



Ombudsman Report

**Investigation into a complaint about a call
held by members of council for the
Municipality of Casselman
on January 26, 2021**

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Ombudsman of Ontario**

January 2024

Complaint

- 1 My Office received complaints about a call held by members of council for the Municipality of Casselman (the “Municipality”) on January 26, 2021.
- 2 The call in question was a lengthy discussion between members of council and was held without staff or public knowledge, and without regard for any of the procedural requirements for meetings of council.
- 3 My Office was told that an audio recording of the clandestine call was inadvertently published on the Municipality’s website. The complainants were concerned that the discussion during the call advanced council business and constituted an illegal closed meeting under the *Municipal Act, 2001*.
- 4 I have concluded that a quorum of council for the Municipality of Casselman materially advanced matters that constituted council business during the call on January 26, 2021. This call was a very serious violation of the open meeting rules.

Ombudsman jurisdiction

- 5 Under the *Municipal Act, 2001*¹ (the “Act”), all meetings of a council, local board, and committee of either must be open to the public unless they fall within prescribed exceptions.
- 6 As of January 1, 2008, the Act gives anyone 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 or use the services of the Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 7 The Ombudsman is the closed meeting investigator for the Municipality of Casselman.
- 8 In investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the municipality’s governing procedures have been observed.

¹ SO 2001, c 25.

- 9 Since 2008, my Office has investigated hundreds of closed meetings in municipalities throughout Ontario. 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. Summaries of the Ombudsman's previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Investigative process

- 10 We received the complaints regarding the January 26, 2021 call between council members on August 29 and 30, 2022, and on September 20, 2022, we advised the Municipality of our intent to investigate the complaints.
- 11 Members of my Office's open meeting team reviewed relevant portions of the Municipality's by-laws, as well as the Act.
- 12 We retrieved and reviewed the original and unaltered audio recording of the January 26, 2021 council meeting which captured conversations between members of council that took place both before and after the official council meeting.
- 13 We obtained and reviewed minutes and agendas for council meetings on other dates where council discussed the matters raised during the January 26, 2021 call. Where appropriate, we also reviewed the audio recordings of these council meetings.
- 14 Finally, members of my Office's open meeting team interviewed the then-Clerk and all members of council for the 2018-2022 term.
- 15 My Office received full co-operation in this matter

The call

- 16 Council convened virtually, over the electronic meeting platform Microsoft Teams, on January 26, 2021 at 6:02 p.m. for a regular meeting of council. We were told that members of council and the public could join the virtual meeting by phone. The audio recording of the meeting suggests that members of council could also be seen onscreen throughout the evening.²

² It appears that the then-Mayor had technical difficulties that night and could only see a person if they were speaking.

- 17 The meeting was audio recorded. As a result of what was described to my Office as a technical mistake, the recording included a short segment before the meeting was opened as well as a very long segment after the meeting was adjourned during which members of council continued to discuss council business. We were told that this recording was then mistakenly published and made available on the Municipality’s website for more than a year.
- 18 The recording of the meeting starts at approximately 5:48 p.m. During the first few minutes of the recording, the then-Mayor can be heard confirming that other members of council are present and requesting that they stay after the meeting [TRANSLATION] “for 30 seconds”.
- 19 The council meeting began at 6:02 p.m. and adjourned at 7:33 p.m. Members of council wished everyone a good night. The then-Clerk confirmed he was not present after this point as the official meeting of council had ended.
- 20 On the recording, at around 7:34 p.m., after a brief pause, the then-Mayor asks if all other members of council are still present by calling their names, one by one. All four other members of council reply in the affirmative. The then-Mayor then asks for confirmation that everyone else has left, to which members of the council reply in the affirmative. Nevertheless, the then-Mayor says that they should wait for a little bit longer.
- 21 Discussion commenced at around 7:34 p.m. For the following 47 minutes (until around 8:21 p.m.), members of council discussed nine distinct matters, without the rules of order that would normally apply during a council meeting. These matters are outlined in the analysis section below. These discussions were held without staff or public knowledge, and without regard for any of the procedures that the Act and procedural by-law require for council meetings.
- 22 We received contradictory information from members of council about if this type of discussion after a council meeting was common in the Municipality. One member of council told us that January 26, 2021 was exceptional, and occurred because of the Municipality’s projects at the time of the call. Another member of council said it might have happened once or twice, while two other members of council told us it might have happened a few times. One member of council said it was not exceptional for discussions to take place after in-person council meetings, but that it was not the common practice for virtual meetings. The then-Clerk told us he was not aware of this sort of covert gathering having occurred in other instances.

Analysis

The definition of “meeting”

- 23** Subsection 238(1) of the Act sets out a two-part test to determine whether a gathering meets the definition of a “meeting.” A regular, special or other meeting of a council is a “meeting” under the Act where: (i) a quorum of members is present, and (ii) members discuss or deal with a matter in a way that materially advances council’s business or decision-making.

Quorum was present

- 24** Section 237 of the Act provides that a majority of a municipal council is necessary to form a quorum. Council for Casselman is composed of five members, so that three members must be present to constitute a quorum.
- 25** My Office has confirmed that all five members of council were present for the first 23 minutes of the call that occurred once the official council meeting ended. Four of the five members of council were present for the full duration of the call, between approximately 7:34 and 8:21 p.m. One member of council left the call at some point between 7:57 and 8:21 p.m. Therefore, a quorum of council participated throughout the entire call.
- 26** In a 2019 report to the City of Hamilton, my Office stated that the requirement in the Act that “a quorum of members is present” means that a “meeting” cannot include gatherings where members of council are not *physically* present.³ In this report, I nonetheless noted that, in the interest of openness and transparency, councils should avoid conducting business outside of a formal meeting.
- 27** The rules for electronic meetings were amended in 2020 as a result of the COVID-19 pandemic, removing the wording that members participating electronically would not be counted towards a quorum. Subsection 238(3.1) currently states that a procedure by-law may provide that members of council may participate electronically in a meeting to the extent and in the manner set out in the by-law.
- 28** The legislature also enacted subsection 238(3.3) to further state that a procedure by-law may provide that members of council participating electronically may be counted in determining whether or not a quorum of members is present at any point in time, both in open or closed session.

³ *Hamilton (City of) (Re)*, 2019 ONOMBUD 2 [*Hamilton*], online: <<https://canlii.ca/t/hxrk7>>.

- 29 In the Hamilton case, I noted that “[t]he words ‘is present,’ when given a plain and ordinary interpretation, mean that someone is physically present **in a particular place.**” [My emphasis] Since then, the legislature has allowed electronic venues to be a place where members may meet if they adopt a by-law to this effect. In a recent report to the Township of McKellar, my Office signalled that “[f]or the purposes of an electronic meeting, the ‘place’ is electronic [...].”⁴
- 30 The Municipality of Casselman was aware of these legislative changes as it amended its procedure by-law, at section 10.7, to allow electronic participation for council meetings in certain circumstances.
- 31 Accordingly, given the legislative amendments made to the open meeting rules as a result of the pandemic, members may be “present” when they come together electronically to discuss and advance business. In this case, a quorum of council members for the Municipality of Casselman was present during the call that followed the official meeting on January 26, 2021.

Council business and decision-making were materially advanced

- 32 In 2018⁵ and 2022⁶ reports to the Municipality of Casselman, I explained what “materially advances” the business or decision-making of council:

[...] “materially advances” involves considering the extent to which the discussions at issue moved forward the business of the municipality, based on factual indicators.

Discussions, debates or decisions that are intended to lead to specific outcomes or to persuade decision-makers one way or another are likely to “materially advance” the business or decision-making of a council, committee or local board. Mere receipt or exchange of information is unlikely to “materially advance” business or decision-making, as long as there is no attempt to discuss or debate that information as it relates to a specific matter that is or will be before a council, committee or local board.⁷

⁴ *McKellar (Township of) (Re)*, 2023 ONOMBUD 3 at para 48, online: <<https://canlii.ca/t/jv6ck>>.

⁵ *Casselman (Village of) (Re)*, 2018 ONOMBUD 11 [*Casselman 2018*], online: <<https://canlii.ca/t/hvmtk>>.

⁶ *Casselman (Municipality of) (Re)*, 2022 ONOMBUD 13 [*Casselman 2022*], online: <<https://canlii.ca/t/jrkx5>>.

⁷ *Casselman 2018*, *supra* note 5 at paras 30-31.

- 33** Mere updates on recent activities or communication of information are unlikely to materially advance business or decision-making.⁸ Likewise, discussions about procedural options do not materially advance business,⁹ nor do discussions of a social nature.¹⁰
- 34** However, votes, agreements, direction or input to staff, and discussions or debates of a proposal, course of action, or strategy are likely to materially advance business or decision-making.¹¹ Discussions about governance issues,¹² approval of minutes, direction to staff on recruitment, and candidate interviews¹³ have also been found to materially advance business or decision-making.
- 35** I must also consider whether the subject matter discussed is council business or not. To this effect, I have previously looked at whether the information received by members of council could inform the future business and decision-making of council.¹⁴ Generally, discussions which relate to business or decision-making and that are set to come back to council can be characterized as discussions about council business.¹⁵ On the other hand, I have found that purely technical or informational discussions on staff's courses of action were not council business.¹⁶
- 36** In light of this definition, I considered the nine distinct matters discussed by council during the call to determine whether council business or decision-making was materially advanced.

