



Ombudsman Report

**Investigation into complaints about closed meetings held
by the Town of Saugeen Shores on July 22, November 11,
November 25, 2019, and February 24, 2020**

**Paul Dubé
Ombudsman of Ontario
July 2020**

Complaint

- 1 My Office received a complaint about meetings held by council for the Town of Saugeen Shores (the “Town”) on July 22, November 11 and November 25, 2019. During these meetings, council convened in closed session to discuss the redevelopment of municipal property on the Port Elgin beach. The complaint alleged that these discussions did not fit within the exceptions to the open meeting rule, and that council’s discussion expanded beyond the descriptions provided in the resolutions to proceed *in camera*.
- 2 Additionally, my Office received two complaints that council held an informal private gathering that amounted to an illegal closed meeting on February 24, 2020. These complaints relate to a recess that council took during an open council meeting.

Ombudsman jurisdiction

- 3 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.
- 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 Saugeen Shores.
- 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.
- 7 To assist municipal councils, staff, and citizens, we have developed an online digest of open meeting decisions that contains summaries of the Ombudsman’s open meeting cases. This searchable repository was

¹ SO 2001, c 25.

created to provide easy access to the Ombudsman's past 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 a matter should or may be discussed in closed session, as well as issues related to open meeting procedure. Summaries of the Ombudsman's previous decisions can be found in the digest:
www.ombudsman.on.ca/digest.

Investigative process

- 8 In March 2020, I advised the Town of my Office's intent to investigate the complaints.
- 9 We reviewed relevant portions of the Town's by-laws and policies, as well as the agenda packages, minutes, and meeting materials relevant to the closed session discussion. In addition, we reviewed the open session video recording of the February 24, 2020 meeting.
- 10 We interviewed all nine members of council, as well as the municipal Clerk and Chief Administrative Officer (CAO).
- 11 My Office received full co-operation in this matter.

Background

The Port Elgin Waterfront Development

- 12 In the summer of 2019, the Town issued a request for proposal to develop the Port Elgin waterfront. Starting in July 2019, the successful proponent entered into negotiations with the Town for the creation of a development called the "Cedar Crescent Village" on the Town's waterfront property. The planned development would include municipal office space and amenities for the community such as a beach store, public washrooms, and a community gathering area.

The July 22, 2019 meeting

- 13 Council met for a regular meeting at 8:30 p.m. on July 22, 2019. At 9:00 p.m., council resolved to proceed *in camera* under the “security of the property” exception (s. 239(2)(a)) to discuss “the Port Elgin Waterfront Development Revitalization.”
- 14 We were told that during the closed meeting, the CAO explained the current status of the Town’s negotiations with the successful proponent for the waterfront development. Additional information was provided in a written report to council. Those we spoke with indicated that the focus of the discussion was the ongoing lease negotiation, as the proponent would be developing land leased to him by the Town. Council members explained that this closed session was the first instance in which council was able to review a draft lease, and indicated that council provided direction to staff regarding the ongoing lease negotiations.
- 15 Council returned to open session at 9:43 p.m. and did not report back to the public on this matter. Although there is no requirement under the *Municipal Act*, for municipal councils to report back in public after the conclusion of a closed meeting, the Ombudsman suggests this best practice to increase transparency of the closed meeting process.

Analysis

Applicability of the security of the property exception to the July 22, 2019 meeting

- 16 Council cited the exception for security of the property of the Town when it moved into closed session on July 22, 2019.
- 17 My Office has found that for a discussion to fit under this exception, first, the property in question has to be owned by the Town, and second, the discussions must be about measures to prevent loss or damage to that property.²

² *Final Order MO 2468-F, Toronto (City) (Re)*, 2009 CanLII 60399 (ON IPC), <http://canlii.ca/t/26g14> and *Interim Order MO-2683-I, Toronto (City) (Re)*, 2011 CanLII 84570 (ON IPC), <http://canlii.ca/t/fpl4n>, as cited in *Deep River (Town of) (Re)*, 2017 ONOMBUD 17, <http://canlii.ca/t/hqspf>, paras 38-40.

- 18 During the July 22 closed session, council discussed ongoing negotiations regarding a lease of municipally owned property. Because council was not discussing measures to prevent loss or damage to municipal property, the security of the property exception did not apply.

Applicability of other closed meeting exceptions to the July 22, 2019 meeting

- 19 Although not cited by the Town, I considered whether council's discussion regarding ongoing lease negotiations fit within other closed meeting exceptions in the *Municipal Act*.
- 20 Section 239(2)(c) of the Act allows municipal councils to discuss the "acquisition or disposition of land" in closed session. The purpose of this exception is to allow a municipality to protect its bargaining power when discussing the potential acquisition or disposition of a specific piece of land.³ In order for this exception to apply, the discussion must involve a land transaction that is currently pending or has been proposed.⁴ The Ombudsman has found that this exception also applies to leasing transactions.⁵
- 21 In the present case, council discussed ongoing negotiations to lease municipally-owned land. The discussion at this meeting fit within the exception for acquisition or disposition of land.
- 22 I also considered whether council's discussions on July 22 came within the closed meeting exception in section 239(2)(k) of the Act, which allows discussions about, "plans and instructions for negotiations". The purpose of this exception is to allow a municipality to protect information that could undermine its bargaining position or give another party an unfair advantage over the municipality during an ongoing negotiation. In order for the exception to apply, the municipality must show that:

³ *Final Order MO-2468-F, Toronto (City) (Re)*, 2009 (ON IPC), <http://canlii.ca/t/26g14>, as cited in *Port Colborne (City of)*, 2015 ONOMBUD 32, <http://canlii.ca/t/gtp7c>, at para 23.

⁴ *Fort Erie (Town of) (Re)*, 2018 ONOMBUD 2, <http://canlii.ca/t/hvmtm>, at para 31.

⁵ *Port Colborne (City of)*, 2015 ONOMBUD 32, <http://canlii.ca/t/gtp7c>, at para 78-79 and 97.

1. The *in camera* discussion was about positions, plans, procedures, criteria, or instructions;
 2. The positions, plans, procedures, criteria, or instructions are intended to be applied to negotiations;
 3. The negotiations are being carried on currently, or will be carried on in future; and
 4. The negotiations are being conducted by or on behalf of the municipality.⁶
- 23 The closed session minutes and our interviews indicate that council reviewed and discussed the CAO's report, which outlined the status of the negotiations about the leasing agreement. Staff were looking to council for guidance on the next steps in these negotiations. At the conclusion of the closed session, council provided direction to staff on a series of matters related to the negotiations and the agreement.
- 24 Accordingly, this discussion comes within the closed meeting exception for plans and instructions for negotiations.

The November 11, 2019 meeting

- 25 Council held a special meeting at 5:00 p.m. on November 11, 2019. After calling the meeting to order, council resolved to proceed *in camera* to discuss "negotiations for the lease for the Port Elgin Waterfront Revitalization Project" relying on the exception for plans and instructions for negotiations (s. 239(2)(k)).
- 26 The closed session minutes indicate that council considered a staff report about the waterfront development, a PowerPoint presentation, and a draft lease agreement. We were told that the CAO sought council's direction on how to proceed with lease negotiations based on the information presented, and that council provided some direction during the meeting. We were told that council members had numerous questions about the lease, and that these could not be fully addressed at the meeting.
- 27 After reconvening in open session at 6:31 p.m., the open meeting minutes indicate that the Mayor "reported that Council gave direction in Closed Session to assist in completing the lease negotiations for the Port Elgin Waterfront Revitalization Project".

⁶ *St. Catharines (City of) (Re)*, 2019 ONOMBUD 1, <http://canlii.ca/t/hxrk5>, at paras 30-31.

Analysis

Applicability of the plans and instructions for negotiations exception to the November 11, 2019 meeting

- 28 Council cited the exception in s. 239(2)(k) to discuss plans and instructions for negotiations when it moved into closed session on November 11, 2019. As set out above, this exception applies to *in camera* discussions about plans or instructions that are intended to be applied to current or future negotiations conducted by or on behalf of the municipality.⁷
- 29 In this case, council's closed session discussion provided direction to staff about how to proceed in ongoing lease negotiation for municipal property. Accordingly, the discussion fit within the cited exception.

The November 25, 2019 meeting

- 30 At 7:38 p.m. on November 25, 2019, the Mayor called to order a regular meeting of council. At 7:52 p.m., council passed a resolution to proceed *in camera* to discuss “negotiations for the lease for the Port Elgin Waterfront Revitalization Project” under the closed meeting exceptions for advice subject to solicitor-client privilege (s. 239(2)(f)) and plans and instructions for negotiations (s.239(2)(k)).
- 31 During interviews we were told that council scheduled this closed session because councillors had unanswered questions regarding the draft lease following the November 11 meeting. Prior to the meeting, councillors were asked to submit questions to the CAO, and those that were identified to be legal in nature were submitted to the Town’s solicitor to answer during the closed session.
- 32 During the closed session, the Town’s solicitor was present and provided answers to councillor’s legal questions regarding the draft lease. Following this discussion, the CAO was directed to complete the negotiations and present the information at a future open session. Council returned to open session at 9:56 p.m. and reported that:

Council gave direction in Closed Session to assist in completing the lease negotiations for the Port Elgin Waterfront Revitalization Project.

⁷ *St. Catharines (City of) (Re)*, 2019 ONOMBUD 1, <http://canlii.ca/t/hxrk5>, at paras 30-31.

Analysis

Applicability of the cited closed meeting exceptions

- 33 Council cited two exceptions to close the discussion at this meeting: the advice subject to solicitor-client privilege exception in section 239(2)(f) and the plans and instructions for negotiations exception in section 239(2)(k).
- 34 The solicitor-client privilege exception covers discussions that include communications between the Town and its solicitor in seeking or receiving legal advice intended to be confidential. Communication will only be found to be subject to solicitor-client privilege if it is:
1. Between a client and his or her solicitor, where the solicitor is acting in a professional capacity;
 2. Made in relation to the seeking or receiving of legal advice; and
 3. Intended to be confidential.⁸
- 35 In the present case, the Town's solicitor was present at the closed session on November 25, 2019, and provided council with specific legal advice related to the draft lease. This information formed the basis of council's direction to staff regarding the ongoing lease negotiation. As a result, the discussion fit within the exception for advice subject to solicitor-client privilege.
- 36 In addition, the discussion also fit within the exception for plans and instructions negotiations, which applies to *in camera* discussions about plans or instructions that are intended to be applied to current or future negotiations conducted by or on behalf of the municipality.⁹ At the November 25 meeting, council provided instructions to staff regarding the Town's ongoing lease negotiations.

Procedural matters

Complaint that discussion went beyond the subjects described in the resolution

- 37 One complaint received by our Office alleged that the discussions that took place about the development project on July 22, November 11 and

⁸ *Canada v. Solosky* [1980] 1 S.C.R. 821.

⁹ *St. Catharines (City of) (Re)*, 2019 ONOMBUD 1, <http://canlii.ca/t/hxrk5>, at paras 30-31.

November 25, 2019 expanded beyond the scope of the descriptions of the matters that were provided in the resolutions to enter each closed session. The complaint indicated that during an open meeting on December 16, 2019, council released a “draft site plan” that included several proposed particulars about the development. As a result, the complainant questioned whether site plan details were inappropriately discussed in closed session.

- 38 According to those we interviewed, the information presented on December 16 was not a “draft site plan”, but rather conceptual art intended to assist the public in understanding the proposed development prior to providing feedback. Our investigation found no evidence that council discussed a draft site plan during its meetings on July 22, November 11 or November 25. Instead, some basic visualizations were provided to help council understand the proposed lease. We were told that the first time members of council discussed the preliminary drawings and concepts of the potential site plan was during the open meeting on December 16, 2019.
- 39 Accordingly, my review found no evidence that council’s discussions went beyond those subjects described in the resolutions to enter closed session.

Council’s recess at February 24, 2020 open meeting

- 40 Two complaints to my Office allege that during an open meeting on February 24, 2020, council held an illegal meeting by discussing council business during a recess.
- 41 Council members met as the Committee of the Whole at 6:30 p.m. on February 24, 2020. The open session video recording of the meeting indicates that, within minutes of the meeting starting, the Mayor stated that one request to speak during “open forum” had been received. “Open forum” is a portion of certain meetings in the Town of Saugeen Shores when residents are permitted to address council. During the February 24 meeting, a resident had requested to speak about the waterfront lease agreement.
- 42 During the meeting, the Mayor stated that due to a provision in the Town’s procedure bylaw, the resident’s presentation could not be heard in “open forum.” The video recording shows that the resident began to speak at the podium while the Mayor tried to interrupt him and eventually spoke over him, stating that the delegation was out of order and asking the resident to take a seat. The resident did not take a seat, and eventually the Mayor

announced that “council will take a recess until [the resident] takes his seat”.

- 43 After the Mayor called a recess, all members of council and the CAO exited council chambers through a back door into an adjoining room. We were told that the adjoining room is a kitchenette that also leads to a hallway containing entryways to the Town offices.
- 44 During the recess, the Mayor discussed procedural options for next steps with the Clerk. The Mayor then relayed these options to members of council who were gathered in the kitchenette and the adjoining hallway.
- 45 We were told that after hearing these options, one councillor indicated they would bring a motion that would allow the resident to speak. We were told that shortly thereafter, council returned to chambers to resume the meeting.
- 46 The open session video resumed after council members had returned to their seats. A councillor raised a point of order and asked that the resident be allowed to speak. The Mayor received the point of order and asked to subject it to a vote.
- 47 Six councillors voted in favour of the resident’s presentation while the Mayor and one councillor voted against. The resident was given three minutes to speak.

Analysis

- 48 My Office has found that the *Municipal Act’s* definition of “meeting” in section 238(1) requires a quorum of councillors to be physically present¹⁰ and discuss a matter in a way that “materially” or “significantly” advances council’s business or decision-making.¹¹ In my Office’s 2018 report regarding “information sessions” in the Village of Casselman, we noted that “updates on recent activities and mere communication of information are not as likely to be considered as materially advancing business or decision-making”, while council would likely be materially-advancing its business or decision-making when “it votes, reaches an agreement, provides direction or input to staff, or discusses or debates a proposal, course of action, or strategy.”

¹⁰ *Hamilton (City of) (Re)*, 2019 ONOMBUD 7, <http://canlii.ca/t/j2pww> at para 65.

¹¹ *Casselman (Village of) (Re)*, 2018 ONOMBUD 11, <http://canlii.ca/t/hvmtk>, at paras 34-35.

- 49 In the present case, while a quorum of council was present at the recess, no members of council had any discussions that materially advanced council business and council did not make any decisions. Rather, the Clerk relayed potential next steps to the Mayor, who then relayed this information to council. Council returned to open session to exercise its decision-making authority.
- 50 As council business was not materially advanced and no decisions were made by council during the recess, these discussions were not a meeting and therefore not subject to the open meeting rules.

Opinion

- 51 Council for the Town of Saugeen Shores did not violate the *Municipal Act*, on July 22, 2019, when it discussed the waterfront development in closed session. The discussion fit under the exception for discussing plans and instructions for negotiations (s. 239(2)(k)) and the exception for discussing the acquisition and disposition of municipal land (s 239(2)(c)).
- 52 Council for the Town of Saugeen Shores did not violate the Act on November 11 or November 25, 2019, when it discussed the waterfront development in closed session. The November 11 discussion was permissible under the exception for plans and instructions for negotiations (s. 239(2)(k)) and the November 25 discussion was permissible under the plans and instructions for negotiations (s. 239(2)(k)) and advice subject to solicitor-client privilege (s. 239(2)(f)) exceptions.
- 53 Council also did not contravene the Act's open meeting requirements during the meeting recess on February 24, 2020. This discussion did not constitute a meeting under the Act, as council did not materially advance any business or decision-making.

Report

- 54 Ombudsman staff reviewed a preliminary version of this report with the Mayor and Clerk on July 22, 2020, and provided the opportunity to comment. Any comments received were considered in the finalization of this report.

- 55 The Town committed to sharing this report with council and making it available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario