingly, this portion of the closed session discussion fit within the "personal matters" exception.
- 66 However, the discussion about whether to proceed by by-election or appointment does not fit within the personal matters exception. Nor does council's discussion about the desired qualifications for the new council member. This discussion did not include any personal information about an individual. Rather it was about the process by which the council seat would be filled, the reasons council wanted to proceed with an appointment, and the skills council felt were important in a potential member of council.
- 67 There was no reason to hold this portion of the discussion in camera, especially as it related to filling a vacancy on council. My Office has previously found that in the interests of transparency, discussions relating to filling a council vacancy should be held in open session.<sup>17</sup> Council's discussion on these topics should not have taken place in closed session.

### ***Decisions made in closed session***

- 68 During the closed session, council made two decisions by consensus: to fill the council vacancy by way of appointment, and to direct the mayor to approach a specific individual to determine their interest in the position. Council made these decisions based on informal verbal agreement and did not formally vote on these matters.
- 69 In a 2015 investigation into illegal vote allegations during closed sessions in the Town of South Bruce Peninsula, my Office found that the clerk acted based on an implied consensus, and that the minutes of the closed

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<sup>16</sup> See, for example: Burk's Falls / Armour (Village of / Township), 2015 ONOMBUD 26 (CanLII), online: <<http://canlii.ca/t/gtp6w>>.

<sup>17</sup> Welland (City of) (Re), 2017 ONOMBUD 20 (CanLII), online: <http://canlii.ca/t/hqspm>.

session did not show that any formal procedural resolution was made, nor any vote taken.<sup>18</sup> In that report, my Office found that a direction based on council consensus is, for all intents and purposes, a vote of council. The same applies to the directions council gave in this case. They essentially reflect votes of council.

- 70** As a best practice, council should more clearly identify the specific direction given, formally vote on it and record it as such in the closed meeting minutes. This is for the benefit of both staff and council so there is no confusion about what direction was given and voted on.
- 71** Although the Act generally prohibits voting in closed session, section 239(6) permits voting in certain circumstances. This section states that council may vote in camera if the meeting is otherwise permitted to be closed to the public, and if the vote is for a procedural matter or to provide directions to officers, employees or agents.
- 72** The first decision was to fill the vacancy by way of appointment. Council was not entitled to make this decision during the closed session. As I found above, the discussion about whether to proceed by by-election or by appointment did not fit within the “personal matters” exception. This vote should have occurred in open session.
- 73** Section 225 of the Act designates the head of council (in this case, the mayor) as the chief executive officer of the corporation and lists enumerated duties of the head. My Office has found that a vote taken in camera to direct the mayor is permissible under section 239(6).<sup>19</sup>
- 74** Council’s discussion about the individual who they felt would be appropriate to fill the council vacancy fit within the “personal matters” exception. Accordingly, council’s second decision, to direct the mayor to approach the individual, was permissible.

## February 14, 2018 meeting

- 75** The complaint about the February 14 special meeting alleged that the township failed to provide public notice of the meeting.

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<sup>18</sup> South Bruce Peninsula (Town of) (Re), 2015 ONOMBUD 25 (CanLII), online: <<http://canlii.ca/t/gtp6t>>.

<sup>19</sup> Timmins (City of) (Re), 2017 ONOMBUD 4 (CanLII), online: <<http://canlii.ca/t/h4rwt>>.

## **Notice to the public**

- 76** The Act does not specify how notice of meetings must be provided to the public. However, it does state that every municipality must pass a procedure by-law that provides for public notice of meetings.<sup>20</sup> My Office has noted that notice should include adequate, meaningful information about all open and closed portions of a meeting. A reasonable interpretation of what constitutes adequate “notice” includes the time, date and location at which a meeting will take place.<sup>21</sup>
- 77** The township’s procedure by-law is silent on public notice for special meetings. In the case of regular meetings, the procedure by-law deems the published agenda to be adequate notice of regular meetings of council and committees, and directs that the agenda be posted on the township’s website and three community bulletin boards. The by-law does not set out minimum timelines for posting the agenda for either regular or special meetings.
- 78** Despite the lack of clarity in the by-law, township staff treat notice of regular and special meetings in the same manner and post the agendas on the township’s website and three community bulletin boards at least 48 hours before the meetings occur. The township should formalize this practice in its procedure by-law.
- 79** In this case, public notice of the February 14 special meeting was provided on the community bulletin boards in accordance with the township’s general practice more than 48 hours before the meeting took place. Unfortunately, due to an absent staff member, notice was not posted on the township’s website.

## **Opinion**

- 80** Council for the Township of The North Shore did not contravene the *Municipal Act, 2001* on December 13, 2017, when it met in closed session to discuss the firefighter honorarium, firefighter employment conditions related to vulnerable persons checks and driver licence abstracts, and the communication protocol between the fire department and township staff. However, the township failed to provide the general nature of the subject matter to be discussed in the closed session resolution and failed to

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<sup>20</sup> *Municipal Act, 2001* s. 238 (2.1)

<sup>21</sup> Black River-Matheson (Township of) (Re), 2015 ONOMBUD 2 (CanLII), online: <<http://canlii.ca/t/gtp6f>>.

include all subject matters discussed during the closed session on its closed meeting agenda, contrary to the *Municipal Act, 2001* and its own procedure by-law.

- 81 Council for the Township of The North Shore contravened the *Municipal Act, 2001* on February 7, 2018, when it discussed how to fill the council vacancy in closed session. This discussion did not fit within the exception cited under the *Municipal Act, 2001* for “personal matters.” Further, because the discussion was not permitted to be closed to the public, council was not permitted under the Act to decide to fill the vacancy by appointment rather than by by-election.
- 82 The Township of The North Shore provided public notice of the February 14, 2018 special meeting by posting notice on three community bulletin boards located in the township.

## Recommendations

- 83 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 The North Shore 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

The Township of The North Shore should endeavor to ensure that its discussion in closed session is focused on those matters as set out in the resolution to close the meeting and its closed meeting agenda.

### Recommendation 3

The Township of The North Shore 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

The Township of The North Shore should ensure that any direction to staff arising out of closed session discussions, where permitted under the *Municipal Act, 2001*, is the subject of a formal resolution and vote in closed session.

**Recommendation 5**

The Township of The North Shore should ensure that any vote taken in closed session is clearly recorded in its closed session minutes.

**Recommendation 6**

The Township of The North Shore should amend its procedure by-law to formalize its general practice of providing notice of special meetings on its community bulletin boards and on the municipal website, and to specify a required public notice period for regular and special meetings.

**Recommendation 7**

The Township of The North Shore should ensure that additional staff members are trained to post notices on its website.

**Report**

- 84 The township was given the opportunity to review a preliminary version of this report and provide comments to our Office. Comments received were considered in the preparation of this final report.
- 85 In its response, council for the Township of The North Shore accepted my Office’s recommendations and stated that it would endeavor to meet these expectations going forward. I commend the township for its response.
- 86 My report should be shared with council and made available to the public as soon as possible, and no later than the next council meeting. 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.



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Paul Dubé  
Ombudsman of Ontario