First item - The audio/video system for electronic council meetings

- 37** Council first discussed issues related to the audio/video system for council meetings. One member of council stated that they were having trouble using Microsoft Teams, and other members stated that staff might be able to assist in future. This portion of the discussion did not constitute council business.

⁸ *Ibid.*

⁹ *Saugeen Shores (Town of) (Re)*, 2020 ONOMBUD 3, online: <<https://canlii.ca/t/j93c3>>.

¹⁰ *Pelham (Town of) (Re)*, 2020 ONOMBUD 2, online: <<https://canlii.ca/t/j8c83>>; *Greater Napanee (Town of) (Re)*, 2021 ONOMBUD 2, online: <<https://canlii.ca/t/jctvh>>.

¹¹ *Casselman 2018*, *supra* note 5.

¹² *Southgate (Township of) (Re)*, 2020 ONOMBUD 7, online: <<https://canlii.ca/t/jc42r>>.

¹³ *Hamilton*, *supra* note 3, online: <<https://canlii.ca/t/j2pww>>.

¹⁴ *Letter from the Ontario Ombudsman to the City of Elliot Lake* (10 August 2012), online: <<https://www.ombudsman.on.ca/resources/reports,-cases-and-submissions/municipal-meetings/2012/city-of-elliott-lake>>.

¹⁵ *Brockton (Municipality of) (Re)*, 2017 ONOMBUD 6, online: <<https://canlii.ca/t/h4rwz>>; *Casselman 2022*, *supra* note 6.

¹⁶ *Casselman 2022*, *supra* note 6.

Second item - The annexation of a piece of land and related negotiations / infrastructure projects

- 38 The second matter discussed during the call was the annexation of a piece of land located in the neighbouring Municipality of The Nation and related negotiations. Members set out detailed plans for a proposed piping route to service the piece of land and discussed repaving a road that would be affected. Members also discussed allocating municipal funds for the project. During this part of the call, the then-Mayor actively sought input from other council members with respect to related negotiations. A majority of members of council voiced their agreement with respect to a specified course of action for negotiating and agreed to allocate a specific amount of municipal funds for this project.
- 39 The annexation of an identified piece of land and related municipal infrastructure projects and negotiations constituted council business. In this case, in the weeks following this meeting, council voted to set up an inter-municipal committee for this project, as the transfer of municipal land required council approval under the *Municipal Act, 2001*.
- 40 Despite some council members telling our Office that these discussions were purely informational, my review of the recording shows that council business was advanced. Input on courses of action was actively sought from, and given by, members of council during the call. Council discussed a specific funding contribution and straw votes were taken to approve specific courses of action. The discussions materially advanced the project, and laid the groundwork for what would have followed should the annexation of the piece of land have been successful.
- 41 The discussion of these matters during a clandestine call between members was a flagrant violation of open meeting rules and was wholly inappropriate.

Third item - The development project

- 42 Third, council discussed another development project and the then-Mayor presented specific options to attract the development project to Casselman. Council also strategized on its position with respect to the upper-tier municipality's large industry tax ratio, as it was suggested that this factor could have an impact on the potential development project.
- 43 Such discussions about the development project constituted council business. The development project in question had been discussed during at least eight council meetings between November 2020 and September 2022.

- 44 Although some of the discussions during the call about this project were limited to updates, certain updates were in fact highly specific proposals on next steps, presented to council to advance the project. For example, members of council discussed the municipality's position on the large industry tax ratio and a change that council wanted the upper-tier municipality to approve. My Office confirmed that the following day, during an open session of council for the upper tier municipality, this matter was dealt with by the then-Mayor of Casselman in a way that was consistent with the proposed course of action developed by consensus during the call.
- 45 Again, the discussion of these matters during a covert call between members was flagrantly inappropriate and contravened the open meeting rules.

Fourth item - The agriculture business project update

- 46 The fourth matter discussed during the call was an update with respect to an agriculture business project of the upper-tier municipality. This project had been dealt with by Casselman's council at earlier meetings and constituted council business. However, I am satisfied that during this call, council was only provided with an update on a recent activity relating to the project, which did not materially advance its business or decision-making.

Fifth item - The addition of a council meeting

- 47 Next, members of council discussed the proposed addition of a council meeting in February 2021. During this part of the call, council debated whether direction to staff should be given and ultimately came to an agreement on a course of action. This matter had been discussed in depth at council meetings at the time.
- 48 The recording reveals that the discussion about this matter featured two members of council putting numerous arguments forward in favour of their respective positions on the matter. Ultimately, after a debate, council decided by consensus to postpone the decision to a set date. This matter constituted council business that was materially advanced during the secret call.

Sixth item - The conduct and performance of an employee of the municipality

- 49 The sixth matter discussed was the conduct and performance of a specific employee of the municipality. This part of the call did not lead to any conclusion or agreement.

- 50** While council members did not vote during this portion of the meeting, the discussion about the employee went beyond mere information sharing. Members discussed the employee's conduct and performance in a way that moved council towards a future decision regarding the employee. Accordingly, this matter also constituted council business that was materially advanced during the secret call.

Seventh item - Oversight and performance of municipal staff working remotely

- 51** Council then discussed the surveillance and performance of municipal staff working remotely. This discussion yielded a consensus that certain changes would be put in place by the municipality.
- 52** Although no decision was clearly expressed during the call, the recording suggests that there was a consensus that changes should be put in place. These discussions led to formal council discussions a month later, on March 3, 2021, where a number of points made on the call were repeated in open session and where direction on this matter was given to the then-Chief Administrative Officer. Accordingly, this matter also constituted council business that was, here also, materially advanced during the secret call.

Eighth item - The administration of the municipal library

- 53** Next, council discussed the administration of the municipal library. This discussion was brief and essentially consisted of one member of council expressing their opinion. This matter was not discussed substantively and did not prompt any council action or further discussion. I am satisfied that nothing during this part of the call related to council business.

Ninth item - The municipal telephone system

- 54** Finally, council talked about issues with the municipal telephone system. During this part of the call, one member of council attempted to persuade others that a particular course of action should be taken to address the issues. Ultimately, a consensus was reached to address this matter.
- 55** These discussions constituted council business. In the course of the discussions, after arguments were presented by a member of council to justify council action on this issue, a consensus was formed to address this matter, thereby advancing the matter. A few days later, at its February 9, 2021 meeting, council approved the purchase of a new telephone system.

Opinion

- 56 The call on January 26, 2021 constituted a “meeting” under the *Municipal Act, 2001*, and was therefore subject to open meeting rules. My investigation found that council business and decision-making were materially advanced for six distinct matters during the call.
- 57 Council for the Municipality of Casselman contravened the *Municipal Act, 2001* on January 26, 2021, by holding a meeting that did not comply with the open meeting requirements. The call was held secretly, public notice was not provided, the public was not able to attend, and an official record in the form of meeting minutes was not kept.
- 58 Had these matters been discussed during a formal council meeting, some of them could potentially have qualified under exceptions to the open meeting rules. However, because council chose to discuss these matters in a secret forum, the entirety of the discussion was illegal and a flagrant violation of the spirit and the letter of the open meeting rules.
- 59 I am particularly concerned that, during the call, members of council took steps to ensure that no member of the public would be present to observe the decision-making process for important local matters. Moreover, statements during the call and made to my office during interviews suggest that other similar clandestine calls and gatherings may have previously occurred. The purpose and intent of the open meeting requirements set out in the *Municipal Act* are precisely to permit the public to observe the decision-making process of those they elect to represent them.
- 60 As I reminded the Municipality in my 2022 report, members of council should be aware that their presence at a gathering could transform that gathering into a meeting subject to the open meeting rules. I urge members of council to familiarize themselves with open meeting rules going forward and to reflect on their obligation to protect the public’s right to observe municipal government in process.
- 61 The members of council’s failure to follow a transparent and structured process to advance council business and decision-making, in accordance with the law, prevented the public from observing the steps taken by their elected officials in carrying out their democratic functions. The decision of council members to participate in this secret call reflects extremely poorly on their respect for the principles of openness, accountability, and transparency underlying the open meeting provisions.

Recommendations

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

Recommendation 1

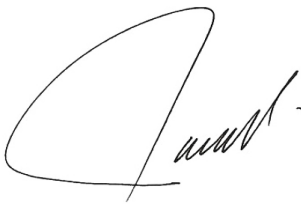
All members of council for the Municipality of Casselman should be vigilant in adhering to their individual and collective obligation to ensure compliance with their responsibilities under the *Municipal Act, 2001*.

Recommendation 2

Council for the Municipality of Casselman should ensure that no council business or decision-making is materially advanced outside of formal council meetings.

Report

- 63 Council for the Municipality of Casselman, as well as the former Mayor of Casselman, were 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.
- 64 This report will be published on my Office's website, and should also be made public by the Municipality of Casselman. In accordance with s. 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