



Ombudsman Report

**Investigation into a complaint about
March 7, 2018 information sessions
involving a quorum of councillors for the
Village of Casselman**

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Ombudsman of Ontario
August 2018**

Executive Summary

My Office investigated a complaint about two information sessions on March 7, 2018 attended by a quorum of council for the Village of Casselman. During these sessions, the council members in attendance received information and updates with respect to the business of the municipality. However, my investigation did not uncover evidence that the council members in attendance at the sessions “materially advanced” the business or decision-making of council.

These sessions were therefore not “meetings” under the definition in the *Municipal Act, 2001* that came into force on January 1, 2018. In the interests of openness and transparency, I suggest that council members receive information and updates about the business of the municipality during public meetings of council.

Complaint

- 1 On March 19, 2018, my Office received a complaint alleging that council for the Village of Casselman violated the open meeting provisions of the *Municipal Act, 2001* when a quorum of council attended two information sessions on March 7, 2018 relating to the business of the municipality.

Ombudsman jurisdiction

- 2 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.
- 3 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 or use the services of the Ontario Ombudsman. 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 Village of Casselman.
- 5 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's governing procedures have been observed.

Investigative process

- 6 On March 29, 2018, my Office issued a notice in accordance with section 18(1) of the *Ombudsman Act* that we would be investigating this complaint.
- 7 Members of my Office's staff reviewed relevant correspondence and documentation relating to two information sessions that took place on March 7, 2018.
- 8 My Office spoke with the Mayor, the Acting Clerk and the Acting Chief Administrative Officer (CAO). We also interviewed third parties who attended the information sessions.

Previous complaints

- 9 My Office previously reviewed five closed meeting complaints about the Village of Casselman.
- 10 In a June 12, 2013 letter,¹ my Office found that council members did not violate the open meeting provisions of the *Municipal Act, 2001* when they gathered together prior to council meetings on three occasions, as council did not exercise its authority or lay the groundwork to do so during these gatherings. We did note, however, the problems inherent in informal gatherings of council members, in particular when a quorum of council is present.
- 11 A February 2015 report from my Office² found that council members did not violate the Act when the newly elected council met informally for dinner several weeks prior to their swearing-in. However, my Office did find that a written direction to staff signed by a quorum of council in office at the time was an illegal meeting. We noted the problems inherent in serial meetings and recommended that the village cease the practice. We also noted issues with the procedure by-law and recommended that the village specifically provide for notice of regular and special meetings.
- 12 An April 2015 report from my Office³ found that a gathering of a quorum of council with a group of developers at a local restaurant was, in effect, a closed meeting of council in contravention of the open meeting provisions of the Act. We recommended that the village adopt written guidelines to ensure that council and committee members are educated on and fully understand the open meeting requirements, that council be vigilant in adhering to its obligations under the Act, and that the village amend its procedure by-law to explicitly provide for notice to the public of special meetings.
- 13 In a January 29, 2016 letter,⁴ my Office found that council for the village did not violate the open meeting requirements when it discussed a consultant's report in two closed sessions under the personal matters exception.

¹ Letter from Ombudsman of Ontario to Village of Casselman (June 12, 2013), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2013/village-of-casselma>>.

² Casselman (Village of) (Re), 2015 ONOMBUD 7 (CanLII), online: <<http://canlii.ca/t/gtp82>>.

³ Casselman (Village of) (Re), 2015 ONOMBUD 14 (CanLII), online: <<http://canlii.ca/t/gtp61>>.

⁴ Letter from Ombudsman of Ontario to Village of Casselman (January 29, 2016), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2016/village-of-casselma>>.

However, we made best practice suggestions that the village improve its resolutions to go into closed session and ensure greater consistency in its reporting back in open session.

- 14 In a June 2018 report,⁵ I found that council for the village did not violate the open meeting rules when it went into closed session to discuss human resources matters on January 8, 2018 and when a quorum of councillors had informal discussions at town hall on January 11, 2018. However, I made best practice suggestions relating to the village's closed meeting procedures.

Background

- 15 Two information sessions took place on March 7, 2018 at Centre Paul-Émile Levesque in Casselman, one in the morning and one in the afternoon.
- 16 The Acting CAO had emailed council members on March 5, 2018 to let them know that representatives from an engineering consulting firm and from a development company would be in town on March 7, 2018 to provide information about their respective ongoing projects. The Acting CAO in her email characterized these sessions as follows: "It's nothing official we're just hearing what they have to say."⁶

Morning information session

- 17 The first information session on March 7, 2018 took place at 9:00 a.m. The Acting CAO's March 5, 2018 email said this session was to "discuss the draft additional fees for the northwest bank of the river", referring to the construction of a residential development and sanitary sewage system along the South Nation River.⁷ In attendance were representatives from an engineering consulting firm, two staff members, and three out of five members of council (Mayor Conrad Lamadeleine, Councillor Marcel Cléroux and Councillor Daniel Lafleur).

⁵ Investigation into a complaint about a January 9, 2018 meeting and a January 11, 2018 discussion among councillors for the Village of Casselman (June 2018), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2018/village-of-casselman>>.

⁶ Original in French: "Ce n'est rien d'officiel on ne fait que voir ce qu'ils proposent."

⁷ Original in French: "...pour discuter de l'ébauche pour les frais aux existant du côté nord-ouest de la rivière."

- 18 According to the engineering consultant, the information session was set up by the Acting CAO to share information with the Village about a development charges and sewer charges study.⁸ Council had commissioned the study in early 2017. During the information session, the engineering consultant provided a status update on the study and explained the *Development Charges Act* process.
- 19 Under the *Development Charges Act*, municipal councils are required to complete a development charges study prior to passing a development charges by-law. The study must be made available for public consultation for at least 60 days prior to the passing of a development charge by-law.
- 20 The Mayor and the engineering firm's representative both stated that there was no discussion among the members of council who attended the information session, and no decisions were made. The engineering firm's representative did most of the talking and explained the methodology of the study. He stated that the members of council in attendance wanted to understand the math and the approval process. According to the engineering consultant, it is not uncommon for elected officials to attend such information sessions.
- 21 The documentation for this information session consisted of complex tables of calculations setting out the math behind the study.

Afternoon information session

- 22 The second information session on March 7, 2018 took place at 1:30 p.m. The Acting CAO's March 5, 2018 email said this session was to "discuss the completion of the subdivision."⁹ In attendance were representatives from a development company, two staff members, and the same three councillors.
- 23 According to a representative from the development company who attended the information session, it was set up by the Acting CAO to provide an update to the Village about an ongoing residential development project. The project had been underway for several years. During the information session, the developer explained the expected timelines for the completion of the project.

⁸ Development charges are fees collected from developers to help pay for infrastructure required to provide municipal services to a new development. Sewer charges are collected from property owners who benefit from wastewater infrastructure.

⁹ Original in French: "...pour discuter sur l'achèvement de la subdivision."

- 24 The Mayor and the developer both stated that there was no discussion among the members of council who attended the information session, and no decisions were made. The meeting was simply to provide an update on the progress of construction. According to the developer, it is not uncommon for elected officials to attend update sessions, while technical meetings and information are shared directly with staff.
- 25 There was no documentation related to this information session.

Analysis

- 26 On May 30, 2017, the *Modernizing Ontario's Municipal Legislation Act, 2017* – also known as Bill 68 – received Royal Assent.¹⁰ Among other matters, a new definition of “meeting” was enacted at section 238(1) of the *Municipal Act, 2001*. The new definition, which came into force on January 1, 2018, is as follows:

“meeting” means any regular, special or other meeting of a council, of a local board or of a committee of either of them, where,

(a) a quorum of members is present, and

(b) members discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

- 27 This complaint presents the first opportunity for me to interpret this new definition of “meeting”. Following the framework for statutory interpretation set out by the Supreme Court of Canada,¹¹ the word “meeting” must be understood not only in its ordinary sense, but also according to the way it is used and in light of the objectives of open meeting legislation.
- 28 Throughout my Office’s open meeting investigations, quorum has been an important factor in determining whether a meeting has occurred. This part of the definition generally speaks for itself.¹²

¹⁰ S.O. 2017, c. 10.

¹¹ *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para 26.

¹² Section 237 of the Act defines “quorum”. Other provisions of the Act refine this definition, for example with respect to electronic participation in meetings (s 238(3.1)).

- 29** However, the expression “materially advances the business or decision-making of council” requires particular attention. To assist me in my interpretation, I have looked to legislative debates and committee hearings, and relevant case law. I have also drawn on previous closed meeting investigator reports where relevant.
- 30** My analysis, set out below, leads me to conclude that the interpretation of “materially advances” involves considering the extent to which the discussions at issue moved forward the business of the municipality, based on factual indicators.
- 31** Discussions, debates or decisions that are intended to lead to specific outcomes or to persuade decision-makers one way or another are likely to “materially advance” the business or decision-making of a council, committee or local board. Mere receipt or exchange of information is unlikely to “materially advance” business or decision-making, as long as there is no attempt to discuss or debate that information as it relates to a specific matter that is or will be before a council, committee or local board.

Interpreting “materially advances”

- 32** The legislative debates and committee hearings around Bill 68 indicate that the intention of the new definition of “meeting” was to “provide greater clarity and help ensure that a simple coffee chat between two councillors is not considered a meeting requiring public scrutiny.”¹³
- 33** While the legislative intent behind the new definition was to avoid capturing informal discussions among a handful of councillors, the debate in the Legislature and submissions made to Standing Committee indicate that the definition – in particular the meaning of the term “materially advances” – remains somewhat unclear.
- 34** Despite the apparent lack of a clear English interpretation of “materially advances”, the French definition of “meeting” in the Act provides a better idea of what the legislature intended. The French version of the Act translates “materially advances” as “qui fait avancer de façon importante”. This can be readily translated as “significantly advances”.

¹³ Bill Mauro, then-Minister of Municipal Affairs, Bill 68 – Second Reading Debate – November 29, 2016. See also: Dipika Damerla, then-Minister of Seniors Affairs, Bill 68 – Second Reading Debate – March 8, 2017.

- 35** Interpreting “materially advances” as “significantly advances” is consistent with court decisions addressing procedural and evidentiary matters, which often speak to whether or not something “materially advances” a proceeding, argument, or cause of action.¹⁴
- 36** Applying this interpretation of “materially advances” requires determining what does and does not in fact significantly move the business or decision-making of council forward.
- 37** Prior to January 1, 2018, my Office and other closed meeting investigators had considered the concept of “materially advances” mostly in the context of informal gatherings of councils and with respect to the education or training exception to the open meeting rules at section 239(3.1) of the Act.¹⁵ The education or training exception uses language similar to the new definition of “meeting”:

A meeting of a council or local board or of a committee of either of them may be closed to the public if the following conditions are both satisfied:

1. The meeting is held for the purpose of educating or training the members.
2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

- 38** The various interpretations by closed meeting investigators of what does and does not constitute a meeting in those investigations were drawn from

¹⁴ See, for example: *Muckpaloo v. Mackay*, 2002 NWTSC 12 at paras 16-24; *Boland v Carew*, 2018 ABQB 317 at para 13.

¹⁵ At least a dozen closed meeting investigations addressed these issues. See, for example: Local Authority Services, Report to the Corporation of the County of Essex (September 2009), <http://www.agavel.com/wp-content/uploads/2013/09/Essex_County_Report_Sep_18_Final.docx>; Lorne Sossin, Open Meeting Investigation: Request to Investigate 2008-2009 Budget Committee Process (February 2010), <<https://www.toronto.ca/legdocs/mmis/2010/ex/bgrd/backgroundfile-29004.pdf>>; Local Authority Services, Report to the Corporation of the Municipality of French River (March 2011), <http://www.agavel.com/wp-content/uploads/2013/09/French_River_Report_Final_08_07_11.docx>; Local Authority Services, Report to the Corporation of the Township of Brock (September 2015), <<http://www.agavel.com/wp-content/uploads/2013/09/Brock-Township-Investigation-Report-Sep-2015.docx>>; Russell (Township of) (Re), 2016 ONOMBUD 1 (CanLII), <<http://canlii.ca/t/gt6qg>>; Brockville (City of), 2016 ONOMBUD 12 (CanLII), <<http://canlii.ca/t/h2ssr>>.

a line of court decisions dealing with meetings of local public bodies: *Vanderkloet et al v Leeds & Grenville County Board of Education*;¹⁶ *Southam Inc. v Hamilton Wentworth (Regional Municipality) Economic Development Committee*;¹⁷ *Southam Inc. v. Ottawa (City) Council*;¹⁸ *Yellowknife Property Owners Assn. v. Yellowknife (City of)*;¹⁹ *Aitken v. Lambton Kent District School Board*;²⁰ and, *3714683 Canada Inc. v. Parry Sound (Town)*.²¹

- 39 For example, the decisions in *Hamilton-Wentworth* and *Ottawa*, discussed together in *Yellowknife*, provide indicators as to the content of “materially advance”. *Hamilton-Wentworth* speaks to “any gathering to which all members of the committee are invited to discuss matters within their jurisdiction”. *Ottawa* speaks to “a function at which matters which would ordinarily form the basis of Council’s business are dealt with in such a way as to move them materially along the way in the overall spectrum of a Council decision.”
- 40 The prior closed meeting investigations and the open meeting court decisions provide factual indicators of the content of “materially advances”. For example, updates on recent activities and mere communication of information are not as likely to be considered as materially advancing business or decision-making.
- 41 However, a council, committee or local board is likely to be materially advancing its business or decision-making – and therefore be subject to the open meeting requirements of the *Municipal Act, 2001* – when, for example, it votes, reaches an agreement, provides direction or input to staff, or discusses or debates a proposal, course of action, or strategy.

Application to the information sessions

- 42 Three members of council were present at each of the information sessions on March 7, 2018. This constitutes a quorum of council for the Village of Casselman.
- 43 However, my investigation did not uncover any evidence that the members of council who attended the two information sessions on March 7, 2018 materially advanced the business or decision-making of council.

¹⁶ 1985 CanLII 1976 (ON CA).

¹⁷ 1988 CanLII 4709 (ON CA).

¹⁸ 1991 CanLII 7044 (ON Div Ct).

¹⁹ 1998 CanLII 6961 (NWT SC).

²⁰ 2002 CarswellOnt 2577 (ON Div Ct).

²¹ 2004 CanLII 47775 (ON SC).

- 44 The morning's development charges session was informative in nature. The study had been commissioned by council in 2017. Council members did not have any input into the study. A new development charges by-law would only come before council upon the conclusion of the statutory public consultation process set out in the *Development Charges Act*. This process had not yet begun at the time of the March 7, 2018 meeting.²² The council members in attendance did not discuss or debate the study, or make any decisions with respect to development charges.
- 45 This case can be distinguished from the situation described by Local Authority Services in its report into the Township of Madawaska Valley.²³ In that case, council went into closed session for three hours to discuss a development charges study report. While the investigator found that there was an education component involving the purpose and process of development charges, the bulk of the in camera session was to hear the findings of the study and to outline specific options available to the municipality. The investigator found that council members debated the options and encouraged other members to support particular positions, which ran afoul of the "education or training" exception that council had invoked to close the meeting. Other elements of the meeting could have been properly discussed in closed session under other exceptions.
- 46 In this case, there is no indication that the council members discussed options with respect to development charges. They only received information about the methodology of the report and about the statutory process under the *Development Charges Act*.
- 47 The afternoon's residential development update session was also informative in nature. Council's decision to proceed with the development preceded the meeting by several years. The council members in attendance did not discuss or debate the development project, or make any decisions with respect to the project.

²² The engineer's development charges report appears to have been made public on April 20, 2018: <http://en.casselman.ca/UserFiles/Servers/Server_4754354/File/Casselma%20W-S%20Background%20Studyfin.pdf>.

²³ Local Authority Services, *Report to the Corporation of the Township of Madawaska Valley* (June 2013), <http://www.agavel.com/wp-content/uploads/2013/09/Madawaska_Valley_2013.doc>.

Opinion

- 48 The two information sessions held on March 7, 2018 were not “meetings” as defined in the *Municipal Act, 2001*. Though a quorum of council attended each session, the sessions involved only the communication of information and updates on recent activities, and thereby did not “materially advance” the business or decision-making of council.
- 49 In the interests of openness and transparency, however, information and updates about the business of the municipality should whenever possible be received by council members during public meetings.

Report

- 50 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.



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