



Ombudsman Report

**Investigation into a complaint about a meeting held
by the Town of Kirkland Lake on August 25, 2020**

**Paul Dubé
Ontario Ombudsman
July 2021**

Complaint

- 1 My Office received a complaint about a closed meeting held by council for the Town of Kirkland Lake (the “Town”) on August 25, 2020. The complainant alleged that council’s *in camera* discussion did not fit within the cited exception to the open meeting rules.

Ombudsman jurisdiction

- 2 Under the *Municipal Act, 2001*,¹ (the “Act”), all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 3 As of January 1, 2008, the Act gives 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 Town of Kirkland Lake.
- 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 My 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.

Council procedures

- 7 The Town's procedure by-law (by-law no.15-075) provides that all meetings must be open to the public unless the subject matter to be discussed is about any of the eight matters listed by the procedure by-law.² These matters coincide with the matters enumerated in s.239(2) subsections (a)-(g) and s.239(3.1) of the Act.
- 8 However, the procedure by-law does not identify the four new open meeting exceptions under s.239(2) of the *Municipal Act* that came into force on January 1, 2018, as part of the *Modernizing of Ontario's Municipal Legislation Act, 2017*. Further, the procedure by-law fails to address the circumstances where a meeting must be closed to the public pursuant to s.239(3) of the Act. As a best practice, the Town should review and amend its procedure by-law to accurately reflect the Act's current closed meeting provisions.
- 9 In accordance with the *Municipal Act*, the procedure by-law requires council to pass a resolution in open session declaring the reason for going *in camera* prior to beginning a closed meeting.

Investigative process

- 10 On October 13, 2020, my Office advised the Town of our intent to investigate this complaint.
- 11 Members of my Office's open meeting team reviewed relevant portions of the Town's procedure by-law and the Act. We reviewed the meeting agenda, the minutes from the open and closed sessions of the meeting, a document that was circulated during the *in camera* portion of the meeting, and notes taken by a council member during the closed session.
- 12 We interviewed those present during the closed session, which included members of council, the Chief Administrative Officer, and the Clerk.³
- 13 My Office received full co-operation in this matter.

² Town of Kirkland Lake, by-law No. 15-075, *Being a by-law to regulate the procedure of the council of the corporation of the Town of Kirkland Lake* (14 July 2015), online: <<https://kirklandlake.civicweb.net/filepro/documents/4200?preview=4215>>.

³ One member of council passed away in the time between the August 25 meeting and when my Office conducted interviews.

The August 25 meeting

- 14 The agenda for the August 25, 2020 special council meeting listed an item to be discussed in closed session regarding “Workplace Violence and Harassment Complaint, Ric McGee, CAO”.
- 15 On August 25, council met for the special meeting at 4:40 p.m. in council chambers. At 4:44 p.m., council resolved to proceed into closed session under the “personal matters” exception found in s. 239(2)(b) of the Act. The resolution did not identify the general nature of the subject to be discussed in closed session.
- 16 The closed session minutes do not provide any substantive information about council’s discussion. The minutes simply reflect a recorded vote to receive the agenda package. My Office relied on interviews with those present during the meeting and on the handwritten notes taken by a council member during the closed session.
- 17 Those interviewed gave differing versions of the discussions that took place in closed session. However, all but one of those interviewed told my Office that there were discussions about staff-council relations and most of those interviewed said that at least one specific individual’s behaviour was discussed at some point during the meeting.
- 18 According to the council member’s notes, the meeting began with a statement that the purpose of the meeting was to discuss mutual respect in the workplace and treatment of staff by council.
- 19 The CAO shared feedback from staff on the council-staff relationship and a document was circulated with suggestions regarding the relationship.
- 20 Some council members discussed an employee’s job performance.
- 21 The conduct of two members of council with respect to municipal staff was also discussed.
- 22 Council discussed the need for training and briefly discussed some procedural matters.
- 23 Council decided to end the closed session and one councillor requested a recorded vote on a motion to receive the agenda package for the meeting.
- 24 Council rose from closed session at 6:12 p.m.

