



Ombudsman Report

**Investigation into complaint about
the Town of Pelham's
decision-making process and
discussion at an informal gathering
in January 2020**

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Ombudsman of Ontario
June 2020

Complaint

- 1 My Office received a complaint alleging that a quorum of councillors informally met to discuss a possible donation from a cannabis producer on January 9, 2020, contrary to the open meeting rules of the *Municipal Act, 2001*.¹ The complaint also alleged that councillors subsequently voted via email on whether they would be in favour of accepting the possible donation.

Ombudsman jurisdiction

- 2 Under the *Municipal Act*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 3 As of January 1, 2008, the Act gives Ontarians 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 investigators. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 4 The Ombudsman is the closed meeting investigator for the Town of Pelham.
- 5 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 our open meeting cases.² 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 all of our Office's investigations that are cited in this report can be found in the digest.
- 6 In addition to my investigative authority under the *Municipal Act*, since 2016 the *Ombudsman Act* has granted my Office authority to review and investigate complaints about the broader administration of municipal entities. In reviewing this complaint about the Town of Pelham's decision-making process, I used my authority under the *Ombudsman Act* to assess whether the Town's administrative conduct was consistent with its legal obligations and the principles of accountability and transparency.

¹ SO 2001, c 25.

² The digest can be found on our website here: <https://www.ombudsman.on.ca/digest/home>

Investigative process

- 7 On March 4, 2020, I advised the Town that I would be investigating council's alleged informal gathering on January 9, 2020. After gathering additional information, I informed the Town on April 1, 2020, that I would also be investigating council's use of email following the informal gathering.
- 8 I assigned this investigation to staff at my Office with expertise in the *Municipal Act's* open meeting provision and broader issues of municipal administration. Staff interviewed all seven members of council³, as well as the municipal Clerk and Chief Administrative Officer (CAO). They also reviewed copies of the emails councillors sent and received regarding the donation, and other relevant materials provided by the Town and those we interviewed.
- 9 My Office received full co-operation in this matter.

Informal gathering on January 9, 2020

Background

- 10 The Town of Pelham has a local park that is the site of a popular summer concert series. A group of volunteers who assist in organizing the series – called the Fonthill Bandshell Committee (the Bandshell Committee), although the group is not a committee of council – worked with the municipality to develop plans for substantial improvements and repairs to the park. The municipality agreed to assist with some of these improvements and advanced funds to the committee so that improvements could be made before the start of the 2020 concert season. In exchange, the Bandshell Committee was expected to begin fundraising efforts and repay the municipality when possible.
- 11 To assist the volunteers in their fundraising efforts, the Mayor sent a letter to local businesses soliciting donations for the park. The Mayor told us that in response, a local cannabis producer indicated that it would consider making a donation to the Bandshell Committee to demonstrate its corporate citizenship. The Mayor said this discussion occurred during a meeting about another matter and that he did not consider the donation to be finalized at that time. Despite the informality of the offer, the Mayor said he shared this information with a member of the Bandshell Committee and asked it to be kept confidential until the donation was finalized.

³ The fact-gathering portion of this investigation occurred prior to the death of Councillor Mike Ciolfi.

- 12 By early January 2020, the Bandshell Committee had made substantial progress in its fundraising and was ready to provide council with a public update at the January 13, 2020 council meeting. A committee member spoke with the Mayor prior to this meeting and indicated that the update to council was going to reference the possible donation from the cannabis producer. The Mayor told us he was unsure if other councillors would be in favour of accepting this donation and said he felt he needed to seek council's opinion before the Bandshell Committee mentioned it in the public report to council.

January 9, 2020 discussion

- 13 To learn whether other councillors would be in favour of accepting the possible donation, the Mayor decided to raise the issue with three councillors who were present at the opening ceremony of a large youth hockey tournament on Thursday, January 9 at approximately 5:30 pm. According to everyone we spoke with, the discussion was brief and occurred in a public hallway of the hockey arena where hundreds of people were milling about. Interviewees told us that the Mayor informed the three councillors that a specific cannabis producer was considering making a donation to the Bandshell Committee and that he wanted to know if each councillor would be in favour of accepting it. The Mayor mentioned that he needed an answer before the next council meeting on Monday, January 13.
- 14 According to our interviews, two councillors each said that this matter should be discussed at a council meeting, while the third councillor did not express any opinion. The Mayor then asked each councillor to email him in the coming days with their thoughts about accepting the donation. Everyone we spoke with agreed that the conversation was very short and that no councillors expressed an opinion on whether council should accept the possible donation. We were told there was no additional discussion of this matter or any other council business.

Mayor's email to councillors

- 15 At 10:22 pm that same evening, the Mayor emailed the three councillors who were not present at the hockey tournament about the same issue. His email read:

Back in August, I sent to several Town businesses a request on behalf of the Band Shell Committee, for a donation to fund the improvements. One of the companies to respond was [a cannabis producer]. They are willing to donate [a sum] to the bandshell, with no strings attached, to show they are trying to be a good corporate citizen.

Because this discussion does not fit the criteria, it cannot be discussed in - camera, and it was decided by [the CAO] and I that perhaps we really wouldn't want to discuss this in open session, so just this once we would make a decision by email, outside of Council. I spoke to [three councillors] tonight at the MCC [hockey arena], so they already know the situation. If you decide to communicate by email to discuss this donation, so be it, I don't want to know about it.

So the question is... Should Council accept this donation. It will be paid to the Bandshell Committee, which in turn will use it to pay us back the money we loaned them.

If you have any questions, feel free to contact me. I have told [a Bandshell Committee member] that I would have the answer for her by Saturday evening, so I would appreciate each of you to email your decision by Saturday afternoon.... thanks... marv

- 16 In response to this email and the short discussion before the hockey tournament, each councillor emailed the Mayor with their opinion on whether the donation should be accepted. In addition, several councillors expressed concern about the manner in which their opinion was sought.
- 17 After receiving these responses, the Mayor responded via separate emails to each councillor noting that his "informal poll is now complete" and that he will inform the head of the Bandshell Committee that council is opposed to accepting a donation from a cannabis producer.
- 18 According to those we spoke with, the Bandshell Committee's update to council did not involve any reference to the possible donation and there has been no further discussion of the matter by council.

Analysis

- 19 My Office has found that the *Municipal Act's* definition of "meeting" in section 238(1) requires a quorum of councillors to be physically present⁴ and discuss a matter in a way that "materially" or "significantly" advances council's business or decision-making.⁵ Subsequent changes to the *Municipal Act* in March 2020 have allowed electronic participants to count for quorum when there is a declared emergency under the *Emergency Management and Civil Protection Act* and the

⁴ *Hamilton (City of) (Re)*, 2019 ONOMBUD 7, <<http://canlii.ca/t/j2pwf>>.

⁵ *Casselman (Village of) (Re)*, 2018 ONOMBUD 11, <<http://canlii.ca/t/hvmtk>>.

municipality's procedure by-law provides for it.⁶ These provisions did not yet exist and would not have applied to council's email exchange in January 2020.

Discussion at the Hockey Arena

- 20 Council's informal discussion at the hockey arena on January 9, 2020 was not a "meeting" under the Act because it did not materially or significantly advance council business or decision-making. While the Mayor introduced the topic of a potential donation, there was no further discussion and no decision was made.

Mayor's email exchange with council

- 21 On the evening of January 9, the Mayor emailed three members of council to solicit their opinion and to allow council to make a decision with respect to whether council should accept the proposed donation. In his email, the Mayor acknowledged that council would be making a decision and that the subject – i.e. a donation for the bandshell – would not meet the criteria for a closed meeting of council under the *Municipal Act*. This email exchange did not meet the Act's definition of a meeting because a quorum of council was not physically present to advance council business.
- 22 However, section 5(3) of the *Municipal Act* states that municipalities can only exercise their power and authority through formal by-laws adopted by council in properly constituted and open council meetings.⁷ By-laws are the primary legislative instrument of municipalities in Ontario and are analogous to acts passed by the provincial legislature.
- 23 In law, council is only permitted to pass by-laws during meetings that are properly constituted under the Act and which are advertised and open to the public. This allows the public to see municipal decision-making in process and hold elected officials accountable for their actions. As the Supreme Court of Canada determined in *London (City) v. RSJ Holdings Inc.*, the public has "the right to observe municipal government in process."⁸ Even council resolutions are not legally binding exercises of a municipality's authority unless council passes a "confirming by-law" at the end of the meeting. No other method of decision-making is legally binding on the municipality. This helps ensure that municipalities comply with the legal requirement that they act by by-law.

⁶ *Municipal Act*, section 238 (3.1-3.4)

⁷ *Municipal Act*, section 5 (3).

⁸ *London (City) v RSJ Holdings Inc*, 2007 SCC 29 at para 32.

- 24 In this case, council contravened the *Municipal Act's* clear requirement to act through by-law when councillors emailed the Mayor with their opinion on the proposed donation. In attempting to exercise its authority without passing a by-law at a public meeting, council denied citizens the right to see municipal decision-making in action and failed to act in an accountable and transparent fashion.
- 25 While the Mayor and CAO said in their interviews that the proposed donation was not a matter of council business and therefore not subject to the *Municipal Act's* decision-making requirements, the Mayor's own email and actions indicate that he considered the acceptance of the donation to be a matter within council's purview. As his emails indicate, the Mayor felt he needed each councillor's vote in order to make a decision, but he did not want to openly discuss and debate the matter in a council meeting.
- 26 Because council failed to act through by-law passed at a properly constituted council meeting, council lacked legal authority to provide its opinion to the Bandshell Committee regarding the acceptance of the potential donation. When the Town wishes to make such decisions through an exercise of its powers and authority, it should ensure that it only does so through a properly passed municipal by-law as required by the *Municipal Act*.

Opinion

- 27 Council for the Town of Pelham did not contravene the *Municipal Act's* open meeting requirements during the discussion at the hockey arena on January 9, 2020, or in their subsequent email exchange, as these exchanges did not constitute meetings under the *Municipal Act*.
- 28 However, the Town of Pelham acted without legal authority when it decided to inform the Bandshell Committee that it was not in favour of accepting a potential donation from a cannabis company. By failing to act through resolution and confirming by-law passed at a properly constituted council meeting, the municipality tried to shield its decision-making process from public scrutiny. These actions were contrary to law and wrong under section 21(1) of the *Ombudsman Act*.

Recommendations

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

Recommendation 1

All members of council for the Town of Pelham should be vigilant in adhering to their individual and collective obligations to ensure that council complies with its responsibilities under the *Municipal Act, 2001*.

Recommendation 2

The Town of Pelham should ensure that it exercises its power and authority through a properly passed resolution and confirming municipal by-law as required by the *Municipal Act*.

Report

- 30** Council for the Town of Pelham was given the opportunity to review a preliminary version of this report and provide comments to our 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 for their cooperation and flexibility. All comments received were considered in the preparation of this final report.
- 31** This report will be published on my Office's website, and should be made public by the Town of Pelham as well.



Paul Dubé
Ombudsman of Ontario