



Ombudsman Report

**Investigation into meetings held by council
and council-in-committee for Norfolk County
on February 14 and November 15, 2023,
and January 9 and January 16, 2024**

**Paul Dubé
Ombudsman of Ontario**

November 2024

Complaint

- 1 My Office received complaints about a closed special meeting held by council for Norfolk County (the “County”) on January 9, 2024, as well as closed meetings held by council-in-committee¹ on February 14, 2023, November 15, 2023, and January 16, 2024. The complaints alleged that some discussions during these meetings did not fit into any of the exceptions to the open meeting rules in the *Municipal Act, 2001* (the “Act”).² One complaint also raised concerns that the resolution to enter closed session at the January 9, 2024 meeting did not provide enough detail about the topic of the intended discussion.
- 2 My investigation found that council-in-committee did not contravene the Act during its February 14, 2023 closed meeting. However, my investigation determined that council-in-committee contravened the Act during meetings on November 15, 2023 and January 16, 2024 by discussing some issues *in camera* that did not come within any of the exceptions to the open meeting rules. My investigation also found that at its January 9, 2024 meeting, council did not provide sufficient detail in its resolution to go *in camera* and discussed a matter *in camera* that did not fit within the open meeting exception cited in its resolution.

Ombudsman jurisdiction

- 3 Under the Act, all meetings of council, local boards, and committees of either must be open to the public, unless they fall within prescribed exceptions.
- 4 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 that have not appointed their own.
- 5 The Ombudsman is the closed meeting investigator for Norfolk County.
- 6 When investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the municipality’s procedure by-law have been observed.

¹ Council-in-committee is defined as “all members of Council sitting as a Committee-of-the-Whole to deal with business matters and make recommendations to Council.” Norfolk County, by-law No 2022-136, *The Procedural By-law* (20 December 2022), s 2.17.

² SO 2001, c 25.

- 7 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.
- 8 The Ontario Ombudsman also has the authority to conduct impartial reviews and investigations of hundreds of public sector bodies. This includes municipalities, local boards, and municipally-controlled corporations, as well as provincial government organizations, publicly funded universities, and school boards. In addition, the Ombudsman's mandate includes reviewing complaints about the services provided by children's aid societies and residential licensees, and the provision of French language services under the *French Language Services Act*. Read more about the bodies within our jurisdiction here: www.ombudsman.on.ca/have-a-complaint/who-we-oversee.

Investigative process

- 9 On March 26, 2024, my Office advised the County of our intent to investigate these complaints.
- 10 Members of my Office's open meeting team reviewed the open and closed meeting materials, including the minutes, agendas, reports, and audio recordings of the meetings. We interviewed the Mayor and the former Clerk.
- 11 My Office received full co-operation during this investigation.

February 14, 2023 council-in-committee meeting

- 12 On February 14, 2023, council-in-committee met in council chambers at 1:00 p.m. At 4:53 p.m., it resolved to move into closed session to discuss four agenda items, including "Insurance Coverage Update," which was the portion of the discussion alleged by one of the complaints to have contravened the open meeting rules.
- 13 Council-in-committee cited the exception for security of the property of the municipality to close this portion of the meeting to the public.

- 14 According to the *in camera* recording, staff presented information and a written report about the status of the County's cyber insurance coverage and answered questions from council members.
- 15 Council-in-committee then proceeded to discuss other agenda items in closed session, and returned to open session at 6:00 p.m.
- 16 Council-in-committee passed a resolution in open session to receive the "Information Memo - Insurance Coverage Update" as information.
- 17 The meeting adjourned at 6:01 p.m.

Analysis

Applicability of the exception for security of the property

- 18 Council-in-committee relied on the exception for security of the property of the municipality in section 239(2)(a) of the Act to discuss the cyber insurance coverage update in closed session.
- 19 The Act does not define "security" for the purposes of this section. In a previous report, my Office found that "security of the property of the municipality" should be given its plain meaning. Property includes both corporeal (physical) and incorporeal (non-physical) property, and the exception applies to the protection of property from loss or damage, and the protection of public safety in relation to that property.³
- 20 My Office has found that in order for the exception to apply, the property must be owned by the municipality and council must discuss measures to prevent loss or damage to that property.⁴
- 21 In this case, I am satisfied that council-in-committee's discussion of the cyber insurance security update related to the protection and security of the County's property. Accordingly, the discussion of this agenda item fit within the exception for security of the property of the municipality.

³ *Amherstburg (Town of) (Re)*, 2018 ONOMBUD 8, online: <<https://canlii.ca/t/hvmv1>>.

⁴ *Deep River (Town of) (Re)*, 2017 ONOMBUD 17, online: <<https://canlii.ca/t/hqspf>>.

November 15, 2023 council-in-committee meeting

- 22 On November 15, 2023, council-in-committee met in council chambers at 1:00 p.m. At 5:15 p.m., council-in-committee resolved to move into closed session to discuss seven agenda items. The complaint alleged that the discussion of two of those items, the “Insurance Coverage Update” and the “Active Development Charge Background Study,” did not fit within the Act’s open meeting exceptions.

Cyber insurance coverage update

- 23 According to the agenda, council-in-committee cited the exception for security of the property of the municipality to discuss the “Insurance Coverage Update.” According to the closed session recording, staff provided an update on the status of the County’s cyber insurance coverage and answered questions from council members.

Development charge background study

- 24 According to its resolution to close the meeting, council-in-committee also cited the exception for litigation or potential litigation to discuss the “Active Development Charge Background Study.” Council-in-committee received a report on this matter later in the closed session.
- 25 During this discussion, staff provided an update on the impacts of provincial legislation and growth-related infrastructure requirements on the County’s development charges. Council-in-committee then discussed the report and staff recommendations regarding the development charge background study.

Return to open session

- 26 Council-in-committee reconvened in open session at 7:29 p.m. and passed a resolution that the cyber insurance coverage update be received as information, as well as a resolution that the development charge background study be received for information and that staff proceed as directed.
- 27 The meeting adjourned at 7:33 p.m.

Analysis

Applicability of the exception for security of the property

- 28 Council-in-committee relied on the exception for security of the property of the municipality to discuss the “Insurance Coverage Update” in closed session.
- 29 My Office has found that in order for the exception to apply, the property must be owned by the municipality and council must discuss measures to prevent loss or damage to that property.⁵
- 30 I am satisfied that the discussion related to protection of the security of the County’s property. Accordingly, this discussion fit within the exception for security of the property of the municipality.

Applicability of the exception for litigation or potential litigation

- 31 Council-in-committee relied on the exception for litigation or potential litigation in section 239(2)(e) of the Act to discuss the “Active Development Charge Background Study” in closed session.
- 32 My Office has found the exception applies in the context of anticipated litigation where there is more than a remote possibility litigation may commence, although the litigation need not be a certainty. Council must believe that litigation is a reasonable prospect and must use the closed meeting to explore that prospect in some way.⁶ The exception does not apply where the possibility that litigation may arise in the future is merely speculative.⁷
- 33 In this instance, County staff provided an update regarding the impacts of provincial legislation and of growth-related infrastructure requirements on the County’s development charges. Council-in-committee also discussed the development charge background study.
- 34 Council-in-committee’s discussion was not focused on litigation or potential litigation. The closed session recording shows the exception was relied on because litigation could arise from developers in the future. However, the possibility that litigation may arise in the future is speculative at best, and the

⁵ *Ibid.*

⁶ *Carleton Place (Town of) (Re)*, 2017 ONOMBUD 18, at para 26, online: <<https://canlii.ca/t/hqspsh>>.

⁷ Letter from the Ontario Ombudsman to City of Timmins (9 May 2017), online:

<<https://www.ombudsman.on.ca/resources/reports,-cases-and-submissions/municipal-meetings/2017/city-of-timmins-2>>.

meeting on November 15, 2023 was not focused on that risk. Therefore, I find that council-in-committee's discussion of the development charge study does not fit within the exception for litigation or potential litigation.

January 9, 2024 special council meeting

- 35** On January 9, 2024, council met in council chambers at 3:30 p.m. for a special council meeting. At 3:53 p.m., council resolved to move into a closed session to discuss one agenda item, "CAO Preliminary Verbal Update – Potential Litigation," relying on the exception for litigation or potential litigation.
- 36** The resolution to move into closed session cited the section of the Act being relied upon - paragraph 239(2)(e) - but did not include the item description from the agenda.
- 37** In closed session, council discussed a sign the County had recently purchased, including related comments on social media and feedback that members of council had received.
- 38** During the closed session, the Chief Administrative Officer (CAO) stated that potential litigation against the County could arise in relation to the sign purchase. When asked about the possibility of litigation, the CAO clarified he was unaware of any but feared discussing the subject in open session could lead to lawsuits.
- 39** Council reconvened in open session at 5:14 p.m. The meeting adjourned at 5:15 p.m.

Analysis

Applicability of the exception for litigation or potential litigation

- 40** Council relied on the exception for litigation or potential litigation to discuss the agenda item "CAO Preliminary Verbal Update – Potential Litigation" in closed session.

- 41 My Office has found the exception does not apply where the possibility that litigation may arise in the future is merely speculative.⁸ Council must believe that litigation is a reasonable prospect and must use the closed meeting to explore that prospect in some way.⁹
- 42 As shown in the closed session recording, the CAO believed litigation could arise by discussing the sign purchase in open session. The recording also demonstrated that council's belief that the municipality might face litigation was based primarily on social media comments and second-hand information.
- 43 As the risk of litigation was speculative, I find that council's closed session discussion does not fit within the exception for litigation or potential litigation.

Resolution to move in camera

- 44 Before moving into a closed session, section 239(4)(a) of the Act requires a council, local board, or committee to state by resolution in open session that a closed meeting will be held, and the general nature of the matter to be considered at the closed meeting.
- 45 The Court of Appeal for Ontario has stated that a 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 while not undermining the reason for proceeding into closed session.¹⁰ My Office has also recommended that councils provide more substantive detail in resolutions authorizing closed sessions.¹¹
- 46 My Office has affirmed that citing an exception from the Act is a best practice, but is usually not sufficient to satisfy the requirements of section 239(4)(a) of the Act, as there is a requirement that municipalities add a level of "informative detail" to the resolution to close a session to the public.¹²

⁸ Letter from Ontario Ombudsman to City of Timmins (9 May 2017) [Timmins], online: <<https://www.ombudsman.on.ca/resources/reports.-cases-and-submissions/municipal-meetings/2017/city-of-timmins-2>>.

⁹ *Carleton Place (Town of) (Re)*, 2017 ONOMBUD 18 at para 26, online: <<https://canlii.ca/t/hqsph>>.

¹⁰ *Farber v Kingston (City)*, 2007 ONCA 173 at para 21, online: <<https://canlii.ca/t/1qtz/>>.

¹¹ *Emo (Township of) (Re)*, 2020 ONOMBUD 6 at para 18, online: <<https://canlii.ca/t/jb1q6>>.

¹² *Brockville (City of)*, 2016 ONOMBUD 12 at para 45, online: <<https://canlii.ca/t/h2ssr>>.

- 47 In this case, council merely identified in its resolution the open meeting exception on which it was relying. Based on my review, I find council could have provided, at minimum, the additional information from the agenda description.
- 48 Therefore, council contravened section 239(4)(a) of the Act by failing to provide sufficient information about the general nature of the matter to be considered in its resolution to proceed into closed session.

January 16, 2024 council-in-committee meeting

- 49 On January 16, 2024, council-in-committee met in council chambers at 1:00 p.m. At 1:03 p.m., it resolved to move into closed session to discuss, among other things, a “Workforce Development Update,” which was the portion of the discussion alleged in the complaints to have contravened the open meeting rules. Council-in-committee cited the exception for personal matters about identifiable individuals to close this portion of the discussion.
- 50 In closed session, external consultants provided a project status update on the County’s workforce development strategy, which was undertaken in response to hiring and retention challenges in the County.
- 51 The consultants presented draft recommendations on human resources policies and non-union employee compensation, and responded to council members’ questions. Council-in-committee then discussed the compensation and working conditions of municipal staff.
- 52 Council-in-committee reconvened in open session at 2:44 p.m. and discussed other matters. The meeting adjourned at 5:43 p.m.

Analysis

Applicability of the exception for personal matters

- 53 The exception for personal matters found in section 239(2)(b) of the Act applies to discussions that reveal personal information about an identifiable individual.
- 54 Generally, information that pertains to an individual in their professional capacity will not fit within the exception for personal matters. My Office has found that salary ranges are generally not considered personal information,

but information about individual staff salaries can be discussed under the exception for personal matters.¹³

- 55 During the January 16, 2024 meeting, council-in-committee discussed the workforce development strategy, as well as working conditions, recruitment, and retention of staff. These discussions did not reveal personal information about any identifiable individuals, and accordingly, the discussion did not fit within the exception for personal matters.

Applicability of the exception for labour relations

- 56 Although not cited by the County, my Office also considered whether or not council-in-committee's discussion could come within the exception for labour relations or employee negotiations under section 239(2)(d) of the Act.
- 57 The purpose of the exception for labour relations or employee negotiations is to protect discussions relating to the relationship between a municipality and its employees. The phrase "labour relations" is interpreted expansively to include matters involving unionized or non-unionized staff, as well as remuneration outside of traditional employment arrangements.¹⁴
- 58 My Office has found that discussions of municipal restructuring or reorganization may fall within the exception. While general discussions around organizational charts do not usually fit, matters relating to effects on individual positions, changes in roles, and working conditions come within the exception.¹⁵
- 59 During this meeting, council-in-committee discussed workforce development strategies, including the compensation and working conditions of municipal staff. These topics may be discussed in closed session under the exception for labour relations or employee negotiations. Accordingly, council-in-committee's discussion was appropriate for consideration *in camera*.

¹³ *Russell (Township of) (Re)*, 2016 ONOMBUD 5 at para 29, online: <<https://canlii.ca/t/gt8dk>>.

¹⁴ *Ontario (Minister of Health and Long Term Care) v Mitchinson*, 2003 CanLII 16894 (ON CA), online: <<https://canlii.ca/t/4qkj>>.

¹⁵ *Russell (Township of) (Re)*, 2016 ONOMBUD 5 at para 37, online: <<https://canlii.ca/t/gt8dk>>.

Opinion

- 60 My investigation found that council-in-committee did not contravene the Act during its discussion at the February 14, 2023 meeting. However, council-in-committee contravened the Act during its meetings on November 15, 2023 and January 16, 2024 by discussing some issues *in camera* that did not fit within the exceptions to the open meeting rules. In addition, at its January 9, 2024 meeting, council did not provide sufficient detail in its resolution to proceed *in camera* and discussed a matter *in camera* that did not fit within the open meeting exception cited in its resolution.

Recommendations

- 61 I make the following recommendations to assist Norfolk County in fulfilling its obligations under the *Municipal Act, 2001* and enhancing the transparency of its meetings:

Recommendation 1

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

Recommendation 2

Council for Norfolk County should ensure that no subject is discussed in a closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 3

Council for Norfolk County should ensure that all resolutions to proceed *in camera* provide a general description of all issues to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.

Report

- 62 Norfolk County was given the opportunity to review a preliminary version of this report and provide comments to my Office. My Office received comments from council.

- 63 In its response, council agreed to ensure that, in future, it will adhere to my report's recommendations when meeting in closed session.
- 64 However, council disagreed with my finding that the exception for litigation or potential litigation did not apply to the closed session discussion on January 9, 2024. Council expressed that, at the time of the meeting, the risk of litigation was real and not speculative. However, my review of the evidence indicates that council's discussion did not fit within the exception.
- 65 I have previously found that it is not unusual for litigation initiated by unsuccessful bidders to occur at the conclusion of the procurement process and that, where there is no specific evidence of a risk of litigation, the concern remains speculative.¹⁶ In this case, I have found that council did not have evidence to bolster its concern that a reasonable prospect of litigation could have resulted from the decision to purchase the sign.
- 66 This report will be published on my Office's website and should also be made public by Norfolk County. In accordance with section 239.2(12) of the *Municipal Act, 2001*, council is required to pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario

Ce rapport est aussi disponible en français

¹⁶ *Timmins*, supra note 8.