



## **Ombudsman Report**

**Investigation into a complaint  
about a meeting held by  
Council for the Township of Leeds and the  
Thousand Islands over email  
in February 2016**

**Paul Dubé  
Ombudsman of Ontario  
September 2016**

## Complaint

- 1 On February 26, 2016, our Office received a complaint regarding a series of emails exchanged by council members for the Township of Leeds and the Thousand Islands.
- 2 The complainant alleged that council discussed a development application regarding a horse farm over email, contrary to the open meeting provisions of the *Municipal Act, 2001* (the Act).

## Ombudsman jurisdiction

- 3 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.
- 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 Township of Leeds and the Thousand Islands.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's procedure by-law have been observed.

## Previous complaints

- 7 My Office issued two reports in 2015 to the Township of Leeds and the Thousand Islands regarding complaints that the township held illegal meetings over email.
- 8 In May 2015, we found that a series of emails regarding compensation for the Deputy Mayor did not contravene the open meeting provisions, but only

because they were exchanged just prior to the current council being officially sworn in.<sup>1</sup>

- 9 In June 2015, we found that council did not contravene the Act or the township's procedure by-law when emails were exchanged amongst council regarding the township's by-laws.<sup>2</sup> The only reason this email discussion did not rise to the level of a contravention of the Act is that a quorum of councillors was not involved. We made two recommendations to the township, one of which expressly addressed council's use of emails:

1. All members of council should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the Act and the township's procedure by-law; and
2. All members of council should avoid laying the groundwork necessary to exercise the power or authority of council over email or through informal discussions.

## Investigative process

- 10 We informed the township of our intent to investigate this complaint on June 14, 2016. Members of my Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the township's procedure by-law, policies, and the Act, as well as the emails exchanged by council members. We reviewed the agenda and minutes for the February 12, 2016 committee of the whole meeting and the February 17, 2016 council meeting. We interviewed the Mayor, all members of council and the Clerk.

My Office received full co-operation in this matter.

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<sup>1</sup> Ombudsman Ontario, *Investigation into whether Council for the Township of Leeds and the Thousand Islands held illegal meetings between October 30 and December 1, 2014 "Re: The Naughty Topic"*, (May 2015), online:

<<https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/Final-Ombudsman-Report---TLTI-May-2015-linked.pdf>>

<sup>2</sup> Ombudsman Ontario, *Investigation into whether Council for the Township of Leeds and the Thousand Islands held illegal meetings to discuss Council's Code of Conduct*, (June 2015), online:

<[https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/Final-Ombudsman-Report---TLTI--June-2015\\_1-linked.pdf](https://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/Final-Ombudsman-Report---TLTI--June-2015_1-linked.pdf)>

## Background

- 11 At a committee of the whole meeting on February 12, 2016, council discussed the approval of a development application relating to the expansion of a horse farm (the “Pilon Horse Farm”). The application was for zoning permissions to allow the farm to expand to 30 horses (from six) and build a boat dock. The committee of the whole recommended that the application be put on hold.
- 12 At the subsequent council meeting on February 17, 2016, council did not adopt the recommendation of the committee of the whole and, instead, approved the Pilon Horse Farm application with conditions. Local media reported that council had changed its mind after a “flurry” of emails between the committee of the whole meeting and the council meeting.<sup>3</sup>
- 13 The township has a practice of publishing emails exchanged between council members and township staff in information packages on its website. These emails are called “quorum emails” because they are sent to a quorum of councillors, and include emails that discuss council business as determined by township staff.
- 14 Councillor John Paul Jackson told my office that council members regularly exchange quorum emails as fact-finding and information-sharing tools. Councillor Jackson explained that quorum emails are used to move the business of council forward without engaging in “two hours” of debate at council meetings. Of the six members of council and the Mayor, only Councillor Liz Huff and Councillor Harold Emmons do not send quorum emails, although they both receive them. Councillor Huff told my Office that she believes quorum emails violate the open meeting rules. Councillor Emmons told my Office that he has only sent one email during this council term.
- 15 Recently, the township has moved towards replacing quorum emails with an online forum, like a live blog, where councillors would discuss council business electronically on a website visible to the public.

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<sup>3</sup> Wayne Lowry, “A Horse of a Different Colour”, The Recorder & Times (February 26, 2015), online: <http://www.recorder.ca/2016/02/22/a-horse-of-a-different-colour>.

- 16 On June 6, 2016, the township's committee of the whole recommended that council approve a policy developed by staff to set guidelines for the use of the online blog or forum. All of council except for Councillor Huff voted for the motion.
- 17 Council did not obtain legal advice about the development of an online forum. Councillor Jackson told us that a lawyer would tell the township "whatever council wants to hear."

## **Township procedures and quorum emails**

- 18 The township's procedure by-law (By-law No. 13-002) was amended in December 2014. The definition of meeting was amended to include email exchanges amongst members of council:

[A]ny regular, special or other meeting of council or a Committee and may include email exchanges which are addressed to all members of council, which contain factual information germane to the business of the Municipality.

- 19 No other provisions of the procedure by-law, such as with respect to notice, account for meetings over email. We were advised that the township sought legal advice regarding its procedure by-law prior to enacting it, and was told that email meetings do not comply with the open meeting requirements.

- 20 The township's email policy was adopted on October 13, 2015. Section 4.12 of the policy addresses council's use of emails:

Township council emails will be included as part of an agenda or information packages when a majority/quorum of members have been included in an email or a thread of email responses. The emails which are to be included are matters which contain factual information germane to the business of the Municipality. It will be the responsibility of the CAO/Acting CAO to review and approve the subject matter before publication.

- 21 Other than section 4.12 of the email policy and the definition of meeting in the procedure by-law, the township does not have any policy or procedure

that regulates council's use of quorum emails or their publication. The Clerk told my Office that quorum emails are typically published on the second and third Friday of each month. It is left to the discretion of staff to decide which emails are germane to the business of the municipality and what, if any, information to redact. Staff told my Office that only the emails they are copied on are considered for publication. If staff are not copied, they may not be aware of emails exchanged by members of council. There is no requirement or consistent practice that requires council members to copy staff.

- 22 Council members showed a general lack of understanding of how quorum emails are collated and published by staff. One councillor told my Office that the Clerk and CAO are always copied on quorum emails. Others told us that staff have unrestricted access to the councillors' email inboxes and read all of their emails before determining which emails should be published. Another member told my Office that the township had technology that captures all quorum emails for publication. Staff confirmed this is not the case.

## **February 13, 2016 emails**

- 23 Ten quorum emails sent between February 4 and 13 regarding the Pilon Horse Farm application were published on the township's website on February 19 as part of a council information package. These information packages are difficult to find on the township's website. They are not posted with meeting agendas and minutes, but rather are posted under "News and Public Notices."<sup>4</sup> The packages are also not archived for the public on the website, but instead are removed after a certain period of time.
- 24 All members of council confirmed they received these emails and read them.
- 25 Of the emails my Office reviewed, three were sent between the February 12 committee of the whole meeting and the February 17 council meeting:

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<sup>4</sup> <http://www.leeds1000islands.ca/Modules/News/Search.aspx>

*February 13, 10:19 a.m. – From Councillor Vicki Leakey to all of council, the CAO, Clerk, and planning director*

Councillor Leakey indicates that she has changed her position on the Pilon Horse Farm application and would be willing to support a motion at the next council meeting to approve the application with certain conditions.

*February 13, 10:32 a.m. – From Councillor Jackson to all of council, the CAO, Clerk, and planning director*

Councillor Jackson responds to Councillor Leakey's email that he is proud that Councillor Leakey can see the bigger picture and is willing to compromise on the application.

*February 13, 3:57 p.m. – From Councillor Gerry Last to all of council, the CAO, Clerk, and planning director*

Councillor Last responds to Councillor Leakey's email, saying that she is confused about Councillor Leakey's email and asks for clarification.

## Analysis

### ***Do the emails constitute a “meeting” for the purposes of the open meeting rules?***

- 26 The *Municipal Act, 2001* 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.”<sup>5</sup> In a 2008 report,<sup>6</sup> in accordance with the underlying objectives of open meeting legislation and relevant case law, my Office developed a working 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

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<sup>5</sup> *Municipal Act, 2001*, S.O. 2001, Ch. 25, s. 238(1).

<sup>6</sup> Ombudsman of Ontario, *Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 25, 2008), online: < <https://www.ombudsman.on.ca/Resources/Reports/City-of-Greater-Sudbury-br--Don%E2%80%99t-Let-the-Sun-Go-D.aspx> >.

committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.<sup>7</sup>

- 27 This definition supports the principles underlying the open meeting rules.
- 28 A meeting of council is not limited to a physical gathering of its members. Instead, a meeting may occur whenever council exercises its authority, including over email.
- 29 In a February 2009 investigation, my Office considered whether sequential phone calls between the Mayor and individual councillors for the Township of Nipissing could be considered a “meeting” for the purpose of the open meeting requirements.<sup>8</sup> In that case, a quorum of council was never present in the same room or on the phone during any of the conversations. However, as a result of the calls, council collectively came to a consensus to approve additional costs related to the purchase of a fire vehicle. Our report notes:

It is not necessarily the form that a meeting takes that should be determinative, but its substance. In my view, a meeting of council is not limited to a physical gathering of its members. Sequential telephone conversations of council members, “*for the purpose of exercising the power or authority of the council or for the purpose of doing the groundwork necessary to exercise that power or authority,*” may constitute a meeting.<sup>9</sup>

- 30 In the same way, a series of emails between council members for the purpose of exercising the power or authority of council, or for the purpose of laying the groundwork necessary to exercise that power or authority, may also constitute a meeting for the purposes of the Act’s open meeting requirements.
- 31 In our May 2015 report about the Township of Leeds and the Thousand Islands, my Office found that a series of emails exchanged by councillors-

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<sup>7</sup> *Ibid* at paras 54-60.

<sup>8</sup> Ombudsman Ontario, *Investigation into Council of the Township of Nipissing Special Meeting of April 25, 2008*, (February 6, 2009), online: <<https://www.ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/nipissingfinaleng.pdf>>

<sup>9</sup> *Ibid* at para 29.



elect laid the groundwork for future decisions of council, and would have violated the *Municipal Act* had council been in office at the time. In our June 2015 report about the township, we found that emails exchanged by council members laid the groundwork for an upcoming council decision, but that the exchange did not constitute a meeting as the emails were not received by a quorum of council. In both decisions, my Office recommended that the township remain vigilant about its use of emails and avoid conducting council business over email.

- 32** Local Authority Services (LAS) has also found that a series of emails can constitute a meeting for the purposes of the open meeting rules. In a September 2015 report about the Township of the Archipelago, Amberley Gavel, on behalf of LAS, considered emails from the Reeve to councillors sent to establish and agree upon criteria for decision-making around an upcoming staff Christmas party. Amberley Gavel cautioned the township about having "pre-meeting discussions" over email or other "non-public venues":

[W]e consider these forms of "pre-meeting discussions" to be meetings under the provisions of the Act... Making pre-determinations about matters which will be under discussion at future meetings, through electronic mail transmissions or other non-public forums, is not open and transparent, as well as being a breach of the Act.<sup>10</sup>

- 33** Not all emails that are sent to a quorum of council will constitute a meeting for the purposes of the open meeting rules. In a January 2013 letter about the Municipality of Leamington, we considered whether an email from the Mayor to a member of the public that copied all of council was a meeting. My Office wrote that "...the provisions of the Act were not intended to prevent council members from communicating with constituents and responding to their inquiries".<sup>11</sup> In that case, there was no evidence to suggest that council discussed the matter itself, or laid the groundwork for future decision-making.

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<sup>10</sup> Local Authority Services, *Report to the Council of the Township of the Archipelago Regarding the Investigation of Closed Meetings of the Council of the Township of the Archipelago and Council's Human Resources Committee* (September 2015) at 14, online: <[http://www.thearchipelago.on.ca/images/M\\_images/hr\\_reort\\_improper\\_closed\\_mtgs\\_amberley\\_gavel.pdf](http://www.thearchipelago.on.ca/images/M_images/hr_reort_improper_closed_mtgs_amberley_gavel.pdf)>.

<sup>11</sup> Letter from Ombudsman of Ontario to Municipality of Leamington (January 16 2013), online: <<https://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Leamington-Jan-16-2013.pdf>>.

- 34 The emails exchanged by council in this case were sent to all council members. The emails discussed a decision that was to be made by council – namely, whether to approve the Pilon Horse Farm application. Council and staff agree that the emails represent a quorum of council discussing council business, which is why the emails were posted to the township’s website as “quorum emails”.
- 35 Despite the findings and recommendations of my Office in two 2015 reports, council has continued to use emails to advance council business or lay the groundwork necessary to exercise the power or authority of council.
- 36 Council did not vote or reach consensus over email, but it is apparent that the emails furthered council’s discussion of the Pilon Horse Farm application, laying the groundwork for the change in council’s position on the application at the next council meeting. Accordingly, the emails exchanged constituted a meeting subject to the open meeting rules. The matter discussed by council over email does not fall within the open meeting rule exceptions in the Act.

***Did the township’s posting of the quorum emails satisfy its obligation to comply with the open meeting rules?***

- 37 Staff and most of council expressed the view to my Office that quorum emails satisfy the open meeting rules because the emails are posted publicly after being exchanged and council continues its discussion at subsequent council meetings. Additionally, some of the councillors told my Office that quorum emails enhance the township’s transparency and accountability because councillors would otherwise have the same discussions behind closed doors with less than a quorum of council.
- 38 The open meeting rules go beyond making council discussions public after they occur. The Supreme Court has stated that the rules are intended to preserve the public’s right to observe local government in process.<sup>12</sup> Further, the Act and the township’s procedure by-law set out requirements with respect to public notice of meetings, resolutions to close a meeting,

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<sup>12</sup> London (City) v. RSJ. Holdings Inc., [2007] 2 SCR 588 at para 32.

and minute-taking that are designed to preserve openness and transparency in local government.

- 39** The public has the right to be present and observe local government decision-making in process, rather than read about it after the fact.
- 40** In a report issued in December 2014 about the City of Clarence-Rockland, my Office explained that the public has a right to attend public meetings and view council proceedings in action.<sup>13</sup> In that case, council had decided to exclude members of the public from a council meeting, providing only a video feed of the session. Our Office found that a video feed does not satisfy the public's right to observe municipal government in action and was not sufficient to allow council to meet its open meeting obligations.
- 41** In the 2015 decision, *Bracken v. Regional Municipality of Niagara*, the Ontario Superior Court found that the right of the public to attend and participate in open public council meetings is protected by the right to freedom of expression in Canada's Charter of Rights and Freedoms:
- I do not accept... that the Applicant still being entitled to simply watch the Region council proceedings on television or to contact Region Councillors by telephone or email to ask questions would be an acceptable restriction on his Sections 2(b) and 7 Charter rights. In my view, his s. 2(b) right is to actually be able to attend and participate in open public Council meetings if he is not violent or threatens violence and abides by the applicable rules.<sup>14</sup>
- 42** The quorum emails violate the public's right to observe local government decision-making in process. Council's practice of relying on quorum emails to lay the groundwork for its decision-making violated the open meeting requirements of the *Municipal Act*.
- 43** In addition to violating the open meeting requirements of the *Municipal Act*, this practice also violates the following procedural requirements.

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<sup>13</sup> Ombudsman Ontario, *Investigation into whether Council for the City of Clarence-Rockland held illegal closed meetings on August 27 and September 15, 2014*, (December 2014), 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)>

<sup>14</sup> *Bracken v Regional Municipality of Niagara Corporation*, 2015 ONSC 6934 at 56.

### **The quorum emails do not meet the requirements for public notice**

- 44 Section 238(2.1) of the Act requires that municipalities provide for public notice of meetings in a procedure by-law. The township's procedure by-law states that council and committee of the whole meetings shall be held on alternating Mondays starting at 7:00 p.m. and 6:30 p.m. respectively. The by-law states that council can vary this schedule or call for additional meetings, "in which case a notice shall be posted advising of the time and date".
- 45 Quorum emails are posted publicly only after they are exchanged. The public is not provided notice prior to the council discussions taking place. The emails do not satisfy the requirements with respect to notice in the Act or the township's procedure by-law.

### **The quorum emails do not satisfy the requirement for council to pass a resolution before closing a meeting to the public**

- 46 Section 239(4) of the Act requires that council pass a resolution before closing a meeting to the public. The resolution must state the fact of the closed meeting and the general nature of the subject matter to be discussed. This requirement is echoed in the township's procedure by-law.
- 47 Quorum emails are exchanged behind closed doors, in that the public has no means to observe the discussions as they occur. Accordingly, the exchanges are closed meetings under the Act. Council does not pass a resolution prior to entering into these closed meeting discussions, nor would there be a mechanism over email for council to pass such a resolution.

### **The quorum emails do not satisfy the requirements in the Act with respect to minutes**

- 48 Section 228 of the Act requires the Clerk to record, without note or comment, all resolutions, decisions and other proceedings of the council. Section 239(7) requires a municipality to record all resolutions, decisions and other proceedings at a meeting, whether it is closed to the public or not. The township's procedure by-law requires that minutes record a list of specific information, including the place, time, and date of the meeting, disclosures of pecuniary interests, and all proceedings of the meeting without note or comment.

- 49 Some council members told us that the emails themselves serve as minutes of the council meetings held over email. However, these emails are not minutes recorded by the Clerk, as required by s. 239(8) of the Act, and the Clerk is not even copied on all quorum emails. The emails do not record resolutions or by-laws passed by council.
- 50 Additionally, the emails are not preserved by the municipality along with official meeting minutes. Instead, the quorum emails are published by the township as part of its website's "news" section, and are removed after a certain amount of time, generally less than a month, such that only recent emails are available online.

### ***Can municipalities hold electronic or remote meetings?***

- 51 During interviews with our Office, some councillors and staff conceded that the quorum emails did not allow the public to observe local government in process. They indicated that they felt the township's plan to implement a new online forum would allow the public to observe council discussions in real time. However, the township was not able to explain how the online forum would satisfy the requirements in the Act respecting meeting notice, passing a resolution to enter closed session, the requirement to keep meeting records, or the public's right to attend open council meetings.
- 52 The Act does not provide for digital or virtual council meetings. Subsections 236(1) and 238(2) of the Act speaks to the physical location of a meeting:

Section 236(1): The council of a municipality shall hold its meetings and keep its public offices within the municipality or an adjacent municipality at a place set out in the municipality's procedure by-law; however, in the case of an emergency, it may hold its meetings and keep its public offices at any convenient location within or outside the municipality.

Section 238(2): Every municipality and local board shall pass a procedure by-law for governing the calling, place, and proceedings of meetings.

- 53 In 2006, the legislature considered Bill 130, the *Municipal Statute Law Amendment Act*. The original version of the bill included a provision permitting electronic participation of council members in council meetings.

The provision did not survive the committee stage and was not included in the enacted version of the bill. However, the *City of Toronto Act* expressly permits electronic participation in meetings, although members participating electronically do not count towards quorum.<sup>15</sup>

## Opinion

- 54 The emails exchanged by council for the Township of Leeds and the Thousand Islands in February 2016 with respect to the Pilon Horse Farm constituted an illegal closed meeting, contrary to the open meeting rules in s. 239 of the Act.
- 55 Not only have members of council for the township failed to be vigilant in adhering to their individual and collective obligations to ensure council complies with its responsibilities under the *Municipal Act, 2001* and the township's procedure by-law, but council members continue to flagrantly disregard the open meeting rules.
- 56 Following my Office's closed meeting investigations in May and June 2015, we recommended that the township take care not to hold illegally closed meetings over email. Rather than avoiding meetings over email, the township began to intentionally discuss council business amongst a quorum of members over email, and publish the resulting emails as "quorum emails" in the news section of its website.
- 57 During the course of this investigation, council members acknowledged that various aspects of the quorum email practice did not accord with the open meeting rules. Instead of taking care to avoid conducting council business electronically, the township is taking steps to implement a live blog or forum online to facilitate conducting council business outside of open council meetings.
- 58 Council members indicated to our Office and in the press that they are acting in accordance with their opinion of how council should operate "in 2016". However, municipalities are creatures of the province and must act in accordance with applicable provincial law. Ontario's *Municipal Act* does

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<sup>15</sup> Subsection 189(4), City of Toronto Act, 2006, S.O. 2006, c. 11.

not permit electronic meetings of council or local boards, or committees of either of them. Such meetings do not satisfy the open meeting requirements with respect to providing public notice, keeping meeting records, or passing resolutions to go in camera. Further, electronic meetings do not provide the public the opportunity to observe local government in process.

## Recommendations

- 59 I make the following recommendations to assist council for the Township of Leeds and the Thousand Islands to improve its practices with respect to open meetings:

### Recommendation 1

Council for the Township of Leeds and the Thousand Islands should cease its practice of using quorum emails to exercise the power or authority of council, or to lay the groundwork necessary to exercise that power or authority.

### Recommendation 2

Members of council for the Township of Leeds and the Thousand Islands should ensure that council business is not advanced, and the groundwork for advancing council business is not laid, over email or via any other electronic format.

### Recommendation 3

Council for the Township of Leeds and the Thousand Islands should confine communications that advance council business, or lay the groundwork to advance council business, to meetings held in compliance with its procedure by-law and the *Municipal Act, 2001*.

### Recommendation 4

All members of council for the Township of Leeds and the Thousand Islands should be vigilant in adhering to their individual and collective

obligation to ensure that council complies with its responsibilities under the *Municipal Act* and its own procedure by-law.

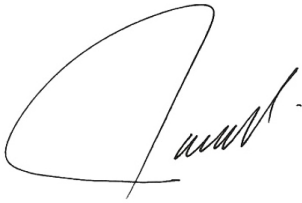
## Municipality's response

- 61 Council for the Township of Leeds and the Thousand Islands was given the opportunity to review a preliminary version of this report. Two members of council provided comments to our Office in writing. All comments received were considered in the preparation of this final report.
- 62 One member of council submitted that, while the township's email policy is not comprehensive, the township's quorum emails and its proposed online forum are intended to enhance transparency and allow for greater public access to council communications. The member submitted that they believe the township's new online forum will comply with the open meeting provisions of the *Municipal Act, 2001*. The member also expressed frustration that provincial legislation does not acknowledge the existence of electronic communications and posed a number of hypothetical questions about the open meeting rules and their application in the context of social media and electronic communications. They also suggested that my Office offer direction to the province to address electronic communications and challenged the provincial government to make it a high priority to address electronic communications as part of its review of the *Municipal Act, 2001*.
- 63 While I understand council's desire to be open and transparent in its public communications and to embrace modern technology and social media, council must do so within the current legislated requirements of the *Municipal Act, 2001*.
- 64 As my Office has now found for the third time with respect to the Township of Leeds and the Thousand Islands, the *Municipal Act* does not provide for emails or other electronic communications to be used as a substitute for meetings to conduct municipal business.
- 65 I encourage council to bring its concerns forward to the Ministry of Municipal Affairs directly, and note that it can make reference to my Office's report. While the Ministry is no longer accepting formal submissions as part of its review of the *Municipal Act, 2001*, the township may wish to raise this issue should any legislative amendments be tabled.



## Report

- 67 My report should be shared with council for the Township of Leeds and the Thousand Islands and made available to the public as soon as possible, and no later than the township's next council meeting.



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Paul Dubé  
Ontario Ombudsman