



Ombudsman Report

**Investigation into a complaint about a meeting held by the
Municipality of Grey Highlands on October 7, 2020**

**Paul Dubé
Ontario Ombudsman
May 2021**

Complaint

- 1 My Office received a complaint about a closed meeting held by council for the Municipality of Grey Highlands (the “Municipality”) on October 7, 2020. The complainant alleged that council’s discussion did not fit within the cited exception to the open meeting rules.

Ombudsman jurisdiction

- 2 Under the *Municipal Act, 2001*,¹ (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 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.
- 4 The Ombudsman is the closed meeting investigator for the Municipality of Grey Highlands.
- 5 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.
- 6 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.

¹ SO 2001, c 25.

Investigative process

- 7 On October 28, 2020, we advised the Municipality of our intent to investigate this complaint.
- 8 My staff reviewed relevant portions of the Municipality's procedural by-law and the Act. We reviewed the meeting agenda, the minutes from the open and closed sessions of the meeting, a staff report, and a video recording of the relevant portion of the closed meeting.
- 9 We interviewed every member of council, the Chief Administrative Officer, the Director of Council and Legislative Services/Clerk, and the Director of Economic and Community Development.
- 10 My Office received full co-operation in this matter.

The October 7 meeting

- 11 Council met for a regular meeting at 1:00 p.m. on October 7, 2020. At 5:15 p.m., council resolved to proceed into closed session to discuss matters related to a joint venture pursuant to s.239(2)(k), regarding a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality.
- 12 Members of my Office's open meeting team reviewed detailed minutes and a video recording of the closed session.
- 13 The CAO and the Director of Economic and Community Development provided council with an update on negotiations between a third party and the Municipality to establish a joint venture partnership. Staff presented a report to council with recommendations for next steps to proceed with the joint venture negotiations. One of the recommendations was that council authorize staff to establish an Economic Development Corporation to further the negotiations.
- 14 Council asked questions about the nature of an Economic Development Corporation and its role in the joint venture negotiation. Council also discussed the strategy it would use to move forward with the joint venture negotiation, the need to finalize a joint venture agreement, sources of funding for the project, and the timing and content of a media release.

- 15 During interviews, council and staff provided my Office with information that was consistent with the minutes and video recording of the closed session.
- 16 Council returned to open session at 6:23 p.m. and reported back to the public on this matter. The report back to the public stated that “Council directed staff to proceed with the establishment of an Economic Development Corporation and to move forward with a media release announcing the collaborative project”.

Analysis

Applicability of the “negotiations” exception to the October 7 meeting

- 17 Section 239(2)(k) of the Act allows discussions about plans and instructions for negotiations to be closed to the public. The purpose of this exception is to allow a municipality to protect information that could undermine its bargaining position or give another party an unfair advantage over the municipality during an ongoing negotiation. In order for the exception to apply, the municipality must show that:
 - i. The *in camera* discussion was about positions, plans, procedures, criteria, or instructions;
 - ii. The positions, plans, procedures, criteria, or instructions are intended to be applied to negotiations;
 - iii. The negotiations are being carried on currently, or will be carried on in future; and
 - iv. The negotiations are being conducted by or on behalf of the municipality.²
- 18 In a recent report to the Town of Saugeen Shores, I considered the applicability of the “plans and instructions for negotiations” exception.³ In that case, council reviewed and discussed a report which outlined the status of ongoing negotiations about a leasing agreement. Staff sought direction on the next steps of the negotiation, which council provided. I found that this discussion fit within the “plans and instructions for negotiations” exception.
- 19 In this case, council discussed plans to proceed with negotiations to enter into a joint venture with a third party. Staff advised council that in order to proceed with the negotiations, the next step would be to establish an Economic Development Corporation.

² *St. Catharines (City of) (Re)*, 2019 ONOMBUD 1 (CanLII), at paras 30-31, online, <<https://canlii.ca/t/hxrk5>>.

³ *Saugeen Shores (Town of) (Re)*, 2020 ONOMBUD 3 (CanLII), <<https://canlii.ca/t/j93c3>>.

- 20** These negotiations were ongoing at the time of the October 7 meeting and conducted on behalf of the Municipality. Staff were looking to council for guidance on the next steps in these negotiations. At the conclusion of the closed session, council provided staff with direction on a series of matters related to the negotiations.
- 21** Accordingly, this discussion comes within the closed meeting exception for plans and instructions for negotiations.

Meeting records

- 22** In this case, the minutes and video recording provided a detailed and reliable account of council's *in camera* discussion. I want to commend the Municipality for creating a complete record of the closed meeting.
- 23** I understand that it is not the Municipality's normal practice to video record closed meetings, but that it happened to have a recording of this particular meeting. I would like to note that the video recording greatly assisted my Office during the investigation.
- 24** Audio or video recordings can assist in any future investigations and ultimately enhance the public's confidence in the Municipality's compliance with the open meeting rules. We currently know of 25 municipalities that have implemented this important practice.⁴
- 25** In response to a preliminary version of this report, staff informed my Office that the Municipality will be recording all closed meetings of council going forward. I would like to commend the Municipality for adopting this exemplary practice.

Opinion

- 26** Council for the Municipality of Grey Highlands did not contravene the *Municipal Act, 2001*, when it proceeded *in camera* on October 7, 2020, to discuss a joint venture. This discussion was permissible under the Act's closed meeting exception for plans and instructions for negotiations in section 239(2)(k).

⁴ Ontario Ombudsman, 2019-2020 Annual Report p.44 online:
<<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/annual-reports/2019-2020-annual-report>>.

Report

- 27 Council for the Municipality of Grey Highlands was given the opportunity to review a preliminary version of this report and provide comments to our Office. Any comments received were considered in the preparation of this final report.
- 28 The Clerk indicated that my report would be made available to the public no later than council's next meeting.



Paul Dubé
Ombudsman of Ontario