



Ombudsman Report

**Investigation into a meeting held by
the City of Niagara Falls on October 6, 2020**

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Ontario Ombudsman
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Complaints

- 1 My Office received complaints about a meeting held by council for the City of Niagara Falls (the “City”) on October 6, 2020.
- 2 The complainants alleged that one of the topics discussed *in camera*, the potential designation of the Niagara River as a protected wetland, did not fall within any of the prescribed exceptions in the *Municipal Act, 2001*.
- 3 The complainants told us that this matter had previously been discussed in open session, and that they therefore expected that it would be discussed in open session again.

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 City of Niagara Falls.
- 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 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

- 9 On December 23, 2020, we advised the City of our intent to investigate these complaints.
- 10 We reviewed the City's procedure by-law, and relevant portions of the Act. We reviewed the meeting records, including the agenda, open and closed session minutes, the video recording of the open portion of the meeting, and the audio recording of the closed session.
- 11 We spoke with the complainants, as well as the Mayor and the Clerk, to obtain additional information about each meeting and about the City'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 City's procedure by-law (No. 2019-04) states that all meetings shall be open to the public except as provided in section 239 of the *Municipal Act, 2001*.
- 14 The by-law also provides that all *in camera* items shall be discussed in a closed meeting prior to the regular council meeting, and that prior to proceeding *in camera*, council shall pass a resolution in open session to convene a closed meeting.
- 15 The City has adopted the best practice of audio recording all closed sessions, as well as broadcasting council meetings live on YouTube.

Legislative amendments regarding electronic meetings

- 16 The *Emergency Management and Civil Protection Act* provides that a state of emergency may be declared by the provincial government and by the head of council of a municipality.
- 17 The Mayor of the City of Niagara Falls declared a local state of emergency on April 4, 2020.² This declaration of emergency remained in effect at the time of the meeting on October 6, 2020.

² <https://niagarafalls.civicweb.net/document/25878>

- 18 Following amendments to the *Municipal Act* made by the *Municipal Emergency Act, 2020* and the *COVID-19 Economic Recovery Act, 2020*, a municipality's procedure by-law may now provide that members can participate electronically in a meeting "to the extent and in the manner set out in the by-law."³ A procedure by-law may now provide that members participating electronically be counted toward quorum and may allow members to participate electronically in meetings that are open or closed to the public.
- 19 While these amendments allow for additional flexibility in conducting meetings through electronic participation, they do not create new exceptions to the open meeting rules or change the applicable procedural 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
- 20 Council amended the City's procedure by-law on March 20, 2020 to provide for the holding of electronic meetings during an emergency.⁵ Council opted to permit members to participate electronically in open meetings but not in closed sessions.
- 21 The amendments to the procedure by-law also stipulated that during the state of emergency, meetings of council were to be considered open to the public "if the meeting is live streamed to a service available to the public electronically."

October 6, 2020 meeting

- 22 The agenda for the October 6 council meeting indicated that due to COVID-19 and the closure of City Hall, the meeting would be broadcast on the City's YouTube channel, Facebook page, and on a local TV station.
- 23 The agenda posted online also included a link to a proposed resolution indicating that council would hold a closed meeting prior to its regularly scheduled meeting to discuss three topics in closed session, including "a matter that falls under section 239(2)(f) for advice that is subject to solicitor-client privilege regarding a potential Ramsar designation." The proposed resolution posted online had not yet been passed by council.

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 City of Niagara Falls, By-law 2020-24 "Council Meetings during an Emergency By-law".

- 24 The closed session minutes indicate that the closed session was called to order in a committee room at 3:00 p.m. Several staff members were also in attendance. In accordance with public health guidelines, members of the public were not permitted to attend in person to observe the proceedings.
- 25 Council opted not to discuss one of the items on the agenda during the closed session, and instead planned to discuss it during the open session that would follow.
- 26 Although the audio recording indicates that council passed a resolution to move into closed session to discuss the two remaining items, this portion of the meeting was not broadcast live on any of the media listed in the agenda. After discussing an item that was not the subject of any complaints to my Office, council proceeded to discuss the potential designation of the Niagara River under the Ramsar Convention.
- 27 The Ramsar Convention on Wetlands of International Importance is a multilateral agreement with the objective of conserving wetlands. Canada ratified the convention in 1981. A wetland can be designated under the Convention through a voluntary process. While the United States side of the Niagara River has been designated under the Ramsar convention, the Canadian side has not.
- 28 During its October 6, 2020 discussion, council received legal advice from the Acting City Solicitor regarding the potential designation of the Niagara River under the Convention. Throughout the discussion, the solicitor referred to documents and a staff report that were provided to council, which were incidental to the legal advice being provided.
- 29 Council then passed a motion to rise from closed session.
- 30 Council convened in council chambers in open session at 4:00 p.m. and a live broadcast commenced at that time.
- 31 During the open meeting, council reported back on its discussion in closed session and passed a motion that it did not support Ramsar designation status for the Niagara River.

Analysis

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

- 32 The complaints received by my Office were about the appropriateness of council discussing the Ramsar designation in closed session on October 6, 2020. Council cited the “solicitor-client privilege” exception as the basis for discussing this matter *in camera*.
- 33 The exception for advice subject to solicitor-client privilege 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.
- 34 The Supreme Court of Canada has found that solicitor-client privilege applies when three pre-conditions are met: (1) There is a communication between a lawyer and a client; (2) which entails the seeking or giving of legal advice; and (3) which is considered to be confidential by the parties.⁶
- 35 During the October 6 meeting, council received confidential advice from the Acting City Solicitor about the potential Ramsar designation. Accordingly, this topic fit within the exception.

Failure to broadcast the passage of a resolution to go *in camera*

- 36 The Mayor and Clerk explained to my Office that prior to the declaration of emergency, council’s practice was to meet in a committee room prior to its regular meetings to conduct closed sessions. The door to this room was kept open and members of the public were welcome to attend and observe council pass a resolution to go *in camera*, at which point they would be asked to leave until council reconvened in open session.
- 37 However, on October 6, 2020, the public was not permitted to attend council chambers or the committee room to observe either the open or closed session meetings. The livestream for the October 6 meeting began at 4:00 p.m. and did not capture council’s resolution to go *in camera*, which was passed at approximately 3:00 p.m.

⁶ *Solosky v. The Queen*, 1979 CanLII 9 (SCC), <<https://canlii.ca/t/1mjtq>>.

- 38 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.
- 39 As my Office has noted in previous closed meeting investigation reports, the requirement to hold meetings that are open to the public is not suspended in an emergency.⁷ None of the amendments to the *Municipal Act* permitting municipalities to allow members to participate in meetings via electronic means have changed this fundamental requirement.
- 40 Whenever the public is excluded from in-person attendance, it is imperative that the alternative electronic format selected enables the public to observe all portions of a meeting except a duly constituted closed session.
- 41 Pursuant to section 239(4) of the Act, members of the public are entitled to observe council pass a resolution in open session stating the general nature of the topics to be discussed *in camera* prior to holding a closed session.
- 42 This requirement is not a mere formality. As the Ontario Court of Appeal has explained, it allows the municipality to provide a general description of the matters to be discussed in a way that maximizes information available to the public without undermining the reason for closing the meeting.⁸ If the resolution to close a meeting is passed when council is already in closed session, it does not provide any information to the public, disclosing neither the fact of the closed meeting nor the general nature of the matter(s) to be considered.⁹
- 43 In this case, although the proposed resolution to go *in camera* was published in advance of the meeting, the public was not able to observe the portion of the meeting when council actually passed the resolution. It is council's responsibility during a meeting to approve or amend an agenda, including proposed closed session items. Council could decide to postpone a particular discussion, or debate whether to discuss a topic in open session rather than closed.

⁷ *Russell (Town of) (Re)*, 2020 ONOMBUD 1 (CanLII), <<https://canlii.ca/t/j6n2t>>.

⁸ *Farber v. Kingston (City)*, 2007 ONCA 173 (CanLII), <<https://canlii.ca/t/1qtzl>>.

⁹ *Burk's Falls / Armour (Village of / Township)*, 2015 ONOMBUD 26 (CanLII), <<https://canlii.ca/t/gtp6w>>.

- 44 Council for the City of Niagara Falls ultimately decided to discuss only two matters *in camera* of the three items set out in the proposed resolution circulated prior to the meeting held on October 6, 2020. As the actual resolution to go *in camera* was not passed in an open meeting, the public was deprived of the opportunity to observe this part of council's decision-making process.
- 45 In previous reports issued by my Office, I have noted that even where a closed session is the only anticipated agenda item, the meeting must begin in open session and the public must be able to attend or otherwise observe that portion of the meeting.¹⁰ Even where a meeting may only be open to the public for a few minutes prior to council going *in camera*, municipalities must ensure that the public can observe the open portions of such meetings.

Opinion

- 46 Council for the City of Niagara Falls did not contravene the *Municipal Act* when it discussed a Ramsar designation *in camera* on October 6, 2020 under the exception for advice subject to solicitor-client privilege.
- 47 However, council contravened the Act when it passed a resolution to go *in camera* in a portion of the meeting that was effectively closed to the public, as the public was unable to attend in person or observe a live broadcast.
- 48 I urge the City of Niagara Falls to consider all available options to ensure that the public's right to observe municipal meetings is upheld in full and that all portions of such meetings are broadcast live when there are restrictions on in-person attendance.

Recommendations

- 49 I make the following recommendations to assist the City of Niagara Falls in fulfilling its obligations under the Act and enhancing the transparency of its meetings:

Recommendation 1

All members of council and committees for the City of Niagara Falls 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.

¹⁰ *Richmond Hill (City of) (Re)*, 2021 ONOMBUD 8 (CanLII), <<https://canlii.ca/t/jf6b3>>.

Recommendation 2

Council for the City of Niagara Falls should ensure that the public is able to observe all open portions of meetings held by council and its committees, including the resolution to go *in camera*.

Report

- 50 Council for the City of Niagara Falls was given the opportunity to review a preliminary version of this report and provide comments to my Office. In light of 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. The comments we received were considered in the preparation of this final report.
- 51 The response from council indicated that the City accepted these recommendations and agreed to ensure that the public is able to observe all open portions of meetings going forward.
- 52 Council also commented that, while the resolution to go *in camera* was not passed in public, the content of the motion was available to the public because it was published in advance of the meeting on the agenda.
- 53 I commend the City for taking steps to ensure advance notice is provided of matters council intends to discuss *in camera* at an upcoming meeting. However, the inclusion of this information on an agenda is not a substitute for passing a resolution during an open meeting, as required by the Act.
- 54 This report will be published on my Office's website, and should be made public by the City of Niagara Falls 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