



Ombudsman Report

**Investigation into meetings held
by the Saugeen Municipal Airport Commission**

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Ombudsman of Ontario
December 2021**

Complaints

- 1 My Office received complaints about meetings held by the Saugeen Municipal Airport Commission (the “Commission”) on April 15, April 22, June 19, July 13, September 23, October 21, and November 25, 2020, as well as on January 13, 2021.
- 2 The complaints alleged that after the Commission began holding electronic meetings as a result of the COVID-19 pandemic, public notice of meetings was not consistently provided, including instructions on how to access electronic meetings.
- 3 The complaints also alleged that even when notice of a meeting and instructions for accessing the meeting were provided, members of the public were not able to observe the portions of meetings that took place after the commissioners rose from closed session and continued to address other business prior to adjournment.

The Saugeen Municipal Airport Commission

- 4 The Saugeen Municipal Airport was incorporated in 1990 by municipalities in Grey County and Bruce County for the purpose of operating a regional airport. Today, the airport is operated with the support of the Municipality of Brockton, the Town of Hanover and the Municipality of West Grey.
- 5 Pursuant to its by-law, the Airport is governed by a Commission composed of between five and seven members. Each of the participating municipalities appoints one member to the Commission and additional citizen members are also nominated to serve as commissioners. At the time my Office first received complaints about meetings held by the Commission, it was composed of five members. The Commission is currently composed of seven members, including three elected officials representing their respective municipalities.
- 6 The *Municipal Act, 2001*¹ (the “Act”), defines a “local board” as “a municipal service board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities.”
- 7 Section 202 of the *Municipal Act* also provides that two or more municipalities may enter into agreements to establish a joint municipal service board to manage and provide particular services as each municipality considers appropriate. Municipal service boards are deemed to be local boards by s. 197 of the Act.

¹ S.O. 2001, c 25.

- 8 Section 70 of the *Municipal Act* authorizes a municipality to establish and operate an airport.
- 9 Accordingly, the Commission is a local board exercising powers under the Act with respect to the affairs of the participating municipalities. It is subject to the open meeting rules under the Act.

Ombudsman jurisdiction

- 10 Under the *Municipal Act*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 11 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 investigator to review complaints about whether the municipality or a local board has complied with the open meeting rules.
- 12 The Ombudsman is the closed meeting investigator for the Saugeen Municipal Airport Commission.
- 13 When investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the applicable procedure by-law have been observed.
- 14 Our Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman's decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of the Ombudsman's previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Investigative process

- 15 On March 30, 2021, we advised the Commission of our intent to investigate the complaint.

- 16 We reviewed the Commission’s governing by-law, the by-laws of the participating municipalities, and relevant portions of the Act. We reviewed the meeting records, including the agenda and minutes for each meeting that was the subject of the complaint.
- 17 We spoke with the complainant, as well as the Chair and General Manager of the Commission, to obtain additional information about each meeting and about the Commission’s modified procedures for holding meetings electronically as a result of the COVID-19 pandemic.
- 18 My Office received full co-operation in this matter.

Analysis

Procedure by-law

- 19 Section 238(2) of the *Municipal Act* requires that every local board pass a procedure by-law governing the calling, place and proceedings of meetings.
- 20 The Act requires that such a procedure by-law “shall provide for public notice of meetings.”
- 21 My Office was told that neither the Commission nor the participating municipalities had previously considered it to be subject to this requirement or the open meeting rules generally.
- 22 The Commission has one by-law (“A By-law relating generally to the transaction of the affairs of Saugeen Municipal Airport Corporation”) that deals with certain procedural matters.
- 23 The by-law requires that minutes be taken of the Commission’s meetings and that the minutes, once approved, be posted on the airport premises and provided to the member municipalities.
- 24 While the by-law sets out certain requirements for providing notice of meetings to the commissioners, it does not set out a process for providing public notice of meetings. Nor does it address the holding of electronic meetings or otherwise specify where meetings shall be held. The by-law stipulates that in an emergency, a meeting may be called at the discretion of the Chair or by two commissioners.

- 25 The by-law is silent on the right of the public to observe the Commission’s meetings except where the topic of discussion falls within one of the mandatory and discretionary exceptions under the *Municipal Act*. Nor does the by-law require that a resolution be passed stating the fact of the holding of the closed meeting and the general nature of the matter to be considered *in camera*.
- 26 My Office was told that as a practical matter, the Commission has historically held meetings that were open to the public. It records in meeting minutes the resolution passed to proceed *in camera* and the general nature of the topics to be discussed therein.

Legislative amendments regarding electronic meetings

- 27 Following amendments to the *Municipal Act* made by the *Municipal Emergency Act, 2020* and the *COVID-19 Economic Recovery Act, 2020*, a procedure by-law may now provide that members can participate electronically in a meeting “to the extent and in the manner set out in the by-law.”² A procedure by-law may now provide that members participating electronically be counted toward quorum and may allow members to participate electronically in meetings that are open or closed to the public.
- 28 While these amendments allow for additional flexibility in conducting meetings through electronic participation, they do not create new exceptions to the open meeting rules or change the applicable procedural rules. Municipal meetings are still required to be open to the public, unless the topic of discussion fits within one of the exceptions set out in the Act.
- 29 As my Office has noted in previous closed meeting investigation reports, the amendments to the *Municipal Act* permitting electronic participation in meetings did not change the fundamental requirement that meetings must be open to the public, which enables citizens to observe council, and certain board or commission proceedings, in action.³ The Supreme Court of Canada has determined that the open meeting requirements in the Act demonstrate that the public has “the right to observe municipal government in process”.⁴
- 30 Whenever the public is excluded from in-person attendance, it is imperative that the alternative electronic format selected enables the public to observe all portions of a meeting except a duly constituted closed session.

² *Municipal Act, 2001*, S.O. 2001 C. 25 at s. 238(3.3).

³ *Westport (Village of) (Re)*, 2021 ONOMBUD 5, online: <<https://canlii.ca/t/jdpvc>>.

⁴ *London (City) v RSJ Holdings Inc.*, 2007 SCC 29 at para 32.

- 31 Notice of meetings must still be provided in accordance with the procedure by-law, meeting minutes must be recorded, and a resolution must be passed in open session before the meeting can be closed to the public.⁵
- 32 The Commission's by-law does not currently provide for members to participate electronically in meetings.

Notice of meetings

- 33 The complaint received by my Office alleged that beginning with a regular meeting scheduled on April 15, 2020, the Commission held a number of meetings via Zoom for which no advance notice was provided to the public on the Commission's website. The complainant explained that members of the public had no way of knowing a meeting was in progress until after it had occurred. Even if they were to learn that a meeting was happening, without instructions on how to log in to access the meeting, the public had no way to observe the meeting.
- 34 The complaint specifically alleged that the Commission held electronic meetings on Zoom on April 22, June 19, July 13, September 23, October 21, and November 25, 2020 without providing advance notice or information on how the public could access the meetings. The complaint alleged that the Commission held a meeting on January 13, 2021 that had originally been scheduled to occur on January 20, 2021, without providing public notice of the change.
- 35 The Chair of the Commission told us that prior to the declaration of emergency related to the COVID-19 pandemic, the Commission held regular in-person meetings at the airport offices on the third Wednesday of every month. Members of the public were welcome to attend and notices advertising the meetings were posted on the airport premises ahead of the meetings.
- 36 The Chair explained that after the declaration of emergency in March 2020, the Commission began holding electronic-only meetings using the Zoom platform to comply with applicable public health guidelines. We were told that meetings were not broadcast live, but that Zoom log-in information was provided upon request.
- 37 The Chair acknowledged that the Commission did not initially have a procedure in place to systematically provide public notice of electronic meetings held by the Commission. The Chair explained that although the Commission endeavoured to post notice of meetings to its website or on Facebook, this may not always have occurred as the Commission lacked full-time staff support and commissioners were dealing with a number of urgent matters.

⁵ *Russell (Town of) (Re)*, 2020 ONOMBUD 1, <<https://canlii.ca/t/j6n2t>>.

- 38 Accordingly, the Chair was unable to confirm that public notice was provided for the meetings held on April 15, April 22, June 19 and July 13, 2020. The Chair also acknowledged that special meetings were held on September 23 and November 25, 2020 to deal with urgent matters and could not recall whether public notice had been provided for these meeting dates. Although the Chair's recollection was that public notice was provided for the October 21, 2020 meeting by posting an announcement on the Commission's website, my Office was not able to verify that any notice had been provided.
- 39 With respect to holding the January 13, 2021 meeting a week before the posted notice date, the Chair noted that this change in schedule was discussed during the December 16, 2020 meeting. However, the Chair acknowledged that anyone not in attendance would not have been aware of the change. Although the change in schedule was mentioned in the minutes of the December 16, 2020 meeting, these minutes were not approved and made public until after the January 13, 2021 meeting had already taken place.
- 40 As the Supreme Court of Canada has recognized, the right of citizens to attend public meetings and view council proceedings in action is the foundation of the municipal open meeting requirement.⁶
- 41 In order for a meeting to be open to the public, the public must be able to attend to observe local government decision-making in process. Without adequate notice of where and when a meeting will occur, the meeting is effectively closed to the public, in violation of the Act.

Rising from closed

- 42 The complaint to my Office also alleged that even when members of the public were able to obtain the Zoom log-in for electronic-only meetings held by the Commission, they would be asked to sign off when the Commission went into closed session to discuss confidential matters and were not always able to rejoin the meeting after the Commission reconvened in open session. The complainant explained that on a number of occasions members of the public had no way of knowing when or if the Commission reconvened in open session after discussing matters *in camera*.
- 43 The complainant alleged that this occurred on a number of meeting dates during 2020 and 2021, including the October 21, 2020 meeting held by the Commission. My Office investigated whether this particular meeting was reopened to the public after the Commission went *in camera*.

⁶ *London (City) v RSJ Holdings Inc.*, 2007 SCC 29 at para 32.

- 44 Representatives of the Commission confirmed that after the initial switch to electronic meetings, whenever the Commission resolved to proceed *in camera*, any members of the public were asked to log out. We were told that nothing prevented members of the public from using the same link to rejoin the meeting following a closed session. However, those we spoke with acknowledged that early in the pandemic, the Commission had not adopted a consistent protocol to ensure that members of the public were informed that they had the right to be readmitted after a closed session to observe the remainder of a meeting.
- 45 In the absence of any formal procedure in place to enable members of the public to know when a closed session had concluded and the open portion of the meeting had resumed, members of the public were effectively deprived of the opportunity to observe any portions of the meeting occurring after the Commission had risen from closed session.
- 46 During its October 21, 2020, meeting, the Commission resolved to go into closed session at 2:13 p.m. to discuss a legal matter. The Commission reconvened in open session at 3:50 p.m. and the meeting was adjourned at 3:55 p.m. Neither the agenda nor the minutes provide any indication that members of the public observing the meeting were told that they could log back on and wait to be readmitted to the meeting after the Commission rose from closed session.
- 47 The Chair confirmed to my Office that beginning with the March 1, 2021 meeting of the Commission, an announcement is now made at the start of each Zoom meeting that during a closed session, guests can be moved into a virtual waiting room and be readmitted to the meeting once the open session resumes. We were told that this streamlines the process and does not require observers to log off and log back into the meeting. The minutes from the Commission's March 1 meeting indicate that guests who had left the meeting during an *in camera* discussion were readmitted to the meeting when the Commission reconvened in open session.
- 48 After reviewing a preliminary version of this report, my Office was provided with comments on behalf of the Commission that members of the public had always been told that they could sign out of a meeting when the commission was going into closed session and that they could sign back in and be placed in a waiting room until the commission was ready to rise from closed and resume its open meeting. The response noted that at no time was anyone in the waiting room not readmitted to a meeting. The response acknowledged that members of the public may have signed back in after the meeting had already adjourned, in which case they would not have known whether or not the meeting was still in progress.

- 49 I recognize that the Commission did not intend to exclude any members of the public from observing portions of any meeting occurring after the Commission rose from closed session. However, on a balance of probabilities, I am satisfied that the Commission did not take adequate steps to ensure that members of the public would be able to observe portions of the October 21, 2020 meeting that occurred after the Commission rose from closed session. I commend the Commission for adopting a more formal procedure in March 2021 to ensure that observers are adequately informed about how to observe portions of the meeting that will occur after an *in camera* session.
- 50 I recognize that municipalities and local boards have faced unprecedented challenges in adapting their operations during the COVID-19 pandemic, including in many cases pivoting to conducting meetings electronically using new technologies.
- 51 However, as my Office has noted in previous closed meeting investigation reports, the requirement to hold meetings that are open to the public is not suspended in an emergency.⁷
- 52 Whenever the public is excluded from in-person attendance at a meeting, it is imperative that the alternative electronic format selected enables the public to observe all portions of a meeting except a duly constituted closed session.
- 53 In previous reports issued by my Office, I have noted that even where a closed session is the only anticipated agenda item, the meeting must begin in open session and the public must be able to attend or otherwise observe that portion of the meeting.⁸ Even where a meeting may only be open to the public for a few minutes before and after holding a discussion *in camera*, municipalities and local boards must ensure that the public can observe the open portions of such meetings.
- 54 The Chair explained that since August 2020, the Commission has implemented a number of changes, including:
- Providing training to members on the open meeting rules,
 - Posting notice of upcoming meetings on its website six months in advance,
 - Posting notice of urgent or special meetings with minimum 24 hours' notice wherever possible,
 - Including a Zoom link in meeting notices to ensure members of the public can access the meeting, and
 - Posting meeting agendas online and at the airport office prior to each meeting to inform members of the public about the proposed topics of discussion.

⁷ *Russell (Town of) (Re)*, 2020 ONOMBUD 1, online: <<https://canlii.ca/t/j6n2t>>.

⁸ *Richmond Hill (City of) (Re)*, 2021 ONOMBUD 8, online: <<https://canlii.ca/t/jf6b3>>.

- 55 I commend the Commission for taking these steps to improve the transparency of its meeting practices.

Opinion

- 56 The Saugeen Municipal Airport Commission contravened the *Municipal Act* by holding meetings without providing adequate public notice on April 15, April 22, June 19, July 13, September 23, October 21 and November 25, 2020, and on January 13, 2021.
- 57 The Commission also contravened the *Municipal Act* when it failed to adequately notify members of the public about how to request readmission to the portion of the October 21, 2020 electronic meeting held after reconvening in open session following a closed session. Accordingly, the portion of the meeting that occurred after the Commission reconvened in open session was effectively closed to the public, as the public lacked adequate information to permit them to observe this portion of the meeting by either in-person or electronic means.
- 58 Finally, the Commission contravened the Act by failing to pass a procedure by-law governing the calling, place, and proceedings of meetings that complies with the requirement under the Act to provide for public notice of meetings.

Recommendations

- 59 I make the following recommendations to assist the Saugeen Municipal Airport Commission in fulfilling its obligations under the Act and enhancing the transparency of its meetings:

Recommendation 1

Members of the Saugeen Municipal Airport Commission should be vigilant in adhering to their individual and collective obligation to ensure that the Commission complies with its responsibilities under the *Municipal Act, 2001*.

Recommendation 2

The Saugeen Municipal Airport Commission should adopt a procedure by-law governing the calling, place and proceedings of meetings, in accordance with its obligations under the *Municipal Act, 2001*.

Recommendation 3

If the Commission wishes to continue holding electronic meetings, its procedure by-law should provide for members to participate electronically and be counted toward quorum.

Recommendation 4

The Commission's procedure by-law should provide for public notice of all meetings, including electronic, emergency and special meetings.

Recommendation 5

The Commission should ensure that information on how to access an electronic meeting is provided in its public notices.

Recommendation 6

The Commission should ensure that the public is able to observe all open portions of meetings, including any business conducted after rising from closed session.

Report

- 60 Members of the Saugeen Municipal Airport Commission were given the opportunity to review a preliminary version of this report and provide comments to my 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 members and staff for their co-operation and flexibility. The comments we received were considered in the preparation of this final report.
- 61 This report will be published on my Office's website, and should be made public by the Commission as well. In accordance with s. 239.2(12) of the *Municipal Act, 2001*, the Commission should pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario