



Ombudsman Report

**Investigation into meetings held by the
Township of Bonfield on May 12 and June 9, 2020**

**Paul Dubé
Ombudsman of Ontario
July 2021**

Complaints

- 1 My Office received a complaint about meetings held by council for the Township of Bonfield (the “Township”) on May 12 and June 9, 2020.
- 2 The complaint alleged that council met electronically without broadcasting the meetings or otherwise permitting the public to observe the proceedings.

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001* (the “Act”)¹, 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 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.
- 5 The Ombudsman is the closed meeting investigator for the Township of Bonfield.
- 6 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.
- 7 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 S.O. 2001, c 25.

Investigative process

- 8 On October 19, 2020, we advised the Township of our intent to investigate this complaint.
- 9 My staff reviewed the Township's procedure by-law and relevant portions of the Act. We reviewed the meeting records, including the agendas and minutes.
- 10 We also reviewed video recordings of the meetings retained by the municipality. Staff explained that a portion of the May 12 meeting was not captured on video due to a technical error, as this was council's first electronic meeting. The portions of the meeting that were captured, as well as a video of the entire June 9 meeting, have now been posted on the municipality's YouTube channel. None of these videos were broadcast live in real time.
- 11 We spoke with the complainant, as well as the Mayor and the Chief Administrative Officer/Clerk (CAO/Clerk), to obtain additional information about the meetings and the Township's modified procedure for holding meetings electronically as a result of the COVID-19 pandemic.
- 12 My Office received full co-operation in this matter.

Procedure by-law

- 13 The Township's procedure by-law (2015-32) states that regular council meetings are to be held on the second and fourth Tuesday of every month. Meetings are to be held in council chambers, except in the case of an emergency, in which case council may meet at any convenient location.
- 14 The procedure by-law reflects the exceptions to the open meeting rule in the *Municipal Act*, but has not been updated to reflect the exception in s. 239(3)(b) for discussions about ongoing Ombudsman or closed meeting investigations, or the new exceptions added as of January 1, 2018, in subsections 239(2)(h) to (k).²

² *Municipal Act, 2001*, S.O. 2001, c. 25, s. 239.

Electronic meetings

- 15 Prior to the COVID-19 pandemic, the *Municipal Act, 2001* permitted councils and local boards to allow members to participate in meetings electronically, provided that they did not count towards quorum and did not participate in closed sessions.
- 16 To permit municipalities to continue to move business forward while protecting public health and respecting any associated orders, the Act was amended by the *Municipal Emergency Act, 2020* in March 2020, and later by the *COVID-19 Economic Recovery Act, 2020* in July 2020. A municipality's procedure by-law may now allow members to participate electronically in a meeting "to the extent and in the manner set out in the by-law."³ Members participating electronically can be counted towards quorum and may vote and participate in closed sessions, if permitted by the procedure by-law.
- 17 While these amendments allowed for additional flexibility in conducting meetings through electronic participation, they did not change the applicable procedural rules or create any new exceptions to the open meeting rules. Municipal meetings are still required to be open to the public, unless the topic of discussion fits within one of the exceptions set out in the Act. Notice of meetings must still be provided in accordance with the procedure by-law, meeting minutes must be recorded, and a resolution must be passed in open session before the meeting can be closed to the public.⁴
- 18 On May 12, council for the Township held a special meeting to amend its procedure by-law to provide for electronic meetings during a declared emergency. The by-law notes that an emergency may be declared either by the head of council or the province under the *Emergency Management and Civil Protection Act*. The amendments provided that members can participate electronically in both open and closed meetings, and that they can vote and be counted towards quorum when doing so.⁵
- 19 The procedure by-law as amended indicates that the Clerk or his designate may establish procedures relating to electronic meetings, provided they do not conflict with the provisions of the by-law.

³ *Municipal Act, 2001*, S.O. 2001 C. 25 at s. 238(3.3).

⁴ *Russell (Town of) (Re)*, 2020 ONOMBUD 1 (CanLII), <<https://canlii.ca/t/j6n2t>>.

⁵ Township of Bonfield, By-law 2020-12, amending by-law 2015-32.

May 12, 2020 special meeting

- 20 The agenda for the May 12 special council meeting stated that it would take place at 6:45 p.m. No location was indicated on the agenda, and no instructions for how the public could access or observe the meeting were included.
- 21 According to the minutes, council held a special meeting at 6:50 p.m. on May 12, 2020.
- 22 The video of the meeting shows that council met electronically using a Zoom video conferencing call. Members of staff and all members of council participated in the meeting.
- 23 The meeting video shows that council asked staff for information about the need to amend the procedure by-law and the relevant changes to the *Municipal Act*. Staff also provided information about how the rules apply to the Township's Emergency Control Group.
- 24 Council also discussed the proposed change that would permit the Clerk to establish procedures for electronic meetings.
- 25 Council then resolved to amend the Township's procedure by-law to provide for electronic meetings during a declared emergency.
- 26 The minutes reflect only the resolutions passed by council, and do not reflect the matters discussed during the meeting.
- 27 The special meeting was adjourned at 7:04 p.m.

May 12, 2020 regular meeting

- 28 The agenda for council's regular meeting on May 12 states that a "virtual council meeting" would be held at 7:00 p.m. No instructions were provided for the public to access or observe the meeting.
- 29 According to the minutes, the meeting started at 7:05 p.m.
- 30 The video of the meeting shows that council met electronically using a Zoom video conferencing call. All members of council participated, along with members of municipal staff.

- 31 The meeting minutes list only the resolutions passed by council, and do not reflect any of the discussion that took place during the meeting. They reflect that council approved a contract related to grave digging, certain disbursements, and a contract for dust control and road stabilization materials. Council accepted the resignation of a firefighter, and approved the minutes of a previous meeting.
- 32 The meeting video reflects that council discussed additional matters not recorded in the meeting minutes, including a proposed by-law to delegate additional authority to municipal staff during the declared emergency.
- 33 The minutes and the video indicate that the meeting was adjourned at 8:04 p.m.

June 9, 2020 meeting

- 34 The agenda for the June 9 meeting stated that council would hold a “virtual council meeting” at 7:00 p.m. No access instructions for the public were provided.
- 35 According to the minutes, the meeting commenced at 7:08 p.m.
- 36 The meeting video shows that council and members of staff met electronically over Zoom.
- 37 The video indicates that council received public works updates, including information regarding maintenance required for a municipal vehicle, and expressed support for staff to proceed with the maintenance work. This discussion is not reflected in the meeting minutes.
- 38 Council considered a notice of motion that a council member had proposed, but had not been added to the agenda. After some discussion, the Mayor agreed to table the motion. Council discussed the motion, then resolved that all communication and correspondence over email and text message by the CAO and the Mayor be copied to all of council, and that all such communications sent during the previous six months be provided to council by the end of June.

- 39 The minutes reflect that council then approved disbursements, and voted on a number of items of municipal business, including endorsing a resolution passed by other municipalities regarding the need for better high-speed internet in rural areas, accepting the applications of two new firefighters, accepting a recommendation regarding recycling, approving certain planning matters, and deciding to hire a summer student.
- 40 The minutes state that the meeting ended at 8:28 p.m.

Analysis

Meetings not broadcast or made accessible to the public

- 41 The Mayor and CAO/Clerk confirmed to my Office that the meetings on May 12 and June 9, 2020 were not broadcast or otherwise made accessible to the public in real time.
- 42 They explained that these were the first meetings held by the Township during the declaration of emergency related to the COVID-19 pandemic, and noted that they were still determining how to hold remote meetings. The Mayor indicated that they had not yet organized the technology to live broadcast meetings.
- 43 The CAO/Clerk told us that he believed he had arranged for the audio of the June 9 meeting to be broadcast, but learned afterwards that this did not happen.
- 44 Both the Mayor and CAO/Clerk told us that there was no intention to exclude the public from these meetings. The CAO/Clerk confirmed that since the June 9 meeting, the Township's meetings have been accessible to the public by either teleconference, livestreaming, or both. The Township now broadcasts meetings using both a livestream on YouTube and a teleconference option for those without sufficient internet access to stream video.
- 45 I recognize that municipalities have faced unprecedented challenges in adapting their operations during the COVID-19 pandemic, as applicable laws, best practices, and public health guidelines continue to evolve. The May 12 and June 9 meetings were held early in the pandemic, as the Township was adjusting to the use of electronic meetings.

- 46 Nevertheless, as my Office has noted in previous closed meeting investigation reports, the amendments to the *Municipal Act* permitting electronic participation in meetings did not change the fundamental requirement that meetings must be open to the public, which enables citizens to observe council proceedings in action.⁶ The Supreme Court of Canada has determined that the open meeting requirements in the Act demonstrate that the public has “the right to observe municipal government in process”.⁷
- 47 As the May 12 special and regular meetings, and the June 9 regular meeting of council were not broadcast or livestreamed, or otherwise made accessible to the public in real time, these meetings were closed contrary to the open meeting rules in the *Municipal Act*. Posting the videos on YouTube at a later date does not satisfy the open meeting requirements of the Act.

Incomplete meeting minutes

- 48 As set out above, the meeting minutes for the May 12 and June 9 meetings record the resolutions passed by council. They list the council members and some members of staff who participated in the meetings, and indicate the time that the meetings began and ended.
- 49 However, the minutes do not reflect the discussion held by council during the meetings. The minutes do not include resolutions listed on the agenda and discussed during the meeting that did not pass.
- 50 Section 239(7) of the *Municipal Act* requires that municipalities “record without note or comment all resolutions, decisions and other proceedings at a meeting”.
- 51 In order to reflect all proceedings at a meeting, in accordance with the Act, the Ombudsman has suggested that minutes include:
- 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;

⁶ *Westport (Village of) (Re)*, 2021 ONOMBUD 5 (CanLII), <<https://canlii.ca/t/jdpvc>>.

⁷ *London (City) v RSJ Holdings Inc.*, 2007 SCC 29, at para 32, <<https://canlii.ca/t/1rtq1>>.

- 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.⁸
- 52** As a best practice, the Township should amend its practices to ensure that minutes reflect all meeting proceedings. While minutes are not intended to be a verbatim transcript, they should record the substantive and procedural subjects discussed and include all resolutions considered, including those that do not pass. Minutes that do not reflect the entirety of issues and matters discussed, as well as the decisions made, during a meeting of council do not provide the accurate record required to protect the municipality, should the meeting be subject to an investigation or litigation. Incomplete minutes also leave municipal officials without a record to consult in future in order to understand how an issue was considered or a decision was reached.
- 53** The Township retained video recordings of the meetings held electronically on May 12 and June 9, 2020. 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.
- 54** In this case, the Township's recordings greatly assisted our investigation and permitted us to review the meeting discussions, despite the lack of detail in the recorded minutes. I commend the Township for retaining video recordings of its meetings and encourage it to adopt this practice permanently going forward.

Opinion

- 55** While the circumstances early in the COVID-19 pandemic were challenging and unprecedented, the open meeting rules continued to apply, including to meetings held electronically.
- 56** Council for the Township of Bonfield violated the open meeting rules when it held meetings that were not open to the public on May 12 and June 9, 2020.

⁸ See Ombudsman of Ontario, *Investigation into whether the Town of South Bruce Peninsula Council improperly held closed meetings: "Open Conflict"* (July 2010) at para 79, online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2010/town-of-south-bruce-peninsula-open-conflict%E2%80%9D>>.

- 57 The Township of Bonfield's procedure by-law reflects the open meeting rules in the *Municipal Act, 2001*, but should be updated to include reference to the exceptions in subsections 239(2)(h – k), and 239(3)(b).

Recommendations

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

Recommendation 1

All members of council and committees for the Township of Bonfield 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 Bonfield should ensure that the public is able to observe all open meetings held by council and its committees in process, including meetings held electronically.

Recommendation 3

As a best practice, council for the Township of Bonfield should ensure that meeting minutes reflect all proceedings of council, including subjects discussed and resolutions considered.

Recommendation 4

The Township of Bonfield should update its procedure by-law to reflect all of the exceptions to the open meeting rules set out in the *Municipal Act, 2001*.

Report

- 59 Council for the Township of Bonfield was given the opportunity to review a preliminary version of this report and provide comments to my Office. Due to the restrictions in place related to COVID-19, some adjustments were made to our normal preliminary review process and we thank council and staff for their co-operation and flexibility.

- 60 Council accepted my recommendations 1, 2, and 4. In response to my recommendation that council ensure meeting minutes reflect all proceedings of council, the Township indicated that it would amend future minutes to include the names and positions of staff, but that it would not record the substance of discussions or resolutions that failed to pass.
- 61 I encourage the Township to reconsider and to accept my recommendation in the interest of transparency and accountability. Accurate and comprehensive minutes provide a record of local decision-making, and should reflect the process followed in arriving at those decisions. The requirement to keep a meeting record should be interpreted in a manner that is consistent with the intent of the municipal meeting provisions, which are directed at enhancing the openness, transparency and accountability of municipal government. A complete record of meeting discussions also protects the municipality by providing an accurate description of what occurred during a meeting, in the event of an investigation or litigation.
- 62 This report will be published on my Office's website, and should be made public by the Township of Bonfield as well. 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