



## **Ombudsman Report**

**Investigation into complaints  
about a closed meeting held  
by the County of Haliburton  
on April 27, 2023**

**Paul Dubé  
Ombudsman of Ontario**

**December 2023**

## Complaint

- 1 My Office received complaints that council for the County of Haliburton (the “County”) held a meeting on April 27, 2023 that did not fit within the closed meeting exceptions in the *Municipal Act, 2001*<sup>1</sup> (the “Act”). The complaints alleged that council discussed the decision of the Haliburton Highlands Health Services (the “HHHS”) to close a hospital emergency room in the Township of Minden Hills while *in camera*, contrary to the open meeting rules.

## Ombudsman jurisdiction

- 2 Under the *Municipal 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 County of Haliburton.
- 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](http://www.ombudsman.on.ca/digest).

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

## Investigative process

- 7 On June 13, 2023, we advised the County of our intent to investigate this complaint.
- 8 We reviewed relevant portions of the County's by-laws, the meeting records, and the Act. We interviewed members of council present during the meeting, the County's Clerk, and the County's Chief Paramedic. We also conducted an interview with the Chair of the HHHS Board of Directors.
- 9 My Office received full co-operation in this matter.

## Background

- 10 On April 20, 2023, the HHHS announced its decision to permanently close the emergency room of a hospital located in the Township of Minden Hills on June 1, 2023. The announcement was met with surprise, fear, and resistance from community members. Many contacted their local councillors to complain about the decision and its imminent effect on the safety and well-being of residents.
- 11 The Clerk told my Office that in response to the announcement, council called a special meeting for April 27. The County invited the HHHS Chief Executive Officer and Board Chair to attend the meeting. The purpose of the meeting was to gather more information from the HHHS representatives and to attempt to reverse or delay the closure. We were told that an *in camera* discussion was planned because the County hoped that the HHHS representatives would be more willing to have a full and frank discussion with council in closed session than in public.

## April 27, 2023 special meeting

- 12 On April 27, 2023, council met in person in council chambers. All of council was in attendance, except Councillor Walt McKechnie. The County's Clerk, the Director of Economic Development and Tourism, and the Chief Paramedic attended the meeting. According to the meeting minutes, council moved into closed session to discuss the "Haliburton Highlands Health Services Reorganization" under the exceptions found in sections 239(2)(g) and 239(2)(i) of the Act. Section 239(2)(g) allows a municipality to discuss a matter in respect of which a council, board, committee, or other body may hold a closed meeting under another Act in closed session. Section 239(2)(i) contains the exception for information supplied in confidence to the municipality by a third party.

- 13 The HHHS Board Chair and the CEO also attended the closed session.
- 14 According to the closed session minutes and those we interviewed, the HHHS representatives were provided an opportunity to speak to council about the decision to close the emergency room. The Board Chair told my Office that he explained the HHHS' rationale for its decision. He shared information about staffing levels, labour relations, and bed capacity at the HHHS hospitals in the County. The HHHS representatives also provided council with a plan to ensure that patients could access emergency services at an alternative hospital following the closure.
- 15 After their remarks concluded, several council members asked the HHHS representatives questions and expressed opinions about the information provided. We were told that, in general, council members expressed their disappointment and disagreement with HHHS' decision and the lack of consultation with the County prior to the announcement. Council members questioned the plan to accommodate patients at a second hospital located in the County. Council members requested that the HHHS delay or reverse its decision.
- 16 The HHHS representatives left the meeting and council continued the *in camera* discussion. The Chief Paramedic provided information to council and answered questions regarding the potential effects of the decision to close the emergency room on the County's ambulance service levels. The Paramedic Chief also shared information about preliminary outreach he had conducted with representatives from the Ministry of Health for additional funding to respond to the changes.
- 17 The discussion turned to possible legal action that the County could seek to prevent or delay the emergency room closure. A council member shared legal advice he had received from a lawyer and information about the potential costs of pursuing legal action. Council came to a consensus that it would not take legal steps at that time.
- 18 Council subsequently discussed public statements the County would make on the matter. Council instructed staff to prepare a press release.
- 19 After returning to open session, council adjourned the meeting.

## Analysis

### Applicability of the exception for matters permissible under another Act

- 20 Council cited section 239(2)(g), matters permissible under another Act, when it moved into closed session on April 27, 2023 to discuss the emergency room closure.
- 21 This exception has limited application because very few pieces of legislation contain exceptions that allow a municipality to hold closed meetings.
- 22 In *London (City) v. RSJ Holdings Inc.*<sup>2</sup>, the Supreme Court of Canada considered whether this exception applied to the closure of a meeting under the *Planning Act* to consider an interim control by-law. The court concluded that the city's obligation to give notice and hold a public meeting under the *Municipal Act* was distinct from the provision in the *Planning Act* permitting interim control by-laws to be passed without a hearing or public participation, and that the meeting should have been conducted openly. The court did offer an example to illustrate when this exception might be applied, observing that under the *Emergency Management and Civil Protection Act*, certain municipal meetings are required to be closed for security reasons.
- 23 Members of council and staff we spoke to could not explain why this exception had been cited. The Clerk shared that the County may have assumed that legislation exists that permits the HHHS Board to hold closed meetings, which also applied to council. However, the County could not cite the legislation that it believed permitted the closed meeting.
- 24 As a best practice to promote transparency and avoid confusion, when the exception in section 239(2)(g) is used to close a meeting to the public, the resolution to move into closed session should include a clear reference to the relevant legislation and provision that permits the meeting to be closed.
- 25 My review did not identify any legislation that permits council to discuss the emergency room closure in closed session. Accordingly, council was not entitled to rely on this exception for its *in camera* discussion on April 27.

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<sup>2</sup> [2007] SCJ No 29.

## Applicability of the exception for information supplied in confidence by a third party

- 26** Council cited the “information supplied in confidence by a third party” exception found in section 239(2)(i) of the Act in the resolution to proceed *in camera* on April 27.
- 27** The purpose of this exception is to protect confidential information about third parties which has been provided to the municipality.<sup>3</sup> In order for the exception to apply, the information must fall into one of the listed types (for example, trade secrets or labour relations); supplied confidentially, whether explicitly or implicitly, to the municipality by a third party; and, if disclosed, would reasonably be expected to cause harm to the third party.<sup>4</sup>
- 28** When the meeting on April 27 was scheduled, staff reached out to the HHHS to invite representatives to attend and speak to council. The County informed the HHHS that the discussion would be held in closed session, but did not ask whether the HHHS would share information it considered confidential.
- 29** Council members told my Office that they believed the HHHS, as a third party, shared confidential information with council during the closed meeting, notably, labour relations information related to hospital staffing. However, the HHHS Board Chair confirmed that none of the information supplied to council by the HHHS representatives during the closed session was considered confidential information by the HHHS.
- 30** We were told that the information relayed to council by the Chief Paramedic regarding possible funding from the Ministry of Health was not supplied in confidence. The information, which was about steps the Chief Paramedic had taken to initiate contact with representatives in the Ministry of Health, did not fit within one of the listed information types in section 239(2)(i).
- 31** Accordingly, the exception does not apply to the *in camera* discussion.
- 32** My Office has previously stated that, as a best practice, municipalities should document the rationale if a third party requests a delegation take place in closed session.<sup>5</sup> When relying on section 239(2)(i) to hold a closed session discussion, it is incumbent upon a municipality to ensure that the discussion satisfies each element of the exception. In advance of the meeting, as a best

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<sup>3</sup> *Greater Sudbury (City of) (Re)*, 2021 ONOMBUD 10, online: <<https://canlii.ca/t/jfvt3>>.

<sup>4</sup> *Municipal Act, 2001*, SO 2001, c 25 s 239(2)(i).

<sup>5</sup> Letter from the Ombudsman to the Town of South Bruce Peninsula (October 14, 2021), online: <<https://www.ombudsman.on.ca/resources/reports,-cases-and-submissions/municipal-meetings/2021/town-of-south-bruce-peninsula>>.

practice, a municipality should consult the third party regarding the confidentiality of information to be discussed and the potential harm of disclosure. The exception does not apply unless all parts of the exception are met.

## Applicability of the exception for advice subject to solicitor-client privilege

- 33** Council did not cite the exception for advice subject to solicitor-client privilege found in s. 239(2)(f) of the Act when it moved *in camera* on April 27. However, during our review, my Office considered whether portions of council's discussion fit within this exception.
- 34** This exception includes communication between a municipality and its solicitor in seeking or receiving legal advice intended to be confidential.<sup>6</sup> The exception ensures that municipal officials can speak freely about legal advice without fear of disclosure.<sup>7</sup> The Supreme Court of Canada has stated that solicitor-client privilege applies when the following conditions are met: (1) there is a communication between a lawyer and a client; (2) which entails the seeking or giving of legal advice; and (3) which is considered to be confidential by the parties.<sup>8</sup> The Supreme Court has determined that the privilege attaches as soon as the potential client takes the first step, even before a formal retainer is established. Protected communications may include matters of an administrative nature such as financial means or the actual nature of the legal problem.<sup>9</sup>
- 35** My Office has found that the exception for advice subject to solicitor-client privilege can apply to circumstances where another person conveys communications or advice from a solicitor to a client, such as a staff member or council member.
- 36** A portion of council's *in camera* discussion on April 27 involved legal advice that had been obtained by a council member from a lawyer regarding potential legal action against the HHHS by the County. The councillor contacted the lawyer in his capacity as a member of council, although he was not directed by council to do so. During the meeting, the council member shared details of his conversation with the lawyer, such as the legal advice he received and an estimate of costs associated with pursuing a specific course of legal action. Council discussed this information and used it as the basis for a consensus not to pursue legal action at that time.

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<sup>6</sup> *Timmins (City of) (Re)*, 2017 ONOMBUD 4, at para 28, online: <<https://canlii.ca/t/h4rwt>>.

<sup>7</sup> *Hamilton (City of) (Re)*, 2019 ONOMBUD 3, at para 33, online: <<https://canlii.ca/t/j2b49>>.

<sup>8</sup> *Solosky v. The Queen*, 1980 1 SCR 821.

<sup>9</sup> *Descôteaux v. Mierzwinski*, [1982] 1 SCR 860 at page 893.

- 37 Therefore, the portions of the *in camera* discussion about legal advice sit within the exception for advice subject to solicitor client privilege.
- 38 In some cases, topics that on their own do not fit within a closed meeting exception may be discussed *in camera*. In *St. Catharines v. IPCO*, the Divisional Court found that it may be unrealistic to expect municipal councils to split up or parse their discussions where part of the discussion fits into an exception to the open meeting rules, but other parts do not –<sup>10</sup> in other words, where moving into and out of closed session would “detract from free, open and uninterrupted discussion”.<sup>11</sup> However, if the topics can be separated, council is expected to return to open session for those portions of the discussion that do not fit within an open meeting exception.
- 39 The *St. Catharines* case can be distinguished from the case at hand. The legal advice conveyed to council and the ensuing discussion were distinct and separate from the earlier discussion involving the HHHS representatives. Council could have discussed the closure of the emergency room with the HHHS representatives in open session before proceeding into closed session to discuss the legal advice.

## Opinion

- 40 Council for the County of Haliburton was not permitted to discuss the decision of the Haliburton Highlands Health Services to close a local emergency room in the Township of Minden Hills while *in camera* on April 27, 2023 under the exceptions in the *Municipal Act, 2001* for matters under another Act or information supplied in confidence by a third party. However, a portion of the discussion fit within the exception for advice subject to solicitor-client privilege.
- 41 I wish to acknowledge that at the time of the April 27, 2023 meeting, the County was dealing with a community in crisis. The decision to close a local emergency room was unexpected and sparked outrage and fear in residents. Council members told my Office that as elected officials, they believed the best way to address the situation was to meet with HHHS representatives in order to reverse or delay the decision. The fact that the closure was imminent added to council’s desire to act quickly. However, the open meeting rules continue to apply, even in times of crisis. The open meeting requirements set out in s. 239 of the *Municipal Act* permit the public to observe the political process. I encourage the County to continue to strive to carry out their business in as transparent and open a manner as possible during all council meetings.

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<sup>10</sup> *St. Catharines (City) v. IPCO*, 2011 ONSC 2346.

<sup>11</sup> *Ibid* at para 42.



## Recommendations

- 42 I make the following recommendations to assist the County of Haliburton in fulfilling its obligations under the Act and enhancing the transparency of its meetings:

### **Recommendation 1**

**All members of council for the County of Haliburton should be vigilant in adhering to their individual and collective obligation to ensure that the County complies with its responsibilities under the *Municipal Act, 2001*.**

### **Recommendation 2**

**The County of Haliburton 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**

**As a best practice, when council for the County of Haliburton relies on the exception in section 239(2)(g) to close a meeting to the public, the resolution to move into closed session should include the relevant legislation and provision that permits the meeting to be closed.**

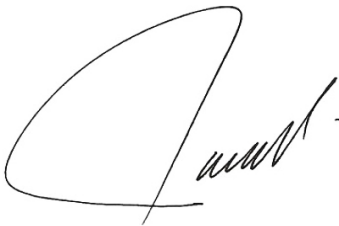
### **Recommendation 4**

**When relying on the section in section 239(2)(i) to discuss information supplied in confidence by a third party in a closed meeting, the County of Haliburton should adopt the best practice of consulting the third party in advance to ensure that all elements of the exception are met.**

## Report

- 43 The County of Haliburton was given the opportunity to review a preliminary version of this report and provide comments. My Office received comments from council.
- 44 In its response, council accepted my findings and provided additional information regarding the circumstances surrounding the closed meeting on April 27, 2023. Council reiterated that the intent of the closed session was to obtain fulsome answers from the HHHS regarding the decision to close the emergency room, which the County believed would include confidential information. In its response, council questioned why the HHHS representatives agreed to speak to council *in camera* if the information they were prepared to share was not confidential.

- 45 I would like to remind the County that, under the *Municipal Act*, it is the County's responsibility to adhere to the open meeting rules. The decision to close a meeting to the public rests with council. I appreciate that the hope of council was that they would receive confidential information during the closed session. However, the County did not take steps to verify that this would be this case, and council closed the meeting on the basis of a hope or expectation that proved to be incorrect. My recommendations include a best practice that when a meeting will be closed under the exception for "information supplied in confidence", the County consult with third party providing the information, ahead of the closed meeting, to ensure that the information to be shared fits within the exception.
- 46 My report should be shared with council for the County of Haliburton. My report should be made available to the public as soon as possible, and no later than the next council meeting.



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**Paul Dubé**  
Ombudsman of Ontario

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