



Ombudsman Report

**Investigation regarding the Town of Hawkesbury's
decision-making process on June 15, 2020**

**Paul Dubé
Ombudsman of Ontario
March 2021**

Complaint

- 1 My Office received a complaint alleging that on June 15, 2020, a quorum of councillors for the Town of Hawkesbury discussed council business that they intended to introduce and vote on at a council meeting scheduled for the next day. The complaint alleged that this discussion amounted to a “meeting” and was improperly closed to the public contrary to the *Municipal Act, 2001*.

Ombudsman jurisdiction

- 2 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.
- 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. 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 Hawkesbury.
- 5 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s procedure by-law have been observed.
- 6 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 open meeting cases. 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 the Ombudsman’s previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

¹ SO 2001, c 25.

Investigative process

- 7 In September 2020, my Office advised the municipality of our intent to investigate this complaint.
- 8 We reviewed the municipality's procedure by-law, open and closed meeting agendas, and minutes from council's committee of the whole meeting on June 16, 2020, as well as materials from a related special council meeting on August 5, 2020. We also reviewed various emails provided to us by municipal staff and councillors relating to council's decision-making on June 15, 2020, as well as a copy of a document signed by various councillors on the same date. We interviewed the Mayor, each member of council, and the current Clerk, who was in a different role in June 2020.
- 9 My Office received full co-operation in this matter.

The June 15, 2020 discussions

- 10 The Mayor told my Office that on the afternoon of June 15, 2020, she individually spoke with three councillors at various locations to determine if they were in favour of terminating identified municipal employees. The Town of Hawkesbury has seven members of council, so confirming the support of three others would mean a majority supported the terminations.
- 11 After each of the three councillors expressed their support for the termination, the Mayor asked them to sign a "confidential" two page, typed document setting out the steps they wanted the municipality to take during a planned closed session discussion the following day. My Office reviewed a copy of this document, which contains the signatures of the Mayor and three councillors. The document identified specific individuals to terminate, as well as an employee who would take on new responsibilities. It also set out the rationale for these actions.
- 12 Each councillor the Mayor spoke with told our Office that they individually met with the Mayor about this matter. The discussions occurred at various locations convenient to each councillor. Two councillors remembered signing the document, while the third could not recall.
- 13 The three members of council who did not sign the document told my Office that they were not approached by the Mayor prior to the June 16, 2020 council meeting. They said they had no idea that the Mayor and other councillors were intending to introduce new business at the June 16

meeting that would lead to the termination of certain employees. Two of the councillors who were not approached told our Office that they felt left out of the council decision-making process and felt that they should have been able to participate. The Mayor confirmed to our Office that she did not approach the other three councillors because she did not believe they would support the terminations.

- 14 When asked about her decision to individually approach councillors about this matter before the June 16 meeting, the Mayor said she thought this was acceptable under the *Municipal Act* because the discussion did not involve a quorum of council. She also said that no decision was made, and that any of the councillors could have changed their mind prior to the council meeting the next day.
- 15 According to the closed meeting minutes from the June 16 committee of the whole meeting, a councillor who had been approached by the Mayor introduced the employee termination matter. Council discussed the issue and voted 4 – 3 to direct staff to take specified actions relating to the terminations. These directions to staff were consistent with those contemplated by the document that the Mayor and three councillors signed the previous day. The Mayor and the three councillors she previously approached voted in favour of the resolution, while the other councillors voted against it.

Analysis

Requirement to hold open meetings

- 16 Section 239(1) of the *Municipal Act, 2001* requires that all meetings of municipal councils be open to the public, subject to limited exceptions. The right of citizens to attend public meetings and view council proceedings in action is the foundation of the municipal open meeting requirement. As the Supreme Court of Canada determined in *London (City) v. RSJ Holdings Inc.*, the open meeting requirements set out in the *Municipal Act* demonstrate that the public has “the right to observe municipal government in process”.²

² *London (City) v RSJ Holdings Inc.*, 2007 SCC 29 at para 32, <<https://canlii.ca/t/1rtq1>>.

- 17 My Office has found that the *Municipal Act*'s definition of "meeting" in section 238(1) requires a quorum of councillors be present³ and discuss a matter in a way that "materially" or "significantly" advances council's business or decision-making.⁴ While the Act previously required councillors to be physically present, it was amended in response to the COVID-19 pandemic to allow electronic participants to count for quorum when the municipality's procedure by-law provided for it.⁵ This change allowed municipalities to conduct synchronous, virtual council meetings that respect the need for social distancing while maintaining the openness and transparency of council business.
- 18 However, these changes to allow for electronic participation do not change the Act's basic definition of meeting, which requires that a quorum of councillors be physically or electronically "present" as a group in order for council to transact its business. The Mayor's individual discussions with three councillors did not amount to a "meeting" under the Act because the sequential nature of the discussions meant that a quorum was never present.
- 19 My Office has always recognized that it is important that council members be able to speak freely with one another outside the structure of a formal meeting. In a 2013 report about the City of London, we explained:

To be clear, the *Municipal Act, 2001* does not create an absolute prohibition against members of council discussing city business outside chambers. It is a healthy thing in a democracy for government officials to share information informally before making policy decisions. I agree that to expect council members never to talk to one another outside of a public meeting is unrealistic and would have the effect of unnecessarily chilling speech.⁶

- 20 However, the discussions in this case went beyond members sharing information informally. Instead, the Mayor effectively organized a voting bloc of councillors who strategically agreed ahead of time about how to deal with a specific matter. This denied other councillors who weren't approached the opportunity to participate in the discussion, and meant that meeting minutes and other municipal records would not record this discussion. Rather than privately canvassing individual council members for support, the Mayor could have acted in a more transparent and accountable fashion by introducing this matter at a formal council meeting.

³ *Hamilton (City of) (Re)*, 2019 ONOMBUD 7, <<http://canlii.ca/t/j2pwf>>.

⁴ *Casselman (Village of) (Re)*, 2018 ONOMBUD 11, <<http://canlii.ca/t/hvmtk>>.

⁵ *Municipal Act*, section 238 (3.1-3.4).

⁶ *London (City of) (Re)*, 2013 ONOMBUD 3, <<https://canlii.ca/t/gtmhj>>.

- 21** While my Office has found that this conduct is not technically prohibited by the *Municipal Act*'s closed meeting provisions, the Act does not directly address this matter. Given the importance of accountability, transparency, and ensuring that openness requirements are not subverted, the government may wish to clarify whether pre-agreements by a majority of council are contrary to the *Municipal Act*'s open meeting provisions.

Opinion

- 22** Council for the Town of Hawkesbury did not contravene the *Municipal Act*'s open meeting requirements on June 15, 2020, when the Mayor individually spoke with three councillors regarding employee terminations, as these sequential discussions did not constitute meetings under the *Municipal Act*.

Report

- 23** Ombudsman staff reviewed a preliminary version of this report with the Mayor and Clerk for the Town of Hawkesbury and provided the opportunity to comment. In response to the report, the Mayor told our Office that she prefers to bring forward new business during council meetings, but felt that the circumstances in this case required a different approach. All comments received were taken into account in preparing this report.
- 24** The Clerk indicated that my report would be shared with council and made available to the public no later than council's next meeting.



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