



Ombudsman Report

**Investigation into complaints about meetings
held by council for the Township of McKellar
on August 24, August 31, and September 9, 2021,
and April 12, 2022**

**Paul Dubé
Ombudsman of Ontario
January 2023**

Complaint

- 1 My Office received complaints about meetings held by council for the Township of McKellar (the “Township”) on August 24, August 31, and September 9, 2021, and April 12, 2022.
- 2 The complainants told my Office that significant sound quality and connectivity issues occurred during the council meeting on August 24, 2021, which the public could observe via livestream. The complainants alleged that these issues impeded the public’s ability to observe the meeting.
- 3 Second, the complainants told my Office that when council returned to open session after meeting *in camera* on August 31, 2021, the remaining portion of the meeting was not livestreamed.
- 4 Third, the complainants indicated that public notices for the September 9, 2021 special council meeting contained contradictory information concerning the time of the meeting and the link to access the livestream, which impacted their ability to attend the meeting in progress.
- 5 Fourth, a complainant told my Office that the Township had posted contradictory public notices concerning the location of the April 12, 2022 council meeting. Additionally, the complainant told us that members of council frequently did not speak into their microphones during the meeting, and were therefore difficult to hear.

Ombudsman jurisdiction

- 6 Under the *Municipal Act, 2001*¹ (the “Act”), all meetings of a council, local board, and committee of either must be open to the public unless they fall within prescribed exceptions.
- 7 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 or use the services of the Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 8 The Ombudsman is the closed meeting investigator for the Township of McKellar.

¹ SO 2001, c 25.

- 9 In investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the municipality's governing procedures have been observed.
- 10 Since 2008, my Office has investigated hundreds of closed meetings in municipalities throughout Ontario. 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. Summaries of the Ombudsman's previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Investigative process

- 11 On October 20, 2021, we advised the Township of our intent to investigate the complaints regarding the August 24, August 31, and September 9, 2021 meetings of council. On November 28, 2022, we advised the Township of our intent to investigate the complaint about the April 12, 2022 meeting of council.
- 12 Members of my Office's open meeting team reviewed relevant portions of the Township's procedure by-law, as well as the Act. We reviewed the meeting records, including the public notices, agendas, minutes, and audio recordings.
- 13 Finally, members of my Office's open meeting team interviewed the former Mayor, the Clerk, and the former Acting Clerk.
- 14 My Office received full co-operation in this matter.

August 24, 2021 meeting

- 15 Council met in chambers on August 24, 2021 at 6:30 p.m. The meeting was livestreamed for the public using Zoom. At 9:21 p.m., council resolved to move to an *in camera* session. It reconvened in open session at 10:13 p.m., and the meeting adjourned at 10:15 p.m.
- 16 The complainants told my Office that there were sound quality and connectivity issues throughout the open session of council, which effectively closed portions of the meeting to the public.

- 17 During interviews, we were told that the meeting had to be stopped a number of times to re-establish connectivity and the issues worsened as more members of the public joined the meeting.
- 18 The Clerk informed my Office that Township staff suspended the meeting whenever they became aware of a connectivity issue. However, we were told by staff that there may have been short periods of time when the council meeting proceeded before staff became aware of a connectivity issue, thus leaving the public out for portions of the meeting.
- 19 My Office's review of an audio recording provided by the Township confirmed that connection with the public was lost at least twice in the course of the recording. Both times, staff informed council of the connectivity issues and the meeting was briefly suspended.
- 20 My Office could not independently assess the sound quality from the public's perspective, as the audio recording provided by the Township emanated from a tape recorder that was physically present in council chambers, instead of from Zoom audio. The recording provided also did not allow my Office to assess the full extent of the connectivity issues as it ended at approximately 8:10 p.m., one hour and forty minutes into the two-hour and fifty-one minute meeting. When asked, Township staff were unable to provide a reason for why the recording cut out at this time.
- 21 Staff explained that the Township does not have high-speed internet and experiences frequent connectivity and technical issues as a result. However, the Clerk did inform us that the Township was actively consulting with technical experts to look at the connectivity issues.
- 22 Township staff told us that connectivity and sound issues would likely persist until the Township acquired high-speed internet. We were told that a high-speed internet grant had recently been provided to the Township and would be used to improve infrastructure over the next two to three years. Finally, we were informed that audio-visual equipment, including speakers and microphones, had been installed in the community centre to improve sound quality for meetings held at that location.

Analysis

- 23 Subsection 239(1) of the *Municipal Act, 2001* requires that all meetings of a municipal council be open to the public, subject to prescribed exceptions. As indicated by the Supreme Court of Canada in *London (City) v. RSJ Holdings Inc.*, the open meeting requirements set out in the Act demonstrate that the public has “the right to observe municipal government in process.”²
- 24 In response to the COVID-19 pandemic, the open meeting rules were modified in subsection 238(3.1) of the Act to allow municipalities to amend their procedure by-laws to permit council to hold electronic meetings. This gives the option to municipalities to satisfy the open meeting requirement without holding in-person council meetings. However, the Act’s basic requirement that meetings be open to the public remains.
- 25 Everyone we spoke to agreed that there were significant technical issues during the August 24, 2021 meeting that adversely affected sound quality and connectivity. Due to the frequency of the sound and connectivity issues, there were periods of time during which the meeting continued without public access. While Township staff did their best to suspend the discussion until connectivity was re-established, they did not always notice the problem immediately and the sound issues persisted throughout the meeting. This left the public unable to observe some portions of the meeting.
- 26 I find that the public was at times unable to listen to council proceedings, and, as a result, the council meeting was improperly closed to the public, contrary to the Act.
- 27 We are cognizant of the practical difficulties experienced by rural municipalities lacking adequate internet infrastructure required to operate electronic meetings during the pandemic. I remain concerned that poor broadband infrastructure in some parts of Ontario may impede the public’s right to observe municipal decision-making in action.³
- 28 However, connectivity issues should not eclipse the open meeting rules. Municipalities must be prepared for technical issues and know how to respond in a way that is consistent with their legal obligations under the Act. Council business cannot proceed when technical issues prevent the public from observing a meeting.⁴

² *London (City) v. RSJ Holdings Inc.*, 2007 SCC 29, at para 32.

³ Letter from Ombudsman to the Township of Lanark Highlands (2 February 2021), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2021/township-of-lanark-highlands>>.

⁴ *Westport (Village of) (Re)*, 2021 ONOMBUD 5, at para 19, online: <<https://canlii.ca/t/jdpvc>>.

- 29** My Office recognizes that the Township has, in good faith, tried to address the persisting connectivity and sound quality issues, notably by suspending meetings when staff became aware of issues and consulting with an IT expert. However, the Township could do more to ensure it complies with the open meeting rules despite technical challenges. In my 2020-2021 Annual Report, I noted the following best practices for electronic meetings:
- Develop procedures to address technological issues – e.g., if the livestream goes down during an open meeting – and make them public;
 - Monitor live broadcasts or teleconferences to ensure transmission quality, so the meeting can be stopped if problems arise;
 - Have a backup method of broadcasting in case the first one fails; and
 - Consider providing telephone conferencing or other alternatives for members of the public who can't watch a livestream.
- 30** In this case, staff participating in the meeting monitored the livestream and stopped the meeting when problems were identified, but did not always notice immediately, such that portions of the discussion were not visible or audible to the public. These problems may have been identified sooner had a member of staff been monitoring the broadcast remotely. The Township should consider having staff watch the livestream of open meetings as if they were a member of the public to monitor the quality.

August 31, 2021 meeting

- 31** Council met in chambers on August 31, 2021, at 5:30 p.m. The meeting was livestreamed for the public using Zoom. Council resolved to move *in camera* at 5:35 p.m., and reconvened in open session at 7:15 p.m. The meeting adjourned at 7:46 p.m.
- 32** The complainants told us that the public was “shut out” of the meeting when council moved *in camera* and could not observe the portion of the meeting after council returned from closed session.
- 33** During the half hour period after council reconvened in open session (between 7:15 and 7:46 p.m.), council passed seven resolutions. Council discussed the approval of recommendations contained in a report from the Wellness Centre & Pool Committee (a Township committee), the appointment of a member of council to the Joint Municipal Service Board, and a requirement to receive a plan for a fundraising campaign pertaining to the

West Parry Sound Recreation and Wellness Centre. Council also adopted a confirmatory by-law.

- 34 Township staff confirmed to my Office that the proceedings were not streamed following the closed session because the public did not have Zoom access for this part of the meeting. We were told that this was consistent with the Township's normal practice at the time to not broadcast the portion of a meeting that follows an *in camera* discussion.
- 35 We were told that the Township has staffing limitations and did not want to ask staff to continue working to readmit the public to a meeting after closed session.
- 36 Since discussing this complaint with my Office in October 2021, the Township told us that it has begun to livestream open sessions that follow a closed meeting.

Analysis

- 37 As noted above, subsection 239(1) of the Act requires that all meetings of a municipal council be open to the public, subject to prescribed exceptions. The public has a right to observe all open portions of meetings of a council, local board, or committee of either.
- 38 The requirement to return to open session and facilitate public participation on August 31, 2021 was not a mere formality.
- 39 During this half hour period, members of council discussed council business and passed seven resolutions. When council failed to ensure the meeting was livestreamed when it came out of closed session, the public was denied the right to observe half an hour of discussions, debates, and votes.
- 40 The Township's failure to publicly livestream the portion of the meeting that occurred after council returned from an *in camera* discussion effectively closed the meeting to the public. This contravened the open meeting requirements contained in the Act.

September 9, 2021 meeting

- 41 Council met in chambers for a special meeting on September 9, 2021, at 5:00 p.m. The meeting was livestreamed for the public using Zoom. The meeting adjourned at 6:42 p.m.
- 42 The agenda posted on the Township's website ahead of the meeting stated that it was scheduled to begin at 5:00 p.m. and contained a Zoom link for public access.
- 43 A public notice was subsequently published on the Township's website on its public notice page before the meeting, advising that the September 9 meeting was scheduled to begin at 5:30 p.m. This notice contained a different Zoom link from the one indicated on the agenda that had previously been posted online.
- 44 The complainants told us that, relying on the public notice, they joined the meeting at 5:30 p.m. only to realize the meeting was already in progress, having begun 30 minutes earlier at 5:00 p.m.
- 45 No one we interviewed could confirm at what time the agenda and public notice were posted. However, they did confirm that the documents were both public and accessible at the time of the meeting. Further, those interviewed could not confirm which of the two Zoom links was used during the meeting.

Analysis

- 46 Subsection 238(2.1) of the Act requires that the Township's procedure by-law provide for public notice of meetings. This requirement applies to any meetings of council, committees, or local boards.
- 47 The Township's procedure by-law provides that the Clerk shall give at a minimum 24 hours' notice to the public for all special meetings of council. It does not indicate if such notice must be provided in the meeting agenda or a separate public notice.
- 48 To uphold the public's right to observe municipal government, municipalities must provide notice of the time and place of the meeting, and then proceed to meet at the time and place specified in the notice.⁵ For the purposes of an electronic meeting, the "place" is electronic and notice of the place is effected

⁵ Russell (Township of) (Re), 2020 ONOMBUD 1 at para 41, online: <<https://canlii.ca/t/j6n2t>>.

by publishing the procedure for how the public can observe the meeting electronically, including a link.

- 49 In interviews, staff explained that the differences between the public notice and the agenda were the result of an inadvertent error in the preparation of the meeting documents.
- 50 Staff confirmed that the Township inadvertently released two public notices with contradictory information about the time and place of the meeting. The Township could not proceed to meet at the time and place specified in both notices.
- 51 Members of the public relying on the public notice, rather than the agenda, could not have known the correct start time of the meeting. In order for a meeting to be open to the public, the public must be able to observe local government decision-making in process. Accordingly, the meeting was effectively closed to the public between 5:00 and 5:30 p.m., in contravention of the Act.⁶
- 52 As a best practice, to promote transparency and eliminate confusion, the Township should provide consistent instructions in all agendas and meeting notices as to how and when members of the public can access an electronic meeting. The Township should also consider adopting a procedure or policy to ensure that meeting documents are accurate and consistent.

April 12, 2022 meeting

- 53 The Township posted an agenda for the April 12, 2022 meeting to its website on the evening of April 8, 2022. It stated that the April 12, 2022 meeting would take place electronically and provided a Zoom link for public access.
- 54 On the morning of April 11, 2022, the Township published a notice on the Township's website on its public notice page. The notice advised that the April 12, 2022 meeting would take place in person at the community centre and that electronic access was cancelled. However, the previously posted agenda with the outdated Zoom information was not amended and remained accessible for the public on another page of the Township's website.
- 55 Council met at the McKellar Community Centre on April 12, 2022, at 6:30 p.m.

⁶ *Hamilton (City of) (Re)*, 2018 ONOMBUD 5 at para 26, online: <<https://canlii.ca/t/hvmtt>>.

- 56** The complainant told my Office that, during the in-person meeting, council members frequently forgot to turn their microphones on, making it difficult for them to be heard by the public present in the room. My Office was also told that one member of council phoned into the meeting and was difficult to hear, and this member appeared to have difficulty hearing the proceedings in the room.
- 57** We reviewed an audio recording from a device placed near council members, which captured the council members' discussion clearly, with the occasional exception of the councillor participating via telephone.
- 58** Staff explained to my Office that the location of the April 12, 2022 meeting was changed due to a last minute staffing issue. We were told that the failure to update or remove the existing notice in the agenda with the Zoom coordinates was an inadvertent error resulting from this staffing issue.
- 59** Staff also informed my Office that they frequently remind council members to turn their microphones on, and are looking to purchasing voice-activated microphones to address this issue going forward.

Analysis

- 60** As previously discussed, subsection 238(2.1) of the Act requires that the Township's procedure by-law provide for public notice of meetings. Municipalities must provide the time and place of the meeting in order to allow the public the opportunity to observe the meeting in progress.⁷
- 61** Paragraph 5.1.2 of the Township's procedure by-law provides that public notice is effected by posting a notice on the Township website. It does not provide a specific timeframe for giving public notice.
- 62** In this case, the outdated Zoom information was not removed from the published meeting agenda when the municipality's meeting plans changed. Members of the public relying on the agenda, rather than the newer public notice, would not have been aware of the location change prior to the meeting. While notice of the meeting with the correct location was also posted, the failure to remove the incorrect information interfered with the public's ability to observe the meeting in progress.

⁷ *Russell (Township of) (Re)*, 2020 ONOMBUD 1 at para 41, online: <<https://canlii.ca/t/j6n2t>>.

- 63** To prevent similar confusion in future, the Township should ensure that all meeting notices and agendas include accurate and up-to-date information about the time and location of the meeting. If this information changes, previously published notices and agendas should be amended.
- 64** Regarding the public's ability to hear council's discussion, poor audio quality at a meeting may interfere with the public's ability to access a meeting.⁸ In this case, I am satisfied that the discussion was audible to those present in the room to observe the meeting.
- 65** Nevertheless, the Township should remain alert to technical issues that could compromise the public's right to listen to proceedings of council. I am encouraged by the Township's recognition of the issue and their efforts to resolve it by looking to acquire a new voice-activated microphone system.

Opinion

- 66** Council for the Township of McKellar contravened the open meeting rules on August 24, 2021, when a meeting proceeded during periods where sound and connectivity issues prevented the public from observing the meeting's livestream.
- 67** Council for the Township of McKellar also contravened the open meeting rules on August 31, 2021 when it failed to resume the livestream of the meeting following a closed session, effectively closing a portion of the meeting to the public.
- 68** Council for the Township of McKellar contravened the open meeting rules on September 9, 2021 when it met between 5:00 and 5:30 p.m. after failing to provide accurate public notice regarding the time and place of the meeting.
- 69** Council for the Township of McKellar also contravened the open meeting rules on April 12, 2022 when it simultaneously provided inconsistent meeting notices, each listing a different meeting location.

⁸ Letter from Ombudsman to the Township of Lanark Highlands (2 February 2021), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2021/township-of-lanark-highlands>>.

Recommendations

- 70** I make the following recommendations to assist the Township of McKellar in fulfilling its obligations under the Act and enhancing the transparency of its meetings:

Recommendation 1

All members of council for the Township of McKellar 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 procedure by-law.

Recommendation 2

Council for the Township of McKellar should ensure that the public has unimpeded access to observe open council meetings, whether they are conducted in person or electronically.

Recommendation 3

Council for the Township of McKellar should adopt a policy regarding the conduct of electronic council meetings that addresses how the quality of a meeting broadcast will be monitored and the steps to be taken if technical issues prevent public attendance during a meeting.

Recommendation 4

Council for the Township of McKellar should ensure that the public is able to observe all open portions of meetings, including any discussion following a closed session.

Recommendation 5

Council for the Township of McKellar should ensure that all meeting notices and agendas include accurate and up-to-date information about the time and location of the meeting.

Recommendation 6

Council for the Township of McKellar should ensure that its procedure by-law provides clear timelines for giving public notice of all meetings.

Report

- 71** Council for the Township of McKellar was provided the opportunity to review a preliminary version of this report and provide comments to my Office. No comments were received.

- 72** This report will be published on my Office's website, and should also be made public by the Township of McKellar. In accordance with s. 239.2(12) of the *Municipal Act, 2001*, council is required to pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario