



Ombudsman Report

**Investigation into a closed meeting held
by the Saugeen Municipal Airport Commission
on September 27, 2021**

**Paul Dubé
Ombudsman of Ontario
June 2022**

Complaint

- 1 My Office received a complaint about a closed meeting held by the Saugeen Municipal Airport Commission (the “Commission”) on September 27, 2021. The complaint alleged that the Commission improperly discussed subject matters that did not come within any of the exceptions found in the *Municipal Act, 2001*¹ (the “Act”).
- 2 My investigation has determined that the discussion about an Access Agreement was appropriate for *in camera* discussion. The *in camera* discussions pertaining to three other matters were not appropriate for closed session and should have been held in open session.

The Saugeen Municipal Airport Commission

- 3 The Saugeen Municipal Airport (the “Airport”) was incorporated in 1990 by four municipalities in Grey County and Bruce County for the purpose of operating a regional airport. It was established through a Municipal Agreement, which indicates that the airport is a joint municipal service board. Today, the airport is operated with the support of the Municipality of Brockton, the Town of Hanover and the Municipality of West Grey.
- 4 Pursuant to its by-law, the Airport is governed by a Commission composed of between five and seven members. Each of the participating municipalities appoints one member to the Commission and additional citizen members are also nominated to serve as Commissioners. At the time my Office received the complaint about this meeting, the Commission was composed of seven members, including three elected officials representing their respective municipalities.
- 5 The *Municipal Act, 2001* defines a “local board” as “a municipal service board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities.”²

¹ *Municipal Act, 2001*, SO 2001 c 25.

² *Ibid*, s 1(1).

- 6 Section 202 of the Act also provides that two or more municipalities may enter into agreements to establish a joint municipal service board to manage and provide particular services as each municipality considers appropriate.³ Municipal service boards are deemed to be local boards by section 197 of the Act.
- 7 The Act authorizes a municipality to establish and operate an airport.⁴ As such, the Commission is a local board exercising powers under the Act with respect to the affairs of the participating municipalities. It is therefore subject to the open meeting rules under the Act.

Ombudsman jurisdiction

- 8 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.
- 9 As of January 1, 2008, the Act gives anyone the right to request an investigation into whether a municipality or local board has complied with the Act in closing a meeting to the public. The Act designates the Ombudsman as the default investigator for municipalities and local boards that have not appointed their own investigator to review complaints about whether they have complied with the open meeting rules.
- 10 The Ombudsman is the closed meeting investigator for the Saugeen Municipal Airport Commission.
- 11 When investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the applicable procedure by-law have been observed.
- 12 My 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

³ *Ibid*, s 202.

⁴ *Ibid*, s 70.

Ombudsman's previous decisions can be found in the digest:
www.ombudsman.on.ca/digest.

Investigative process

- 13 On November 26, 2021, we advised the Commission of our intent to investigate this complaint.
- 14 My Office reviewed the Commission's Municipal Agreement, which is an agreement between the Commission and the participating municipalities to establish, operate, maintain, and improve the Saugeen Municipal Airport. We also reviewed records related to the meeting on September 27, 2021, including the agenda and minutes. My Office also reviewed the Commission's procedure by-law, which was enacted on December 15, 2021, and its amendments, which were passed on January 19, 2022.
- 15 My Office interviewed all members of the Commission present at the meeting on September 27, 2021.
- 16 My Office received full co-operation in this matter.

September 27, 2021 meeting

- 17 The Commission met for a special meeting on September 27, 2021. Six of the seven members were present. The meeting was called to order at 6:59 p.m. and proceeded *in camera* at 7:01 p.m. The Commission cited the exceptions for advice subject to solicitor-client privilege and plans and instructions for negotiations to close the meeting.
- 18 The resolution to proceed *in camera* does not provide further information on the topics of discussion for the closed session.
- 19 Once in closed session, the Commission discussed the following four items, which are found in the closed meeting agenda:
 1. the Access Agreement;
 2. the Municipal Agreement;
 3. the Municipal Agreement's withdrawal clause; and
 4. matters pertaining to the "2021 financials."

The Access Agreement

In camera discussions

- 20 The Commission's discussions under this subject related to its ongoing talks with a client concerning the terms of their Access Agreement – a contract between the Commission and a client allowing access and use of Airport property. The Commission received an update on the status of the negotiations with the client and discussed the content of the Access Agreement.
- 21 The Commission also authorized a specified course of action aimed at ensuring that the client signed the Access Agreement.
- 22 In closing this matter to the public, the Commission cited the exception for plans and instructions for negotiations at paragraph 239(2)(k) of the Act and the exception for advice subject to solicitor-client privilege at paragraph 239(2)(f) of the Act. In the course of our interviews, one Commissioner also cited the exception for personal matters about an identifiable individual at paragraph 239(2)(b) of the Act.

Analysis

Applicability of the exception for plans and instructions for negotiations

- 23 The exception at paragraph 239(2)(k) of the Act allows discussions to be held *in camera* for the purpose of protecting information that could undermine the bargaining position of the Commission or give another party an unfair advantage during an ongoing negotiation.⁵ In order for the exception to apply, the Commission must show that:
 1. The *in camera* discussion was about positions, plans, procedures, criteria, or instructions;
 2. The positions, plans, procedures, criteria, or instructions are intended to be applied to negotiations;
 3. The negotiations are being carried on currently, or will be carried on in future; and
 4. The negotiations are being conducted by or on behalf of the Commission.⁶

⁵ Letter from the Ombudsman to the City of Pickering (23 September 2020), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2020/city-of-pickering>>.

⁶ *St. Catharines (City of) (Re)*, 2019 ONOMBUD 1 at paras 30-31 [*St. Catharines*], online: <<https://canlii.ca/t/hxrk5>>.

- 24 During the closed session, the Commission discussed ongoing negotiations and authorized certain changes to be made to the Access Agreement in order to advance these negotiations. Further, the Commission gave instructions pertaining to a specified course of action during the negotiations. The first part of the test is met.
- 25 The Commission's authorizing of a course of action in relation to the Access Agreement was in the context of a back-and-forth discussion with its client – that is, a process of negotiation. The instructions were given in the hopes that its client would sign the agreement. Therefore, the second part of the test is met.
- 26 The negotiations were being conducted by the Commission at the time of the meeting. The third and fourth parts of the test are also met.
- 27 The discussions relating to the Access Agreement were properly held *in camera* as the exception for plans and instructions for negotiations applies. Accordingly, it is not necessary to consider the applicability of the other two exceptions raised by the Commission.

The Municipal Agreement

In camera discussions

- 28 During the closed session, the Commission also discussed updating the Municipal Agreement, which had not been updated in a decade. This agreement sets out cost-sharing details between the participating municipalities and includes provisions about withdrawal from the agreement, the Commission's authority, the need for audited financial statements, and binding arbitration.
- 29 The Commission reviewed the history of the Municipal Agreement and suggested changes. Our interviews revealed that the discussion concerned minor changes to the Municipal Agreement, such as updating the document to reflect current dates.
- 30 These discussions were held *in camera* under the exception for advice subject to solicitor-client privilege at paragraph 239(2)(f) of the Act. The Commission also relied on the exception for plans and instructions for negotiations at paragraph 239(2)(k) of the Act to close the meeting.

- 31 Regarding the exception for solicitor-client privilege, there was no solicitor present at the meeting and we were told by those interviewed that no legal advice was delivered at, or prior to, this meeting about the Municipal Agreement. In their interviews, no one we spoke with recalled discussing legal advice under this subject.
- 32 With respect to the exception for plans and negotiations, we were told that the Commission relied upon this exception because discussing the Municipal Agreement in public would weaken its bargaining position with potential third-party buyers or with the three participating municipalities. The Municipal Agreement is a publicly available document.

Analysis

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

- 33 Per paragraph 239(2)(f) of the Act, a meeting or part of a meeting may be closed to the public if the subject matter being considered is advice that is subject to solicitor-client privilege, including communications necessary for that purpose. The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.⁷
- 34 A solicitor was not present during the meeting and we were told that advice from a solicitor was not received by the Commission about the Municipal Agreement during, or in advance of, the meeting. No one recalled discussing legal advice. Therefore, discussions about the Municipal Agreement were not covered by the exception for communications subject to solicitor-client privilege.

Applicability of the exception for plans and instructions for negotiations

- 35 Paragraph 239(2)(k) of the Act allows discussions about plans and instructions for negotiations to be closed to the public. As set out previously, this exception applies where the Commission is able to show that the *in camera* discussion was about positions, plans, procedures, criteria, or instructions, intended to apply to negotiations conducted by the Commission or on its behalf.
- 36 There is no evidence to suggest that there was discussion around developing plans, procedures, criteria, or instructions for present or future negotiations with a potential buyer or with the participating municipalities.

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

Additionally, the Municipal Agreement is a publicly available document, and third parties would be aware of its content prior to any negotiation.

- 37 Accordingly, the exception for plans and instructions for negotiations does not apply.

The Municipal Agreement's withdrawal clause

In camera discussions

- 38 In addition to the general discussions about the Municipal Agreement, the Commission also discussed a specific withdrawal clause in the Municipal Agreement and the process by which a municipality can withdraw from it.
- 39 At the time of the closed meeting, none of the three participating municipalities had given a notice of withdrawal.
- 40 No solicitor was present during the closed session and no prior legal advice was provided to the Commission with respect to the withdrawal clause or withdrawal process. In their interviews, no one we spoke with recalled discussing legal advice under this subject.
- 41 In closing this discussion to the public, the Commission relied on the exception for advice subject to solicitor-client privilege at paragraph 239(2)(f) of the Act and the exception for plans and instructions for negotiations at paragraph 239(2)(k) of the Act.

Analysis

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

- 42 Under this subject, members of the Commission read the withdrawal clause in the Municipal Agreement and discussed the effects of a withdrawal among themselves. No one told my Office in interviews that legal advice was discussed.
- 43 As no legal advice from a solicitor was presented or considered in the course of this discussion, the exception for advice subject to solicitor-client privilege does not apply to this matter.

Applicability of the exception for plans and instructions for negotiations

- 44 The exception for plans and instructions for negotiations applies where the Commission is able to show that the *in camera* discussion was about positions, plans, procedures, criteria, or instructions, intended to apply to negotiations conducted by the Commission or on its behalf.
- 45 Our Office has found that, for this exception to apply, the discussion should focus on “specifically formulating a detailed course of action with respect to current or future negotiations.”⁸
- 46 Our investigation indicates that the Commission was not conducting any negotiations relating to withdrawal at the time of the meeting. In addition, the withdrawal clause allows unilateral withdrawal on the part of any participating municipality without any negotiation with the Commission. We also found there were no discussions about plans or instructions related to a future negotiation.
- 47 As indicated earlier, the Municipal Agreement (which includes the withdrawal clause) is a public document, so a review of its contents does not reveal anything confidential.
- 48 The exception for plans and instructions for negotiations does not apply to the discussions about the withdrawal clause.

The “2021 financials”

In camera discussions

- 49 Finally, during the closed session, the Commission reviewed its financial position, its revenues, and its expenses. More specifically, my Office was told by those interviewed that the Commission discussed how close they were to the budget, what their financial position would be like at year-end, and what would need to be added to the 2022 budget.
- 50 One Commissioner explained to us that the Commission was looking to better understand its financial situation in order to plan for the 2022 budget and request an appropriate contribution from the participating municipalities. However, my Office was told that the Commission was not negotiating with the municipalities for a change in funding at the time of the meeting, and that it did not discuss plans for future funding negotiations.

⁸ *St. Catharines*, *supra* note 6 at para 34.

- 51 My Office was told that financial information is usually discussed by the Commission in an open session, but in this case, the Commission wanted to review the increased legal fees it faced in 2021. These legal fees primarily resulted from ongoing negotiations with a specific client, although the Commission limited itself to discussing the legal fees incurred by the Commission, rather than personal information about this client.
- 52 No solicitor was present at the meeting and no legal advice relating to the 2021 financial position was provided at the meeting.
- 53 In closing this matter to the public, the Commission cited the exception for plans and instructions for negotiations at paragraph 239(2)(k) of the Act and the exception for advice subject to solicitor-client privilege at paragraph 239(2)(f) of the Act. One Commissioner also suggested that the exception for personal matters about an identifiable individual at paragraph 239(2)(b) of the Act applied to the discussion.

Analysis

Applicability of the exception for personal matters about an identifiable individual

- 54 Paragraph 239(2)(b) of the Act allows a meeting to be closed when discussions pertain to a personal matter about an identifiable individual, including municipal employees. Personal information is information that can be reasonably expected to identify an individual.⁹
- 55 In this case, there was no mention of personal information relating to an individual in the course of this discussion.
- 56 Discussions about the Commission's own legal fees do not reveal personal information about identifiable individuals. Indeed, my Office has already held that legal fees incurred by members of council in their official capacity are not considered "personal matters."¹⁰ Similarly, while not binding on my Office, the Information and Privacy Commissioner has held that the amount of legal fees paid by a municipality to defend an action is not personal information because the information is about the municipality's expense and not *about* the opposing party.¹¹

⁹ *Ontario (AG) v Pascoe*, 2002 CanLII 30891 (ONCA) at para 1, online: <<https://canlii.ca/t/1chz2>>.

¹⁰ Letter from the Ombudsman to the Town of Midland (4 February 2014), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2014/town-of-midland>>.

¹¹ Order MO-2083-F, *Toronto (City) (Re)*, 2006 CanLII 50736 (ON IPC), online: <<https://canlii.ca/t/1qvt5>>.

57 The exception for personal matters about an identifiable individual does not apply.

Applicability of the exception for plans and instructions for negotiations

58 As explained at paragraph 23, the exception for plans and instructions for negotiations applies where the Commission is able to show that the *in camera* discussion was about positions, plans, procedures, criteria, or instructions, intended to apply to negotiations conducted by the Commission or on its behalf.

59 In our interviews, three distinct reasons were given for applying this exception:

1. negotiations with a specific client;
2. negotiations with the participating municipalities; and
3. negotiations with potential buyers.

60 With respect to negotiations with a client, my Office was told that legal fees had to be discussed *in camera* to protect the Commission's bargaining position with the client. However, a discussion about an amount of money spent is not about a position, plan, procedure, criteria, or instruction. While not binding on my Office, the Information and Privacy Commissioner has similarly concluded that a statement of fact about the amount of money spent on legal fees by a municipality does not contain positions, plans, procedures, criteria or instructions.¹²

61 With respect to negotiations with the participating municipalities, one member of the Commission suggested that discussions about the Commission's financial position would weaken the Commission's position when negotiating a change in funding with the municipalities. This assertion conflicts with those of other members of the Commission interviewed, who categorically denied that any possible funding negotiations were discussed further to the 2021 financial information. On a balance of probabilities, I am not satisfied that the Commission had any *in camera* discussions about positions, plans, procedures, criteria, or instructions that were intended to be applied to negotiations with its municipal partners.

62 With respect to negotiations with potential buyers, my Office confirmed that the Commission was not negotiating with a buyer at the time of the meeting. Furthermore, the Commission did not discuss any plans for a future negotiation with a potential buyer.

¹² Order MO-2481, *Waterloo (City) (Re)*, 2009 CanLII 69094 (ON IPC), online: <<https://canlii.ca/t/270kp>>.

63 The exception for plans and instructions for negotiations does not apply.

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

- 64 Paragraph 239(2)(f) of the Act allows a meeting to be closed when there is discussion of advice subject to solicitor-client privilege, including communications necessary for that purpose. My Office has previously determined that solicitor-client privilege does not apply to generic discussions of the amount of money spent on legal fees as this, on its own, does not reveal any privileged information.¹³
- 65 During the interviews conducted by my Office, one member of the Commission told my Office that legal advice had been discussed under this subject. However, he was not able to provide any details about the subject of this advice, and the other commission members did not recall discussing legal advice. The minutes contain no reference to a discussion about legal advice.
- 66 On a balance of probabilities, I am satisfied that there was no legal advice discussed by the Commission at this meeting pertaining to its 2021 financial information. As such, the discussions about the 2021 financial position do not fit within the exception for advice that is subject to solicitor-client privilege.

Parsing the discussion

- 67 In its response to a preliminary version of this report, the Commission told my Office that it felt the Access Agreement was “tightly linked” and “inseparable” from the other subject matters, and that since the Access Agreement could be discussed *in camera*, those other matters also qualified for closed session consideration.
- 68 My Office has previously found that matters that do not usually fit within one of the Act’s exceptions can sometimes be discussed in closed session if the matters relate to a discussion on a single topic, and if splitting the information would require unreasonable interruption to the conversation.¹⁴ However, where the discussion can be separated, members are expected

¹³ *Collingwood (Town of) (Re)*, 2022 ONOMBUD 1 at para 43, online: <<https://canlii.ca/t/jlvk1>>.

¹⁴ *St.-Charles (Municipality of) (Re)*, 2019 ONOMBUD 6 at para 28, online: <<https://canlii.ca/t/j2p1h>>.

to return to open session for aspects of the discussion that do not fit under an open meeting exception.¹⁵

- 69 Based on the evidence before my Office, I am satisfied that the Commission's discussion about negotiations relating to the Access Agreement were separate and distinct from the discussions about the Municipal Agreement, its withdrawal clause, and the 2021 financial position. Our investigation indicates that in the closed meeting itself, the Commission delineated between these topics, moving onto a new topic only after finishing its discussion about the previous matter. Accordingly, it would have been possible for the Commission to parse its discussion between open and closed session without creating an unreasonable interruption to the conversation.

Resolution to proceed *in camera*

- 70 Subsection 239(4) of the Act requires that, before holding a closed meeting, a municipality or local board or committee of either of them must state by resolution “the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting.”
- 71 The Ontario Court of Appeal in *Farber v Kingston (City)* explained that “the resolution to go into closed session should 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.”¹⁶
- 72 The resolution passed by the Commission to proceed *in camera* cited the closed meeting exceptions it relied on to exclude the public. However, the resolution failed to provide any further detail regarding the Commission's intended discussion as required by subsection 239(4) of the Act. The open meeting agenda provided to the public also did not include any further information about the *in camera* discussions.
- 73 The report-back following the closed meeting revealed the closed meeting agenda items and provided a broad review of what was discussed *in camera*. While I acknowledge the Commission's concerns about confidentiality, the fact that the Commission reported back in open session providing general information on the subject matters discussed suggests that similar information could have been provided in the closed session resolution.

¹⁵ *Plympton-Wyoming (Town of) (Re)*, 2021 ONOMBUD 4, online: <<https://canlii.ca/t/jd49k>>.

¹⁶ *Farber v Kingston (City)*, 2007 ONCA 173 at para 21, online: <<https://canlii.ca/t/1qtz/>>.

- 74 Our review indicates that the Commission could have revealed substantially more information about its intended topics of conversation without undermining the reason for which the public was excluded from the discussion.
- 75 Furthermore, the resolution does not specify which closed meeting exception related to which closed session matter. Our investigation revealed that members of the Commission had a different understanding of which exceptions applied to each particular closed session matter.
- 76 While the Act does not require resolutions to specifically indicate which exception will be relied on for each matter discussed in closed session, I consider this a best practice and encourage the Commission to adopt this practice to enhance the accountability and transparency of its meetings.

Opinion

- 77 The Saugeen Municipal Airport Commission did not contravene the *Municipal Act, 2001* when it proceeded *in camera* on September 27, 2021 to discuss the Access Agreement. The discussions pertaining to this matter were permissible under the Act's closed meeting exception for plans and instructions for negotiations at paragraph 239(2)(k).
- 78 The Saugeen Municipal Airport Commission contravened the *Municipal Act, 2001* on September 27, 2021 when it discussed *in camera* the Municipal Agreement, the Municipal Agreement's withdrawal clause, and the 2021 financial position.
- 79 The Saugeen Municipal Airport Commission's resolution to proceed *in camera* on September 27, 2021 failed to provide meaningful information to the public about the matters that would be discussed *in camera*. In failing to state by resolution the general nature of the matters to be considered *in camera*, the Saugeen Municipal Airport Commission contravened the requirements of paragraph 239(4)(a) of the *Municipal Act, 2001*.

Recommendations

- 80 I make the following recommendations to assist the Saugeen Municipal Airport Commission in fulfilling its obligations under the Act and enhancing the transparency of its meetings in the future:

Recommendation 1

Members of the Saugeen Municipal Airport Commission should be vigilant in adhering to their individual and collective obligation to ensure compliance with their responsibilities under the *Municipal Act, 2001*.

Recommendation 2

The Saugeen Municipal Airport Commission 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

When proceeding *in camera*, the Saugeen Municipal Airport Commission should ensure that its resolutions to proceed *in camera* provide a general description of the issues to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.

Recommendation 4

As a best practice, Saugeen Municipal Airport Commission should clearly specify which closed meeting exception it intends to rely on for each individual matter discussed *in camera*.

Report

- 81 The Saugeen Municipal Airport Commission 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 the Commission for its co-operation and flexibility. All comments we received were considered in the preparation of this final report.
- 82 In its response, the Commission said that its discussions about an Access Agreement, legal fees, and discussions of 2021 financial position each related to its ongoing negotiation with a specific individual. The Commission also indicated that legal advice had been discussed during the meeting.
- 83 I have carefully considered the Commission's submission but am not convinced, on a balance of probabilities, that the discussions about these other matters related to legal advice or ongoing negotiations, for the reasons set out earlier in this report.

- 84 This report will be published on my Office's website, and should also be made public by the Saugeen Municipal Airport Commission. In accordance with paragraph 239.2(12) of the *Municipal Act, 2001*, the Commission is required to pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario