



Ombudsman Report

**Investigation into a closed meeting held by
the City of Welland**

**Paul Dubé
Ombudsman of Ontario
November 2017**

Complaint

- 1 In September 2017, my Office received a complaint about a closed meeting held by the City of Welland on September 19, 2017.
- 2 The complaint alleged that council, sitting as the committee of the whole, improperly voted during a closed session to appoint a new councillor to the vacant Ward 5 council seat.

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001*, 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 City of Welland.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act in section 239 of the *Municipal Act, 2001* and the municipality's procedure by-law governing meetings have been observed.

Council procedures

- 7 In accordance with the *Municipal Act, 2001*, the city's procedure by-law (by-law no. 2017-6) states that all meetings shall be open to the public except as provided in section 239 of the *Municipal Act*. Prior to proceeding in camera, council and any committees must state by resolution the fact of holding a closed meeting and the general nature of the subject matter to be considered.
- 8 The procedure by-law mirrors the requirements of the *Municipal Act* in preventing the taking of a vote during a closed meeting unless provided for by legislation and states that no vote shall be taken by ballot or any other method of secret voting, except as otherwise provided, by the *Municipal Act*.

Investigative process

- 9 On September 21, 2017, we advised the municipality of our intent to investigate this complaint.
- 10 Members of my Office reviewed the city's procedure by-law and relevant portions of the Act. We reviewed the meeting records from the open and closed portions of the September 19, 2017 meeting. In addition to the written records of the meeting, the city also provided a video recording of the open portion of the meeting and an audio recording of the closed portion of the meeting. We reviewed the open meeting recording but the closed meeting recording was inaudible.
- 11 We interviewed the clerk and members of council who were present at the closed meeting.
- 12 My Office received full co-operation in this matter.

Background

Council meeting on September 19, 2017

- 13 On July 25, 2017, council declared the Ward 5 council seat vacant. The seat was previously held by the late Councillor Rocky Letourneau.
- 14 Council decided to fill the vacancy by appointment of a resident from the community. Under subsection 263(5)(1) of the *Municipal Act, 2001*, a person must be appointed to fill the vacancy within 60 days after the day the seat was declared vacant.
- 15 In order to meet the 60-day requirement, the city decided to choose and appoint the new council member during the September 19, 2017 council meeting.
- 16 According to the meeting minutes, council proceeded into closed session as the committee of the whole at 5:47 p.m., citing the "personal matters", "proposed or pending acquisition or disposition of land", and "litigation or potential litigation" exceptions to the open meeting rules. The resolution to proceed into closed session did not include a general description of the topics to be discussed.

- 17 The closed meeting agenda lists a number of items for in camera discussion including the “Ward 5 vacancy appointment”. The clerk confirmed that council discussed the Ward 5 vacancy appointment under the “personal matters” exception.
- 18 Once in closed session, council discussed how to proceed with the vote to select a successful candidate for the Ward 5 vacancy. City staff had previously recommended using ranked ballots. However, council decided by verbal consensus to have each councillor vote for one candidate and the candidate with the majority of votes would fill the seat.
- 19 Following the discussion, staff distributed ballots to each council member. The Mayor told us that each ballot was marked with the relevant councillor’s name on it. Councillors then filled in the ballot with their choice for the new council member. The Mayor, as chair of the meeting, did not participate in the vote. Staff collected and tallied the ballots in private, and then announced the candidate who had received the majority of the votes. The ballots were not read aloud. Some councillors referred to the process explicitly as a secret ballot vote.
- 20 Based on the vote, staff prepared the following motion to present to council during the open session:
- THAT THE COUNCIL OF THE CITY OF WELLAND appoints Claudette Richard to Welland City Council to fill the ward 5 vacancy, due to the passing of Councillor Letourneau.
- 21 After reconvening in open session, the clerk announced the addition to the open meeting agenda and read out the motion as it appears above. Council did not discuss the motion or vote on it after the motion was read out, but continued with its other business.
- 22 The clerk and Mayor told my Office that the motion to appoint the new council member to the Ward 5 vacant seat was voted ‘en bloc’. According to the clerk, en bloc voting is a single vote of council, which adopts a number of items. In this case, motions arising from various items previously discussed were all addressed in a single open session vote. Council members had an opportunity to request that specific items be removed from the en bloc vote for further discussion. The Ward 5 appointment was not identified for further discussion. Ultimately, the motion was carried as part of council’s en bloc vote. This vote was not recorded in the open session minutes as a separate vote.

Analysis

23 The complaint to our Office alleged that council voted improperly during the closed session portion of the September 19 meeting to appoint a councillor to the vacant Ward 5 council seat.

“Personal matters about an identifiable individual” exception

24 The city relied on the closed meeting exception for “personal matters about an identifiable individual” under subsection 239(2)(b) of the *Municipal Act* to hold its in camera discussion about the Ward 5 vacancy appointment.

25 The personal matters exception applies to discussions about an individual in his or her personal capacity, rather than an official or professional capacity.¹ However, information about an individual in their official capacity can take on a more personal nature if it relates to scrutiny of that individual’s conduct.² My Office has found that discussions about the professional fitness, past work history, and qualifications of candidates for a municipal committee or appointments fit within the personal matters exception.³

26 In this case, the members of council who were present during the closed session told members of my Office that the in camera discussion did not include any personal information about the candidates. Rather, the committee only discussed the ballot procedure for the vote and whether to use a ranked ballot or a majority wins method.

27 Had council held an in camera discussion about the personal information and opinions on the candidates nominated for the vacant Ward 5 seat, that discussion would have likely fit within the personal matters exception.⁴ However, the closed session discussion focused solely on the procedure for voting and the vote itself. There was no discussion about any personal

¹ Ombudsman of Ontario, *Investigation into whether the Economic Development Committee for the Township of McKellar held illegal closed meetings on May 5, 2015 and by email between April 22 and 24, 2015* (November 2015) at para 50, online:

<<https://www.ombudsman.on.ca/Resources/Reports/Township-of-McKellar.aspx>>

² IPC Order MO-2519, Township of Madawaska Valley, April 29, 2010.

³ Ombudsman of Ontario, *Investigation into complaints about closed meetings held by Council for the City of London on May 17 and June 23, 2016* (February 2017) at para 19, online: <[https://www.ombudsman.on.ca/Resources/Reports/City-of-London-\(8\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-London-(8).aspx)>

⁴ Ombudsman of Ontario, *Investigation into whether Council for the Town of Bracebridge held illegal closed meetings on December 9 and 17, 2014* (March 2015) at para 41, online: <<https://www.ombudsman.on.ca/Resources/Reports/Town-of-Bracebridge.aspx>>

information about the candidates for the vacant council seat during the closed session.

- 28** Accordingly, the closed session discussion did not fit within the personal matters exception.

Voting in closed session

- 29** The open meeting rules established in s.239 of the *Municipal Act* only permit voting in closed session in limited circumstances.
- 30** Section 239(6) provides that voting is only permitted in closed session, if the meeting is otherwise properly closed under one of the permissible exceptions to the open meeting requirements and,
- (b) the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board.
- 31** The city's procedure by-law also prevents voting in closed session unless permitted by legislation.
- 32** The closed meeting minutes indicate that council voted and, as a result of that vote, a successful candidate was selected to fill the council vacancy. As noted above, the meeting was not properly closed under the personal matters exception. The vote was also not for a procedural matter or for giving directions or instructions as contemplated by s.239(6) of the *Municipal Act*. Under the circumstances, the vote during the closed session was improper. However, it was later confirmed in an open session vote.

Ballot voting

- 33** In considering this complaint, I am acting in my role as a closed meeting investigator. Accordingly, my focus is on determining whether council complied with section 239 of the *Municipal Act* and the relevant procedure by-law. The city's procedure by-law prevents voting by ballot or any other secret method of voting except as provided by the *Municipal Act*.
- 34** Section 244 of the Act specifically addresses ballot voting. It provides that with limited exceptions voting by ballot or any other method of secret voting is prohibited and such votes are of no effect. Consideration of whether council's vote by ballot during the closed session was of no force or effect is outside the scope of my role as a closed meeting investigator, and council

did confirm its choice of councillor in open session. Under the circumstances, I am not making a specific finding relating to this issue.

- 35** However, as the city's procedure by-law addresses secret ballot voting, I may make a finding as to whether the vote violated the procedure by-law.
- 36** The Mayor suggested that the vote was not secret, as each councillor's name was written on their individual ballot. However, the ballots were tallied in secret by staff. Although the clerk advised my Office that councillors could have requested the ballots be read aloud, council members were not aware they could make that request. Individual council members also told my Office that council explicitly used a secret ballot vote to ensure anonymity.
- 37** Accordingly, council voted by a secret ballot method and in doing so violated the city's procedure by-law.

Procedural matters

Closed meeting record

- 38** After the closed session vote took place, staff prepared a motion to add to the open meeting agenda regarding the vacant seat appointment. However, council did not formally vote to direct staff to prepare such a motion. Staff prepared the motion on their own accord based on the result of the vote.
- 39** When voting in closed session, council should clearly identify the item, formally vote on it, and record the outcome in the closed session meeting minutes.

Audio recordings

- 40** The City of Welland should be commended for recording open and closed meetings of council. This provides the most clear, accessible record for closed meeting investigators to review, and assists in ensuring that officials do not stray from the legal requirements during closed meetings.
- 41** However, in this case, the audio recording system failed to work properly resulting in an inaudible recording of the closed session. The video recording of the open session was intact. The clerk informed my Office that staff are reviewing the technology used to audio record closed meetings. We encourage the city to pursue this review of its system, to ensure that audio recordings provide a clear and audible record of all discussions.

Resolution to proceed in camera

- 42** Subsection 239(4) of the Act requires that the resolution to proceed in camera include the general nature of the subject matter to be considered. The city's procedure by-law has equivalent requirements.
- 43** The Court of Appeal in *Farber v Kingston (City)*⁵ stated that:
- the resolution to go into closed session 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 excluding the public.
- 44** My Office has also recommended that councils provide more substantive detail in resolutions authorizing closed sessions. For instance, in our Office's 2015 review of closed meetings in the Municipality of South Huron, we noted that council's resolution "should provide a brief description of the subject matter to be considered in closed session".⁶
- 45** In this case, the council's resolution to proceed in camera on September 19 did not provide meaningful information to the public about the issue that would be discussed in camera.

Ensuring transparency

- 46** Council emerged from closed session with an addition to the agenda to appoint one individual from the candidate list to the vacant Ward 5 seat. There was no further discussion about the motion nor was there a vote immediately after reading out the motion. Rather the motion, along with other matters, was passed in an en bloc vote that was not recorded in the minutes. It is unclear from the open session minutes that the en bloc vote occurred and the minutes do not record the items that were included in that vote. Keeping detailed minutes is important for transparency, for both open and closed meetings. Minutes should clearly identify that council has dealt with certain matters en bloc.
- 47** For a member of public, their perception would likely have been that the vote on the appointment of the Ward 5 vacant seat took place during the closed session. Indeed, some council members also expressed a lack of awareness

⁵ *Farber v. Kingston (City)*, 2007 ONCA 173 at para 21.

⁶ Ombudsman of Ontario, *Investigation into closed meetings held by council for the Municipality of South Huron* (February 2015) at para 58, online: <
<https://www.ombudsman.on.ca/Resources/Reports/Municipality-of-South-Huron.aspx>>

that there was a vote in open session on the appointment. 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.

- 48** 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.

Opinion

- 49** Council for the City of Welland contravened the *Municipal Act, 2001* and the city's procedure by-law when it discussed procedure for voting under the "personal matters exception" at the meeting on September 19, 2017.
- 50** Moreover, council for the City of Welland contravened the *Municipal Act, 2001* and the city's procedure by-law when it voted in closed session by secret ballot on September 19, 2017 to select a candidate from the nominations to appoint to the Ward 5 council seat.

Recommendations

- 51** I make the following recommendations to assist the City of Welland in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of council for the City of Welland should be vigilant in adhering to their individual and collective obligation to ensure that council and its committees comply with their responsibilities under the *Municipal Act, 2001* and the procedure by-law.

Recommendation 2

The City of Welland should ensure that no subject is discussed in closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 3

The City of Welland should ensure that its in camera votes comply with the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 4

The City of Welland should ensure that its resolutions to proceed in camera 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 excluding the public.

Recommendation 5

The City of Welland should ensure that its minutes are a full record of the meeting. The minutes should clearly identify when an en bloc vote has occurred and indicate items that were included in the en bloc vote.

Report

- 52 The City of Welland was given the opportunity to review a preliminary version of this report and provide comments. As part of its comments, the City accepted my findings and agreed to comply with my recommendations.
- 53 My report should be shared with council for the City of Welland and should be made available to the public as soon as possible, and no later than next council meeting.



Paul Dubé
Ontario Ombudsman