



Ombudsman Report

**Investigation regarding meetings held by
the Village of Westport on September 15, 2020**

**Paul Dubé
Ombudsman of Ontario
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Complaint

- 1 My Office received a complaint regarding two meetings held by council for the Village of Westport on September 15, 2020. The complaint alleged that due to a technical issue, council did not livestream the virtual committee of the whole or special council meeting for the public. The complaint alleged that, as a result, these meetings were closed to the public contrary to the *Municipal Act, 2001*.

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 citizens 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 Village of Westport.
- 5 When investigating closed meeting complaints, we consider whether the municipality has complied with the open meeting requirements of the Act and its own procedure by-law.
- 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 procedure. 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 In October 2020, I advised the municipality of my intent to investigate this complaint.
- 8 We reviewed the meeting agendas, minutes, and the municipality's procedure by-law. We also reviewed portions of the video recordings of the September 15 meetings that were uploaded by the municipality to its YouTube channel. We interviewed the Mayor and the Clerk/Chief Administrative Officer (CAO).
- 9 My Office received full co-operation in this matter.

The September 15, 2020 meetings

- 10 Council met virtually for a committee of the whole meeting on September 15, 2020 at 6:00 p.m. The agenda indicated that, pursuant to by-law 2020-10, the meeting would be held remotely. According to the CAO/Clerk, the municipality's practice is to convene remote meetings using Zoom video conference technology and live broadcast the Zoom meeting on the municipality's YouTube channel. The CAO/Clerk told us that the municipality has around 500 residents and a very small municipal staff. He said there is no technical staff to assist with virtual meetings and that he is responsible for administering this technology. He said he typically hosts the virtual meetings from his own home because it has a better internet connection than his municipal office.
- 11 For the meeting of September 15, we were told that the CAO/Clerk attempted to begin live streaming the Zoom meeting on YouTube shortly before the committee of the whole meeting was set to begin. However, he encountered a series of technical issues that prevented him from doing so. We were told that he attempted to troubleshoot the issue for approximately 10 minutes, but was unable to get the YouTube live stream technology to work. During this period, council and others who were logged into Zoom were aware that the meeting was being delayed as the CAO/Clerk tried to resolve technical issues with the live stream. The CAO/Clerk told us the municipality does not have a back up streaming service it can rely on if the municipality is experiencing technical issues with YouTube.
- 12 Once it became clear to the CAO/Clerk that the live stream would not be easy to fix, the CAO/Clerk prepared an email alerting certain local reporters

and residents who had previously expressed interest in attending council meetings of the technical issues. The email advised that the council meeting would not be broadcast, but that it would be recorded and made available following the meeting. Further, the CAO/Clerk spoke by telephone with a local reporter prior to the start of the meeting to advise of the issue.

- 13 After these steps were completed, the committee of the whole meeting was convened and council conducted its business over Zoom without any mechanism for members of the public to access the meeting. We were told the meeting proceeded without further incident and was adjourned at 7:58 p.m. Immediately thereafter, council convened a special council meeting to finalize an urgent matter arising from the committee of the whole meeting. The special council meeting was also not broadcast to the public due to the same technical issues and concluded at 8:01 p.m.
- 14 The Clerk/CAO told us that following the meeting, he sent an email to local reporters and certain residents who had previously expressed an interest in attending council proceedings. The email indicated that the municipality had experienced issues with the live stream for the September 15 meetings and included a link to a video of the meeting (created by Zoom) that he had uploaded to the municipality's YouTube page.
- 15 During their interviews, the Mayor and CAO/Clerk both emphasized that there was no intention to prevent the public from attending the virtual council meetings. Both indicated that this was an anomaly and that the municipality has not experienced streaming issues for any other council meetings. Each felt it was important for council business to proceed as scheduled on September 15 even in the face of the technical difficulties that prevented the public from virtually attending the meeting. They indicated that the municipality did not have any policies or procedures that addressed this situation and said they looked forward to any guidance that the Ombudsman could provide.

Analysis

Requirement to hold open meetings

- 16 Section 239(1) of the *Municipal Act, 2001* requires that all meetings of municipal councils be open to the public, subject to limited exceptions. The right of citizens to attend public meetings and view council proceedings in action is the foundation of the municipal open meeting requirement. As the Supreme Court of Canada determined in *London (City) v. RSJ Holdings*

Inc., the open meeting requirements set out in the *Municipal Act* demonstrate that the public has “the right to observe municipal government in process”.²

- 17 In response to the COVID-19 pandemic, the province amended the Act’s open meeting rules to permit municipalities to amend their procedure by-laws to permit council to hold electronic meetings (s. 238(3.1)). However, this did not change the Act’s basic requirement that meetings be open to the public. Rather, the amendments gave municipalities the option to satisfy this requirement without requiring that they hold in-person council meetings.
- 18 It is undisputed that the public was not able to virtually attend the September 15, 2020 meetings due to technical issues with the live stream. Accordingly, the committee of the whole and special council meeting were improperly closed to the public contrary to the *Municipal Act, 2001*. While I am sympathetic to the difficult situation that the CAO/Clerk and council faced, and cognizant of the practical need to transact the business of the municipality, council should not have met or transacted council business when the live stream was not functioning.
- 19 In an age of virtual council meetings, municipalities must be prepared for technical issues and know how to respond in a way that is consistent with their legal obligations under the *Municipal Act*. At a minimum, this means that council business cannot proceed when technical issues prevent the public from accessing the meeting. To prepare for this eventuality, municipalities should consider establishing a policy or procedure informing staff, council, and the public on what steps the municipality will take when faced with technical issues. Where possible, municipalities should consider having a second method for streaming the meeting so that they can switch to another service if there are issues with the first. Municipalities may also wish to consider having staff log in to the live stream as if they were a member of the public to monitor its quality and clarity.

Opinion

- 20 Council for the Village of Westport contravened the *Municipal Act, 2001* on September 15, 2020, when it held a committee of the whole and special council meeting that the public was unable to attend due to technical issues. While council did not initially intend to exclude the public from these

² *London (City) v RSJ Holdings Inc.*, 2007 SCC 29, at para 32, <<https://canlii.ca/t/1rtq1>>.

meetings, it was aware that the public could not attend and chose to convene the meetings and conduct council business anyway.

Recommendations

- 21 I make the following recommendations to assist the Village of Westport in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of council for the Village of Westport 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 Village of Westport should ensure that the public is able to access its virtual council meetings prior to conducting council business.

Recommendation 3

The Village of Westport should adopt a policy regarding the conduct of virtual council meetings. Among other things, the policy should state that council business will not be conducted if technical issues prevent public attendance. It should also set out steps the municipality will take in such an event.

Report

- 22 Council for the Village of Westport was given the opportunity to review a preliminary version of this report and provide comments to our Office. In light of the restrictions in place related to the COVID-19 pandemic, some adjustments were made to our normal preliminary review process and we thank council members for their co-operation and flexibility. Any comments received were considered in the preparation of this final report.

- 23 This report will be published on my Office's website, and should be made public by the Village of Westport as well. In accordance with s. 239.2(12) of the *Municipal Act, 2001*, council should pass a resolution stating how it intends to address this report.



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