



Ombudsman Report

**Investigation into a complaint about a meeting held
by the Township of Johnson on October 29, 2019**

**Paul Dubé
Ontario Ombudsman
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Complaint

- 1 My Office received a complaint about a special council meeting held by the Township of Johnson (the “Township”) on October 29, 2019.
- 2 The complainant alleged that during the meeting, council voted in closed session to appoint a new councillor to a vacant council seat. Further, the complainant alleged that the Township did not provide notice for the special meeting.

Ombudsman jurisdiction

- 3 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.
- 4 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.
- 5 The Ombudsman is the closed meeting investigator for the Township of Johnson.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.
- 7 To assist municipal councils, staff, and citizens, we have developed an online digest of open meeting decisions that contains summaries of the Ombudsman’s open meeting cases. This searchable repository was created to provide easy access to the Ombudsman’s past 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 a matter should or may 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.

Council procedure

- 8 The Township's procedural by-law (by-law no. 2019-945) states that a meeting may be closed to the public where permitted to be closed under legislated authority.
- 9 The procedural by-law provides that the Clerk shall give at least 24 hours' notice to the public of all special meetings. The procedural by-law is silent on the matter of voting during a closed council meeting.

Investigative process

- 10 On February 10, 2020, I advised the Township that we would investigate the concerns raised by the complainant about the meeting of October 29, 2019.
- 11 Members of my Office's Open Meeting Team reviewed relevant portions of the Township's procedural by-law and the Act. We reviewed the meeting agenda, relevant documents, and the minutes from the open and closed session of the meeting.
- 12 We interviewed the Mayor and two members of council, the Clerk, and the Treasurer, who were all present at the meeting.
- 13 My Office received full co-operation in this matter.

Background

- 14 On July 18, 2019, Councillor James Carter resigned from council. Council formally accepted the resignation during a council meeting on August 28, 2019.
- 15 Following Councillor Carter's resignation, the Clerk drafted a report outlining three options available to council to fill the vacant seat. The report advised that council could choose to conduct a by-election, advertise the position to the public and appoint a member of the public, or appoint a runner-up from the 2018 municipal election. The report recommended the second option, to advertise the position to the public and appoint a member of the public.

- 16 Council received the report during its meeting on September 18, 2019. The meeting minutes show that council adopted a resolution directing staff to advertise the position to the public and plan for the appointment of the new council member.
- 17 My Office was told that after the advertisement was posted, four interested candidates contacted the Township and applied for the position.

The October 29, 2019 meeting

- 18 The Clerk told my Office that notice of a special council meeting occurring on October 29, 2019 was posted on the municipality's website on October 25, 2019. The notice consisted of the meeting agenda, which included the date, time and location of the meeting. The Clerk provided my Office with two screenshots from the software used to manage the municipal website that showed when the notice was posted online. The Mayor told my Office that he recalled seeing the notice on the website and that it was posted two days before the meeting.
- 19 The minutes for the October 29 meeting indicate that the meeting began at 5:30 p.m. We were told that after the Mayor called the meeting to order, he announced that the procedure to fill the council vacancy would begin. Subsequently, the four candidates each made a presentation to council about why they wanted to be a council member. Following each presentation, members of council asked the candidates questions.

The closed session

- 20 After the four candidates finished their presentations, council passed a resolution to proceed into closed session. The minutes state that council passed the following resolution:

Council Vacancy – Personal matters about an identifiable individual, including municipal or local board employees; Municipal Act, c.25, s. 239 (2)(b).

- 21 The Clerk told my Office that the purpose of the closed session was to provide council an opportunity to candidly discuss the candidates and their presentations without potentially embarrassing any of the candidates in public. According to the Clerk, the discussion would be personal in nature and, therefore, would not be appropriate for public consideration.

- 22** The closed session minutes indicate that council convened in closed session as the committee of the whole (the “committee”). The composition of the committee is the same as council, with the Mayor and three council members. The Clerk and Treasurer were also present. The *in camera* session began at 6:21 p.m.
- 23** The Mayor told our Office that he led the closed session discussion. He asked council members to express their opinions about the four candidates. According to one individual we interviewed, the Mayor began the discussion by saying, “We all know we’re here to make a decision.”
- 24** We were told that while *in camera*, council members discussed each candidate. The discussion included the professional experience of the candidates, their volunteer experience, and what each candidate had to offer if they were appointed to council. Once the committee finished reviewing each candidate, the Mayor called for a vote for the committee to recommend a candidate to fill the council vacancy. The Mayor and the council members who spoke with our Office told us they voted by a show of hands.
- 25** Another individual present at the meeting told my Office that council came to a verbal consensus, instead of a show of hands, when the Mayor called for a vote. Another witness recalled that council came to a consensus but did not specify whether or not there was a show of hands.
- 26** We were also told by one council member that the show of hands was unofficial and not a real vote because it did not occur in open session.
- 27** The closed session minutes state that the following resolution was passed *in camera*: “the committee of the whole (closed meeting) recommend Dalton MacFarlane to fill the vacant Council position for the remainder of the 2018-2022 term”. The council member who moved for the resolution to be adopted did not recall doing so. The Mayor told my Office that the resolution was passed in open session, not during the closed session as is recorded by the minutes.
- 28** The closed session ended at 6:33 p.m.

The open session

- 29** After the closed session meeting of the committee of the whole adjourned, council reconvened in open session. The candidates and members of the public were invited back into council chambers. The open session minutes indicate that council

received the closed session recommendation from the committee and carried a motion to appoint the successful candidate to council.

Analysis

- 30** The complaint alleged that during the October 29 meeting, council voted while *in camera* to appoint a new council member.
- 31** Section 244 of the Act states that votes must be taken in open session, subject to the narrow exception outlined in section 236(6) of the Act, which permits voting *in camera* for procedural matters or for giving directions to staff.

Did a vote occur?

- 32** There was some confusion among council members about whether or not a vote occurred during the closed session.
- 33** The closed session minutes record the committee voting to recommend a candidate to fill the vacancy to council. However, the council member who is recorded in the minutes as making the motion to recommend the candidate did not recall doing so during the closed session, and thought they made the motion during the open session. The Mayor told my Office that he did not remember the vote occurring in closed session.
- 34** The Mayor and council members we interviewed told my Office that there was a show of hands during the closed session to recommend that Dalton MacFarlane fill the vacant council position. This is also recorded in the minutes. Accordingly, I find that a vote occurred during the closed session of the meeting on October 29, 2019.
- 35** There were also differing recollections about how the vote took place. While the majority of individuals I interviewed recalled the vote taking place by show of hands, the Treasurer told my Office that council came to a verbal consensus. My Office has previously found that a direction based on council consensus is, for all intents and purposes, a vote of council.²

² *The North Shore (Township of) (Re)*, 2018 ONOMBUD 9, online: <<http://canlii.ca/t/hvmv3>>.

36 Further, there was some confusion about the vote that took place. One councillor told my Office that the *in camera* vote didn't "count" as an official vote, since voting must take place in open session. He told us that the vote was "not an official vote". However, the prohibition on voting in closed session extends to all votes, including informal votes such as straw polls or show of hands.

Was the meeting closed in accordance with the Act?

37 Section 236(6) of the Act permits voting *in camera* for procedural matters or when giving directions to staff if the meeting is properly closed to the public in accordance with the Act.

38 On October 29, 2019, the council went into closed session citing s.239(2)(b) of the Act which allows a meeting, or part of a meeting, to be closed to the public if the subject matter of the meeting concerns "personal matters about an identifiable individual".

39 In order to qualify as personal information, it must be reasonable to expect that an individual could be identified if the information was disclosed publicly. Generally, information that pertains to an individual in their professional capacity will not fit within the personal matters exception.³ However, in some cases, information about a person in their professional capacity can still fit within the exception if it reveals something personal or relates to scrutiny of an individual's conduct.⁴ My Office has consistently found that discussions about an identifiable individual's employment history and qualifications for a particular job fit within the personal matters exception of the Act.⁵

40 We were told by the council members and staff present during the closed session that the discussion focused on the professional qualifications and experience of each of the four candidates as this information pertained to the role of councillor. The council members reviewed the candidates' qualifications and examined how these qualifications would contribute to the work of council and council's collaboration. For example, my Office was told that council discussed one candidate's experience managing finances and discussed another candidate's volunteer experience.

³ *Aylmer (Town) (Re)*, 2007 CanLII 30462 (ON IPC), online: <<http://canlii.ca/t/1scqh>>.

⁴ *South Huron (Municipality of) (Re)*, 2015 ONOMBUD 6, online: <<http://canlii.ca/t/gtp80>>.

⁵ See for example: *South Huron (Municipality of) (Re)*, 2015 ONOMBUD 6, online: <<http://canlii.ca/t/gtp80>>; and *Burk's Falls / Armour (Village of / Township)*, 2015 ONOMBUD 26, online: <<http://canlii.ca/t/gtp6w>>.

41 Accordingly, the discussion held during closed session fit within the “personal matters” exception and the session was therefore closed in accordance with the Act.

Was the vote regarding a procedural matter or direction to staff?

42 Section 236(6) of the Act only permits voting during properly closed sessions if the vote is about procedural matters or gives directions to staff.

43 The council members and staff we spoke to agreed that the purpose of the vote was to recommend a candidate to fill a council vacancy. The discussions that led to the vote were about which candidate would be best suited to fill the vacant seat. The vote was not related to a direction to staff or a procedural matter.

44 Accordingly, the vote was contrary to the Act.

45 In the past, I have commented on the importance of ensuring transparency when appointing a council member. In a report to the City of Welland, I commented:

Without discussion in open session or an individual vote on the matter, it is not unreasonable for the members of the public to conclude that the appointment was finalized in closed session.

Although council may have been motivated by a desire to protect the names of candidates or appear united in their nomination to the vacant seat, local government must remain vigilant to ensure it acts in a transparent and accountable manner.⁶

46 I would echo this sentiment for the case at hand. While council members for the Township of Johnson were motivated to protect the privacy of the candidates and to appear united in their choice of appointment, they voted in closed session, contrary to the Act, to recommend a specific candidate for the council vacancy.

Notice for the October 29, 2019 special meeting

47 The complainant alleged that the Township failed to provide notice of the October 29, 2019 special meeting.

⁶ *Welland (City of) (Re)*, 2017 ONOMBUD 20 at paras 47-48, online: <<http://canlii.ca/t/hqspm>>.

- 48** The Act does not specify how notice of meetings must be provided to the public. However, it does state that every municipality must pass a procedural by-law that provides for public notice of meetings.⁷ My Office has found that notice should include adequate, meaningful information about all open and closed portions of a meeting. A reasonable interpretation of what constitutes adequate “notice” includes the time, date, and location for a meeting.⁸
- 49** The Township’s procedural by-law states that the Clerk shall give at least 24 hours’ notice to the public of all special meetings and that the Clerk shall post notice of all meetings on the municipal website to constitute notice to the public of the meeting. The procedural by-law is silent on the matter of voting during a closed council meeting.
- 50** The Clerk told my Office that he posted notice of the October 29, 2019 special meeting on the Township’s website on October 25, 2019. My Office was provided with screenshots confirming that the meeting agenda was posted on October 25, 2019. The agenda indicated the time, date, and location of the meeting.
- 51** The Mayor recalled seeing notice posted on the website in advance of the meeting.
- 52** I am satisfied that the Township provided notice for the October 29, 2019 special meeting in accordance with its procedural by-law.

Other procedural matters - minutes

- 53** Section 239(7) of the Act requires that a municipality record, without note or comment, all resolutions, decisions and other proceedings during a meeting. While the Act prohibits notes or comments from being included in the official record, this does not mean that the subjects discussed at a meeting should not be documented.
- 54** My Office has provided best practice recommendations for meeting minutes in past reports. The requirement to keep a meeting record should be interpreted consistently with the open meeting provisions, which exist to enhance openness, transparency and accountability in municipal governance.⁹

⁷ SO 2001, c 25, s 238 (2.1).

⁸ *Black River-Matheson (Township of) (Re)*, 2015 ONOMBUD 2, online: <<http://canlii.ca/t/gtp6f>>.

⁹ *Welland (City of) (Re)*, 2017 ONOMBUD 20, online: <<http://canlii.ca/t/hqspm>>.

- 55** In a report to the Township of Bonfield, my Office recommended that meeting minutes should include a detailed description of the substantive and procedural matters discussed.
- 56** In this case, the minutes for the meeting on October 29, 2019, did not include a full description of the subjects discussed either in closed or open session. Instead, they only included a list of the resolutions passed. As a result, it was impossible for my Office to determine, on the basis of the meeting records, the nature of the discussion in open and in closed session.
- 57** Many municipalities opt to make audio or video recordings of closed meetings to ensure that a complete record exists. We currently know of 25 municipalities that have implemented this important practice: The Regional Municipality of Niagara, the Townships of Adelaide Metcalfe, McMurrich/Monteith, North Huron, and Brudenell, Lyndoch and Raglan; the Towns of Amherstburg, Collingwood, Fort Erie, Midland, Pelham, and Wasaga Beach; the Cities of Brampton, Elliot Lake, London, Niagara Falls, Oshawa, Port Colborne, Sarnia, Sault Ste. Marie, Thorold, and Welland; and the Municipalities of Brighton, Central Huron, Meaford, and Southwest Middlesex.
- 58** Audio or video recordings can assist greatly during an investigation, and enhance the public's confidence in a municipality's compliance with the open meeting rules. Had the Township created an audio or video recording of council's October 29, 2019 meeting, a complete and reliable record of the discussion would have been available to assist during this investigation.

Opinion

- 59** My investigation found that the Township of Johnson provided sufficient notice of the special meeting held on October 29, 2019. It posted the meeting agenda on its website on October 25, 2019 in accordance with its procedural by-law.
- 60** The committee of the whole for the Township of Johnson violated the open meeting rules by conducting an illegal vote in closed session to recommend a candidate to fill a council vacancy. While the committee's closed session discussion about the candidates fit within the personal matters exception, the vote to recommend a candidate was not for a procedural matter or a direction to staff.

- 61 To improve its meeting practices going forward, and to comply with best practices, the Township of Johnson should ensure that no decisions are made or votes taken in a closed meeting – except for procedural matters or to give direction to officers, employees, agents, or contractors as is allowed by the Act. The Township should also ensure that meeting records fully reflect the proceedings of all meetings, and consider audio or video recording closed meetings to provide for a reliable record of all future discussions.

Recommendations

- 62 I make the following recommendations to assist the Township of Johnson in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of council for the Township of Johnson should be vigilant in adhering to their individual and collective obligations to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own procedural by-law.

Recommendation 2

The Township of Johnson should ensure that votes in closed session are limited to procedural matters and directions to staff.

Recommendation 3


The Township of Johnson should ensure that open and closed meeting records are complete and accurately reflect all of the substantive and procedural items discussed.

Report

- 63 Council for the Township of Johnson 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 COVID-19, 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.

- 64** This report will be published on my Office's website, and should be made public by the Township of Johnson 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.



Paul Dubé
Ombudsman of Ontario