



Ombudsman Report

**Investigation into complaints about meetings held by council
for the Town of Petrolia on September 11, October 25, and
November 14, 2017**

**Paul Dubé
Ombudsman of Ontario
May 2018**

Complaints

- 1 In November 2017, my Office received complaints that three closed meetings held by council for the Town of Petrolia did not comply with the open meeting rules in the *Municipal Act, 2001* (the “Act”).
- 2 The complaints alleged that closed session discussions on September 11 and October 25, 2017, about a proposal to have the YMCA operate the town’s community centre, did not fit within any of the exceptions set out in the Act. The complaints also alleged that, during a closed session on November 14, 2017, council discussed a specific individual, as well as hiring an integrity commissioner, and that such discussions did not fit within any exceptions set out in the Act.

Ombudsman jurisdiction

- 3 Under the Act, all meetings of council, local boards and committees of each of them must be open to the public unless they fall within the 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 Petrolia.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the municipality’s procedure by-law have been observed.

Investigative process

- 7 On January 8, 2018, we advised the municipality of our intent to investigate these complaints.
- 8 My Office reviewed the city’s procedure by-law and relevant portions of the Act. We reviewed the meeting records from the open and closed portions of the September 11, October 25, and November 14, 2017 meetings, as well as supporting documentation. We interviewed the town’s interim CAO/Clerk, the Director of Cultural Services, and all members of council.
- 9 My Office received full co-operation in this matter.

Background: The YMCA proposal

10 The Town of Petrolia has owned and operated a community recreation centre in the town since 2006, which was known at the time of these meetings as the Oil Heritage District Community Centre. Town staff told us that, in spring or summer 2017, officials from the YMCA approached the town about the possibility of the YMCA becoming the facility's operator. By September 2017, staff told us they determined that the matter should be put before council for consideration. At the time of the September 11 and October 25, 2017 meetings, information about the YMCA's proposal was not yet public.

Council meeting on September 11, 2017

- 11 Council for the Town of Petrolia held a regular meeting in council chambers at 7:00 p.m. on September 11, 2017.
- 12 The minutes indicate that council passed a resolution to close the meeting at 7:45 p.m. to discuss four matters, including, "Legal 2017-04 – pending labour relations." That matter was the subject of the complaint to my Office.
- 13 According to the closed session minutes, two representatives from the YMCA attended the meeting to present an operating proposal to council for the Oil Heritage District Community Centre. We reviewed a copy of the presentation slides from the meeting.
- 14 The slides set out an overview of the YMCA as an organization and its operations in the area around Petrolia. They stated that YMCA services are open to everyone, and that 11 percent of members in the area require financial assistance. They included a map of other YMCA facilities in the area and participation statistics from other communities. The slides set out the shared services model used by the YMCA in other communities, and provided details on what each department of the YMCA contributes, such as marketing, administrative and technical services, and fundraising administration.
- 15 The slides also addressed estimated operating budgets if the YMCA were to operate the Petrolia community centre, including an estimate of the town's costs, and off-set funding that the town would be required to pay to mitigate losses over the first year of operations. They described the YMCA's membership model, and provided projected membership statistics for the next five years.
- 16 The slides provided an overview of how current members of the centre would transition to become YMCA members, addressed membership assistance, and

described the YMCA's "Strong Kids" campaign. One slide set out the town's costs for the transition, including costs for YMCA staff time to assist with the transition.

- 17 The presentation ended by setting out the benefits of having the YMCA as a partner. It concluded with a slide listing the next steps, including the town endorsement of a Memorandum of Understanding, council approval to negotiate a five-year operating agreement, a YMCA audit of the existing facility, and relaunch of the centre as a YMCA.
- 18 Council members told us that the presentation was very high-level. Council was told about how the YMCA operates in nearby communities like the Town of Goderich, and how it would bring efficiencies to the operation in Petrolia. Council members told us they remember hearing about the YMCA's strengths, including with respect to marketing. Some council members and staff remember being told about how the YMCA would save the town money, and that the town would retain ownership of the building and equipment.
- 19 Council members told us that the discussion also touched on how members of the community centre would transition to become YMCA members, and about membership fees and day pass costs.
- 20 During interviews, investigators from my Office were told that following the presentation by the YMCA representatives, the town's Director of Cultural Services provided council with information and answered questions. Two councillors recalled discussing whether the YMCA would continue an existing partnership with the local family health team, focusing on health and wellness programs for seniors.
- 21 Ombudsman staff were told that some council members asked about the implications of the proposal on current centre employees, as employee matters were not addressed during the YMCA's presentation. Staff recalled telling council that the proposal would affect all staff at the centre, and noted that certain employees were unionized. During interviews, we were told that this was a preliminary, high-level discussion about the effect on staff and whether staff at the centre would transition to become staff of the YMCA. While one council member recalled the discussion following the YMCA presentation focusing on labour issues, the other members of council told us that labour issues were discussed for a few minutes during the question-and-answer portion of the meeting.
- 22 Councillors remembered being told that, in order to move forward, the YMCA would have to conduct an in-depth study of the centre's operations. During the meeting, council voted to direct staff to proceed with a Memorandum of Understanding between the town and the YMCA to continue the process, and directed staff to report back to council as progress was made.

23 The YMCA representatives left the meeting at 8:40 p.m. Council next discussed a property standards matter that was not related to the subject of this investigation.

24 The open session resumed at 9:21 p.m.

Analysis

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

25 The discussion about the YMCA's proposal was identified on the agenda and in the minutes as "Legal." During a review of a preliminary version of this report, council told us that staff had received legal advice prior to the meeting with respect to the proposed Memorandum of Understanding. However, during interviews, town staff and council members confirmed that no legal advice was received or discussed during the meeting. The matter was presented by the town's Director of Cultural Services and representatives from the YMCA. No legal advisers were present during the meeting, and no legal advice was presented to council either verbally or in writing.

26 In order for the exception in s.239(2)(f) of the Act to apply, advice from a solicitor or related communication must exist, and be the subject of the in camera discussions.

27 Council for Petrolia did not receive legal advice during the meeting on September 11, 2017, either in person, through staff, or in writing, and no legal advice was discussed. The discussion did not fit within the exception for advice subject to solicitor-client privilege.

Applicability of the exception for labour relations or employee negotiations

The YMCA presentation

28 Town staff and members of council told us council relied on the exception for labour relations and employee negotiations to discuss the YMCA's proposal in camera because discussing the matter in public would lead to speculation about the impact of the proposal on existing employees. They told us that while the content of the presentation was not labour relations information, the fact that council was considering the proposal might have labour relations implications.

29 During the presentation by YMCA staff, no employees or labour information were discussed. Instead, the presentation focused on the YMCA's operating model and processes, and how those might be applied in Petrolia. The presentation itself did not cover employment issues.

- 30** The exceptions in the *Municipal Act* are to be interpreted and applied narrowly, to maximize the information discussed in public. The exceptions do not extend to discussions about sensitive information, or to information that might lead the public to speculate about otherwise confidential information. As stated in my Office's 2014 report about the City of Welland:

Although there may have been a desire to maintain confidentiality in order to protect various interests of the city, I must emphasize again that council cannot bring a matter in camera simply because it is considered sensitive or confidential or potentially against the city's interests to discuss it publicly. Matters can only be discussed in camera if they fit squarely within the exceptions to the open meeting requirements.

- 31** The topics covered in the presentation did not fit within any of the exceptions to the open meeting rules.

The question-and-answer period

- 32** Following the YMCA presentation, council members asked staff and the YMCA representatives a series of questions about the proposal. During this portion of the meeting, questions were asked about the impact of the proposal on employees.
- 33** Generally, the labour relations exception does not apply to discussions relating to an organizational review or restructuring by a municipality. However, my Office has found that the exception may apply to a discussion relating to reorganization as it affects individuals and their roles.¹
- 34** Other closed meeting investigators have also found that the exception in s.239(2)(d) can apply to discussions about large groups of employees. In a 2013 report about the City of Markham, Local Authority Services (LAS) found that a discussion about giving all full-time staff three paid days off in December was permitted in camera. LAS wrote that while a discussion about granting a benefit to a large number of employees would not constitute personal matters, it did fit within the exception for labour relations or employee negotiations.
- 35** In a 2008 decision, the Information and Privacy Commissioner (IPC) considered whether a City of Ottawa closed meeting fit within the exception for labour

¹ See Ontario Ombudsman, *Letter to the Town of Amherstburg* (December 9, 2013), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2013/town-of-amherstburg>>; Ontario Ombudsman, *Investigation into a complaint about a meeting held by Council for the City of Sault Ste. Marie on October 13, 2015* (August 2016), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2016/city-of-sault-ste-marie>>.

relations and employee negotiations, as well as two other exceptions.² In that case, the city was discussing a plan to take over a community centre from a private company that had been operating it on behalf of the city. As part of that process, all staff would become employees of the city. The IPC found that the discussion fit within the exception in s.239(2)(d).

- 36** While no individual employees were identified during the September 11, 2017, meeting by name or position, the portion of discussion about employees applied to every employee of the community centre. As it applied to every employee, the portion of the discussion about staffing fit within the exception for labour relations and employee negotiations in s.239(2)(d).
- 37** The questions about employees were entwined with questions about a number of other issues, including how the YMCA operates in other municipalities, the financial viability of the proposal, membership fees, programs for seniors, and whether the town would retain ownership of the building.
- 38** In 2011, with respect to an appeal of a decision of the IPC, Ontario's Divisional Court found that it is not realistic to expect a municipal council to come in and out of closed session to parse permitted topics from topics not permitted in camera. The Court explained:

Whenever a participant interrupts the consideration [of a permitted topic]... to refer to any other option being considered or to review any part of the history or background, the meeting would have to adjourn to go into a public session and then close again when the discussion returned to consider the [permitted topic]. It is not realistic to expect the members of a municipal council to parse their meetings in this way. At a minimum, it would detract from free, open and uninterrupted discussion. It could lead to meetings that dissolve into recurring, if not continuous, debate about when to close the meeting and when to invite the interested public to return.³

- 39** While many of the questions posed by council members on September 11, 2017 did not relate to employees or labour issues, it would be unrealistic to expect the town to parse employee-related questions from other general questions during the question-and-answer portion of the meeting. The question period that followed the YMCA presentation fit within the exception for labour relations or employee negotiations.

² IPC, Order MO-2335, City of Ottawa, August 2008, online: <<https://decisions.ipc.on.ca/ipc-cipvp/orders/en/item/133125/index.do?r=AAAAAQANT3JkZXIgtU8tMjMzNQE>>.

³ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 at para 42.

Council meeting on October 25, 2017

- 40 The Town of Petrolia held a special meeting on October 25, 2017, at 4:30 p.m. in council chambers. Council passed a resolution at 4:31 p.m. to close the meeting, referencing, “Legal: 2017-04, to discuss pending labour relations.”
- 41 According to the minutes, during the closed session, the town’s Director of Cultural Services (the “Director”) gave a report to council about the YMCA proposal to operate the community centre, as a follow-up to the September 11, 2017 in camera meeting discussed above. No representatives from the YMCA were present. According to the minutes and interviews conducted by my Office, the Director explained how the process would move forward, outlining the timing of the process and when the matter would be brought before council again.
- 42 The Director next provided information to council about how the proposal might affect employees at the centre. Council members asked questions about the labour relations implications of the proposal, including with respect to wage scale and effects on unionized employees, which staff answered. While no legal advice was conveyed to council, we were told during interviews that staff informed council that they had consulted the town’s external counsel.
- 43 Some members of staff and council told us that the Director was simply providing an update to council, and that the council did not make any decisions or give direction to staff during the meeting. Other members of staff and council told us that council directed staff to continue to negotiate with the YMCA and to inform community centre staff about the proposal.
- 44 The Director told council that the proposal would affect all staff at the centre, so he planned to go to the centre immediately after the meeting to speak with staff. Staff and council members told us the Director left the closed meeting before it ended to go to the community centre to inform staff about the proposal.
- 45 Council returned to open session at 4:57 p.m.
- 46 The open minutes state that council rose and reported to the public by distributing a press release stating that the town was discussing options with the YMCA to operate the community centre. The press release stated that staff at the centre were being notified and that the YMCA had committed to providing first consideration to all current, qualified staff. It stated that the community would be consulted on the proposal, and that a contract would go to council in December based on the outcome of public consultation.

- 47 The Clerk told us that the press release was posted immediately to the town's social media accounts.

Analysis

Exception for labour relations or employee negotiations

- 48 The town relied on the exception for labour relations and employee negotiations to discuss this matter in camera. As noted above, this exception generally does not apply to discussions about organizational reviews or restructuring, but it can apply to reorganization as it affects individuals in their roles. In this case, the YMCA's proposal, if accepted by the town, would affect the employment status of every employee at the community centre.
- 49 During interviews with investigators from my Office, staff and council members who attended the closed meeting told us that the discussion focused on the employees of the centre. Throughout the Director of Cultural Services' presentation, council members asked questions about how staff would transition from being employees of the town to being employees of the YMCA. The presentation itself focused in large part on the effects of the proposal on staff and how to best inform employees about the proposal.
- 50 The discussion in camera on October 25, 2017 consisted of council discussing labour relations with respect to all employees of the community centre. As with the portion of the September 11, 2017 meeting about employees, this discussion fit within the exception for labour relations or employee negotiations.

Council meeting on November 14, 2017

- 51 Council for the Town of Petrolia held a special meeting in council chambers at 2:30 p.m. on November 14, 2017. The agenda for the special meeting stated that council would be discussing three matters in camera. The first two matters were listed under the exception in s.239(2)(b) for personal matters about an identifiable individual. The third was listed under the exception in s.239(2)(d) for labour relations or employee negotiations. The complaints to my Office pertain to the third discussion topic.
- 52 The open session minutes recorded a resolution to close the meeting citing the exceptions as in the agenda, along with the word "personal" and a file number. No additional detail about the subjects to be discussed was included in the resolution.
- 53 The minutes stated that council moved in camera at 2:31 p.m.

- 54 In camera, council discussed the first two topics referenced in the agenda and resolution.
- 55 According to the minutes and interviews my Office conducted with staff and council members, council next discussed complaints received by the town about alleged breaches of the town's code of conduct by a member of council.
- 56 We were told that one member of council left the meeting at 3:15 p.m., shortly after this discussion commenced. Council then discussed the alleged breaches of the code of conduct, including the nature of the complaints received and the identity of the complainants.
- 57 During this discussion, council discussed whether to refer the matter to a third party for investigation. Members of council and staff told us that one member of council suggested that council retain a specific integrity commissioner to review the complaints, but there was no additional discussion of this point. We were told that council and staff were familiar with the suggested integrity commissioner because the individual had provided training to the town in the past. During interviews, one council member told our Office that the individual was "the obvious choice," so no discussion was required.
- 58 Council also discussed who would bring a motion forward for consideration in open session regarding the code of conduct allegations.
- 59 The minutes indicated that the council member who had left returned to the meeting at 3:40 p.m. Council next discussed a fourth matter before returning to open session at 4:10 p.m.
- 60 In open session, council passed a resolution to appoint Amberley Gavel as integrity commissioner to review the code of conduct complaint, future complaints, and other matters related to the code of conduct, and to provide advice about the code to council members.
- 61 The open meeting adjourned at 4:17 p.m.

Analysis

Applicability of the exception for personal matters about an identifiable individual

- 62 The exception in s.239(2)(b) permits discussions of personal matters about an identifiable individual in camera.
- 63 One complainant told my Office they believe this discussion did not fit within the exceptions in the Act because council discussed which integrity commissioner to

hire during the closed session. The meeting minutes and information obtained through interviews indicated that, while one councillor identified an integrity commissioner, there was no discussion about the hiring process or qualifications of the integrity commissioner.

- 64** Instead, the discussion focused on the unproven allegations made against a member of council. Council discussed the allegations and the past conduct of the council member.
- 65** The Act does not define “personal matters,” but the IPC has found that the term “personal matters” in the Act is analogous to the term “personal information” in the *Municipal Freedom of Information and Protection of Privacy Act*.⁴ While the decisions of the IPC are not binding on my Office, they can be instructive.
- 66** In a 2010 decision, the IPC explained that information about a person in their professional capacity does not generally constitute personal information, but that information can take on a more personal quality if an individual’s conduct is scrutinized or questioned.⁵ In that case, a committee of council considered the conduct of a member of the committee during a closed session. The IPC found that the discussion revealed something of a personal nature about the committee member and constituted personal information.
- 67** During the closed meeting on November 14, 2017, council for the Town of Petrolia discussed and scrutinized the conduct of a member of council. The information went beyond the council member’s professional capacity with the town, and consisted of personal information. The discussion fit within the exception for personal matters in the Act.

Procedural matters

Resolution

- 68** The *Municipal Act* requires municipal councils, local boards, and committees to pass a resolution in public before closing a meeting. The resolution must state the fact of the closed meeting and the general nature of the subject(s) to be discussed.
- 69** In *Farber v. Kingston*, the Ontario Court of Appeal found that the City of Kingston did not comply with the Act when it closed a meeting to receive legal advice regarding the renaming of a public square, as the city described the discussion

⁴ Order MO 2368 (26 November 2008), online: IPC <<https://decisions.ipc.on.ca/ipc-cipvp/orders/en/item/133096/index.do>>.

⁵ Order MO 2519 (29 April 2010), online: IPC <<https://decisions.ipc.on.ca/ipc-cipvp/orders/en/item/133361/index.do>>.

only as “legal matters” in the resolution to go in camera.⁶ The Court explained that “the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.”

- 70** On September 11 and October 25, 2017, the Town of Petrolia passed resolutions to discuss the YMCA matter in camera that referenced only the word “legal,” an internal file number, and “pending labour relations.” On November 14, 2017, the town’s resolution to go in camera referenced only the exceptions relied on in the Act, along with the word “personal,” and an internal file number.
- 71** The resolutions passed by the town failed to provide meaningful information to the public about the matters to be discussed in camera. The town should endeavour to comply with the Act by providing a description of the matters to be discussed in camera, to the extent possible without undermining the reason for closing the meeting.

Voting

- 72** The *Municipal Act* prohibits voting in a closed meeting, except where the subject is permitted to be discussed in a closed meeting, and the vote is for a procedural matter or to give directions to municipal staff or officials.
- 73** During interviews with my Office, council members and staff had inconsistent understandings of whether council made any decisions in camera or gave directions to staff on November 14, 2017. Some individuals interviewed told us that council is careful to avoid ever voting in camera. They said that decisions in camera on November 14, 2017 were made by consensus, in that no one objected to a proposal by staff, giving staff tacit confirmation to proceed. Others told us that staff was merely providing information to council about the status of the proposal, and that council did not reach consensus or make any decisions.
- 74** In a 2015 report about the Township of Bonfield, my Office found that a township committee came to an informal consensus with respect to directions to the township’s staff, rather than taking a formal vote. My Office explained that it is a best practice for municipalities to give directions to staff through a formal vote, so that the directions are clear and recorded in the meeting minutes.⁷

⁶ Farber v. Kingston (City), 2007 ONCA 173.

⁷ 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) at para 63 - 67, online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/township-of-bonfield>>.

75 As a best practice, the Town of Petrolia should ensure that all decisions made in a closed meeting are made through formal resolution and recorded in the meeting minutes.

Audio and video recording

76 During the interviews conducted by my Office, members of council and staff had different recollections of the discussions in camera. Some members of council said they did not remember any details of the closed meetings, and others mixed up meetings where the same topic was discussed on more than one day.

77 I strongly encourage the Town of Petrolia to audio or video record all in camera meetings of council, committees, and local boards. Keeping an audio or video recording of meeting discussions would provide an accessible and reliable record of closed meetings, should a meeting be reviewed by a closed meeting investigator. This can greatly reduce the impact of an investigation on the town's resources and ensure an accurate record on which to base the investigation.

78 Audio or video recording of closed meetings has already been adopted by many municipalities in Ontario in the interest of transparency and accountability. They include the Townships of Adelaide Metcalfe, McMurrich/Monteith, North Huron, and Brudenell, Lyndoch and Raglan; the Towns of Amherstburg, Midland, Wasaga Beach, Pelham, and Fort Erie; the Municipalities of Central Huron, Meaford, and Brighton; and the Cities of Oshawa, Port Colborne, Sault Ste. Marie, Brampton, London, Niagara Falls, Sarnia, and Welland.

Closed meeting complaint fees

79 One complainant told my Office that they submitted a cheque for \$250 to the town along with their closed meeting complaint in accordance with the town's fees by-law.

80 Town staff told us that the Ombudsman is the town's closed meeting investigator, but the town may consider appointing a closed meeting investigator in the future. In anticipation of that potential change, the town added a \$250 fee for closed meeting complaints to its fees by-law. Staff told us that the town is returning any fees paid while the Ombudsman is the investigator, and returned the complainant's cheque in this case.

81 The open meeting law enforcement scheme is premised on a willing public coming forward to assist in ensuring that transparency is maintained at the municipal level.

82 Some municipalities have chosen to implement a complaint fee, where they have appointed a closed meeting investigator other than my Office. My Office has

publicly denounced this practice as it penalizes complainants for exercising their statutory rights, and may prevent legitimate complaints from being brought forward due to concerns about financial cost. Charging a fee for complaining is entirely inconsistent with the primary intent of the open meeting provisions to foster democratic legitimacy at the local level.

- 83 I encourage the Town of Petrolia to continue to permit members of the public to make complaints about alleged improperly closed meetings without charging a complaint fee, whether the Ombudsman continues as the town's closed meeting investigator or council appoints an investigator.

Opinion

- 84 Council for the Town of Petrolia contravened the open meeting provisions of the *Municipal Act, 2001* on September 11, 2017, when it received a presentation from staff of the YMCA in camera.
- 85 Council for the Town of Petrolia did not contravene the open meeting rules when it discussed labour relations in camera at meetings on September 11 and October 25, 2017.
- 86 Council for the Town of Petrolia also did not contravene the Act when it discussed allegations respecting code of conduct violations by a member of council in camera on November 14, 2017.

Recommendations

- 87 I make the following recommendations to assist the Town of Petrolia in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

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

Recommendation 2

The Town of Petrolia should ensure that no subject is discussed in a closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 3

The Town of Petrolia should ensure that its resolutions to proceed in camera provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.

Recommendation 4

The Town of Petrolia should ensure that all decisions made in camera by council, committees or local boards are made by resolution and recorded in the meeting minutes.

Recommendation 5

The Town of Petrolia should implement the practice of audio or video recording its open and closed sessions.

Report

- 88 The Town of Petrolia was given the opportunity to review a preliminary version of this report and provide comments. Comments received were considered in the preparation of this final report.
- 89 My report should be shared with council for the Town of Petrolia. My report should be made available to the public as soon as possible, and no later than the next council meeting. 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