



Ombudsman Report

**Investigation into meetings held by the
Town of Collingwood on February 6 and June 11, 2018**

**Paul Dubé
Ombudsman of Ontario
January 2022**

Complaints

- 1 My Office received a complaint about two closed meetings held by council for the Town of Collingwood (the “Town”) on February 26, 2018, and June 11, 2018.
- 2 These meetings were held leading up to a judicial inquiry into the Town’s 2012 partial sale of a municipal hydro utility. We received this complaint in March 2021 after the judicial inquiry was complete.
- 3 The complainant alleged that the *in camera* discussions about the judicial inquiry did not fall within any of the prescribed exceptions in the *Municipal Act, 2001*.

Ombudsman jurisdiction

- 4 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.
- 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. 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 Town of Collingwood.
- 7 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.
- 8 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

¹ SO 2001, c 25.

procedures. Summaries of the Ombudsman’s previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Investigative process

- 9 On July 6, 2021, we advised the Town of our intent to investigate the complaint.
- 10 We reviewed the Town’s procedural by-law and relevant portions of the Act.
- 11 We reviewed the meeting records for both meetings, including the agenda, and open and closed session minutes. The Town did not make audio or video recordings of its closed sessions at the time, but has since adopted the best practice of audio recording all closed sessions, as well as video recording and broadcasting live streams of council meetings.
- 12 We also spoke with the complainant, the Mayor, and municipal staff to obtain additional information about the closed sessions.
- 13 My Office received full co-operation in this matter.

Background

- 14 Section 274 of the *Municipal Act* enables municipalities to request by resolution that a Superior Court judge inquire into a supposed breach of trust by a council member or employee, matters connected with good government, or the conduct of municipal business. The judge exercises powers under section 33 of the *Public Inquiries Act*.² The municipality is responsible for paying for the costs of inquiry counsel, inquiry staff, and any other incidental costs.³
- 15 During its meeting on February 26, 2018, council voted to establish a judicial inquiry (the “inquiry”) into the sale of a 50% stake in the Town’s municipal power utility to a private corporation and the use of resulting proceeds for recreational facilities.
- 16 The inquiry focused on events from the 2010-2014 term of council and the relationships between the former Mayor, her brother (a lobbyist and

² *Ibid*, s 274(2).

³ *Ibid*, s 274(6).

consultant), the former Deputy Mayor, and a municipal employee. The former Mayor was still in office during the February 26 and June 11, 2018 meetings.

- 17 The inquiry held substantive hearings from April to December 2019, and made its final report on November 2, 2020.⁴ Although judicial inquiries are non-adversarial processes and do not determine fault or liability, the inquiry made adverse findings against those involved in the partial sale of the Town's municipal power utility and subsequent purchase of recreation facilities.
- 18 The Town has since retained a law firm to provide advice about potential next steps.⁵ Although the meetings referred to in this complaint and the inquiry itself are over, the controversy leading to the inquiry remains an active issue in the Town.

February 26, 2018 council meeting

- 19 The agenda for the February 26 council meeting indicated that council would hold an *in camera* discussion under the open meeting exception for solicitor-client privilege at s. 239(2)(f) of the Act.
- 20 The open meeting began at 5:00 p.m. in council chambers, and council subsequently passed a resolution to proceed into closed session under the exception for solicitor-client privilege.
- 21 The agenda and resolution posted online described the closed meeting discussions as including a "Hydro Share Sale update." The complaint, and our review, focused on this portion of the *in camera* discussion.
- 22 My Office was told that the Town had retained a solicitor to provide council with options to pursue regarding the hydro share sale, including a potential judicial inquiry. Accordingly, during the closed session on February 26, 2018, council received legal advice from both this solicitor and its regular solicitor respecting the sale and the potential judicial inquiry. The closed session minutes reflect these discussions.

⁴ Town of Collingwood, Collingwood Judicial Inquiry, *Transparency and the Public Trust*, by Associate Chief Justice Frank N. Marrocco (Collingwood, Ontario: Collingwood Judicial Inquiry, 2020), online: <<https://www.collingwoodinquiry.ca/report/index.html>>.

⁵ Ian Adams, "The quest for accountability: Collingwood to pursue legal action based on inquiry findings", Simcoe.com (Toronto Star), online: <<https://www.thestar.com/local-collingwood/news/council/2021/07/21/the-quest-for-accountability-collingwood-to-pursue-legal-action-based-on-inquiry-findings.html>>.

- 23 Council passed a motion to rise from the closed session before returning to open session at 6:40 p.m.
- 24 In open session, the retained solicitor gave a PowerPoint presentation about the hydro share sale and options for council to consider in response, including the pros and cons of a judicial inquiry.
- 25 After the presentation, council passed a resolution requesting a judicial inquiry and outlining its scope.
- 26 Council returned to closed session at 7:57 p.m. to obtain advice from the retained solicitor about the Town's media release for the inquiry. This closed session was not the subject of any complaints to my Office.

Analysis

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

- 27 The complaint made to my Office alleged that council inappropriately excluded the public from its discussion about a potential judicial inquiry. Council cited the exception for solicitor-client privilege as the basis for discussing this matter *in camera*.
- 28 The exception for solicitor-client privilege applies to discussions that include communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential. The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.
- 29 Communication will only be found to be subject to solicitor-client privilege if it is: (1) between a client and his or her solicitor, where the solicitor is acting in a professional capacity; (2) made in relation to the seeking or receiving of legal advice; and (3) intended to be confidential.⁶
- 30 During the closed meeting on February 26, 2018, council received advice from its solicitors that was intended to be confidential.
- 31 Therefore, the *in camera* discussion about the hydro share sale fit within the exception for solicitor-client privilege cited by council.

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

June 11, 2018 council meeting

- 32 The agenda for the June 11 council meeting indicated that an *in camera* discussion would be held for two topics, including a matter subject to “solicitor-client privilege” under s. 239(2)(f) of the Act. The agenda and resolution described the discussion as relating to “Judicial Inquiry.”
- 33 The meeting began at 5:00 p.m. and council passed a resolution to go into closed session at 6:32 p.m.
- 34 The closed session minutes state that the Town’s Chief Administrative Officer (CAO) provided council with an overview of the judicial inquiry process and advised of the need for independent counsel to represent the Town’s interests at the inquiry.
- 35 My Office was told that the lawyer retained for the meeting on February 26, 2018 meeting was no longer on retainer by the time of the meeting on June 11, 2018. The CAO had contacted three firms in advance of the June 11 meeting, and two responded with fee quotes. While the closed session did not include a lawyer from either firm, the CAO presented both quotes and council proceeded to discuss them.
- 36 My Office was told that the fee quotes provided to council included proposed strategy for the inquiry, along with information about each firm’s relevant expertise and legal fees, and were intended to be kept confidential.
- 37 The closed session minutes note that a motion in open session would consider appointment of counsel.
- 38 Upon returning to open session at 6:54 p.m., council unanimously passed a motion to appoint the lawyer previously on retainer for the meeting on February 26, 2018 as the Town’s counsel for the inquiry.

Analysis

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

- 39 The complaint made to my Office alleged that council inappropriately discussed the inquiry *in camera*. Council cited the exception for solicitor-client privilege in order to proceed to closed session regarding the judicial inquiry.

- 40 The exception for solicitor-client privilege allows municipal councils to go into closed session to discuss “advice that is subject to solicitor-client privilege, including communications necessary for that purpose.” Therefore, the exception covers discussions of legal advice and communications related to seeking and receiving that advice. The same test as laid out in the section above applies here.
- 41 The Supreme Court has determined that the solicitor-client relationship arises as soon as the potential client takes the first steps, even before a formal retainer is established.⁷ In this case, the Town had taken the first steps to receiving formal legal advice by seeking fee quotes from three solicitors.
- 42 Furthermore, my Office has found that the exception for solicitor-client privilege can apply to circumstances where another person, such as the CAO, conveys communications or advice from a solicitor to a council.⁸ When the CAO conveyed two solicitor fee quotes to council at the meeting on June 11, 2018, this discussion was subject to privilege even though no solicitors were present.
- 43 My Office has previously found that solicitor-client privilege does not apply to discussion of a solicitor’s hourly rate since this would not, on its own, reveal any communication protected by privilege.⁹
- 44 In contrast to a generic hourly rate, the fee quotes presented at the closed session on June 11, 2018 contained specific information with respect to a specific matter for which the Town required legal advice and representation. The quotes included each firm’s suggested strategy for representing the Town at the judicial inquiry, as well as the firm’s relevant expertise and projected overall costs.
- 45 The fee quotes were also provided to the CAO in confidence.
- 46 Accordingly, council’s *in camera* discussion about fee quotes from prospective counsel for the Town in its inquiry fell within the scope of seeking and receiving legal advice under s. 239(2)(f) of the *Municipal Act*.

⁷ *Descôteaux v Mierzwinski*, [1982] 1 SCR 860, [1982] SCJ No 43.

⁸ *Greater Sudbury (City of) (Re)*, 2017 ONOMBUD 2 at paras 45 and 54-6, online: <<https://canlii.ca/t/h4rwp>>.

⁹ *Norfolk (County)*, 2016 ONOMBUD 7 at para 38, online: <<https://canlii.ca/t/h2sth>>.

Opinion

- 47 Council for the Town of Collingwood did not contravene the *Municipal Act, 2001* when it received legal information and advice *in camera* on February 26, 2018 about the hydro share sale and potential judicial inquiry, under the exception for advice subject to solicitor-client privilege.
- 48 Council for the Town of Collingwood did not contravene the *Municipal Act, 2001* when it went *in camera* on June 11, 2018, to discuss fee quotes for prospective legal representation at the judicial inquiry. The discussion fit within the closed meeting exception for advice subject to solicitor-client privilege.

Report

- 49 Council for the Town of Collingwood 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 the normal preliminary review process and we thank council and staff for their co-operation and flexibility. All comments we received were considered in the preparation of this final report.
- 50 My report should be shared with council for the Town of Collingwood. The Town agreed to make my report available at the next council meeting.



Paul Dubé
Ombudsman of Ontario