



## **Ombudsman Report**

**Investigation into a meeting held by the  
Township of Brudenell, Lyndoch and Raglan  
on October 8, 2019**

**Paul Dubé  
Ombudsman of Ontario  
October 2021**

## Complaints

- 1 My Office received a complaint about a special meeting held by council for the Township of Brudenell, Lyndoch and Raglan (the “Township”) on October 8, 2019.
- 2 The complaint alleged that council’s *in camera* discussion did not fall within any of the prescribed exceptions in the *Municipal Act, 2001*.

## Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001*<sup>1</sup> (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 anyone 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 Brudenell, Lyndoch and Raglan.
- 6 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.
- 7 Our Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman’s decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of the Ombudsman’s previous decisions can be found in the digest: [www.ombudsman.on.ca/digest](http://www.ombudsman.on.ca/digest).

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<sup>1</sup> SO 2001, c 25.

## Investigative process

- 8 We received a complaint about this meeting on November 11, 2020, and on November 27, 2020, we advised the Township of our intent to investigate the complaint.
- 9 We reviewed the Township's procedure by-law and relevant portions of the Act. We reviewed the meeting records, including the open meeting minutes, and the Deputy Clerk's notes from the closed session.
- 10 We also reviewed documents provided by the complainant and municipal staff, and spoke with current and former municipal staff and some members of council to obtain additional information about the meeting.
- 11 My Office was provided with an audio recording capturing approximately five minutes of the meeting. We were told that while the Township normally audio records the entirety of its closed sessions, a technical issue occurred with the recording device at this meeting and the first 25 minutes of the meeting were not recorded. Unfortunately, none of council's substantive discussion was captured by the recording.

## Procedure by-law

- 12 The Township's procedure by-law (No. 99-01) provides that regular meetings of council shall be held on the first Wednesday of the month at 7 p.m. The by-law also provides that a special meeting may be called by the head of council or by petition of a majority of members with 24 hours notice to members of council. The by-law does not state how notice of special meetings is to be provided to the public.
- 13 The by-law does not stipulate that all meetings of council and committees are to be open to the public except where the topic discussed fits within one of the exceptions under the Act. Nor does it state that council shall pass a resolution in open session to convene a closed meeting prior to proceeding *in camera*.
- 14 The Township has adopted the best practice of audio recording all closed sessions; however, this has not been formalized in the procedure by-law.

## October 8, 2019 special council meeting

- 15 My Office was not provided with a copy of an agenda for this meeting and was unable to verify whether any agenda was prepared.
- 16 The then-Clerk/Treasurer told my Office that notice of the meeting would have been provided to members of council by email and to the public by posting on the Township's website. Those we spoke with could not recall precisely how they received notice of the meeting or who called the meeting. However, all of those we spoke with agreed that the purpose of the special meeting was to provide council with an update on a matter that had been appealed to the Fire Safety Commission.
- 17 The minutes from the October 8 meeting indicate that it took place at the municipal offices at 4 p.m. with all five members of council in attendance, as well as three municipal staff. The minutes indicate that no members of the public were in attendance.
- 18 The minutes state that the meeting was called to order by the Mayor, and that a councillor declared a pecuniary conflict of interest in relation to the matter to be discussed *in camera*.
- 19 According to the minutes, council then passed a resolution to go into closed session "to discuss litigation or potential litigation."
- 20 The next entry in the minutes reflects that council passed a second resolution to rise from closed. The minutes indicate that a second councillor subsequently declared a pecuniary conflict of interest and that the Mayor reported "that one issue regarding litigation or potential litigation was discussed in closed session."
- 21 Council passed a resolution to adjourn the meeting at 4:30 p.m. This was the only portion of the meeting captured by the partial audio recording provided to my Office.
- 22 The then-Clerk/Treasurer confirmed that there were no formal closed session minutes taken during this meeting. However, we were provided with notes taken by the Deputy Clerk during the meeting. As no formal record of the closed meeting was recorded by the municipality, we sought information about the topics discussed through interviews with council members and staff.

- 23** Those we spoke with confirmed that no topics were discussed in open session during the October 8 special meeting. Unfortunately, some of those we interviewed had conflicting memories of the discussion that occurred in closed session.
- 24** We were told that the Township had been contacted by the Ontario Fire Safety Commission respecting an application received by the Commission involving the Township's Fire Department.
- 25** The Commission is an adjudicative tribunal administered by Tribunals Ontario. It is established under the *Fire Protection and Prevention Act, 1997*, with a mandate to hear appeals from certain decisions of the Ontario Fire Marshall or a municipal fire chief.<sup>2</sup>
- 26** Township staff told my Office that at the time of the meeting, the matter was ongoing and council was provided with a status update.
- 27** The Deputy Clerk's notes indicate that in addition to receiving an update from staff about the Fire Safety Commission appeal, council also discussed whether certain members were in a conflict of interest with respect to this topic and how they should proceed. We were told that this related to the matter that was the subject of the litigation.
- 28** Members of council and staff who spoke with my Office all agreed that the Fire Safety Commission appeal was discussed during the meeting. All those we spoke with agreed that no direction was provided to staff and that council did not take any votes respecting this matter.
- 29** However, one member of council recalled that a second topic involving a human resources matter was also discussed during this meeting and that council agreed on a course of action to be taken in order to address the issue. Staff and other members of council we interviewed did not recall this topic being discussed. Accordingly, on a balance of probabilities, I am unable to conclude that any other topics were discussed during this meeting.

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<sup>2</sup> S.O. 1997, c. 4.

## Analysis

### Applicability of the exception for litigation or potential litigation

- 30** The complaint received by my Office alleged that council's discussion did not fit within this exception.
- 31** The "litigation" exception allows a municipality or local board to proceed *in camera* to discuss "litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board." Although the Act does not define what constitutes "litigation or potential litigation," courts have determined this exception is reserved for circumstances where the subject matter discussed is ongoing litigation or involves a reasonable prospect of litigation.<sup>3</sup>
- 32** My Office has previously found that this exception permits council to discuss and prepare for pending litigation before an administrative tribunal in a closed meeting, as well as to receive and consider new information affecting an ongoing appeal.<sup>4</sup> It is not necessary that council also receive legal advice or discuss litigation strategy – council may simply receive information or ask questions about the status of the litigation.<sup>5</sup>
- 33** In this meeting, council received an update from staff about the status of an appeal filed with the Fire Safety Commission, an administrative tribunal. Accordingly, the discussion related to ongoing litigation and fit within this exception.

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<sup>3</sup> *RSJ Holdings Inc. v. London (City)*, 2005 CanLII 43895 (ON CA), <<https://canlii.ca/t/1m32m>> at para 22.

<sup>4</sup> *Norfolk (County of) (Re)*, 2016 ONOMBUD 18 (CanLII) <<https://canlii.ca/t/h2st5>>; Ombudsman Ontario, Letter to the City of Greater Sudbury (2013), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2013/city-of-greater-sudbury-en>>.

<sup>5</sup> *Richmond Hill (City of) (Re)*, 2021 ONOMBUD 8 (CanLII), <<https://canlii.ca/t/jf6b3>>.

## Procedural matters

### Procedure by-law

- 34 The Township's procedure by-law was enacted in 1999. In many important respects, the by-law fails to reflect the current procedural requirements of the *Municipal Act*. My Office previously encouraged the Township to update its procedure by-law in a letter issued in 2014.<sup>6</sup>
- 35 The Acting Clerk/Treasurer told my Office that in practice, the Township follows the open meeting requirements in the Act and that the Township intends to update its procedure by-law.
- 36 The by-law does not reference the closed meeting exceptions from the *Municipal Act*. In addition, the by-law does not include any provision requiring that, before proceeding *in camera*, council shall state by resolution the fact of the holding of the closed meeting and the general nature of the matter to be considered, as required by section 239(4) of the Act.
- 37 The Township should comprehensively review and amend its procedure by-law to accurately reflect the *Municipal Act's* current closed meeting provisions. Specifically, the Township should ensure that the amended by-law:
- Explicitly requires that public notice be provided for all regular and special council and committee meetings, in accordance with section 238(2.1) of the Act;
  - Accurately reproduces the closed meeting exceptions in section 239 of the Act;
  - Reflects section 239(4) of the Act, which requires a municipality to state by resolution the fact of the holding of a closed meeting and the general nature of the matter to be considered *in camera*; and
  - Prohibits the taking of a vote *in camera* unless the vote is for a procedural matter or for giving directions to staff, pursuant to sections 239(5)(6).

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<sup>6</sup> Ombudsman Ontario, Letter to the Township of Brudenell, Lyndoch and Raglan (2014), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2014/township-of-brudenell,-lyndoch-and-raglan>>.

## Minutes

- 38 Subsection 239(7) of the Act requires municipalities to record without note or comment all resolutions, decisions and other proceedings at a meeting of the body, whether it is closed to the public or not. Although the Act prohibits notes or comments from being included in the official record, this does not mean that the subjects discussed at a meeting should not be documented. Minutes should include a detailed description of the substantive and procedural matters discussed.
- 39 By failing to record and adopt minutes for the portion of the October 8, 2019 meeting held *in camera*, the Township contravened the Act.
- 40 My Office has found that the record of a closed meeting should include reference to:
- Where the meeting took place;
  - When the meeting started and adjourned;
  - Who chaired the meeting;
  - Who was in attendance, with specific reference to the clerk or other designated official responsible for recording the meeting;
  - Whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
  - **A detailed description of the substantive and procedural matters discussed, including reference to any documents considered;** and
  - Any motions, including who introduced the motion and seconders;
  - All votes taken, and all directions given.<sup>7</sup>
- 41 In this case, while the open session minutes do record the location, time, attendees and resolutions passed, no closed session minutes exist to provide a full description of the substantive matters discussed.

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<sup>7</sup> *Bonfield (Township of) (Re)*, 2015 ONOMBUD 35 (CanLII), <<https://canlii.ca/t/gtp7j>>.

## Notice

- 42 The Mayor and then-Clerk/Treasurer explained that to the best of their recollection, public notice of the special meeting was provided by posting information on the Township's website. However, my Office was not able to confirm precisely how and when public notice was provided. Nor does the Township's procedure by-law stipulate how notice is to be provided to the public about special meetings.
- 43 The Township's by-law should, but does not, provide for giving notice to the public of regular council meetings, special council meetings, or committee meetings.
- 44 Staff told my Office that in practice, advance notice of meetings is posted on the Township's website. The Township also maintains an online calendar that contains the dates of upcoming meetings.
- 45 It is in the Township's interest to ensure that it documents how public notice is provided of all meetings of council and committees, even where the only topic on the agenda is an *in camera* item.
- 46 My Office has previously noted that it is a best practice to post an agenda publicly in advance of a meeting, listing the matters to be discussed. This is consistent with the intent of the open meeting requirements and allows citizens to make an informed choice as to whether to attend a particular meeting.<sup>8</sup>

## Resolution to go *in camera*

- 47 Council's resolution passed to go *in camera* and recorded in the open session minutes did not satisfy the requirement under s. 239(4) of the Act to state by resolution the general nature of the matter to be considered at the closed meeting.

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<sup>8</sup> *Emo (Township of) (Re)*, 2008 ONOMBUD 2 (CanLII), <<https://canlii.ca/t/gttgg>>.

- 48 The Ontario Court of Appeal has found that the resolution to close a meeting should provide a general description of the issue to be discussed in a way that maximizes the information available to the public without undermining the reason for excluding the public.<sup>9</sup> My Office has also recommended that councils provide more substantive detail in resolutions authorizing closed sessions.<sup>10</sup>
- 49 In this case, the minutes for the October 8, 2019 special meeting only indicated that council resolved to discuss “litigation or potential litigation” *in camera*. The resolution to proceed into closed session did not include any information about council’s intended discussion other than referencing the “litigation” exception.
- 50 In future, the Township should ensure that its resolutions to proceed *in camera* 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.

## Audio recording

- 51 My Office strongly encourages municipalities to make audio or video recordings of council proceedings, in addition to recording meeting minutes. This provides the most clear and accessible record for closed meeting investigators to review, and assists in ensuring that officials do not stray from the legal requirements during closed meetings. Audio or video recordings can also enhance the public’s confidence in the municipality’s compliance with the open meeting rules.<sup>11</sup>
- 52 The Township is to be commended for adopting the best practice of audio recordings its meetings. I encourage the Township to formalize this practice by incorporating audio recording into its procedure by-law.
- 53 However, my Office was told that due to a technical error, most of the October 8, 2019 meeting was not audio recorded. As a result of this, and the failure to record closed session minutes, there was very little documentation of this meeting for my Office to review.

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<sup>9</sup> *Farber v. Kingston (City)*, 2007 ONCA 173 (CanLII), online.

<sup>10</sup> *Kirkland Lake (Town of) (Re)*, 2021 ONOMBUD 12 (CanLII), <<https://canlii.ca/t/jgvld>>.

<sup>11</sup> *Sables-Spanish Rivers (Township of) (Re)*, 2020 ONOMBUD 5 (CanLII), <<https://canlii.ca/t/j9vbx>>.

- 54 The Township should consider taking additional steps to ensure the integrity of any audio recordings it intends to rely on, such as testing the recording equipment prior to commencing the meeting, or ensuring that a backup recording is also made. That being said, an audio recording cannot act as a substitute for the requirement to record formal written minutes of open and closed portions of meetings.

## Opinion

- 55 Council for the Township of Brudenell, Lyndoch and Raglan did not contravene the *Municipal Act* when it discussed a Fire Safety Commission appeal *in camera* on October 8, 2019 under the exception for litigation or potential litigation.
- 56 While I could not confirm how and when the Township notified the public of this meeting, I found insufficient evidence to conclude that council contravened the Act by failing to provide notice.
- 57 However, council contravened the Act by failing to record minutes of the closed session held on that date.
- 58 Council also contravened the requirements of section 239(4)(a) of the Act by failing to state by resolution the general nature of the matters to be considered *in camera*.

## Recommendations

- 59 I make the following recommendations to assist the Township of Brudenell, Lyndoch and Raglan in fulfilling its obligations under the Act and enhancing the transparency of its meetings:

### **Recommendation 1**

**All members of council and committees for the Township should be vigilant in adhering to their individual and collective obligation to ensure that the municipality complies with its responsibilities under the *Municipal Act, 2001* and its procedure by-law.**

**Recommendation 2**

The Township should comprehensively review and amend its procedure by-law to accurately reflect the *Municipal Act's* current closed meeting provisions.

**Recommendation 3**

The Township should amend its by-law to provide for public notice of all regular and special meetings of council and committees.

**Recommendation 4**

When proceeding *in camera*, Council should pass a resolution that clearly sets out the fact of the closed meeting and the general nature of the matters to be discussed.

**Recommendation 5**

The Township should ensure that both open and closed session minutes are kept of all meetings of council, local boards, and committees of either of them.

**Recommendation 6**

The Township should ensure that meeting records are complete and accurately reflect all of the substantive and procedural items that were discussed.

**Recommendation 7**

The Township should take additional steps to ensure the integrity of its practice of audio recording open and closed sessions.

## Report

- 60 Council for the Township of Brudenell, Lyndoch and Raglan was given the opportunity to review a preliminary version of this report and provide comments to my Office. In light of the restrictions in place related to COVID-19, some adjustments were made to our normal preliminary review process and we thank council and staff for their co-operation and flexibility. The comments we received were considered in the preparation of this final report.

- 61 This report will be published on my Office's website, and should be made public by the Township as well. In accordance with s. 239.2(12) of the *Municipal Act, 2001*, council should pass a resolution stating how it intends to address this report.



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Paul Dubé  
Ombudsman of Ontario