



Ombudsman Report

**Investigation into a complaint about a meeting
held by the Township of Lanark Highlands
on September 22, 2020**

**Paul Dubé
Ontario Ombudsman
August 2021**

Complaint

- 1 My Office received a complaint about a council meeting held by the Township of Lanark Highlands (the “Township”) on September 22, 2020. The complainant alleged that council’s discussion did not fit within the closed meeting exceptions in the *Municipal Act, 2001* (the Act).¹

Ombudsman jurisdiction

- 2 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.
- 3 As of January 1, 2008, the Act gives anyone the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 4 The Ombudsman is the closed meeting investigator for the Township of Lanark Highlands.
- 5 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.
- 6 Our Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman’s decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of the Ombudsman’s previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

¹ SO 2001, c 25.

Investigative process

- 7 On October 27, 2020, my Office advised the Township that we would investigate the September 22, 2020 meeting.
- 8 Members of my Office's open meeting team reviewed relevant portions of the Township's procedural by-law and the Act. We reviewed the meeting agenda, relevant documents, and the minutes from the open and closed sessions of the meeting.
- 9 We also interviewed all members of council, the Clerk/Chief Administrative Officer (CAO), and the Deputy Clerk.
- 10 My Office received full co-operation in this matter.

Background

- 11 We were told that the Township had been in the process of negotiating a potential land transaction involving a local association. The potential land transaction involved specific parcels of land.
- 12 During negotiations, Township staff raised questions about the association and its relationship to another organization. We were told that council directed staff to gather more information about the association before proceeding with the potential land transaction.
- 13 According to the CAO/Clerk, staff met with newly appointed board members of the association prior to the September 22, 2020 council meeting to gather more information.
- 14 We were told that after the meeting between staff and the newly appointed board members, staff sought legal advice about whether council could be provided with an update about this issue at an *in camera* council meeting. We were also told the municipality's decision to discuss this matter in closed session was based on the legal advice it received.

The September 22 meeting

- 15 Council met for a regular meeting at 7:50 p.m. At 8:04 p.m., council resolved to proceed *in camera* under the “personal matters” exception (s.239(2)(b)) and the “acquisition or disposition of land” exception (s.239(2)(c)) to discuss the association.
- 16 We were told that council questioned staff during the meeting about the appropriateness of continuing the discussion in closed session. Staff relayed the legal advice that had been received, and council relied on this advice to proceed with the closed session.
- 17 According to the minutes, which were taken by the Deputy Clerk, council heard an oral update from the CAO/Clerk about the meeting between Township staff and the new board members of the association. The CAO/Clerk also confirmed with us that this was the purpose of the closed session.
- 18 The minutes indicate that Township staff and the new board members had discussed the governance and management of the association. The new board members also had questions for Township staff about an existing agreement between the Township and the association. The existing agreement contained certain provisions that the association wanted to clarify.
- 19 According to the minutes, staff told council they would continue to work with the association to clarify the questions raised.
- 20 The council members and staff we spoke with had varying recollections of this closed session. Some told my Office that the proposed land transaction was discussed briefly to provide context for the discussion. Others said that the proposed land transaction was not discussed during the meeting at all. One council member told my Office that the matter of the proposed land transaction was a “completely separate issue” from the discussion during the September 22 meeting.
- 21 We were told that some of the association’s board members, past and present, were identified during council’s discussion. One council member and members of staff told my Office that the discussion involved scrutinizing the personal conduct and temperament of an identified individual. Another council member told my Office that the association as a whole was the focus of the discussion, rather than identified individuals. We were also told that council discussed concerns about the association’s past financial record-keeping and governance practices.

- 22** Although there is no indication of such information in the meeting minutes, based on what we were told by some councillors and staff, I find on a balance of probabilities that council scrutinized the conduct and temperament of an identified individual during the September 22 meeting.
- 23** According to the minutes, council returned to open session at 8:42 p.m.

Analysis

Applicability of the “acquisition or disposition of land” exception

- 24** On September 22, 2020, council went into closed session citing s.239(2)(c) of the Act, which allows a meeting, or part of a meeting, to be closed to the public if the subject matter of the meeting concerns the acquisition or disposition of land.
- 25** The purpose of the “acquisition or disposition of land” exception is to protect the municipality’s bargaining position by permitting discussions to be held in closed session about a proposed or pending acquisition or disposition of land by a municipality.
- 26** In a previous report to the Town of Fort Erie, my Office considered two meetings closed under the “acquisition or disposition of land” exception.² In that case, the Fort Erie council discussed the details of a proposed partnership with a post-secondary institution that would have eventually required the purchase of real estate. I found that council did not discuss any specific properties that it planned to purchase or lease. It was in the early stages of deciding whether to proceed with the partnership and was not acting with a view to protecting its bargaining position in property negotiations.
- 27** In the present case, the closed session minutes indicate that council discussed the governance of the association. According to the minutes, council did not discuss the properties that were subject to the proposed land transaction nor did council take any practical steps during this meeting towards acquiring or disposing of properties. Further, there was nothing in the minutes to indicate that council discussed information that could impact the municipality’s bargaining position with respect to the proposed land transaction.

² *Fort Erie (Town of) (Re)*, 2018 ONOMBUD 2 (CanLII), <<https://canlii.ca/t/hvmtm>>.

- 28** We were told that council heard an update from the CAO/Clerk about the meeting between Township staff and the new board members of the association. Some of the people we interviewed told my Office that the proposed land transaction was mentioned briefly to provide context to the discussion, while others said the proposed land transaction was not discussed.
- 29** Based on the documentary evidence and interviews we conducted, I find on a balance of probabilities that council did not discuss the proposed land transaction during the September 22 meeting. If the potential transaction was mentioned, it was in passing and to provide context, rather than the focus of the discussion.
- 30** The fact that the discussion related to the proposed land transaction does not mean that the discussion itself was about the proposed land transaction. In this case, the discussion was about the governance of the local association. Accordingly, council's discussion on September 22, 2020, did not fit within the open meeting exception for acquisition or disposition of land.

Application of the “personal matters” exception

- 31** Council also cited s.239(2)(b) of the Act to go into closed session on September 22, 2020. We were told that council cited this exception because some of the association's board members, past and present, were identified during the meeting. My Office was told that council cited the “personal matters” exception to avoid implicating individuals or opening them to public scrutiny in relation to the governance of the association.
- 32** The exception for personal matters allows a meeting, or part of a meeting, to be closed to the public if the subject matter concerns personal matters about an identifiable individual. The Act does not define “personal matters,” but the Information and Privacy Commissioner (IPC) has found that the term “personal matters” in the Act is analogous to the term “personal information” in the *Municipal Freedom of Information and Protection of Privacy Act*.³ The decisions of the IPC are not binding on my Office, but they can be instructive.
- 33** The IPC has found that information only qualifies as personal for the purposes of the Act if it pertains to an individual in their personal capacity, rather than their professional capacity. However, information about a person in their professional capacity may still qualify if it reveals something personal about

³ *Clarington (Municipality) (Re)*, 2008 CanLII 68856 (ON IPC), online: <<https://canlii.ca/t/2217x>>.

the individual. Discussions about an individual's conduct are generally considered personal.⁴

- 34** In a previous report to the County of Norfolk, my Office investigated a meeting closed under the “personal matters” exception to hear a local board’s oral deputation to council.⁵ The deputation related to the local board’s operations and a request for a significant grant. The County’s solicitor told my Office that the deputation contained information that could have affected the personal lives of the individual members of the board. For example, there was concern that board members could have been scrutinized by the community or local media for their roles as members of the board.
- 35** In my report to the County of Norfolk, I found that the information conveyed to council by the board’s deputation related to the business of the board. I found that the discussion related to the members in their professional capacity as board members and accordingly, the “personal matters” exception did not apply.
- 36** In the present case, the closed session minutes are detailed and they do not indicate that council discussed personal information or the conduct of identifiable individuals. Rather, the minutes show that identified individuals met with Township staff in their capacity as board members. They suggest that council discussed association business, including governance and finances, and asked questions about the provisions of an existing agreement between the Township and association.
- 37** However, some of those we spoke with indicated that the discussion also scrutinized the personal conduct and temperament of identified individuals and raised concerns related to that conduct. In response to a preliminary version of this report, Township staff told my Office that statements made about the character of identifiable individuals were intentionally not included in the closed meeting minutes due to their nature.
- 38** Based on the interviews my Office conducted and council’s response to my preliminary report, I find on a balance of probabilities that council discussed personal information about identifiable individuals during the September 22 meeting.

⁴ *Madawaska Valley (Township) (Re)*, 2010 CanLII 24619 (ON IPC), online: <<https://canlii.ca/t/29p2h>>.

⁵ *Norfolk (County of) (Re)*, 2017 ONOMBUD 14 (CanLII), <<https://canlii.ca/t/h69cz>>.

Procedural matters

Meeting records

- 39** The minutes for the September 22 closed session are detailed, and my Office relied on these minutes in light of council's varying recollections of the closed meeting.
- 40** However, in a response to a preliminary version of this report, council noted that the minutes are a summary of the discussion and do not reflect every statement made. Council maintained that the discussion included personal matters regarding identifiable individuals, despite the fact that the meeting minutes do not reflect this.
- 41** I have explained in my Open Meeting Guide that the Act does not require municipalities to create verbatim transcripts of meetings, but minutes should be more detailed than just a list of resolutions.⁶ My Office has noted that records of a closed meeting should include the following:
- Where the meeting took place;
 - When the meeting started and adjourned;
 - Who chaired the meeting;
 - Who was in attendance, with specific reference to the Clerk or other designated official responsible for recording the meeting;
 - Whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
 - A detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered;
 - Any motions, including who introduced the motion and seconders;
 - All votes taken, and all directions given.
- 42** In this case, the closed meeting minutes did not contain any reference to the discussion about personal matters of identifiable individuals. Going forward, council should ensure that the minutes reflect council's discussion regarding all substantive matters.
- 43** Councillors also told my staff that they had difficulty remembering details of council's conversation due to the passage of time.

⁶ Open Meetings: Guide for Municipalities, Ontario Ombudsman, online: <https://www.ombudsman.on.ca/have-a-complaint/who-we-oversee/municipalities/municipal-closed-meetings/open-meetings-guide-for-municipalities>.

- 44 My Office consistently recommends, as a best practice, that municipalities audio or video record their closed sessions. Audio or video recordings ensure that there is an accurate record of the discussion. They can assist greatly in an investigation, and enhance the public’s confidence in the municipality’s compliance with the open meeting rules.

Opinion

- 45 The Township of Lanark Highlands did not contravene the *Municipal Act, 2001*, when it met in closed session on September 22, 2020. The discussion fit within the “personal matters” exception to the open meeting requirements of the Act.

Report

- 46 The Township was given the opportunity to review a preliminary version of this report and provide comments to my Office. We received written comments from council and its solicitor that were considered in the preparation of this final report.
- 47 Council highlighted several factors that it felt were relevant to my analysis, including that it received legal advice prior to deciding to go *in camera* and that the discussion on September 22 was part of a larger series of discussions regarding the association. Council also indicated that it felt five other exceptions to the open meeting rules would have allowed council to discuss this matter in closed session. These exceptions were not relied upon to go into closed session and were not reflected in the closed meeting minutes or in the interviews my Office conducted. As this report concludes that the discussion fit within the personal matters exception, it is not necessary to analyze the applicability of these other exceptions.



Paul Dubé,
Ombudsman of Ontario