



Ombudsman Report

**Investigation into a closed meeting held by
the Policy Review Committee for
the Town of Carleton Place
on March 14, 2017**

**Paul Dubé
Ombudsman of Ontario
October 2017**

Complaint

- 1 In April 2017, my Office received a complaint about a closed meeting of the Policy Review Committee (the “committee”) for the Town of Carleton Place held on March 14, 2017. The committee consists of all members of council for the Town of Carleton Place.
- 2 The complaint alleged that the committee held an illegal closed meeting on March 14 to discuss a public statement made by Mayor Louis Antonakos on March 7, during a meeting of a different committee, the Planning and Protection Committee.

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001*, 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 citizens 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 Town of Carleton Place.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.

Committee procedures

- 7 The town’s procedure by-law (by-law no. 09-2015) states that all meetings shall be open to the public except as provided in section 239 of the Act. Prior to proceeding in camera, council and any committees must state by resolution the fact of holding a closed meeting and the general nature of the subject matter to be considered.

Investigative process

- 8 On June 15, 2017, after conducting a preliminary review, we advised the municipality of our intent to investigate this complaint.
- 9 Members of my Office reviewed the town's procedure by-law and relevant portions of the Act. We reviewed the meeting records from the March 7 meeting of the Planning and Protection Committee and the March 14 meeting of the Policy Review Committee.
- 10 We interviewed the clerk and members of council who were present at the closed meeting on March 14, 2017.
- 11 My Office received full co-operation in this matter.

Background

The Mayor's statement

- 12 On March 7, 2017, during an open meeting of the Planning and Protection Committee, the Mayor made a lengthy public statement. The Mayor's statement touched on a number of local issues, including council's media relations and media reports following a report issued by the town's Integrity Commissioner that dismissed a code of conduct complaint against the Mayor. The Mayor also made comments about an identifiable individual who had lodged a subsequent code of conduct complaint against the Mayor. At the time of the meeting, the Integrity Commissioner was still investigating this complaint.
- 13 The Mayor referred to "attacks" against himself and members of council by an individual he called a "disgruntled developer." In addition to referencing the individual's code of conduct complaint, the Mayor also stated that the individual had a record of assaulting a peace officer and had contravened the town's planning and building application processes as well as various pieces of provincial legislation like the *Planning Act* and the *Building Code Act*.
- 14 A written copy of the Mayor's statement was appended to the meeting's Action Report (similar to meeting minutes). The Action Report, which included the Mayor's statement, was made publicly available on the town's website.

- 15 On March 11, 2017, the identifiable individual who was referenced in the Mayor's statement made a public Facebook post, which linked to a media article about the Mayor's statement. The Facebook post stated that the Mayor had opened himself and the town up to a discrimination lawsuit.
- 16 Following the publication of the Action Report on the town's website and the Facebook post, Councillor Sean Redmond approached the Clerk to add the Mayor's statement as an item on the closed session agenda for an upcoming Policy Review Committee meeting because he believed it opened the town up to liability. At that point, the agenda for the meeting had already been published so any additions would have to be made by motion during the meeting.

The March 14, 2017 closed meeting of the Policy Review Committee

- 17 On March 14, 2017, the Policy Review Committee met in council chambers for a regular meeting.
- 18 According to the clerk, Councillor Redmond made a motion to add the Mayor's statement to the closed meeting agenda prior to the committee going in camera. This motion was not recorded in the open meeting minutes; however, all members of council who were interviewed recalled that the motion had been passed by the committee. My Office has found that meeting minutes should include a detailed description of the substantive and procedural matters discussed and any motions, including who introduced the motion and seconders.¹
- 19 According to the open meeting minutes, the committee passed a resolution to proceed in camera to discuss a number of items. The committee cited the "litigation/potential litigation" exception found in section 239(2)(e) of the Act to discuss the Mayor's statement. The Mayor advised my Office that he voted against the resolution to proceed in camera.
- 20 While in camera, the committee discussed its concerns that the town might face potential litigation arising out of the Mayor's comments against the identifiable individual. The committee discussed the individual's Facebook post and the implications of allowing a copy of the Mayor's statement to remain appended to the Action Report and available on the town's website.

¹ Ombudsman of Ontario, *Investigation into the allegation that the Public Works Committee for the Township of Bonfield violated the Municipal Act, 2001 on May 19 and June 2, 2015* (November 2015), online: < [https://www.ombudsman.on.ca/Resources/Reports/Township-of-Bonfield-\(2\).aspx](https://www.ombudsman.on.ca/Resources/Reports/Township-of-Bonfield-(2).aspx)>.

- 21 The committee directed staff to add the following item to the open session agenda:

THAT the Mayor's statement made at the March 7th, 2017 Planning and Protection Committee meeting not be included with the Action Report (128132)

- 22 After returning to open session, the committee passed the motion to remove the Mayor's statement from the Action Report in a recorded vote of 6-1, with the Mayor voting against the motion.

Analysis

- 23 The complaint to our Office alleged that the committee's discussion about the Mayor's statement did not fit within the "litigation/potential litigation" exception and was therefore contrary to the open meeting rules.

"Litigation or potential litigation" exception

- 24 The *Municipal Act* does not specifically define what constitutes "litigation or potential litigation." The exception in s. 239(2)(e) for litigation or potential litigation is reserved for circumstances where the matter discussed is the subject of ongoing litigation or there is a reasonable prospect of litigation.
- 25 In *RSJ Holdings v. London (City)*, the Ontario Court of Appeal considered the exception in s. 239(2)(e) for litigation or potential litigation. The Court observed that, "The fact that there might be, or even inevitably would be, litigation arising from the [matter discussed] does not make the "subject matter under consideration" potential litigation".²
- 26 My Office has found that the "litigation/potential litigation" exception applies in the context of anticipated litigation where there is more than a remote possibility litigation may commence, although the litigation needs not be a certainty. The municipality must believe that litigation is a reasonable prospect and must use the closed meeting to explore that prospect in some way.³

² *RSJ Holdings Inc. v. London (City)*, [2005] OJ No 5037.

³ Ombudsman of Ontario, *Investigation into the Township of West Lincoln's alleged violation of the Municipal Act, 2001 on June 15 and June 22, 2015* (November 2015), online: <<https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/Ontario-Ombudsman---Final-report---West-Lincoln-linked.pdf>>.

The circumstances surrounding the meeting

- 27** When considering whether there was a reasonable prospect of litigation, the broader circumstances of the closed meeting are relevant.⁴
- 28** In this case, all of council, except the Mayor, claimed to believe there was potential for litigation after listening to the Mayor's statement at the March 7 meeting and seeing the subsequent Facebook post. The councillors told members of my Office that the Mayor and the identifiable individual have an open and publicly contentious relationship, which in their shared opinion could make the individual predisposed to launching a lawsuit against the town.
- 29** The councillors explained that the fact the Mayor's statement was available on the town's website deepened their concern that the town would likely be the subject of litigation by the individual. According to one councillor, he was concerned about mitigating possible future damages against the municipality if the statement remained publicly accessible on the municipality's website.

Was there a reasonable prospect of litigation?

- 30** Some of the councillors said they relied on personal experience and business sense to rationalize why they felt the municipality was facing a reasonable prospect of litigation.
- 31** I am not satisfied that, at the time of the March 14 closed meeting, there was sufficient reason for the committee to believe there was a reasonable prospect of litigation related to the Mayor's statement. In fact, I find the prospect of litigation was too remote for the closed meeting exception to apply.
- 32** The Mayor's statement, while contentious, does not justify the committee's belief that litigation was a reasonable prospect. While the committee may have had a suspicion that the Mayor's statement opened the town up to liability, this belief alone would not constitute a reasonable prospect of litigation and I find the possibility too remote to justify closing the meeting to the public.

⁴ Ombudsman of Ontario, *Investigation into a complaint about closed meetings held by Council for the Township of Georgian Bay on October 13, 2015 and January 11, 2016* (January 2017), online: <[https://www.ombudsman.on.ca/Resources/Reports/Township-of-Georgian-Bay-\(1\).aspx](https://www.ombudsman.on.ca/Resources/Reports/Township-of-Georgian-Bay-(1).aspx)>

- 33** A statement by the identifiable individual that the Mayor and the town had created the potential for a lawsuit did not create “potential litigation” that justified closing the meeting to the public. The fact that the councillors believed the individual was more likely to file a lawsuit due to the nature of his relationship with the Mayor does not make him more inclined to file a lawsuit against the town itself. The identifiable individual had taken complaints to the Integrity Commissioner for investigation and was awaiting the results of that investigation. Lawsuits are expensive propositions, which most people initiate only as a last resort. The reference to a lawsuit in the Facebook post does not rise to the level of “potential litigation”, as the post was rhetorical in nature and did not contain a threat of litigation.
- 34** Finally, the committee’s belief that allowing the Mayor’s statement to remain online would aggravate the individual’s damages if a lawsuit was filed against the municipality is speculative at best.
- 35** The committee may have wished to act quickly and in the best interests of the town by meeting to discuss the Mayor’s statement and direct staff to remove the statement from the town’s website. However, at the time of the meeting on March 14, 2017, the town did not face a reasonable prospect of litigation with respect to the Mayor’s statement.
- 36** Accordingly, the committee’s discussion about the Mayor’s statement during the closed session on March 14, 2017 did not fit within the “litigation/potential litigation exception” and the meeting should have been open to the public.

Opinion

- 37** The Policy Review Committee for the Town of Carleton Place contravened the *Municipal Act, 2001* and the town’s procedure by-law when it discussed the Mayor’s statement during its in camera meeting on March 14, 2017 under the “litigation/potential litigation” exception to the open meeting rules.

Recommendations

38 I make the following recommendations to assist the Town of Carleton Place in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of council for the Town of Carleton Place should be vigilant in adhering to their individual and collective obligation to ensure that council and its committees comply with their responsibilities under the *Municipal Act, 2001* and the procedure by-law.

Recommendation 2

The Town of Carleton Place 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

The Town of Carleton Place should ensure that meeting records are complete and accurately reflect all substantive and procedural items that were discussed.

Report

39 The municipality was given the opportunity to review a preliminary version of this report and provide comments to our Office. Comments received were considered in the preparation of this final report.

40 My report should be shared with council and made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ontario Ombudsman