



Ombudsman Report

**Investigation into meetings held by council
for the Township of McMurrich/Monteith
on June 8 and July 6, 2021**

**Paul Dubé
Ombudsman of Ontario
March 2022**

Complaints

- 1 My Office received complaints about two closed meetings held by council for the Township of McMurrich/Monteith (the “Township”) on June 8 and July 6, 2021.
- 2 The complaints alleged that *in camera* discussions during both meetings did not fall within any of the prescribed exceptions in the *Municipal Act, 2001*.
- 3 My review has determined that council for the Township did not contravene the *Municipal Act, 2001* when it held a closed meeting on June 8, 2021. Council did contravene the *Municipal Act, 2001* when it heard a delegation in closed session on July 6, 2021.

Ombudsman jurisdiction

- 4 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.
- 5 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.
- 6 The Ombudsman is the closed meeting investigator for the Township of McMurrich/Monteith.
- 7 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.
- 8 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

¹ SO 2001, c 25.

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.

Investigative process

- 9 In July and September 2021, my Office advised the Township of our intent to investigate the complaints about these meetings.
- 10 We reviewed audio recordings of both closed meetings, as well as the relevant agendas, open and closed session minutes, and materials circulated in closed session. We also reviewed emails relevant to the meeting held on July 6, 2021. We reviewed the Township's procedural by-law and relevant portions of the Act.
- 11 We further spoke with the Clerk and the Reeve to obtain additional information about each meeting.
- 12 My Office received full co-operation in this matter.

June 8, 2021 council meeting

- 13 Council met for an emergency council meeting at 7:00 p.m. on June 8, 2021. The meeting agenda indicated that council would hold a closed session under the closed meeting exception for solicitor-client privilege under section 239(2)(f) of the Act.
- 14 As set out in the closed meeting minutes, at 7:01 p.m. council passed a resolution to proceed into closed session under the exception for advice subject to solicitor-client privilege. The resolution described the topic of *in camera* discussion as "Planning matters – Horn Lake Development."
- 15 My Office was told that council intended to discuss the status of the Horn Lake development and receive corresponding legal advice. The Township's planner prepared a memo in advance of the meeting that provided updates on the development plans and set out areas of concern.

- 16 Once *in camera*, the Township's lawyers provided an unexpected update to council and related information about how the municipality should proceed in the circumstances. Council then discussed aspects of the development with its planner, including council's position on remaining points of negotiation, based on the issues raised in the planner's memo.
- 17 My Office was told that at the time of the meeting, the Township's negotiations with the developer were ongoing. My Office was also told that during the closed session on June 8, 2021, council provided guidance to its planner on how to proceed with the negotiations. The minutes and audio recording for the closed session reflect these discussions.
- 18 Council passed a resolution to return to open session at 8:28 p.m. Once in open session, council reported that it had accepted the reports, recommendations and directions given to staff in closed session, prior to adjourning at 8:36 p.m.

Analysis

Applicability of the exception for advice subject to solicitor-client privilege

- 19 Council cited the exception for advice subject to solicitor-client privilege under section 239(2)(f) of the Act as the basis for discussing the Horn Lake development matter *in camera*.
- 20 My Office has found that this exception applies to discussions that include communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential. The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.²
- 21 Communication will only be found to be subject to solicitor-client privilege if it is: (1) between a client and their solicitor, where the solicitor is acting in a professional capacity; (2) made in relation to the seeking or receiving of legal advice; and (3) intended to be confidential.³

² *Niagara Falls (City of) (Re)*, 2021 ONOMBUD 13, online: <<https://canlii.ca/t/jgvlg>>.

³ *Timmins (City of) (Re)*, 2017 ONOMBUD 4 at para 28, online: <<https://canlii.ca/t/h4rwt>>.

- 22** In a recent report on the Town of Collingwood, my Office found that solicitor strategy about a specific legal matter fell within the exception for advice subject to solicitor-client privilege.⁴
- 23** In this case, the Township’s lawyers advised council on how to proceed in response to their update during the June 8, 2021 closed meeting. This information was advice subject to solicitor-client privilege since the lawyers communicated legal advice to the municipality in a confidential setting.
- 24** Accordingly, the part of the *in camera* discussion involving the Township’s lawyers fit within the exception cited by council for advice subject to solicitor-client privilege.
- 25** Once the closed meeting turned to discussion between council and the Township’s planner about development plans, the lawyers did not participate further. No legal advice was sought or given, and there was no discussion of legal advice received prior to the meeting. Instead, council’s discussion focused on ongoing negotiations related to the development. This discussion did not fit under the exception for advice subject to solicitor-client privilege.

Applicability of the exception for plans or instructions for negotiations

- 26** Although not cited by council, my Office considered whether this second part of the closed session fit within the exception for plans or instructions for negotiations under section 239(2)(k) of the Act.
- 27** The purpose of this exception is to allow “a municipality to protect information that could undermine its bargaining position or give another party an unfair advantage over the municipality during an ongoing negotiation.”⁵
- 28** In order for the exception to apply, the municipality must show that:
- a. The *in camera* discussion was about positions, plans, procedures, criteria, or instructions;
 - b. The positions, plans, procedures, criteria, or instructions are intended to be applied to negotiations;

⁴ *Collingwood (Town of) (Re)*, 2022 ONOMBUD 1 at para 44, online: <<https://canlii.ca/t/jlvk1>>.

⁵ *Grey Highlands (Municipality of) (Re)*, 2021 ONOMBUD 11 at para 17, online: <<https://canlii.ca/t/jfzr8>>.

- c. The negotiations are being carried on currently, or will be carried on in future; and
- d. The negotiations are being conducted by or on behalf of the municipality.⁶

- 29 In a 2020 report regarding the Town of Saugeen Shores, my Office reviewed closed meetings held by council to discuss ongoing lease negotiations for a local waterfront development.⁷ The Chief Administrative Officer updated council on the status of these negotiations, with further information provided in a written report, and council reviewed a draft lease agreement. At the end of the meeting, council directed staff on matters related to the negotiations and agreement. My Office found the meeting fit within the exception for negotiations.
- 30 Here, council's *in camera* discussion on June 8, 2021 related to ongoing negotiations between the Township and the Horn Lake developer. Council discussed a memo from its planner that provided status updates and identified remaining concerns in the negotiations. Council determined a position on various negotiating points and gave corresponding direction to staff.
- 31 Accordingly, the *in camera* discussion of development plans on June 8, 2021 involved formulating positions intended to apply to ongoing negotiations conducted by the Township and fit within the negotiations exception under section 239(2)(k) of the Act.

July 6, 2021 council meeting

- 32 Council held a regular meeting on July 6, 2021 beginning at 7:00 p.m. According to the meeting agenda, a closed session was scheduled to occur prior to the meeting's open session.
- 33 According to the open meeting minutes, at 7:04 p.m. council passed a resolution to proceed into closed session under two exceptions to the open meeting rules. My Office's review focused only on the part of the meeting closed under the exception for litigation or potential litigation, which the resolution further described as relating to a "Roads matter."

⁶ *Ibid.*

⁷ *Saugeen Shores (Town of) (Re)*, 2020 ONOMBUD 3, online: <<https://canlii.ca/t/j93c3>>.

- 34 Council's *in camera* discussion began with a delegation from a local property owner who requested that the Township complete a survey to define the location of a municipal road in relation to his property. The delegate explained that he wanted this survey due to an ongoing property dispute with a neighbouring property owner.
- 35 Members of council asked the delegate some questions and explained that they would need to get back to him about his survey request.
- 36 Once the delegate left the meeting, members of council and staff continued to discuss matters raised in the delegation, including the potential legal implications for the municipality. Council and staff then discussed obtaining a legal opinion on the matter.
- 37 The *in camera* discussion then moved on to an unrelated labour relations issue, which is not part of my Office's investigation.
- 38 Council passed a resolution to return to open session at 8:57 p.m. Council did not pass a further resolution with respect to this matter.
- 39 In addition to reviewing the meeting materials, my Office also reviewed correspondence between the delegate and the Township that was sent prior to the closed session. This review confirmed that before the meeting, the delegate repeatedly reached out by email to both the Clerk and Reeve, and by phone to the Clerk. In these communications, the delegate requested certain information and generally discussed his property dispute. The delegate also repeatedly mentioned the prospect of legal action against the neighbouring property owner and/or the municipality. We found no evidence that the delegate asked to delegate to council in closed session instead of open session.
- 40 When my Office spoke with the Clerk and Reeve, we were told that since the closed meeting on July 6, 2021, the delegate's lawyer had explicitly threatened legal action against the Township.

Analysis

Applicability of the exception for litigation or potential litigation

- 41 Council relied on the exception for litigation or potential litigation under section 239(2)(e) of the Act to receive the delegation about the road matter and discuss its proposed next steps in closed session.

- 42 Although the Act does not define what constitutes “litigation or potential litigation,” courts have determined this exception is reserved for circumstances where the subject matter discussed is ongoing litigation or involves a reasonable prospect of litigation.⁸ My Office has found that speculation or suspicion about potential litigation are not sufficient to meet the exception.⁹
- 43 My Office has also found that broader circumstances surrounding a closed meeting are relevant to evaluating whether there was a reasonable prospect of litigation.¹⁰ For example, in a 2014 report on the Township of Georgian Bay, my Office determined that verbal threats of litigation against the municipality constituted potential litigation.¹¹ My Office recently reached the same conclusion upon review of a closed meeting held by council for the Township of Russell.¹²
- 44 The exception for litigation or potential litigation exists to allow parties to litigation to prepare their positions in private without fear of premature disclosure.¹³ In a 2014 letter to the Town of Orangeville, my Office reviewed a closed meeting during which council discussed potential litigation relating to a lease agreement with a restaurant owner, who was present for part of the session.¹⁴ My Office found that while there was a real likelihood of litigation, the restaurant owner would be the opposing party to it and therefore the exception for litigation or potential litigation could not apply to the part of the meeting he attended.

⁸ *RSJ Holdings Inc. v London (City)*, 2005 CanLII 43895 (ON CA) at para 22.

⁹ *Carleton Place (Town of) (Re)*, 2017 ONOMBUD 18 at para 32, online: <https://canlii.ca/t/hqsph>.

¹⁰ *Carleton Place (Town of) (Re)*, 2017 ONOMBUD 18 at para 27, online: <https://canlii.ca/t/hqsph>.

¹¹ *Georgian Bay (Township of) (Re)*, 2017 ONOMBUD 1 at para 27, online: <https://canlii.ca/t/h4rwh>.

¹² Letter from the Ontario Ombudsman to Township of Russell (23 February 2021), online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2021/township-of-russell>.

¹³ *Blank v Canada (Minister of Justice)* 2006 SCC 39, quoted in Letter from the Ontario Ombudsman to Town of Orangeville (24 January 2014), online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2014/town-of-orangeville>.

¹⁴ Letter from the Ontario Ombudsman to Town of Orangeville (24 January 2014), online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2014/town-of-orangeville>.

- 45 In this case, the delegate repeatedly contacted the Clerk and Reeve about the property dispute. During these communications, the delegate indicated that he would be taking legal action regarding the matter. Although the delegate did not initiate litigation against the Township prior to the July 6, 2021 meeting, his communications with the Clerk and Reeve could be reasonably interpreted as an implied threat of litigation against the Township.
- 46 Accordingly, council had reason to think that the Township faced potential litigation related to the road matter and was entitled to discuss the municipality's response to this potential litigation *in camera* on July 6, 2021.
- 47 However, the portion of the closed meeting where the delegate spoke to council about his concerns and answered questions from council does not fit within the exception for litigation or potential litigation. The delegate was the source of the potential litigation, and the exception is intended to create a sphere of privacy to allow a municipality to prepare its response and legal strategy in an adversarial process.

Applicability of the exception for personal matters

- 48 The Clerk suggested to my Office that the exception for personal matters could have alternatively applied to portions of the meeting that didn't fit within the exception for litigation or potential litigation on July 6, 2021. The personal matters exception to the open meeting requirement, under section 239(2)(b) of the Act, applies to discussions that reveal personal information about an identifiable individual.
- 49 To be considered personal information, it must be reasonable to expect that an individual could be identified if the information were disclosed publicly.¹⁵ My Office has found the exception does not apply if the discussion is limited to publicly available information, or information that is already publicly known.¹⁶

¹⁵ *Ontario (Ministry of Correctional Services) v Goodis*, [2008] OJ No 289 at para 69.

¹⁶ Letter from the Ontario Ombudsman to City of Timmins (9 May 2017), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2017/city-of-timmins-2>>.

- 50 Specific to property ownership information, both my Office and the Information and Privacy Commissioner have determined that that the name of a property owner, surveys and maps do not qualify as personal information.¹⁷
- 51 In this case, the delegate discussed the neighbouring property owner during his presentation. However, the audio recording indicates that the discussion remained limited to publicly available information.
- 52 Accordingly, the exception for personal matters under section 239(2)(b) of the Act does not apply to the delegation portion of the discussion about the road matter on July 6, 2021.

Could the discussion on July 6, 2021 have been parsed?

- 53 Since the delegation portion of the July 6, 2021 closed session does not fit under any open meeting exceptions, but the discussion afterward fits within the exception for litigation or potential litigation, my Office considered whether these two discussions were interwoven such that it would not have been practical for council to split the discussion between open and closed session.
- 54 In *St. Catharines (City) v. IPCO*, the Ontario Divisional Court commented that it is not always realistic to expect councillors to parse their meetings between open and closed sessions where it would “detract from free, open and uninterrupted discussion.”¹⁸
- 55 In 2017, my Office reviewed a closed meeting held by council for the City of Timmins to discuss a proposed addition to a local college campus.¹⁹ In that meeting, council heard a presentation from the college’s representative during which he shared information and responded to questions from council. After his presentation, the representative left the room and council discussed the city’s position on the proposal. My Office found the portion of the meeting involving the college’s representative did not fit within the cited exception for acquisition or disposition of land because he represented the other party to the proposed land deal. However, the portion of the meeting conducted without the representative, during which council discussed the City’s position on the proposal, did fit within the exception. My Office

¹⁷ *Northern Bruce Peninsula (Municipality of) (Re)*, 2018 ONOMBUD 7 at paras 23-4, online: <<https://canlii.ca/t/hvmtz>>.

¹⁸ 2011 ONSC 234 at para 42.

¹⁹ *Timmins (City of) (Re)*, 2017 ONOMBUD 9, online: <<https://canlii.ca/t/h4rx5>>.

concluded the meeting could have been parsed, with the representative's portion occurring in open session and council's follow-up discussion occurring in closed session under the cited exception.

- 56 The meeting on July 6, 2021, had a similar structure – council heard a delegation, the delegate left, then council discussed the information received. There were two distinct portions of the meeting. As in the case of the City of Timmins, the delegation portion of the July 6, 2021 meeting could have been parsed from council's subsequent discussion and held in open session. There is no evidence that this would have interrupted or hindered the conversation. Accordingly, council could have split its discussion between open and closed sessions.

Opinion

- 57 Council for the Township of McMurrich/Monteith did not contravene the *Municipal Act, 2001* when it held a closed meeting on June 8, 2021 to discuss the Horn Lake development. The first part of the meeting, during which council communicated with its lawyers, fit within the exception for advice subject to solicitor-client privilege. The second part of council's closed session discussion related to ongoing negotiations with the developer and did not fit within this exception. However, it instead fit within the exception for plans and instructions for negotiations under section 239(2)(k) of the Act.
- 58 Council for the Township of McMurrich/Monteith contravened the *Municipal Act, 2001* when it heard the delegation about the road matter *in camera* on July 6, 2021. This delegation could have been parsed from council's subsequent discussion on how to respond to the issue, which fit within the cited exception for litigation or potential litigation under section 239(2)(d) of the Act.

Recommendations

- 59 I make the following recommendations to assist the Township of McMurrich/Monteith in fulfilling its obligations under the Act.

Recommendation 1

Members of council for the Township of McMurrich/Monteith 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*.

Recommendation 2

Council for the Township of McMurrich/Monteith 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 3

Council for the Township of McMurrich/Monteith should ensure that portions of a discussion that do not fit within any exception to the open meeting rules are parsed and held in open session, where it is possible to do so without interrupting or hindering the conversation.

Report

- 60 Council for the Township of McMurrich/Monteith was given the opportunity to review a preliminary version of this report and provide comments to my Office. Due to restrictions in place related to COVID-19, some adjustments were made to the normal preliminary review process and we thank council and staff for their cooperation and flexibility. Any comments we received were considered in the preparation of this final report.
- 61 This report will be published on my Office's website, and should be made public by the Township of McMurrich/Monteith as well. In accordance with section 239.2(12) of the *Municipal Act*, council is required to pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario