



**Investigation into the City of Owen
Sound's alleged violations of the
Municipal Act, 2001 on April 27, May 25
and June 15, 2015**

**Barbara Finlay
Acting Ombudsman of Ontario
November 2015**

Complaint

- 1** On July 27, 2015, our Office received a complaint that council for the City of Owen Sound illegally discussed the council practice of beginning each meeting with a “faith blessing” during an in camera session as part of the April 27, 2015 regular council meeting. The complaint also alleged that on May 25 and June 15, 2015, some members of council gathered at a local restaurant after the regular council meeting ended and held an illegal closed meeting contrary to the open meeting provisions of the *Municipal Act, 2001* (the Act).

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 City of Owen Sound.
- 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 July 29, 2015, we advised council for the City of Owen Sound of our intent to investigate this complaint.
- 7** Members of our Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the city’s procedure by-law and the Act, as well as relevant meeting agendas, minutes, and materials. They interviewed the Mayor, Deputy Mayor, and the city’s seven councillors. They also spoke with the city’s current Deputy Clerk and the previous Deputy Clerk, who has been on leave since August 2015.
- 8** We received co-operation in this matter.

Council procedure

- 9** Section 4.13 of the city's procedure by-law¹ states that all council meetings shall be open to the public, subject to listed closed meeting exceptions.
- 10** At the time of the April 27, 2015 council meeting, section 4.10 of the procedure by-law stated that notice of regular council meetings shall be posted on the city's website in the form of an annual calendar. On November 2, 2015, council amended its procedure by-law, and this provision is now contained in section 4.4.1.²
- 11** Prior to the revisions of the procedural by-law, section 4.2 indicated that regular meetings of council would commence with in camera matters in room 205 of city hall. Following the in camera discussion, the by-law stated that the "public agenda" portion of the meeting would commence at 7:00 p.m. in council chambers. Our investigation indicates that council no longer uses room 205 for in camera sessions and instead meets in city hall's basement boardroom. The amendments of the procedure by-law on November 2, 2015 removed this out-dated reference and now provide that closed session matters will be discussed at a time and location set out on the public meeting agenda.

April 27, 2015 council meeting

- 12** On April 27, 2015, at 4:30 p.m., council for the City of Owen Sound met in the basement boardroom of city hall. Notice of the meeting was provided on the city's meeting calendar at the beginning of the year, and the meeting agenda was published online three days before the meeting.
- 13** Through inadvertence, the published agenda erroneously indicated that council would meet in council chambers, not the basement boardroom. In her interview, the Deputy Clerk on leave indicated that council regularly meets in the basement boardroom for the first portion of the meeting, which includes a brief open session, a resolution to move in camera, and council's in camera discussion. At the time established on the meeting agenda, council resumes open session and moves to council chambers. The Deputy Clerk on leave acknowledged that,

¹ City of Owen Sound, by-law No 2007-242, *A by-law to regulate the proceedings of the meetings of the council of the corporation of the City of Owen Sound and its committees* (3 December 2007), online: <https://www.owensound.ca/sites/default/files/by-laws/2007-242%20Procedural%20By-law%20CONSOLIDATED_0.pdf>.

² City of Owen Sound, by-law No 2015-149, *A by-law to amend by-law no. 2007-242* (2 November 2015).

because the agenda listed council chambers as the location of the meeting, a member of the public would not know where council would meet for the first portion of the meeting.

- 14** For the April 27 meeting, the meeting minutes indicate that council convened in open session in the basement boardroom and then immediately resolved to go in camera. The resolution to enter closed session stated the following regarding the faith blessing matter:

THAT City Council now move in camera to consider...one matter relating to advice that is subject to solicitor-client privilege respecting the Faith Blessing or Moment of Silent Reflection.

- 15** The agenda described the matter using the same language.
- 16** Our interviews and documentary review indicate that, in light of the Supreme Court’s ruling on prayer in council meetings, the Deputy Clerk on leave had prepared a report related to council’s practice of beginning each meeting with a faith blessing. The written report indicated that the Deputy Clerk on leave had consulted with the city’s solicitor and had received legal advice, which she summarized in the report.
- 17** The closed meeting minutes indicate that the Deputy Clerk on leave presented this report to council and orally “outlined the legal advice provided by the City’s solicitor” regarding council’s faith blessing practice. During interviews, the councillors indicated that there was very little or no discussion about this matter following the Deputy Clerk on leave’s presentation. Rather, councillors reserved their comments and discussed the matter in open session later that evening. Following that discussion, council voted in open session to refrain from opening meetings with the faith blessing and passed several resolutions to effect this change.

Analysis

Closed meeting exception

- 18** Council relied on the closed meeting exception for advice subject to solicitor-client privilege to go in camera to discuss legal advice related to the faith blessing.
- 19** Subsection 239(2)(f) of the *Municipal Act* permits a municipality to consider advice that is subject to solicitor-client privilege, including communications necessary for that purpose, in closed session. This exception can only be used when some advice from a solicitor or related communication actually exists for

council's consideration. Communication will only be found to be subject to solicitor-client privilege if it is: (a) between a client and his or her solicitor, where the solicitor is acting in a professional capacity; (b) made in relation to the seeking or receiving of legal advice; and (c) intended to be confidential.³

- 20** At the meeting on April 27, council discussed the contents of communications between the Deputy Clerk on leave and the city's solicitor that provided legal advice related to council's faith blessing. Although the solicitor communicated with the Deputy Clerk on leave, the legal advice was provided for council and relayed by the Deputy Clerk on leave. Council maintained the confidentiality of this advice by discussing it in camera. Further, council limited its in camera discussion to the legal advice provided by the city solicitor. Council discussed the broader issue of faith blessings and came to a decision regarding the practice later that evening in open session.
- 21** Accordingly, council's discussion fit within the exception for advice subject to solicitor-client privilege in section 239(2)(f).

Notice

- 22** On April 27, council met at 4:30 p.m. in open session in the basement boardroom of city hall before immediately resolving to go in camera.
- 23** The meeting agenda properly indicated that council would be meeting at 4:30 p.m. However, it failed to indicate that this meeting would occur in the basement boardroom, as opposed to council chambers.
- 24** Further, the procedure by-law in place at the time of this meeting indicated that council would be meeting in a third location – room 205 of city hall – for this portion of the council meeting. According to the current Deputy Clerk, the procedure by-law was out-of-date and council typically does not use room 205 because it is small and has poor Wi-Fi.
- 25** Section 238(2) of the Act requires that a procedure by-law provide for notice to the public of all meetings. However, the Act does not specify the content of this notice. The city's procedure by-law in place at the time did specify that regular meetings would commence in room 205 for in camera matters and then proceed to council chambers for the "public agenda" portion of the meeting.

³ *Solosky v the Queen*, [1980] 1 SCR 821 at 837.

- 26** Our Office has noted on numerous occasions that a meeting notice should include adequate, meaningful information about all open and closed portions of a meeting.⁴ In our Office’s investigation into closed meetings in the Township of Black River-Matheson in 2014, we determined that a reasonable interpretation of what constitutes adequate “notice” includes the time, date and location at which a meeting will take place.⁵
- 27** This interpretation of the notice requirements in the *Municipal Act* is informed by the intent and purpose of the open meetings provisions, which is to enshrine the public’s “right to observe municipal government in process”.⁶ Without notice of where a meeting will take place, members of the public are effectively denied this right.
- 28** In this instance, members of the public were properly informed of the time and date of the April 27, 2015 regular council meeting. However, the notice did not provide the correct location for the open portion of the meeting that preceded council’s resolution to enter closed session. Further, the city’s procedure by-law at the time actually provided incorrect information on where council would meet. Although the lack of accurate public notice was inadvertent, the public was still effectively denied notice of the meeting’s location in violation of the *Municipal Act*.
- 29** Council for the City of Owen Sound has already taken steps to rectify these notice issues. In November 2015, council approved amendments to the city’s procedure by-law so that it no longer provides potentially inaccurate notice of where closed meetings will be held. Rather, the procedure by-law now indicates that notice of the closed meeting location will be provided on the meeting agenda that is published as notice for each meeting.
- 30** In addition, since August 2015, the current Deputy Clerk has implemented the practice of providing detailed location information on its public meeting agendas for both the open and closed portions of each meeting. This now includes information such as the street address of city hall. I commend the city for making these proactive changes to the procedure by-law and for adopting the practice of providing more detailed location information in its meeting notice.

⁴ Ombudsman of Ontario, *Investigation into whether the Town of Mattawa council and its Ad Hoc Heritage Committee held improperly closed meetings* (December 2010), online: <<http://www.ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/mattawafinal.pdf>>.

⁵ Ombudsman of Ontario, *Investigation into Council for the Township of Black River-Matheson closed meeting* (November 2014), online: <<http://www.ombudsman.on.ca/Files/sitemedia/files/Black-River-Matheson-EN-final-Nov27.pdf>>.

⁶ *London (City) v RSJ Holdings Inc* [2007], 2 SCR 588 at para 32.

May 25 and June 15, 2015 restaurant gatherings

- 31** Our Office received a complaint alleging that various councillors gathered at a local restaurant following the council meetings on May 25 and June 15, 2015 in violation of the open meeting provisions of the *Municipal Act*.
- 32** In their interviews, councillors were forthright about these gatherings and indicated that is common for council to socialize after meetings. Because this practice is so common, most councillors were unable to specifically recollect what occurred at the May 25 and June 15 gatherings. Rather, they provided our Office with general information about how the gatherings are organized and structured, who typically attends, and what the councillors discuss.
- 33** Councillors advised us that normally at the end of a council meeting, they will informally arrange to meet socially at a local restaurant.
- 34** On both May 25 and June 15, councillors gathered at Shorty's Bar and Grill (Shorty's) after the council meeting concluded. Shorty's was chosen because it is conveniently located and open late. Councillors advised us that they always sit at the same table at Shorty's because it is the only table large enough for the group. This table is in the restaurant's regular dining area and is near other tables, including a table on a raised platform that directly overlooks it. The councillors indicated that, on other occasions, the social gatherings have been held at Boston Pizza. When the councillors meet at Boston Pizza, they pull several tables together on the "bar side" of the restaurant.
- 35** Councillors indicated that the social gatherings typically start at approximately 9:30 or 10:00 p.m. because that is when council meetings usually end. The gatherings typically last about an hour. Several councillors noted that Shorty's closes at 11 p.m.
- 36** When we asked how this practice began, numerous councillors indicated that the previous city council had a reputation for not getting along with each other. According to these councillors, the previous council's poor working relationship was a major issue during the municipal election.
- 37** Once elected, the new councillors took conscious steps to get to know each other on a social level. In his interview, one councillor indicated that he originally initiated the gatherings so that councillors could "get away from the council meeting", "talk about life", and "socialize" together. Numerous councillors indicated that the gatherings have been successful at fostering a collegial council

atmosphere. Some councillors indicated that members of the public have specifically commended the current council for their strong working relationships.

Discussions at the May 25 and June 15 social gatherings

- 38** At the time of our interviews, councillors struggled to remember if they attended the specific gatherings on May 25 and June 15. Most councillors were only able to say that they “often” go to the gatherings. Members of city staff do not attend. One councillor interviewed believed that the June 15 gathering had occurred at Boston Pizza rather than Shorty’s, although this recollection was not consistent with that of others we spoke to.
- 39** On at least two occasions, a member of the public joined, or was invited to join, council’s gathering. At the May 25 gathering, various councillors recalled asking a local reporter who was also eating at Shorty’s to come and sit at the table where the councillors were sitting. The councillors indicated that the reporter declined the offer. During the June 15 gathering, the Mayor indicated that he sat at the table of the same local reporter for approximately an hour. The Mayor indicated that several councillors who attended the gathering on that occasion “stopped by” the table where he and the reporter were sitting to chat or to say goodbye as they left.
- 40** Councillors were unable to specifically recall what they discussed at the social gatherings on May 25 and June 15. In general, the councillors indicated that they chat about various matters occurring in their personal lives, such as their families, jobs, and hobbies.
- 41** Each councillor said that council business is never discussed. Councillors indicated that discussing council matters would be antithetical to the purpose of the gatherings, which is to “get away” from council business, socialize, and relax at the end of the night.
- 42** Two councillors did recall one instance where one councillor cautioned another councillor not to discuss a certain topic because it was council business. They said that the offending councillor immediately stopped and the topic was changed. The other councillors did not recall this occurring.

Analysis

- 43** Section 238(1) of the *Municipal Act* defines a “meeting” as “any regular, special or other meeting of a council, of a local board or of a committee of either of them”. This definition is circular and not particularly helpful in determining whether a meeting has actually occurred.

44 In a 2008 report regarding closed meetings in the City of Greater Sudbury, our Office developed the following definition of “meeting” to assist in the interpretation of the definition contained in the Act:

Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or the purpose of doing the groundwork necessary to exercise that power or authority.⁷

45 This definition remains consistent with leading interpretations of the open meetings law and reinforces the right of the public to observe municipal government in process.⁸

46 The *Municipal Act* does not prevent council members from meeting informally or socially outside of council chambers. However, as Local Authority Services (LAS) noted in its 2015 report regarding closed meetings in the Township of Carling, councillors should consider the “perception by the public that decisions might be made during such gatherings, ‘behind closed doors’ ...even if that gathering is merely social in nature”.⁹ Similarly, in our Office’s 2012 report regarding a private breakfast meeting in the City of Hamilton, we noted that it can be challenging to assure the public that no improper discussions have taken place when councillors or committee members meet informally.¹⁰

47 In the present case, councillors from the City of Owen Sound gathered socially at a local restaurant after the council meetings on May 25 and June 15, 2015. In each instance, the councillors sat in the public section of the restaurant, surrounded by other dining tables. Councillors did not discuss council business; rather, their discussion was confined to social matters including talk about their personal lives and subjects of mutual interest. This type of social gathering is not a “meeting” for the purposes of the Act and is therefore not subject to any of the Act’s open meeting requirements.

⁷ Ombudsman of Ontario, *Don’t Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 2008) at para 92, online: <http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2_2.pdf>.

⁸ *London (City) v RSJ Holdings Inc*, 2007 SCC 29 at para 32; *Southam Inc v Ottawa (City)* (1991), 5 OR (3d) 726 (Ont Div Ct) at paras 12-18; *Southam Inc v Hamilton-Wentworth Economic Development Committee* (1988), 66 OR (2d) 213 (Ont CA) at paras 9-12.

⁹ Local Authority Services, *A Report to the corporation of the Township of Carling* (March 2015) at 7, online: <<http://www.agavel.com/wp-content/uploads/2013/09/Carling-Investigation-Report-Final-March-2015.docx>>.

¹⁰ Ombudsman of Ontario, *Investigation into whether the City of Hamilton’s NHL Proposal Sub-Committee held an improperly closed meeting* (February 2012) at para 24, online: <http://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/HamiltonNHL-final-EN-for-web_1.pdf>.

48 The social gatherings at a local restaurant on May 25 and June 15, 2015 did not contravene the open meeting requirements of the *Municipal Act*. I recognize, as the councillors themselves noted, that such gatherings, when confined to purely social matters, can help council establish and maintain healthy and collaborative working relationships. The *Municipal Act's* open meeting requirements were clearly not intended to thwart such efforts. However, council should continue to be vigilant in ensuring that conversation during their social get-togethers does not stray into matters of council business or decision-making.

Opinion


49 Council for the City of Owen Sound did not contravene the *Municipal Act, 2001* on April 27, 2015 when it went in camera to receive legal advice related to council's faith blessing. However, through inadvertence, council failed to provide accurate notice of where a portion of this meeting would be held.

50 The May 25 and June 15 gatherings of members of council at Shorty's were purely social in nature and did not contravene the *Municipal Act*. They were not "meetings" for the purposes of the Act and therefore were not subject to the Act's open meeting requirements.

Report

51 The current Deputy Clerk, the Deputy Clerk on leave, 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.

52 My report should be shared with council for the City of Owen Sound and made available to the public as soon as possible, and no later than the city's next council meeting.



Barbara Finlay
Acting Ombudsman of Ontario