



Ombudsman Report

**Investigation into a closed meeting
held by the Town of Deep River
in May 2017 and gatherings of the town's police
service plan consultation working group**

**Paul Dubé
Ombudsman of Ontario
October 2017**

Complaint

- 1 Our Office received a complaint alleging that council for the Town of Deep River inappropriately met in camera on May 17 and 18, 2017. The complainant felt that council should not have discussed a police service consultation plan in closed session because the topic did not appear to fit within any of the closed meeting exceptions in the *Municipal Act, 2001*.
- 2 The complainant also alleged that a police service consultation “working group” formed during the May 18 closed meeting should have been classified as a committee of council subject to open meeting requirements under the Act and the town’s procedure by-law.

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 4 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 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.
- 5 The Ombudsman is the closed meeting investigator for the Town of Deep River.
- 6 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

- 7 On July 6, 2017, we advised the Town of Deep River of our intent to investigate this complaint.
- 8 We reviewed relevant portions of the municipality’s procedure by-law and the Act, as well as the meeting agenda and open/closed meeting minutes from the May 17, 2017 meeting, which was continued on May 18, 2017. Included with the closed meeting minutes were highly detailed notes taken

by the Deputy Clerk, which appear to provide a comprehensive record of the discussion. These notes provided a nearly verbatim running dialogue of what each person said during the closed session. We also reviewed various documents related to the police service consultation plan, including a draft timeline, staff report, minutes from other council meetings, and various correspondence.

- 9 To understand the background and context of this meeting, as well as the subsequent activities of the “working group”, we interviewed the Clerk/Chief Administrative Officer (CAO), the Deputy Clerk, the Mayor and the Reeve.
- 10 We received co-operation with our investigation.

Council procedures

- 11 The town’s procedure by-law¹ states that, subject to the exceptions set out in s. 239(2) of the *Municipal Act, 2001*, all meetings of council and committees shall be open to the public.
- 12 The procedure by-law also states that meetings shall not adjourn later than 11:00 p.m. Any outstanding agenda items shall be discussed at the next regular meeting unless council decides otherwise.
- 13 The by-law also provides for the creation of various types of committees by resolution of council, including ad hoc committees, advisory committees and task forces, which are defined in the by-law. The by-law states that council must approve terms of reference for a committee or task force.
- 14 “Working group” is not defined or referenced in the town’s procedure by-law.

Background regarding municipal policing

- 15 The Town of Deep River, like other municipalities in the province, considered whether to contract with the Ontario Provincial Police (OPP) for its municipal policing needs. Municipalities wishing to contract with the

¹ Town of Deep River, by-law 2014-53, *A By-law to govern and regulate the proceedings of the Council of the Town of Deep River*, online:
<<http://www.deepriver.ca/download.php?dl=YToyOntzOjI6ImIkjtzOjQ6IjExMDciO3M6Mzoia2V5IjtpOjI7fQ==>>.

OPP must go through the OPP's costing process to determine how much the OPP would charge the municipality for this service.

- 16 The town initially requested a costing from the OPP in 2012. However, in the fall of 2013, before the town's costing process was complete, the OPP announced a moratorium on costings to allow it to review and revise its system for billing municipalities.
- 17 After the OPP billing reform was completed, the town received its OPP costing proposal in early 2017. The matter was referred to the municipality's Protection & Safety Committee, which recommended that a comprehensive community engagement plan be developed to conduct public consultations and solicit citizens' opinions on the future of police services in Deep River.
- 18 Council accepted the committee's recommendation and a police service consultation plan was developed by staff in accordance with council's wishes. This draft consultation plan was discussed during the meetings on May 17 and 18 and was further revised by the working group following the meetings.

The May 17 and 18, 2017 meetings

- 19 On May 17, 2017, at 6:01 p.m., council for the Town of Deep River met in council chambers for a regular council meeting.
- 20 The town's usual practice is to discuss any closed session items first with the aim of commencing discussion of open session agenda items by 7:00 p.m. After the meeting was called to order, a councillor presented a motion to amend the agenda to move discussion of the police service consultation plan from closed session into open. That motion was defeated and this item remained on the closed session agenda.
- 21 According to the open meeting minutes, council then resolved to proceed in camera at 6:15 p.m.:

"to address a matter in accordance with Section 239(2) of the *Municipal Act, 2001* pertaining to:

(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is:

(a) the security of the property of the municipality or local board;

- (b) personal matters about an identifiable individual, including municipal or local board employees;
- (d) labour relations or employee negotiations;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

regarding: [...] and a **Police Service Consultation Plan.**" [emphasis added]

- 22 The agenda indicated that the following closed meeting exceptions applied to the police service consultation plan topic:
- (a) the security of the property of the municipality or local board;
 - (b) personal matters about an identifiable individual, including municipal or local board employees;
 - (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose.
- 23 Due to time limitations, council was unable to consider the police service consultation plan during closed session during the May 17, 2017 meeting. Instead, council resolved to discuss this matter the next day following a previously scheduled council information and training session.
- 24 Accordingly, council reconvened its closed session discussion on May 18, 2017, at 8:25 p.m.
- 25 During the May 18 closed session, council discussed many aspects of the consultation plan and related issues, including:
- practical matters such as wording, layout and tone of the consultation plan materials;
 - whether and how a provision of the former police chief's contract should be communicated to the public;
 - council's desire to involve current members of the Deep River Police Association within the broader consultation process;
 - whether the opening of a satellite office in Deep River should be made a condition of any agreement to contract with the OPP;
 - whether current civilian staff of the Deep River Police Service would be able to continue working at a satellite office;
 - general police issues, such as revenue from background checks, response times and service quality; and
 - the feasibility of the proposed draft consultation plan timeline.
- 26 After reviewing and considering the draft consultation plan, council determined that some aspects of the plan were in need of further revision,

such as the precise wording of survey questions, the presentation of information in a newsletter, and the release dates of various documents.

27 We were told that by this time, it had become clear to council that the workload involved in implementing the consultation plan would place a significant burden on town staff. Therefore, an informal “working group” was formed to allow members of council to contribute to this project in an essentially administrative role. This group would not have independent decision-making authority, but would instead report back to council.

28 In closed session, council passed several resolutions, including that:

- the police service consultation plan include a meeting with the Deep River Police Association;
- staff be directed that should the town enter into negotiations with the OPP, a satellite office be included as a condition of the agreement, with consideration to employ current civilian employees;
- the Mayor and two councillors be authorized to work with staff to finalize communication documents for release; and
- that council approve the draft consultation plan timeline.

29 Council rose from closed session at 10:40 p.m. and resolved that:

“two items in the Police Service Consultation Plan be presented in Open Session as matters arising from Closed Session, including the timeline of events for the Consultation Plan, and

THAT if the Town enters into negotiations with the OPP a Satellite Office will be included.”

30 The meeting was adjourned at 10:44 p.m.

Police service consultation plan “working group”

31 During the May 18, 2017 closed session, council voted to authorize the Mayor and two councillors to assist in the implementation of the police service consultation plan. The resolution did not refer to a “working group” as such; rather, it listed the three members by name. However, our review of the detailed notes taken by the Deputy Clerk indicates that members of council referred to this team as a working group at multiple points during the meeting.

32 We understand that over several weeks, members of the working group

met together, separately, and with staff to work on tasks related to the consultation plan such as editing documents. The group did not hold formal meetings, prepare agendas or record minutes. It had no decision-making authority beyond finalizing documents which had already been approved by council in draft form.

- 33 The three members of the working group provided a verbal report regarding the police service consultation plan to council during a special council meeting on May 30, 2017. Final versions of documents to be released as part of the consultation plan were provided to council during the session. Council passed a resolution to receive the verbal report and to post the documents presented to council on the town's website.
- 34 Working group volunteers were also involved in finalizing questions and information to be included in a newsletter and survey mailed to all households on June 1, 2017, and an online survey conducted between June 21, and June 28, 2017.
- 35 Members of the working group also attended public consultation sessions and were responsible for collecting feedback and responding to residents' inquiries. Following these consultation sessions, working group members assisted staff in preparing responses to questions and posting them on the town's website.
- 36 The "working group" is no longer active, as its sole purpose had been to assist in executing the consultation plan, which was completed by the end of June.

Analysis – closed meeting exceptions

- 37 While the resolution to proceed in camera did not specifically identify which closed meeting exceptions council intended to rely on to discuss the police service consultation plan, the meeting agenda cited the following exceptions:
 - (a) the security of the property of the municipality or local board;
 - (b) personal matters about an identifiable individual, including municipal or local board employees;
 - (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

Applicability of the "security of the municipal property" exception

- 38 Section 239(2)(a) of the *Municipal Act* allows a municipal council to discuss subject matters related to the security of the property of the

municipality. *The Municipal Act* does not define “security” for the purposes of this section. Although we are not bound by decisions of the Information and Privacy Commissioner (the IPC), our 2014 report on the City of Welland noted that the IPC has determined that “security of the property of the municipality” should be given its plain meaning, in that it applies to protecting property from physical loss or damage (like vandalism or theft), and the protection of public safety in relation to that property.² The IPC has clarified that the term can apply to both “corporeal” and “incorporeal” property, as long as it is owned by the municipality and the discussion is about preventing its loss or damage.³

- 39 During interviews, council and staff justified their reliance on this exception because the topic of discussion involved police services, which in their view implicated safety and security throughout the town, including municipal property. They also suggested that this exception applied because the discussion implicated potential uses of the current police headquarters, which are located in a building owned by the town.
- 40 Council’s in camera discussion on May 18 regarding the police service consultation plan did not deal with potential threats, loss or damage to municipal property. Accordingly, council was not entitled to rely on the “security of municipal property” closed meeting exception.

Applicability of the “personal matters” exception

- 41 Council also relied on the “personal matters” exception in section 239(2)(b) of the Act. This exception allows council to discuss personal matters about an identifiable individual, including municipal or local board employees, in closed session.
- 42 The IPC and our Office have determined that this exception does not apply to discussions about employees in their professional capacity. However, discussions about an individual in their official capacity can take on a more personal nature if the individual’s conduct is scrutinized.⁴
- 43 The IPC has established a two-part test to distinguish personal information from professional for the purposes of the open meeting rules:

² Order MO 2468-F (27 October 2009), online: <<http://decisions.ipc.on.ca/ipc-cipvp/orders/en/item/133522/index.do?r=AAAAAQAHU8tMjQ2OAE>> cited in Ombudsman of Ontario, *Investigation into multiple closed meetings by Council for the City of Welland from June 2012 to May 2014* (November 2014) at 30, online: <<https://www.ombudsman.on.ca/Resources/Reports/City-of-Welland.aspx>>.

³ Order MO-2683-I (30 December 2011), online: <<http://decisions.ipc.on.ca/ipc-cipvp/orders/en/item/133702/index.do?r=AAAAAQANT3JkZXIgTU8tMjY4MwE>>

⁴ IPC Order MO-2519 (29 April 2010).

1. In what context do the names of individuals appear? Is it in a personal or business context?
 2. Is there something about the particular information that, if disclosed, would reveal something of a personal nature about the individual?
- 44** We were told that council relied on the personal matters exception because a section of a former police chief's contract was discussed, and council felt this discussion was sensitive. We were also told that Deep River police service employees would be identifiable in the community even if they were not named.
- 45** However, our interviews and document review indicate that council did not discuss any named individuals during the closed session. Furthermore, employees were not discussed in a personal capacity: conduct, character, and job performance were not at issue. The discussion was primarily about police service delivery in general, and how to communicate with the public about this issue. Therefore, this discussion did not fit within the exception in section 239(2)(b) of the Act.

Applicability of the “solicitor-client privilege” exception

- 46** The committee also relied on the “advice subject to solicitor-client privilege” exception in section 239(2)(f) of the Act to discuss the police service consultation plan. Those we spoke with said the exception applied to aspects of the discussion related to a former police chief's contract.
- 47** This exception can only be relied on when 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.⁵
- 48** Although council had previously received and considered written advice from its solicitors related to the former police chief's contract, our review indicated that the substance of this advice was not discussed during the May 18 in camera meeting. Our Office has previously found that while

⁵ *Canada v. Solosky* [1980] 1 S.C.R. 821

council need not be receiving a new legal opinion for this exception to apply, the focus of the discussion must be on the “potential legal ramifications” of a particular course of action.⁶

- 49 Here, council’s discussion was limited to whether and how information about the contract should be disclosed to the public in the police service consultation plan materials. Council did not consider the substance of the legal advice it had previously received regarding the contract, and instead centered its discussion on planning public information forums and finalizing communication materials for residents.
- 50 The other topics discussed by council, such as logistical and administrative aspects of the plan, a satellite office, and general police matters, also did not fit within this exception. Accordingly, council was not entitled to rely on the “advice subject to solicitor-client privilege” closed meeting exception.

Applicability of the “labour relations” exception

- 51 Although it was not cited by the town, we also considered whether the discussion could have fit within the exception in section 239(2)(d) for labour relations or employee negotiations. The labour relations or employee negotiations exception generally applies to matters involving hiring, firing, and disciplining specific employees.⁷ My office has found that it does not apply to general discussions about an organizational review or restructuring in a municipality.⁸
- 52 During the May 18 closed session, the majority of the discussion focused on service levels and other administrative issues, as well as strategies for sharing information with local residents. Council did not discuss individual employees, their compensation or their roles. Accordingly, council would also not have been entitled to rely on this exception.

⁶ Ombudsman of Ontario, *Investigation into the Township of West Lincoln’s alleged violation of the Municipal Act, 2001 on June 15 and June 22, 2015* (November 2015) at 25, online: <<https://www.ombudsman.on.ca/Resources/Reports/Township-of-West-Lincoln.aspx>>

⁷ Ombudsman of Ontario, *Investigation into a complaint about a meeting held by the Board of Management for the Ridgeway Business Improvement Area* (April 2017), at para 37, online: <https://www.ombudsman.on.ca/Resources/Reports/Board-of-Management-for-the-Ridgeway-Business-Impr.aspx#_ftnref1>.

⁸ Ombudsman of Ontario, *Investigation into a complaint about a meeting held by Council for the City of Sault Ste. Marie on October 13, 2015* (August 2016) at para 24, online: <[https://www.ombudsman.on.ca/Resources/Reports/City-of-Sault-Ste-Marie-\(3\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-Sault-Ste-Marie-(3).aspx)>.

Analysis – working group

- 53 During the May 18 closed session, council resolved to appoint three councillors to assist staff in finalizing police service consultation plan documents. We received a complaint that these councillors – the police service consultation “working group” – met in violation of the *Municipal Act*’s closed meeting requirements.
- 54 According to those we spoke with and the documents we reviewed, the working group’s primary role was to finalize documents, such as press releases, newsletters, and correspondence with stakeholders. No terms of reference were drafted for the working group and none of those we interviewed considered it to be a committee of council. Rather, they felt that its primary role was to assist staff in an essentially administrative capacity. The group did not hold formal meetings but instead worked informally on the consultation plan documents at members’ convenience and in conjunction with staff. We were told that everything produced by the working group was brought back to council for final approval. Council reviewed the materials presented by the working group during its May 30, 2017 meeting.

Procedure by-law

- 55 The town’s procedure by-law does not include any definition of “working group.” It defines various types of committees which may be created, including:

“Ad Hoc Committee: any special purpose Committee created by resolution of Council with approved Terms of Reference.

Advisory Committee: any special purpose Committee created by Council with approved Terms of Reference to provide recommendations or advice to Council.

Task Force: an Advisory Committee with approved Terms of Reference, that is formed for a set period of time sufficient to make recommendations to the Council on a specific issue.”⁹

- 56 All of these bodies must consist of three members, be created by a resolution of council and be given terms of reference specifying their role and powers.¹⁰

⁹ By-law 2014-53 s. 1.01

¹⁰ *Supra* note 1.

57 Based on our interviews and document review, the working group:

- was created by resolution passed in closed session;
- was composed of three members of council;
- had no identified chair;
- had no formal terms of reference;
- had no decision-making authority and instead reported back to council;
- did not hold formal meetings;
- did not prepare agendas or record minutes; and
- carried out its activities individually and as a group.

58 Because the working group lacked terms of reference, it does not satisfy the committee criteria under the town's procedure by-law.

59 Furthermore, the working group was exercising an administrative function, rather than a decision-making role. In finalizing documents for public release that had already been approved by council in draft form, the working group was essentially performing the role of municipal staff. This does not come within the procedure by-law's definition of committee.

Municipal Act's *definition of "committee"*

60 Section 238(1) of the *Municipal Act* defines "committee" as "any advisory or other committee, subcommittee or similar entity of which at least 50 per cent of the members are also members of one or more councils or local boards." The working group was entirely made up of members of council.

61 However, in previous reports, our Office has determined that the role and function of a group must also be examined in order to determine whether it functions as a committee, sub-committee, or similar entity.¹¹ In several reports, our Office has found that when groups primarily exchange information or advance positions a municipality has already decided upon without laying the groundwork for decision-making by council, the body will not constitute a committee.¹²

62 In this case, the "working group" exercised an administrative function and

¹¹ Ombudsman of Ontario, *Investigation into whether Heads of Council in West Parry Sound have been holding illegal closed meetings including on February 19, 2015* (November 2015) at 33, online: <<https://www.ombudsman.on.ca/Resources/Reports/Heads-of-Council-in-West-Parry-Sound.aspx>>

¹² Ombudsman of Ontario, *Investigation into whether a Committee of Council for the City of Hamilton held an illegal meeting on July 25, 2014* (November 2014), online: <<https://www.ombudsman.on.ca/Resources/Reports/City-of-Hamilton-November-2014.aspx>>; Ombudsman of Ontario, *Letter to the City of Clarence-Rockland, regarding meetings in November and December, 2010* (February 2012), online: <<https://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Sent-to-Clarence-Rockland---1.pdf>>

did not advance council business or lay the groundwork to do so. Along with town staff, members of the working group assisted in implementing the consultation plan that had been previously approved by council and documented in detail by the Deputy Clerk during the May 18, 2017 council meeting.

- 63** Consequently, the informal police service consultation plan working group was not a committee of council under the *Municipal Act* or the town's procedure by-law and its meetings did not need to be open to the public.

Analysis – voting in closed session

- 64** Section 244 of the *Municipal Act* states that votes must be taken in open session, subject to the narrow exception outlined in section 239(6) of the Act, which permits voting in camera for procedural matters or for giving directions to staff. The town's procedure by-law mirrors these provisions.

- 65** During the May 17 and 18 closed sessions, council voted to pass five resolutions that related to the police service consultation plan, including that:

- the police service consultation plan include a meeting with the Deep River Police Association;
- staff be directed that should the town enter into negotiations with the OPP a satellite office be included, with consideration to employ current civilian employees;
- the Mayor and two councillors be authorized to work with staff to finalize communication documents for release; and
- council approve the draft consultation plan timeline.

- 66** Only one of these resolutions involved providing direction to staff. Another involved a procedural matter. The other three resolutions involved substantive decisions being taken by council.

- 67** While some of the resolutions could perhaps have been worded as a direction to the staff in charge of implementing the consultation plan, they were not phrased as such. For example, an in camera resolution to approve the draft timeline of the consultation plan, and a further resolution authorizing the Mayor and two councillors to work with staff to finalize communication documents for release, did not provide direction to staff or involve procedural matters.

- 68** Accordingly, council voted on resolutions in closed session that were not procedural or for providing direction to staff, violating the *Municipal Act*'s voting prohibition.

Analysis – resolution to proceed in camera

- 69 The resolution to proceed in closed session listed four *Municipal Act* exceptions applicable to some or all of the four topics council proposed to discuss in camera. Although the agenda made it clear which exceptions applied to individual topics, the resolution passed by council did not.
- 70 Section 239(4)(a) of the *Municipal Act* requires that the resolution to enter closed session disclose the “the general nature of the matter to be considered”. As noted by the Court of Appeal in *Farber v. Kingston (City)*, “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.”¹³
- 71 Another closed meeting investigator, Local Authority Services, has noted that the principles of openness and transparency are at the core of the open meeting provisions of the *Municipal Act*, and that these principles require maximizing the information available to the public.¹⁴
- 72 Before proceeding in camera, council did provide a brief description of each topic to be discussed, i.e. “Police Service Consultation Plan.” However, the resolution did not indicate which closed meeting exception from the *Municipal Act* applied to each topic. While the *Municipal Act* does not require council to specifically indicate which exception they intend to rely on for each matter discussed in camera, the town should adopt this as a best practice.

Opinion

- 73 Council for the Town of Deep River contravened the *Municipal Act, 2001* and the town’s procedure by-law on May 18, 2017, when it discussed the police service consultation plan in camera.
- 74 This topic did not fit within the “advice subject to solicitor-client privilege,” “security of the municipal property,” or “personal matters about an identifiable individual” closed meeting exceptions, or any other exception to the *Municipal Act*’s open meeting requirements.

¹³ 2007 ONCA 183 at para 21.

¹⁴ Local Authority Services, *Report to the Corporation of the Municipality of Kincardine Regarding Allegations of Improperly Closed Meetings of the Council for the Municipality of Kincardine* (July 2014) at 8, online: <<http://www.agavel.com/wp-content/uploads/2015/01/Kincardine-Investigation-Final-Report-July-2014.docx>>.

- 75 In addition, council contravened the Act and the town's procedure by-law by voting on several resolutions in camera that were neither procedural nor involved direction to staff.
- 76 However, the formation of the police service consultation plan "working group" and its subsequent activities did not contravene the Act or the town's procedure by-law. The working group did not fit the definition of a "committee" and was therefore not required to hold open meetings.

Recommendation

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

Recommendation 1

All members of council for the Town of Deep River 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 Deep River should ensure that no subject is discussed in closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 3

Council for the Town of Deep River should take care to cite only the closed meeting exceptions applicable to each topic of discussion in its resolutions to enter closed session.

Recommendation 4

Council for the Town of Deep River should ensure that its in-camera votes comply with sections 239(6) of the *Municipal Act, 2001* and its own procedure bylaw.

Recommendation 5

As a best practice, council for the Town of Deep River should specify which closed meeting exceptions apply to each topic of discussion in the resolution to enter closed session.

Report

- 78** The Town of Deep River was given the opportunity to review a preliminary version of this report and provide comments. No comments were received.
- 79** My report should be shared with council for the Town of Deep River and made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario