



Ombudsman Report

**Investigation into a complaint about meetings held by the
City of Brockville on October 13 and October 18, 2021**

**Paul Dubé
Ombudsman of Ontario
August 2022**

Complaint

- 1 My Office received a complaint about closed meetings held by council for the City of Brockville (the “City”) on October 13 and October 18, 2021.
- 2 The complaint alleged that council’s *in camera* discussion during the meeting on October 13, 2021 did not fall within any of the prescribed exceptions in the *Municipal Act, 2001*.
- 3 The complaint further alleged that adequate public notice was not provided for council’s meetings on October 13 and October 18, 2021.

Ombudsman jurisdiction

- 4 Under the *Municipal Act, 2001*¹ (the “Act”), all meetings of a council, local board, and committees of either must be open to the public unless they fall within prescribed exceptions.
- 5 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 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.
- 6 The Ombudsman is the closed meeting investigator for the City of Brockville.
- 7 In investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the municipality’s governing procedures have been observed.
- 8 Since 2008, my Office has investigated hundreds of closed meetings in municipalities throughout Ontario. 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. 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

- 9 On November 30, 2021, my Office advised the City of our intent to investigate the council meeting held on October 18, 2021. On December 8, 2021, we further advised the City of our intent to investigate the council meeting held on October 13, 2021.
- 10 Members of my Office's open meeting team reviewed relevant portions of the City's procedure by-law, as well as the Act. We reviewed the meeting records, including the agenda and minutes. We also reviewed evidence of public notices for each meeting provided by the City.
- 11 In the course of the investigation, we interviewed seven (of nine) members of council² and the City Clerk/Acting City Manager.
- 12 My Office received full co-operation in this matter.

October 13, 2021 council meeting

- 13 Council met virtually for a special meeting on October 13, 2021 at 4:30 p.m. Council immediately passed a resolution to move into closed session, citing the exceptions for personal matters about an identifiable individual and for litigation or potential litigation. The resolution did not further describe the topic of discussion.
- 14 My Office was told that during the closed meeting, some council members expressed concerns about an employee's performance, and council discussed an individual's conduct.

Analysis

Applicability of the exception for litigation or potential litigation

- 15 Council cited the exception for litigation or potential litigation under paragraph 239(2)(e) of the Act when it proceeded *in camera* on October 13, 2021.

² Two members of council were not interviewed because they were appointed to their seats after the meetings in question took place.

- 16 The exception applies when there is a reasonable prospect of litigation.³ It is not enough for members of council to base a prospect of litigation on personal experience.⁴ Mere speculation or suspicion about potential litigation is also not sufficient to make the discussion fit within the exception.⁵
- 17 Our interviews confirmed that there was no ongoing litigation at the time of the October 13, 2021 meeting. Any concern about litigation was speculative, such that the discussion did not relate to actual potential or ongoing litigation.
- 18 Accordingly, council's discussion on October 13, 2021, did not fit within the exception for litigation or potential litigation.

Applicability of the exception for personal matters about an identifiable individual

- 19 Council also cited the exception for personal matters about an identifiable individual under paragraph 239(2)(b) of the Act to proceed into closed session on October 13, 2021.
- 20 In 2021, my Office reviewed a meeting held by council for the Town of Kirkland Lake where council discussed relationships between council members and staff. This included discussion about the conduct of two members of council toward municipal staff, and an employee's job performance. I found that both the scrutiny of an individual's conduct and the discussion about an individual's job performance fit within the exception for personal matters.⁶
- 21 In this case, council discussed an employee's performance and expressed opinions about that employee's conduct.
- 22 Accordingly, council's *in camera* discussion on October 13, 2021 fit within the exception for personal matters about an identifiable individual.

³ Letter from Ombudsman of Ontario to City of Timmins (9 May 2017), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2017/city-of-timmins-2>>.

⁴ *Carleton Place (Town of) (Re)*, 2017 ONOMBUD 18 at para 30, online: <<https://canlii.ca/t/hqsph>>.

⁵ *Ibid* at para 32.

⁶ *Kirkland Lake (Town of) (Re)*, 2021 ONOMBUD 12 at paras 29 – 32, online: <<https://canlii.ca/t/jgvld>>.

Resolution to move *in camera*

- 23 Before moving into closed session, a municipality must pass a resolution that states the general nature of the matter to be considered.⁷ The resolution to go into a closed 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.⁸
- 24 In a 2016 report to the City of Brockville, I held that a committee of the City contravened the requirement to provide a general description of its *in camera* discussion when its resolution merely referred to an exception contained in the Act.⁹ I indicated that the committee should pass a resolution before moving *in camera* that clearly sets out the fact of the holding of the closed meeting and the general nature of the matters to be discussed.
- 25 For council's closed meeting on October 13, 2021, council passed a resolution to proceed *in camera* that cited the closed meeting exceptions it relied on to exclude the public. However, the resolution failed to provide any further description of council's intended discussion as required by subsection 239(4) of the *Municipal Act*. While it is a best practice to include the exception to be relied upon to close a meeting, the exception itself is not the "general nature of the matter to be considered." Generally, stating only the exception does not satisfy the requirements of the open meeting rules.
- 26 The City 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 them.

Public notice

- 27 The complaint also raised concerns relating to public notice for the meetings on October 13 and October 18, 2021.
- 28 The October 13, 2021 meeting was a special meeting of council, running from 4:30 p.m. to 6:54 p.m. The Clerk provided us with evidence that the agenda was posted to the City's website, as notice for the meeting, at 9:29 a.m. on Monday, October 11, 2021, more than 48 hours before the meeting. The agenda included the mode (virtual), date, and time of the meeting. A

⁷ *Municipal Act*, *supra* note 1, s 239(4).

⁸ *Farber v Kingston (City)*, 2007 ONCA 173 (CanLII), online: <<https://canlii.ca/t/1qtz/>>.

⁹ *Brockville (City of)*, 2016 ONOMBUD 12 at para 53, online: <<https://canlii.ca/t/h2ssr/>>.

“video” tab is made visible shortly before every meeting and allows the public to access a livestream of the meeting.

- 29 The October 18, 2021 meeting was a special meeting of council, running from 6:00 p.m. to 7:55 p.m. The Clerk provided us with evidence that the agenda was posted to the City’s website as notice of the meeting at 11:01 a.m. on Saturday, October 16, 2021, more than 48 hours before the meeting. The agenda included the mode (virtual), date, and time of the meeting.
- 30 Section 4 of the City’s procedure by-law provides that regular meetings of council are held on the second and fourth Tuesday of each month at 7:00 p.m., unless council directs otherwise by resolution, in which case notice must be posted in the municipal offices advising of the time and place.
- 31 In the case of special meetings of council, section 7 of the City’s procedure by-law provides that members should receive 48 hours’ notice. The procedure by-law does not, however, contemplate any public notice for special meetings of council.
- 32 Our interviews revealed that most members of council were not familiar with the City’s public notice requirements for special meetings. Some members believed the City is required to provide 48 hours’ notice to the public, while others believed there is an exception to the notice requirement for special meetings.
- 33 The Clerk told us she follows the practice of posting agendas to the City’s website as notice of special council meetings a minimum of 48 hours before each meeting.

Analysis

- 34 Subsection 238(2.1) of the Act requires that the City’s procedure by-law provide for public notice of meetings. This requirement applies to *all* meetings of council, committees, or local boards, including special meetings.
- 35 The public must have the opportunity to observe meetings in process. Where no notice about date, time, and location is provided in advance, the meeting is effectively closed. The City’s procedure by-law should set out the

requirement to provide public notice for all meetings that includes the date, time, and location of each meeting.¹⁰

- 36 My Office's investigation revealed that the City's procedure by-law does not state that notice is to be provided to the public for special council meetings. Although the Clerk told my Office that the City has a consistent practice of posting notice, the procedure by-law should provide for public notice of special meetings that specifies the time, place, and purpose of the meeting.
- 37 In a 2016 report to the City of Brockville, I noted that the City's procedure by-law should explicitly require that public notice be provided for special council meetings.¹¹ Yet, since 2016, the City has failed to update its procedure by-law. I take this opportunity to again urge council to amend its procedure by-law to require public notice for special meetings, as required by the Act.

Opinion

- 38 Council for the City of Brockville did not contravene the *Municipal Act, 2001* on October 13, 2021 when it went *in camera* to discuss the performance and conduct of a staff member. The discussion fell within the closed meeting exception for personal matters about an identifiable individual, provided at paragraph 239(2)(b) of the Act.
- 39 Council for the City of Brockville contravened subsection 239(4) of the *Municipal Act, 2001* on October 13, 2021, when it failed to state by resolution the general nature of the matters to be considered *in camera*.
- 40 Council for the City of Brockville contravened subsection 238(2.1) of the *Municipal Act, 2001* by failing to provide for public notice about the calling, place and proceedings of special meetings in its procedure by-law.

Recommendations

- 41 I make the following recommendations to assist the City of Brockville in fulfilling its obligations under the *Municipal Act, 2001* and enhancing the transparency of its meetings.

¹⁰ *Letter from the Ombudsman to the City of Hamilton* (5 January 2022) at p 4, online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2022/city-of-hamilton>>.

¹¹ *Brockville (City of)*, 2016 ONOMBUD 12 at para 17, online: <<https://canlii.ca/t/h2ssr>>.

Recommendation 1

All members of council for the City of Brockville 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

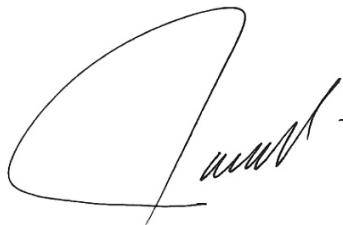
The City of Brockville's procedure by-law should be amended to provide for public notice of special meetings.

Recommendation 3

Council for the City of Brockville should ensure that 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.

Report

- 42 Council for the City of Brockville was given the opportunity to review a preliminary version of this report and provide comments to my Office. Due to restrictions in place related to COVID-19, some adjustments were made to our normal preliminary review process and we thank council for its co-operation and flexibility. No comments were received.
- 43 This report will be published on my Office's website, and should be made public by the City of Brockville as well. In accordance with subsection 239.2(12) of the *Municipal Act*, council is required to pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario