



Ombudsman Report

**Investigation into meetings held by council
for the Town of Essex on February 20, April 15,
April 29, and May 6, 2024**

**Paul Dubé
Ombudsman of Ontario**

October 2025

Complaint

- 1 My Office received a complaint that council for the Town of Essex (the “Town”) held closed meetings on February 20, April 15, April 29, and May 6, 2024 that did not fit within the cited open meeting exceptions in the *Municipal Act, 2001*¹ (the “Act”). The complaint also alleged that council failed to provide a general description of the matter to be discussed in closed session in the resolutions to enter *in camera* at each of these four meetings, in contravention of section 239(4)(a) of the Act.
- 2 My investigation determined that the closed session discussions at these meetings fit within exceptions to the open meeting rules under the *Municipal Act, 2001*.
- 3 However, my investigation also determined that the Town contravened the Act in failing to state by resolution the general nature of the subject matter to be discussed in its closed sessions on February 20, April 15, April 29, and May 6, 2024.

Ombudsman jurisdiction

- 4 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.
- 5 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.
- 6 The Ombudsman is the closed meeting investigator for the Town of Essex.
- 7 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.
- 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

¹ SO 2001, c 25 [“*Municipal Act*”].

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/en/info-public-bodies-and-officials/municipal-government/municipal-meeting-digest.

- 9 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/en/make-complaint/what-we-can-help-you/organizations-you-can-complain-about.

Investigative process

- 10 My Office notified the Town of our intent to investigate these complaints on June 17, 2024. We spoke with the Mayor, Deputy Mayor, Chief Administrative Officer (CAO), and councillors. We also reviewed the meeting agendas, open and closed minutes, and materials related to the four meetings.
- 11 My Office received full co-operation in this matter.

February 20, 2024 council meeting

- 12 Council met on February 20, 2024 at 4:00 p.m. for a regular meeting. After calling the meeting to order, council passed a resolution to move into a closed session, citing the open meeting exceptions for acquisition or disposition of land, and plans and instructions for negotiations. The resolution did not contain any further information about the topic to be discussed in closed session.
- 13 According to the closed session minutes and our interviews with council members, council discussed a plan to purchase a property and subsequently lease it to a third party. This discussion included potential offering prices, and conditions that could be included in the purchase agreement and the subsequent lease agreement.
- 14 Council moved out of closed session to adjourn the meeting at 4:34 p.m.

Analysis

Exception for acquisition or disposition of land, s. 239(2)(c)

- 15 Council cited the exception for acquisition or disposition of land, which applies to discussions of “a proposed or pending acquisition or disposition of land by the municipality or local board.”² It is primarily intended to protect a municipality’s bargaining position during the process of buying or selling municipal land, and can extend to property interests such as easements, or lease agreements.³ For the exception to apply, a municipality must be a party to the land transaction.⁴ In addition, the discussion must involve an actual land transaction that is either pending or has been proposed.⁵ The land transaction must be more than merely speculative.⁶
- 16 In a 2021 letter to the City of Sault Ste. Marie, I found that a closed session meeting in which council considered ongoing discussions about acquiring a piece of land, potential cost of the land, and possible terms of sale fit within the exception.⁷
- 17 In this case, council’s closed session discussion involved a proposed land transaction for a specific property, a prospective offer price, and terms for the purchase agreement and a subsequent lease agreement. Council had a bargaining position to protect against the landowner and the third party interested in leasing the land. The Town’s bargaining position could have been adversely affected by public disclosure of the details discussed during the closed session. Consequently, the February 20, 2024 closed session discussion fits within the exception for acquisition or disposition of land.

Exception for plans and instructions for negotiations, s. 239(2)(k)

- 18 Council also cited section 239(2)(k) of the Act, which enables a municipality to discuss “a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.”⁸ The purpose of the exception for plans and instructions for negotiations is to allow “a municipality to protect information that could undermine its bargaining position or give another party an unfair advantage over

² *Municipal Act*, *ibid*.

³ *Port Colborne (City of)*, 2015 ONOMBUD 32 at para 77, online: <<https://canlii.ca/t/gtp7c>>.

⁴ *Ibid*.

⁵ *Fort Erie (Town of) (Re)*, 2018 ONOMBUD 2 at para 31, online: <<https://canlii.ca/t/hvmtm>>.

⁶ *Fort Erie (Town of) (Re)*, 2015 ONOMBUD 12 at paras 22–23, online: <<https://canlii.ca/t/gtp5w>>.

⁷ Letter from the Ontario Ombudsman to City of Sault Ste. Marie (2 March 2021), online: <<https://www.ombudsman.on.ca/en/our-work/municipal-meetings/city-sault-ste-marie-march-2-2021>>.

⁸ *Municipal Act*, *supra* note 1.

the municipality during an ongoing negotiation”.⁹ In order for the exception to apply, the municipality 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 municipality.¹⁰

19 Each prong of the test is satisfied in this case. Council discussed its plan to purchase the property and subsequently lease it to a third party. Details of the plan, such as the purchase price, lease price, and conditions for the transactions were part of the discussion. Council’s intent was that the plan be applied to negotiations with the landowner and third party interested in leasing the land on behalf of the municipality.

20 Therefore, council’s discussion on February 20, 2024, also fits within this exception.

April 15, 2024 council meeting

Background

21 The Shepley Drain is a municipal drain that runs through farmland and urban areas in the Town of Essex.¹¹ The Town’s Drainage Board previously proposed funding improvements to the Shepley Drain with potential voluntary contributions from affected residents who could choose to opt in to the improvements. We were told by council members that some residents impacted by the proposal threatened council members with litigation, challenging the proposed work on the Shepley Drain.

⁹ *Grey Highlands (Municipality of) (Re)*, 2021 ONOMBUD 11 at para 17, online: <<https://canlii.ca/t/jfzr8>>.

¹⁰ *Ibid.*

¹¹ Town of Essex, *Report to Council*, 3 October 2022, online: <<https://townofessex-pub.escribemeetings.com/filestream.ashx?DocumentId=11640>>.

The closed session

- 22** Council held an in-person special council meeting on April 15, 2024, beginning at 5:30 p.m. After calling the meeting to order, council passed a resolution to move into closed session, citing the open meeting exceptions for information subject to solicitor-client privilege, and education or training. The resolution did not contain any further information about the topic to be discussed in closed session.
- 23** According to the minutes and our interviews with council members, the closed session began with the CAO advising council that the Town had received threats of litigation regarding the proposed work on the Shepley Drain. Staff then described the proposed improvements to the Shepley Drain and provided council with information on relevant provisions in the *Drainage Act*.¹² The Town's Director of Legal and Legislative Services was present at the closed session and provided council with legal advice related to the Shepley Drain and the threats of litigation. Council members told us that this additional information was necessary to understand the legal advice it received.
- 24** At 5:45 p.m., council moved out of closed session to adjourn the meeting.

Analysis

Exception for advice subject to solicitor-client privilege, s. 239(2)(f)

- 25** Council cited the exception for advice subject to solicitor-client privilege, which applies to discussions between a municipality and its solicitor in seeking or receiving legal advice intended to be confidential and includes communications for that purpose.¹³ The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.¹⁴
- 26** I have previously determined that communication will only be found to be subject to solicitor-client privilege if it is: (1) between a client and their 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.¹⁵
- 27** I have also determined that information provided to council in closed session by someone who is not a lawyer may fit within the exception for solicitor-client privilege if the information is received in relation to council seeking legal

¹² RSO 1990, c D 17.

¹³ *McMurrich/Monteith (Township of) (Re)*, 2022 ONOMBUD 4, at para 20, online: <<https://canlii.ca/t/jncmn>>.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, at para 21.

guidance or if it is necessary in order for council to meaningfully discuss the issues with legal counsel.¹⁶ For example, in a 2023 report to the City of Hamilton, I found that the exception applied to a four-part PowerPoint presentation, despite only one part of the presentation containing legal advice, because the rest of the presentation provided the municipality with context necessary to receive legal advice from its solicitor.¹⁷

- 28 In this case, during the closed session, the Town's Director of Legal and Legislative Services provided legal advice to council about the Shepley Drain and the threats of litigation. While only part of the closed session was directly related to legal advice, several council members told us that the information presented to council about relevant provisions in the *Drainage Act* was necessary to understand legal advice and meaningfully discuss it.
- 29 Accordingly, council's closed session discussion on April 15, 2024 fits within the exception for solicitor-client privilege.

Exception for education or training, s. 239(3.1)

- 30 Council also cited the exception for education or training under subsection 239(3.1) of the Act. This exception allows a meeting to be closed to the public if it is held for the purpose of "educating or training" members, and if no member discusses or otherwise deals with a matter in a way that materially advances the business or decision-making of the municipality, local board, or committee.
- 31 My Office has previously determined that this exception is narrowly construed and will only apply to closed session discussions that are solely for the purpose of educating or training council members.¹⁸ Any attempt to rely on this exception must be carefully scrutinized.¹⁹
- 32 In a 2014 letter to the Town of Moosonee, my Office determined that instruction from a Municipal Advisor did not qualify under the exception for education or training, as the information provided was not general in nature, but related to specific matters that directly impacted municipal business.²⁰

¹⁶ *Pelham (Town of) (Re)*, 2018 ONOMBUD 4, online: <<https://canlii.ca/t/hvmtr>>; and *Temagami (Municipality of) (Re)*, 2021 ONOMBUD 3, online: <<https://canlii.ca/t/jcxs0>>.

¹⁷ *Hamilton (City of) (Re)*, 2023 ONOMBUD 14, at paras 29-30, online: <<https://canlii.ca/t/k1856>>.

¹⁸ *Welland (City of) (Re)*, 2014 ONOMBUD 7, at para 57, online <<https://canlii.ca/t/gtmhx>>.

¹⁹ Ontario Ombudsman, "The ABCs of Education and Training: Investigation into City of Oshawa Development Services Committee Special Meeting of May 22, 2008" (March 2009) at para 29, online: <<https://www.ombudsman.on.ca/en/our-work/investigations/abcs-education-and-training>>.

²⁰ Letter from the Ontario Ombudsman to the Town of Moosonee (9 September 2014), online: <<https://www.ombudsman.on.ca/en/our-work/municipal-meetings/town-moosonee-september-9-2014>>.

- 33 In this case, council received information from staff on provisions in the *Drainage Act* that were relevant to the specific issue of improvements on the Shepley Drain and associated threats of litigation. This information was not general in nature but directly impacted the business or decision-making of the municipality, such as whether council decided to move forward with the Shepley Drain improvements. Accordingly, the exception for education or training does not apply to the closed session.

Exception for litigation or potential litigation, s. 239(2)(e)

- 34 Although not cited by council, my Office also assessed whether the exception for litigation or potential litigation under section 239(2)(e) of the Act could apply to council's April 15, 2024 meeting. My Office has found that the exception can apply where the matter discussed is the subject of ongoing litigation, or where there is a reasonable prospect of litigation. In the case of threats of litigation rather than active litigation, my Office typically considers whether council considers litigation a reasonable prospect and uses the closed meeting to explore the prospect in some way.²¹
- 35 In this case, the threats of litigation received by the Town regarding its actions surrounding the Shepley Drain were at the core of and framed the entire closed session discussion. Accordingly, the exception applies to council's closed session discussion.

April 29, 2024 council meeting

Background

- 36 On October 5, 2023, the Town issued a Request for Expressions of Interest (REI) for the development of the Essex Centre Sport Fields (ECSF).²² Council members told us that the Town had acquired 70 acres of land in the hopes of developing a large multi-use sports complex. Through the REI process, council was gathering proposals from interested parties for the development and potential sale of 10 acres of ECSF lands.

²¹ Letter from the Ontario Ombudsman to the Township of Russell (23 February 2021), online: <<https://www.ombudsman.on.ca/en/our-work/municipal-meetings/township-russell-february-23-2021>>; *Georgian Bay (Township of) (Re)*, 2017 ONOMBUD 1, online: <<https://canlii.ca/t/h4rwh>>.

²² Town of Essex's *Request for Expressions of Interest REI-CS-23-005 – Essex Centre Sport Fields – Potential Value-Added Opportunities* ["REI"], (5 October 2023), at p 4.

- 37 The REI document contained provisions regarding the confidentiality of a respondent's proposals, such as stipulating that submissions would be received in confidence and the Town would maintain confidentiality except as otherwise required by law.²³ The REI also stated that the Town could conduct meetings with individual respondents where they could present their proposals to the Town without the risk of that information being shared with other respondents as potential competitors.²⁴
- 38 The Town received a response to its REI and requested that the respondent meet with council to present its proposal. According to the CAO, ahead of meeting with council, the respondent's representatives advised municipal staff that public disclosure of its proposal could assist or inspire competitors, which would adversely impact its fundraising efforts. They also raised concerns about the content of their presentation being stolen, making their project less unique, and consequently less attractive to investors.

The closed session

- 39 Council held an in-person meeting on April 29, 2024, which began at 6:00 p.m. After calling the meeting to order, council cited the open meeting exception for acquisition or disposition of land in its resolution to move into closed session. The resolution did not contain any further information about the topic to be discussed in closed session.
- 40 According to the minutes and those we interviewed, the representatives of the respondent to the REI attended as a delegation and participated in the closed session. The closed session had two portions: a presentation by the representatives of their proposal for the ECSF lands sports facility, and council's subsequent discussion of that proposal after the delegation left the closed session.
- 41 During the first portion of the meeting, the delegation presented their general business concept to council, which included information on specific goods and services to be offered at the facility. This presentation included several images to illustrate the concept for the exterior and the interior layout of the facility, detailed construction schematics with specific measurements, and 3D construction renderings of part of the facility.

²³ REI, *supra* note 22 at p 21.

²⁴ *Ibid*, at p 16.

- 42 The closed meeting minutes record that the delegation advised council that their proposal was to remain confidential while they sought funding, in order to prevent potential competitors from stealing their ideas. The CAO recalled that the delegation's request for confidentiality was also expressed repeatedly in verbal conversations before the meeting. According to the CAO, the delegation explained that the company was still seeking investors for the project, and that public disclosure could inspire competition and lead to less interest from potential investors.
- 43 Following the presentation, the delegation left the room, and council discussed their interest in and concerns regarding the delegation's proposal, as well as potential conditions to be included in any future transaction.
- 44 According to the minutes, staff then provided council with information on a draft letter of intent to the respondent to the REI, including a proposed land sale price. Staff noted that they would return to council with a draft letter of intent for review and approval.
- 45 At 7:10 p.m., council moved out of closed session to adjourn the meeting.

Analysis

Exception for acquisition or disposition of land, s. 239(2)(c)

- 46 Council cited the exception for acquisition or disposition of land to discuss the proposed development in closed session. As previously noted, this exception allows a municipality to proceed *in camera* to discuss "a proposed or pending acquisition or disposition of land by the municipality or local board" with the primary purpose of protecting its bargaining position. Generally, a municipality must be either the seller or purchaser of the land in order for the exception to apply.²⁵
- 47 My Office has previously found that the exception typically does not apply to closed session discussions attended by the other party to the land transaction because it would defeat the purpose of protecting the municipality's bargaining position.²⁶ As such, the exception for acquisition or disposition of land does not apply to the first portion of the meeting, when the delegation was in attendance.

²⁵ *Port Colborne (City of)*, 2015 ONOMBUD 32 (CanLII), online: <<https://canlii.ca/t/gtp7c>>.

²⁶ Letter from the Ontario Ombudsman to the Town of Orangeville, (24 January 2014), online: <<https://www.ombudsman.on.ca/en/our-work/municipal-meetings/town-orangeville-january-24-2014>>.

- 48 Following the delegation's presentation, council discussed its interest in proceeding with the disposition of the municipal lands that were the subject of the REI, the conditions to be included in the ensuing land deal, and a proposed sale price. Discussions of specific details related to a potential transaction for specified land fits within the exception for acquisition or disposition of land.²⁷ Had this discussion been public, council's bargaining position would have been disadvantaged in a potential transaction. Therefore, council's discussion following the presentation on April 29, 2024 fits within the exception for acquisition or disposition of land.

Exception for information supplied in confidence by a third party, s. 239(2)(i)

- 49 Although not cited by council, my Office considered whether the exception for information supplied in confidence by a third party might apply to the April 29, 2024 meeting. The purpose of this exception is to protect confidential information about third parties which has been provided to the municipality.²⁸ In order for the exception to apply, the information must fall into one of the listed types (for example, commercial or technical information); be 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.²⁹

The information discussed fell into the listed types

- 50 Of the types of information listed in the exception, "commercial" and "technical" information are the most likely to apply to the delegation's presentation. "Commercial information" is information relating to the buying, selling or exchange of merchandise or services.³⁰ In this case, the delegation presented its general business concept contained in its response to the REI, which included information about goods and services to be offered at the proposed facility. As such, the delegation's presentation qualifies as commercial information.
- 51 In addition, "technical information" is information usually prepared by a professional that describes the construction, operation or maintenance of a structure, process, equipment or thing.³¹ As the presentation contained detailed

²⁷ Letter from the Ontario Ombudsman to City of Sault Ste. Marie (2 March 2021), online: <<https://www.ombudsman.on.ca/resources/reports,-cases-and-submissions/municipal-meetings/2021/city-of-sault-ste-marie>>.

²⁸ *Greater Sudbury (City of) (Re)*, 2021 ONOMBUD 10, online: <<https://canlii.ca/t/jfvt3>>.

²⁹ *Municipal Act*, *supra* note 1, s 239(2)(i).

³⁰ *Leeds and the Thousand Islands (Township of) (Re)*, 2022 ONOMBUD 5, at para 31, online: <<https://canlii.ca/t/jnkk9>>.

³¹ *Ibid* at para 32.

architectural drawings and concept art, as well as dimensions for construction purposes, the presentation qualifies as technical information.

The information was supplied confidentially

52 The second prong of this exception requires the information to have been supplied confidentially to the municipality by the third party. I have found that the party resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided.³² All circumstances of the case are considered to determine whether there was an expectation of confidentiality, including whether the information was:

1. Communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
2. Treated consistently by the third party in a manner that indicates a concern for confidentiality;
3. Not otherwise disclosed or available from sources to which the public has access; and
4. Prepared for a purpose that would not entail disclosure.³³

53 The delegation attended the closed session and presented to council under the assurance that the information it provided would not be made public as that could impact the REI respondent's competitive position. The REI stipulated that the Town would receive responses in confidence and maintain the confidentiality of such information except as otherwise required by law. The delegation also spoke to the CAO prior to the meeting about the confidentiality of its presentation. In addition, during the closed session, the delegation verbally advised that the information contained in the presentation was confidential. The information was not publicly accessible. Accordingly, the information in the presentation was supplied by the delegation confidentially.

A reasonable expectation of harm existed

54 This element of the exception requires that disclosure of the confidential information could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the third party.

³² *Brockton (Municipality of) (Re)*, 2023 ONOMBUD 13 (CanLII), ["*Brockton*"] online: <<https://canlii.ca/t/k11jq>>.

³³ *Ibid.*

- 55** I have relied on the Supreme Court of Canada’s interpretation of an analogous third-party exception under freedom of information legislation, which provided that the requirement is to “demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.”³⁴ The onus is on the party seeking to withhold information to supply “detailed and convincing” evidence to establish a reasonable expectation of harm.³⁵
- 56** I have previously found an expectation of harm in cases involving closed session discussions about the proposals of participants in a procurement process.³⁶ The proposals contained proprietary information related to a development such as cost estimates and rates, contract clauses, and architectural information.
- 57** In my 2021 letter to council for the Town of South Bruce Peninsula, I found that public disclosure of the presentation made in closed session could have alerted competitors to the proprietary technology detailed in the proposal, which could risk competitors licensing use of that technology in the region, and that it could have interfered with a pending land transaction related to the proposal.³⁷ In my 2023 letter to council for the City of Greater Sudbury, I found that public disclosure could significantly prejudice bidders against one another in the procurement process, or in subsequent contract negotiations.³⁸
- 58** In this case, the delegation’s presentation contained details and visualizations of the construction, including dimensions, which are proprietary to the delegation. As well, the delegation had raised concerns about public disclosure which could inspire competitors and impact its fundraising efforts.
- 59** I am satisfied that there was a reasonable expectation of harm that public disclosure of the information contained in the delegation’s presentation could adversely impact the REI respondent’s competitive position.
- 60** Consequently, the delegation’s presentation, and council’s subsequent discussion on April 29, 2024, fits within the exception for information supplied in confidence by a third party.

³⁴ *Brockton*, *supra* note 32.

³⁵ *Ibid*, at para 30.

³⁶ Letter from the Ontario Ombudsman to Town of South Bruce Peninsula, (14 October 2021), [“*South Bruce*”] online: <<https://www.ombudsman.on.ca/en/our-work/municipal-meetings/town-south-bruce-peninsula-october-14-2021>>; see also Letter from the Ontario Ombudsman to City of Greater Sudbury, (3 March 2023) [“*Greater Sudbury*”], online: <<https://www.ombudsman.on.ca/en/our-work/municipal-meetings/city-greater-sudbury-march-3-2023>>.

³⁷ *South Bruce*, *ibid*.

³⁸ *Greater Sudbury*, *supra* note 36.

May 6, 2024 council meeting

Background

- 61 Before October 2023, the Town outsourced its water billing services to E.L.K Energy Inc. (“E.L.K”). E.L.K. is an energy distribution company that was entirely owned by the Town of Essex at the time of the May 6, 2024 meeting. At the time, E.L.K.’s board of directors was appointed by the Town, and included both the Mayor and Deputy Mayor, three Town staff, and three other members.
- 62 The Act defines a municipally controlled corporation as “a corporation that has 50 per cent or more of its issued and outstanding shares vested in the municipality or that has the appointment of a majority of its board of directors made or approved by the municipality, but does not include a local board as defined in subsection 1 (1).” The Town was E.L.K.’s sole shareholder and the Town also appointed the entirety of E.L.K.’s board of directors. As E.L.K. was also not a local board, it meets the definition of a municipally controlled corporation.
- 63 While the Town of Essex owned E.L.K. at the time, it did not directly run the corporation’s daily operations, which were largely operated by E.L.K.’s own management team and staff. E.L.K. is also a distinct legal entity from the Town. It is a municipal corporation under the *Ontario Electricity Act, 1998*, and incorporated under the *Business Corporations Act, 1990*. E.L.K. is an institution for the purposes of freedom of information legislation and can be independently sued.
- 64 On March 20, 2023, council resolved to issue a letter of discontinuance to E.L.K. on October 1, 2023. In the interim, the Town gradually assumed water billing and collection services from E.L.K. and hired Entegrus Inc. (“Entegrus”), a third-party electrical distributor, to manage E.L.K. on a temporary basis.
- 65 The Mayor told my Office that by the May 6, 2024 meeting, the Town had put out a request for bids to purchase E.L.K. from the Town or merge it with another company.

The closed session

- 66** Council held a meeting on May 6, 2024 at 4:00 p.m. After calling the meeting to order, council cited the open meeting exceptions for information supplied in confidence by a third party and information belonging to the municipality to move into closed session. The resolution did not contain any further information about the topic to be discussed in closed session.
- 67** Council members told us that the closed session discussion focused on financial information presented by staff related to E.L.K.'s management and a transition to direct billing by the Town for water services. Additionally, council members told us that a small portion of the meeting involved a discussion of potential litigation. Several council members advised us that the Town's Director of Legal and Legislative Services, who is a lawyer, was present and provided legal advice to council about the potential litigation.
- 68** According to the closed session minutes, staff provided council with an assessment of E.L.K.'s billing practices and finances based on information gathered from E.L.K.'s Management Services Team. We were told that the Management Services Team requested that the information remain confidential.
- 69** Council moved out of closed session to adjourn the meeting at 4:50 p.m.

Analysis

Exception for information supplied in confidence by a third party, s. 239(2)(i)

- 70** Council cited the exception for information supplied in confidence by a third party to hold the closed session discussion. As noted, the purpose of this exception is to protect confidential information about third parties which has been provided to the municipality.³⁹ In order for the exception to apply, the information must fall into one of the listed types (for example, commercial or financial information); be 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.⁴⁰

³⁹ *Greater Sudbury (City of) (Re)*, 2021 ONOMBUD 10, online: <<https://canlii.ca/t/jfvt3>>.

⁴⁰ *Municipal Act*, *supra* note 1, s 239(2)(l).

The information discussed fell into the listed types

- 71 The information discussed by council is best characterized as commercial or financial information. Commercial information is information relating to the buying, selling or exchange of merchandise or services.⁴¹ Financial information is related to money and its use or distribution and must contain or refer to specific data, and includes “profit and loss data.”⁴²
- 72 The information discussed by council related to E.L.K.’s management of the Town’s water billing services and its finances. This information qualifies as commercial and financial information.

The information was supplied by a third party

- 73 Several council members told my Office that the information was supplied by E.L.K. and that E.L.K. is a third party to the Town. My Office has not previously assessed whether a municipally controlled corporation constitutes a “third party” for the purposes of this exception.
- 74 At the time of the meeting, the Town did not manage E.L.K.’s day-to-day operations. Furthermore, as an incorporated business, E.L.K. is a distinct legal entity apart from the Town of Essex. E.L.K. is also a distinct institution under freedom of information legislation.
- 75 I am satisfied that E.L.K. is a third party for the purposes of this exception.

The information was supplied confidentially

- 76 My Office was advised that Town staff were told by E.L.K. staff that the information being provided was confidential. However, the Town did not provide my Office with any records to substantiate this. Nonetheless, I am satisfied that on a balance of probabilities, the information was supplied confidentially by the third party.

⁴¹ *Leeds and the Thousand Islands (Township of) (Re)*, 2022 ONOMBUD 5, at para 31, online: <<https://canlii.ca/t/jnkk9>>.

⁴² *Hamilton (City of) (Re)*, 2019 ONOMBUD 3, at para 45. [“*City of Hamilton* 2019 report”], online: <<https://canlii.ca/t/j2b49>>.

A reasonable expectation of harm existed

- 77 This element of the exception requires that disclosure of the confidential information could reasonably be expected to cause harm to the third party.
- 78 Based on the information my Office gathered, I am satisfied that disclosure of the confidential information provided by E.L.K. to the Town could adversely affect the bidding process to sell or merge E.L.K. by impacting E.L.K.'s value and competitive position.
- 79 Consequently, the exception applies to council's discussion on May 6, 2024.

Exception for information belonging to the municipality, s. 239(2)(j)

- 80 Council also relied on the exception for information belonging to the municipality, which allows a municipality to proceed *in camera* to discuss a trade secret or scientific, technical, commercial or financial information that belongs to the municipality or local board and has monetary value or potential monetary value. My Office has adopted a three-part test for the exception, which sets out that the exception will apply where the *in camera* discussion is about:
- i. A trade secret, or financial, commercial, scientific or technical information;
 - ii. That belongs to the municipality or local board; and
 - iii. Has monetary value or potential monetary value.⁴³
- 81 During the meeting, staff provided council with an assessment of E.L.K.'s billing practices and finances. Staff obtained data from E.L.K. which informed its assessment. The information contained in the assessment prepared by staff can be characterized as financial or commercial information.
- 82 The next question is whether the information belongs to the municipality. I have previously found that information will belong to an institution if it is owned by the institution,⁴⁴ and that information prepared by municipal staff indicates that it belongs to the municipality.⁴⁵ The assessment was prepared by Town staff and therefore belongs to the Town.
- 83 The final part of the analysis is determining whether the information has monetary or potential monetary value. I have previously found that establishing "monetary value" requires evidence that "the information itself have intrinsic

⁴³ *Pelham (Town of) (Re)*, 2022 ONOMBUD 9, at para 44, online: <<https://canlii.ca/t/jpsh5>>.

⁴⁴ *Ibid*, at para 45; *Hamilton (City of) (Re)*, 2019 ONOMBUD 3, at para 46, online: <<https://canlii.ca/t/j2b49>>.

⁴⁵ *City of Hamilton* 2019 report, *supra* note 42 at para 52.

value, such that disclosure would deprive the institution of that monetary value.”⁴⁶

- 84 In this case, prior to the meeting, the Town had placed a request for bids for E.L.K.’s merger or sale. Several council members told us that disclosure of the information discussed at this meeting could have affected the bids received, as staff’s assessment of E.L.K.’s finances and billing practices could have impacted the quality of any potential bids. This would therefore impact the monetary value in any subsequent merger or sale. As such, the information has monetary value, and this discussion on May 6, 2024 falls within the exception for information belonging to the municipality.

Exception for solicitor-client privilege, s. 239(2)(f)

- 85 My Office also reviewed whether council’s discussion regarding potential litigation could fit under the exception for solicitor-client privilege. As previously noted, this exception applies to discussions between a municipality and its solicitor in seeking or receiving legal advice intended to be confidential and includes communications for that purpose.⁴⁷ The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.
- 86 I have previously noted that communication will only be found to be subject to solicitor-client privilege if it is: (1) between a client and their 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.⁴⁸
- 87 During the closed session, council sought and received legal advice from the Director of Legal and Legislative Services, who was present, about potential litigation. Consequently, the exception for solicitor-client privilege also applies to that portion of the discussion on May 6, 2024.

Resolutions to move into closed session

- 88 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.

⁴⁶ *City of Hamilton* 2019 report, *supra* note 42 at para 46.

⁴⁷ *Ibid.*

⁴⁸ *Canada v Solosky*, [1980] 1 SCR 821.

- 89 At its February 20, April 15, April 29, and May 6, 2024 meetings, council only cited the applicable exception(s) in its resolutions and provided no further information on the matters to be discussed in closed session. In each of these instances, more information could have been provided without undermining the reason for excluding the public. Consequently, council contravened section 239(4)(a) of the *Municipal Act, 2001* during each meeting by failing to provide a description of the general nature of the matter to be considered in each of its closed meetings.

Opinion

- 90 Council for the Town of Essex was permitted to conduct its closed sessions on February 20, April 15, April 29, and May 6, 2024 under various open meeting exceptions within the *Municipal Act, 2001*.
- 91 However, council contravened section 239(4)(a) of the *Municipal Act* at each of these four meetings by failing to provide a description of the general nature of the matter to be discussed in closed session.
- 92 I have previously emphasized the importance of a municipality obtaining evidence in writing to confirm requests from a third party to maintain confidentiality of material provided when relying on the exception under section 239(2)(i) of the Act. I encourage the Town to adopt this best practice in future if it intends to rely on the exception for confidential information from a third party to hold closed session discussions.

Recommendations

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

Recommendation 1

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

Recommendation 2

In accordance with the *Municipal Act, 2001*, council for the Town of Essex should provide as much information as possible about the general nature of the matters to be considered in its resolutions to go into a closed meeting, without compromising the reason for holding a closed meeting.

Recommendation 3

As a best practice, when council for the Town of Essex intends to rely on section 239(2)(i) of the *Municipal Act, 2001* to close a meeting to the public, more robust record keeping should be employed for any requests by a third party that the information under discussion remain confidential.

Report

- 94** The Council for the Town of Essex was given the opportunity to review a preliminary version of this report and provide comments to my Office. All comments we received were considered in the preparation of this final report.
- 95** This report will be published on my Office's website and should also be made public by the Town of Essex. 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