Analysis

Applicability of the “personal matters” exception

- 25** Council cited s.239(2)(b) of the Act, the exception for personal matters, when it moved into closed session on August 25, 2020.
- 26** The “personal matters” exception applies to discussions that reveal personal information about an identifiable individual. Generally, information that pertains to an individual in their professional capacity will not fit within the personal matters exception.⁴ However, in some cases, information about a person in their professional capacity can still fit within the exception if it reveals something personal or relates to scrutiny of an individual’s conduct.⁵ For example, information about an employee’s job performance is considered personal information.⁶
- 27** In a report to the Township of Lanark Highlands, my Office found that a discussion about the staff-council relationship included scrutiny of an individual councillor’s conduct. The discussion touched on information that was speculative and involved scrutiny of a councillor’s conduct that went beyond their official capacity as a member of council. Accordingly, the portions of the discussion that scrutinized an individual’s conduct fit within the “personal matters” exception.⁷
- 28** During the August 25, 2020 meeting, council for the Town of Kirkland Lake discussed at least one council member’s behaviour towards staff. The discussion involved scrutinizing the council member’s behaviour and conduct when interacting with staff. This information went beyond their conduct in their official capacity and took on a more personal nature.
- 29** Accordingly, the portions of the discussion that scrutinized the council member’s conduct fit within the “personal matters” exception.
- 30** Council also discussed an individual employee’s job performance during the closed meeting. My Office has found that discussions about an individual’s job performance fit within the “personal matters” exception.

⁴ *Aylmer (Town) (Re)*, 2007 CanLII 30462 (ON IPC), online: <<https://canlii.ca/t/1scqh>>.

⁵ *South Huron (Municipality of) (Re)*, 2015 ONOMBUD 6, online: <<http://canlii.ca/t/gtp80>>.

⁶ *Madawaska Valley (Township) (Re)*, 2010 CanLII 24619 (ON IPC), online: <<https://canlii.ca/t/29p2h>>.

⁷ *Lanark Highlands (Township of) (Re)*, 2018 ONOMBUD 1 (CanLII), online: <<http://canlii.ca/t/hvmtf>>.

- 31** In a 2018 report to the Township of The North Shore, council discussed whether a municipal employee had fulfilled certain employment conditions.⁸ I found that this information was personal in nature and noted that discussions about employee performance are inherently personal. Like in the case of the Township of The North Shore, council for Kirkland Lake discussed a municipal employee’s performance during the August 25 meeting. This information is inherently personal in nature.
- 32** Accordingly, the parts of the discussion that scrutinized an individual’s job performance fit in the “personal matters” exception.

Applicability of the “labour relations” exception

- 33** Council did not cite the “labour relations” exception in its resolution to move into closed session. However, my Office reviewed whether council’s discussion fit within this exception.
- 34** The purpose of the “labour relations” exception to the open meeting rules is to protect discussions relating to the relationship between a municipality and its employees.⁹ According to the Ontario Court of Appeal, the meaning of “labour relations” can extend to the relations and conditions of work beyond those related to collective bargaining.¹⁰
- 35** In a letter to the Township of North Huron, my Office considered a closed meeting where council discussed the general work environment for firefighters as part of an ongoing dispute between the firefighters and the Township.¹¹ The firefighters had verbally resigned or threatened to resign unless council addressed their concerns about identified individuals and the fire department’s work environment. The Ombudsman found that the labour relations or employee negotiations exception applied to council’s discussion about the firefighter’s general work environment.
- 36** In this case, staff told us that they raised concerns central to the employment relationship during the closed meeting. Those interviewed confirmed that the topics throughout the closed meeting related to the nature of the relationship between council and staff, including examples of conduct and suggestions for

⁸ *The North Shore (Township of) (Re)*, 2018 ONOMBUD 9 (CanLII), online: <<https://canlii.ca/t/hvmv3>>.

⁹ *The Nation (Municipality of) (Re)*, 2019 ONOMBUD 4 (CanLII), online: <<https://canlii.ca/t/j2b4c>>.

¹⁰ *Ontario (Minister of Health & Long-Term Care) v. Ontario (Assistant Information & Privacy Commissioner)* 2003 CarswellOnt 4071, [2003] O.J. No. 4123, 126 A.C.W.S. (3d) 185, 178 O.A.C. 171. See also IPC Order PO-3311 (2014); and IPC Order PO-3311 (2014).

¹¹ Letter from Ombudsman Ontario to Township of North Huron (December 11, 2017), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2018/township-of-north-huron>>.

improving that employment relationship. Council discussed these concerns and potential resolutions during the closed session.

- 37** Based on the interviews we conducted and on the council member’s handwritten notes, I find on a balance of probabilities that the employee-employer relationship was central to council’s discussion during the August 25, 2020 closed session. Accordingly, the discussion fit within the “labour relations” exception.

Procedural matters

Resolution to proceed *in camera*

- 38** Before moving into a closed session, s. 239(4) of the Act requires a municipality to state by resolution in open session that a closed meeting will be held, and the general nature of the matter to be considered at the closed meeting.
- 39** In *Farber v. Kingston (City)* (2007 ONCA 173), the Ontario Court of Appeal determined that the resolution to close a meeting should provide a general description of the issue to be discussed in a way that maximizes the information available to the public without undermining the reason for excluding the public.¹² My Office has also recommended that councils provide more substantive detail in resolutions authorizing closed sessions.¹³
- 40** In this case, the agenda for the August 25 council meeting indicated that council would be discussing a “Workplace Violence and Harassment Complaint” in closed session. This information was also reflected in the open session minutes. However, the resolution to proceed into closed session passed by council did not include any information about council’s intended discussion other than referencing the “personal matters” exception.
- 41** The inclusion of the general nature of the matter to be discussed in the agenda and minutes did not satisfy the Town’s obligation to include this information in the resolution passed by council. In the future, the Town should ensure that its resolutions to proceed *in camera* 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.

¹² *Farber v. Kingston (City)*, 2007 ONCA 173 (CanLII), online: <<https://canlii.ca/t/1qtzl>>.

¹³ *Niagara (District Airport Commission) (Re)*, 2016 ONOMBUD 22 (CanLII), online: <<https://canlii.ca/t/h2stf>>.

Meeting records

- 42** Under section 239(7) of the Act, a municipality is required to record, without note or comment, all resolutions, decisions and other proceedings at its meetings. This does not mean that the subjects discussed at the meeting should not be documented.
- 43** My Office has provided best practice recommendations about sufficient meeting records in past reports. The requirement to keep a meeting record should be interpreted consistently with the open meeting provisions, which exist to enhance openness, transparency and accountability in municipal governance.¹⁴
- 44** In a 2010 report to the Town of South Bruce Peninsula, my Office stated that closed meeting minutes should ideally include references to:
- 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.¹⁵
- 45** In this case, the Town of Kirkland Lake's closed meeting minutes failed to include a description of the matters discussed during closed session.
- 46** As the meeting records failed to sufficiently reflect the proceedings on August 25, we sought information about the topics discussed through interviews with council members and staff. We also relied on the handwritten notes taken by one council member during the meeting. Unfortunately, those we interviewed had conflicting memories of the meeting and the handwritten notes were incomplete in places.

¹⁴ *Tehkummah (Township of) (Re)*, 2018 ONOMBUD 3 (CanLII), at para 57, online: <<https://canlii.ca/t/hvmtp>>.

¹⁵ *South Bruce Peninsula (Town of) (Re)*, 2010 ONOMBUD 1 (CanLII), online: <<https://canlii.ca/t/gttg6>>.

- 47 Many municipalities opt to make audio or video recordings of closed meetings to ensure that a complete record exists. We currently know of 25 municipalities that have implemented this important practice.¹⁶
- 48 Audio or video recordings can assist greatly in case of an investigation, and enhance the public's confidence in the municipality's compliance with the open meeting rules. Had the Town created an audio or video recording of council's August 25 closed meeting, a complete and reliable record of the discussion would have been available to assist during this investigation.

Opinion

- 49 Council for the Town of Kirkland Lake did not contravene the *Municipal Act, 2001*, when it proceeded *in camera* on August 25, 2020. Some parts of the discussion fit within the "personal matters" exception and council's entire discussion fit within the "labour relations" exception.
- 50 Council for the Town of Kirkland Lake contravened the requirements of section 239(4)(a) of the *Municipal Act, 2001*, by failing to state by resolution the general nature of the matters to be considered *in camera*.

Recommendations

- 51 I make the following recommendations to assist the Town of Kirkland Lake in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of council for the Town of Kirkland Lake 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.

¹⁶ Ontario Ombudsman, 2019-2020 Annual Report p.44 online:
<<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/annual-reports/2019-2020-annual-report>>.

Recommendation 2

The Town of Kirkland Lake should ensure that its resolution to proceed *in camera* provides 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.

Recommendation 3

As a best practice, the Town of Kirkland Lake should ensure that open and closed meeting records are complete and accurately reflect all of the substantive and procedural items discussed, and consider implementing a practice of audio or video recording closed session meetings.

Recommendation 4

As a best practice, the Town of Kirkland Lake should review and amend its procedure by-law to accurately reflect the *Municipal Act's* current closed meeting provisions.

Report

- 52 Council for the Town of Kirkland Lake was given the opportunity to review a preliminary version of this report and provide comments to my Office. Any comments received were considered in the preparation of this final report.
- 53 This report will be published on my Office's website, and should be made public by the Town of Kirkland Lake as well. In accordance with s.239.2(12) of the *Municipal Act, 2001*, council should pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario