



**Investigation into the meeting
held by the Town of Fort Erie
on December 14, 2015**

**Barbara Finlay
Acting Ombudsman of Ontario
February 2016**

Complaint

- 1** On December 21, 2015, our Office received a complaint regarding the December 14, 2015 special meeting held by council for the Town of Fort Erie. The complaint alleged the meeting was supposed to be open to the public, but that a locked security door prevented the public from accessing the room where the meeting was being held. The complainant alleged that, as a result, the meeting had been closed to the public contrary to the open meeting requirements in the *Municipal Act, 2001*.

Ombudsman jurisdiction

- 2** Under 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 properly closed 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 Town of Fort Erie.
- 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.

Investigative process

- 6** On January 7, 2016, we advised the head of council for the Town of Fort Erie of our intent to investigate this complaint.
- 7** Members of the Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the town's procedure by-law and the Act; the meeting agenda and minutes from the December 14 special council meeting; and other materials provided by the town. They spoke with the Mayor, Clerk and the town's Chief Administrative Officer (CAO).
- 8** We received full co-operation in this matter.

Council procedure

- 9** Section 3.5(b) of the town's procedure by-law¹ requires that, whenever possible, the Clerk shall provide forty-eight hours prior notice for all special meetings of council. The notice must state the business to be considered by council, and no business other than that stated in the notice will be considered at the special meeting except by a majority vote of the council members present at the meeting.
- 10** Section 4.3(a) of the by-law states that a meeting agenda constitutes notice of the meeting, and that the agenda is to be posted on the town's website.
- 11** Section 3.7(c) of the by-law states that no meeting or part of a meeting may be closed to the public unless the subject matter being considered meets the legislated criteria for conducting a closed meeting. The by-law provides that the decision to close a meeting to the public is discretionary.
- 12** However, while the by-law appropriately recognizes that most of the Act's closed meeting exceptions are discretionary, the Act also contains two mandatory closed meeting exceptions. Section 239(3)(a) of the Act requires that requests under the *Municipal Freedom of Information and Protection of Privacy Act* be discussed in closed session. Similarly, section 239(3)(b) of the Act requires that council discuss an ongoing ombudsman or closed meeting investigation in closed session. Council for the Town of Fort Erie should amend its procedure by-law to accurately reflect the mandatory nature of these closed meeting exceptions.

December 14, 2015 special council meeting

- 13** On December 14, 2015 at 5:00 p.m., council for the Town of Fort Erie held a special meeting in Conference Room No. 1 in the Town Hall. Notice of the special meeting was provided on the town's website in accordance with the procedure by-law. The agenda indicated that the meeting would consist of two presentations to council; the first is described as "Re: Municipal Conflict of Interest Act (5:00 – 5:30 p.m.)" and the second is described as "Re: General Liability Insurance – Errors & Omissions (5:30 – 6:00 p.m.)". The agenda indicated that the entire meeting would occur in open session.

¹ Township of Fort Erie, by-law No 42-2015, *Being a by-law to adopt council rules of procedure and to repeal by-law no. 145-06* (23 March 2015), online: <[http://www.town.forterie.ca/bylaws/2015-042/\\$FILE/42-2015%20Council%20Rules%20of%20Procedure.pdf](http://www.town.forterie.ca/bylaws/2015-042/$FILE/42-2015%20Council%20Rules%20of%20Procedure.pdf)>.

The locked door

- 14** Conference Room No. 1 is located in a non-public area of the town hall building used as staff workspace. It is necessary to pass through a locked security door to access the door to the conference room. The security door is primarily made of glass and can be unlocked by entering the correct code. The entrance to the conference room is visible through the security door. The town's Clerk indicated that the conference room is often used for the in camera portion of council meetings because of its small size and its superior AV equipment. Open sessions of council are typically held in the Council Chambers at Town Hall.
- 15** On December 14, 2015, however, council met in the conference room with the intention of holding an open meeting. At no point during the meeting did council pass a resolution to proceed in camera, and the door to the conference room remained open throughout the meeting. When asked why council decided to hold an open meeting in the conference room, the Clerk indicated that the conference room was chosen because it is smaller than council chambers and more conducive to training presentations.
- 16** The Clerk advised that, before the December 14 meeting, one member of the public expressed interest in attending the meeting. The Clerk said that she monitored the area near the locked security door before the meeting began to see if this individual, or any others, needed help getting through the locked security door. She indicated she chose not to prop the door open because of trespassing issues at the town hall.
- 17** The Clerk advised that no members of the public had arrived by the time the meeting was called to order at 5:02 p.m. The Clerk indicated that once the meeting commenced, she continued to visually monitor the security door from inside the conference room and to listen for any knocks. During the meeting, she did not hear or see anyone trying to access the conference room. However, our Office was informed that some individuals had unsuccessfully attempted to access the meeting while it was in progress.
- 18** During interviews with our Office, the Clerk, Mayor, and CAO each recognized that the locked security door prevented the public from accessing the conference room. However, they reiterated that the meeting was intended to be open to the public and that the town would take steps to ensure that this issue did not arise again.

The discussion

- 19** The open meeting minutes indicate that the meeting consisted of presentations about the *Municipal Conflict of Interest Act* and the town's insurance coverage.

The Clerk indicated that each presentation was intended to educate councillors about the selected topic and was delivered as a lecture, with time at the end for councillors to ask questions.

- 20** The meeting began with a thirty-minute presentation by the town solicitor about the *Municipal Conflict of Interest Act* (the *MClA*). The Clerk advised that the Town Solicitor prefaced his presentation by telling council that he would only provide an overview of the *MClA*, not give specific legal advice. The open meeting minutes indicate that the presentation covered the history and purpose of the *MClA*, the definition of a pecuniary interest, two exceptions to the general conflict rules, and other related matters. The Clerk advised that councillors asked questions related to the presentation, such as whether it is necessary for a councillor to leave the meeting room when he or she declares a conflict in open session.
- 21** Following the town solicitor's presentation, two employees of the town's liability insurer gave a presentation about municipal insurance coverage. The open meeting minutes indicate that the presenters outlined the role of an insurance broker and explained the town's general liability coverage, including what is and is not included. A similar explanation was provided for the town's errors and omissions liability coverage and the town's legal expenses coverage. The Clerk indicated that councillors asked a few clarifying questions, such as when a councillor's legal expenses would be covered under the policy. The Clerk indicated that there was no discussion about changing the town's insurance coverage; the purpose of the presentation was to help councillors understand the insurance coverage that had previously been selected through the town's request for proposals process.
- 22** At 6:06 p.m., council resolved to adjourn the special meeting and reconvene in Council Chambers for a regular meeting of council. This was the only resolution passed during the meeting.

Analysis

The locked door

- 23** As our Office explained in a 2014 report regarding the City of Clarence-Rockland, the right of citizens to attend public meetings and view council proceedings in action is the foundation of the municipal open meeting requirements.²

² Ombudsman of Ontario, *Investigation into whether Council for the City of Clarence-Rockland held illegal closed meetings* (December 2014) at para 31, online: <[https://www.ombudsman.on.ca/Resources/Reports/City-of-Clarence-Rockland-\(1\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-Clarence-Rockland-(1).aspx)>.

- 24** The Supreme Court of Canada has also commented on this right. In *London (City) v. RSJ Holdings Inc.*, the court determined that the open meeting requirements set out in the *Municipal Act* demonstrate that the public has “the right to observe municipal government **in process**”³ [emphasis added]. On December 14, council for the Town of Fort Erie frustrated this right by meeting in a room that was inaccessible to the public because of a locked security door.
- 25** The fact that council did not intend to meet in private does not make up for the fact that the public was barred from attending the meeting. Similarly, the Clerk’s attempts to monitor the locked security door before and during the council meeting do not negate the fact that the locked door prevented members of the public from accessing the conference room where council was meeting.

The discussion and the *Municipal Act* Exceptions

- 26** During the December 14 meeting, council viewed PowerPoint presentations that provided a general overview of the *Municipal Conflict of Interest Act* and the town’s insurance coverage. Based on the information provided to our Office, council may have considered exercising its discretion to close the meeting to the public under the education and training exception in section 239(3.1) of the Act. However, council did not exercise this discretion and did not follow any of the procedures necessary to close the meeting to the public. Having decided to have the meeting open to the public, council should have ensured that members of the public had access to the room where the meeting took place.

Opinion

- 27** Council for the Town of Fort Erie contravened the *Municipal Act, 2001* on December 14, 2015 when it met in Conference Room No. 1 for a special open meeting of council. Although the meeting was intended to be open to the public, a locked security door prevented members of the public from accessing the conference room, denying them the ability to attend the meeting. As a result, the meeting was closed to the public and the public’s right to observe municipal government in process was frustrated.

Recommendations

- 28** I make the following recommendations to assist the town in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

³ *London (City) v RSJ Holdings Inc*, 2007 SCC 29 at para 32.

Recommendation 1

All members of council for the Town of Fort Erie 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

Council for the Town of Fort Erie should ensure that open meetings are held in spaces accessible by the public and that doors are kept open in order to provide access.

Recommendation 3

Council for the Town of Fort Erie should make the two PowerPoint presentations from the special council meeting on December 14, 2015 available to the public.

Recommendation 4

Council for the Town of Fort Erie should amend its procedure by-law to provide that the closed meeting exceptions in section 239(3)(a) and (b) of the *Municipal Act* are mandatory, rather than permissive, exceptions to the Act's open meeting requirements.

Report

- 29** The Clerk, Chief Administrative Officer, town solicitor, Mayor, and all members of council were given the opportunity to review a preliminary version of this report and provide comments to our Office. Comments received were considered in the preparation of this final report.
- 30** My report should be shared with council for the Town of Fort Erie and made available to the public as soon as possible, and no later than the town's next council meeting.



Barbara Finlay
Acting Ombudsman of Ontario