



**Ombudsman Report**  
**Investigation into a complaint**  
**about a special meeting held by the**  
**Township of Russell on April 2, 2020**  
**by electronic participation**

**Paul Dubé**  
**Ontario Ombudsman**  
**April 2020**

## Complaint

- 1 My Office received a complaint that council for the Township of Russell held a meeting on April 2, 2020 that did not comply with the open meeting rules in the *Municipal Act, 2001* (the “Act”).
- 2 Due to the COVID-19 pandemic, this meeting was held online with the electronic participation of members and staff rather than at the township offices.
- 3 The complaint alleged that while the agenda for the meeting indicated it would be held by electronic participation, it did not include a link to the website where the meeting would be broadcast. Instead, as the agenda listed the address of the township offices, the complainant attended the building that day to observe the meeting, but found that the doors were locked.
- 4 Under the Act, all meetings of council, local boards, and committees of each of them must be open to the public, unless they fall within prescribed exceptions.

## Ombudsman jurisdiction

- 5 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 or use the services of the Ontario Ombudsman. 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 Township of Russell.

## Investigative process

- 7 On April 13, we advised the Township of Russell of our intent to investigate this complaint.
- 8 My Office obtained and reviewed the agenda and a video recording of the April 2, 2020 special meeting. We also reviewed the township’s procedure by-law, spoke with the Clerk, and reviewed additional documentation provided by the township.
- 9 Audio and video recordings provide the most accurate and complete record of a meeting and we commend the municipality for adopting the practice of recording its council meetings.

10 My Office received full co-operation in this matter.

## Provincial declaration of emergency

- 11 COVID-19 is a disease caused by a novel coronavirus that can result in serious illness or death, especially in vulnerable groups, such as elderly and immunocompromised persons.<sup>1</sup> At the present time, there is no known cure or vaccine for COVID-19.<sup>2</sup>
- 12 On March 11, 2020, as increasing numbers of confirmed cases of COVID-19 were reported around the globe, the World Health Organization classified the outbreak as a pandemic.<sup>3</sup>
- 13 On March 17, 2020, an Order in Council<sup>4</sup> was issued in Ontario declaring a province-wide state of emergency pursuant to the *Emergency Management and Civil Protection Act*.<sup>5</sup> As of the writing of this report, the emergency was still in effect.
- 14 When an emergency has been declared, the Lieutenant Governor in Council may issue orders “to prevent, reduce or mitigate serious harm to persons or substantial damage to property.”<sup>6</sup> Several orders have been made in an effort to prevent the spread of the virus.
- 15 On March 24, non-essential places of business were ordered to close across Ontario.<sup>7</sup> Many municipal facilities and services were also ordered to close, such as libraries, food service establishments, child care centres, concert venues, and indoor and outdoor recreational facilities.<sup>8</sup> Schools were ordered to close as well.<sup>9</sup>

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<sup>1</sup> World Health Organization, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>

<sup>2</sup> Public Health Agency of Canada, <https://www.canada.ca/en/public-health/services/diseases/coronavirus-disease-covid-19.html>

<sup>3</sup> Public Health Ontario, <https://www.publichealthontario.ca/en/diseases-and-conditions/infectious-diseases/respiratory-diseases/novel-coronavirus>

<sup>4</sup> Order in Council 518/2020; see also O. Reg. 50/20 *Declaration of Emergency*

<sup>5</sup> R.S.O. 1990, chapter E.9 at s. 7.0.1(1). The Lieutenant Governor in Council or the Premier may by order declare that an emergency exists throughout Ontario or in any part of the province if several criteria are met, such as where immediate action is required, “to prevent, reduce or mitigate a danger of major proportions that could result in serious harm to persons or substantial damage to property.”

<sup>6</sup> *Supra* note 5 at s. 7.0.1(2)

<sup>7</sup> O. Reg. 82/20 *Closure of Places of Non-Essential Business*

<sup>8</sup> O. Reg. 51/20 *Closure of Establishments*; O. Reg. 104/20 *Closure of Outdoor Recreational Amenities*

<sup>9</sup> Order in Council 576/2020

- 16 On March 18, organized public events of more than 50 people were prohibited.<sup>10</sup> On March 28, the order was amended to limit gatherings to no more than five people, with limited exceptions.<sup>11</sup>

### Local response to COVID-19

- 17 Under the *Emergency Management and Civil Protection Act*, the head of council of a municipality may also declare a local state of emergency and take steps to implement the municipality's emergency plan.<sup>12</sup> On March 26, the United Counties of Prescott & Russell, an upper-tier municipality whose territory includes the Township of Russell, declared a state of emergency.<sup>13</sup>
- 18 In addition to actions which can be taken by provincial and municipal governments in a declared emergency, a Medical Officer of Health appointed by a local board of health may also issue orders under the *Health Protection and Promotion Act* to prevent the transmission of communicable diseases.<sup>14</sup>
- 19 The Medical Officer of Health for the Eastern Ontario Health Unit, which includes the Township of Russell, has issued several orders under the Act, such as closing all places of worship, day cares, and establishments providing personal care services.<sup>15</sup> The Medical Officer of Health has also recommended that citizens practice social or physical distancing by staying home as much as possible and avoiding all non-essential outings.<sup>16</sup>

### Amendments to the *Municipal Act*

- 20 The open meeting rules in the *Municipal Act* protect the public's right to observe municipal government decision-making in process. Under normal circumstances, municipalities may permit members to participate electronically in a meeting, but those members are not counted towards quorum and cannot participate in a closed session.<sup>17</sup> That means that a quorum of members must be present in one location in order for a meeting to take place.
- 21 Starting March 16, my Office began receiving inquiries from municipalities and the public about how COVID-19 and the declaration of emergency impacted the

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<sup>10</sup> O. Reg. 52/20 *Organized Public Events, Certain Gatherings*

<sup>11</sup> O. Reg. 99/20 *Emergency Order Under Subsection 7.0.2(4) of the Act*

<sup>12</sup> *Supra* note 5 at s. 4

<sup>13</sup> <https://eohu.ca/en/article/2020-03-26-1>

<sup>14</sup> R.S.O. 1990, c. H.7 at s. 22

<sup>15</sup> <https://eohu.ca/files/resources/eohu-section-22-order-bilingual.pdf>

<sup>16</sup> <https://eohu.ca/en/article/2020-03-17-1>

<sup>17</sup> *Municipal Act*, s. 238.

open meeting rules. On March 17, we spoke with staff at the Ministry of Municipal Affairs and Housing regarding the concerns that had been raised.

- 22** On March 19, 2020, I wrote to the Minister of Municipal Affairs and Housing to highlight a gap in the legislation relating to open municipal meetings. I pointed out that:

...under the *Municipal Act* and *City of Toronto Act*, municipal councils, local boards, and committees can only hold meetings closed to the public in limited circumstances. The provisions that provide for municipalities to hold electronic meetings are currently restricted to circumstances where a quorum of members is present. There is no exception to the open meeting rules that would permit municipalities to exclude the public from meetings in order to limit the spread of disease during an epidemic.... In the face of the current COVID-19 emergency, municipalities must have the tools to appropriately balance the transparency and openness of local government against the need to protect public health and safety.

- 23** That day, the legislature passed Bill 187, the *Municipal Emergency Act, 2020*, which took effect on March 19, 2020. The Bill amended the *Municipal Act, 2001*, to allow municipalities to make changes to their procedure by-law, should they wish to do so, to permit:

- Members of a council or of a local board who are participating electronically in a meeting to be counted towards quorum; and
- Members participating electronically to participate in a closed session.<sup>18</sup>

These changes apply only when an emergency has been declared under the *Emergency Management and Civil Protection Act*.

- 24** To amend a procedure by-law, a quorum of council would normally have to meet and vote in person at an open meeting. The amendments to the Act now permit members of council to hold a special meeting via electronic participation during an emergency even if their existing procedure by-law does not allow for it. They can do so only for the purpose of amending the municipality's procedure by-law to allow for electronic participation.<sup>19</sup>

- 25** While the amendments made by the *Municipal Emergency Act, 2020*, permit quorum to be attained through electronic participation, they did not create any new exceptions to the open meeting rules, or change any of the other applicable rules. Municipal meetings are still required to be open to the public, unless the

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<sup>18</sup> *Municipal Act, 2001*, at s. 238(3.3)

<sup>19</sup> *Ibid* at s. 238(3.4)

topic of discussion fits within one of the exceptions set out in the Act. Notice of meetings must still be provided in accordance with the procedure bylaw, meeting minutes must be recorded, and a resolution must be passed before the meeting can be closed to the public.

- 26** The Ministry of Municipal Affairs and Housing subsequently issued an information sheet outlining how these changes impact municipalities, which is available online.<sup>20</sup> The Ministry encouraged municipal officials to contact their local Municipal Services Office with further questions. Other organizations such as the Association of Municipalities of Ontario (AMO)<sup>21</sup> and the Association of Municipal Managers, Clerks, and Treasurers of Ontario (AMCTO) have also made additional resources available that may be of further assistance.<sup>22</sup>

### Changes to township operations

- 27** During the period leading up to the Township of Russell's April 2 meeting, visitors to the municipal website were greeted with a pop-up alert. It advised that COVID-19 had resulted in changes to municipal services and provided a link to a dedicated page providing additional information.
- 28** The Clerk told us that various measures were taken to inform residents that all council meetings would be held electronically rather than at the township offices. On March 30, a note was posted on the township's website indicating that "Council meetings will continue on the same date and time as planned and will be held through electronic participation." This information was included on both a dedicated COVID-19 page and on the page providing information on upcoming council and committee meetings.
- 29** Staff told us they shared this information on the township's Facebook page on April 1, and that the electronic sign in front of the township offices was also updated around the same time to display this information.

### **The April 2, 2020 special meeting**

- 30** On March 31 at approximately 6:00 p.m., the Clerk issued a notice that a special meeting would be held on April 2, 2020, at 6:00 p.m. by electronic participation. Notice to the public was provided at approximately 6:00 p.m. when an agenda for the special meeting was posted on the township's website.

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<sup>20</sup> "Providing Flexibility For Municipalities To Hold Local Meetings During Emergencies"

<http://www.amo.on.ca/AMO-PDFs/COVID19/Information-sheet-Electronic-Meetings-During-an-Em.aspx>

<sup>21</sup> <http://www.amo.on.ca/AMO-Content/Health/COVID19Resources>

<sup>22</sup> <https://www.amcto.com/Blog/March-2020/Government-Passes-Bill-187,-the-Municipal-Emergenc>

- 31 The agenda for the April 2 special meeting indicated that it would occur via “Electronic Participation.” No hyperlink or direction to visit a specific website was listed. Below “Electronic Participation”, the agenda listed the address of the township offices where meetings are normally held. Staff told us that this was an oversight.
- 32 On the morning of April 2, the township’s website was updated to include a hyperlink to a website where the meeting would be broadcast live. This link was also shared on Facebook immediately prior to the commencement of the meeting. The Clerk told my office that at the time the agenda was issued, the precise website where the meeting would be streamed was not yet known.
- 33 The special meeting was called to order by the Mayor at 6:00 p.m. on April 2, 2020. The Mayor conducted a roll call and each member of council can be heard on the meeting video indicating that they are participating electronically.
- 34 Council then voted to suspend its rules of procedure to permit discussion of a staff report recommending that the Procedure By-law (2019-020) be amended in response to the passage of the *Municipal Emergency Act* (Bill 187) by adding the following provisions:
- 4.19 - Electronic Participation During Emergency Situations:
1. Members can participate electronically in a Meeting, which is open or closed to the public during any period where an emergency has been declared to exist in all or part of the County under section 4 or 7.0.1 of the *Emergency Management and Civil Protection Act*.
  2. Any Member participating electronically shall be counted in determining whether or not a quorum of Members is present at any point in time.
  3. The technology used shall enable electronic participation of Members in decision-making and ensure the meeting can be open to the public, for example, but not limited to, telephone, video or audio-conferencing.
- 35 Council voted to receive the report and accept staff’s recommendation to amend the procedure by-law. Council then proceeded to discuss other agenda items related to the impact of COVID-19 on municipal operations. A confirmation by-law was passed prior to the conclusion of the meeting.
- 36 According to the archived webcast (available online), the Mayor invited members of the public viewing the live webcast to submit questions via the “chat” function of the webcast software. A staff member can be heard indicating that there was

one member of the public viewing the live webcast. No questions were received, and council proceeded to deal with other business.

- 37** After the live webcast ended, a video recording of the proceedings remained available on the website. A recording was also posted to the township's YouTube channel.<sup>23</sup>
- 38** The Clerk indicated that going forward, staff will endeavour to include a link to the Township's website in each agenda for a meeting to be held by electronic participation. The Township's website provides a link to the webcast for each upcoming meeting,, as well as more detailed instructions on how to access and participate in a meeting in progress.
- 39** Finally, the Clerk indicated that the township planned to make video tutorials available to residents about the software used to conduct electronic meetings. This is now available on the Township's website:  
[http://www.russell.ca/town\\_hall/municipal\\_government/council](http://www.russell.ca/town_hall/municipal_government/council)

## Analysis

- 40** The right of citizens to attend public meetings and view council proceedings in action is the foundation of the municipal open meeting requirement. As the Supreme Court of Canada determined in *London (City) v. RSJ Holdings Inc.*, the open meeting requirements set out in the *Municipal Act* demonstrate that the public has "the right to observe municipal government in process".<sup>24</sup> The recent amendments to the *Municipal Emergency Act, 2020*, have not changed that.
- 41** In order to ensure that the public's right to observe municipal government is not frustrated, the municipality must provide notice of the time and place of the meeting, and then proceed to meet at the time and place specified in the notice.
- 42** In this case, the Township of Russell provided notice of the April 2 special meeting 48 hours in advance by publishing the meeting agenda to its website, as required by s. 4.7.4 of its Procedure By-law.
- 43** The posted agenda indicated that the meeting would take place at 6:00 p.m. via "electronic participation." The address of the township offices where meetings are usually held was also listed.
- 44** As the meeting agenda listed the address of the township offices in addition to indicating the meeting would take place by electronic participation, this may have

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<sup>23</sup> <https://youtu.be/jvzH3lfWwH4>

<sup>24</sup> *London (City) v RSJ Holdings Inc*, 2007 SCC 29 at para 32.



led to confusion amongst some members of the public. Nevertheless, I cannot conclude that members of the public were prevented from observing the meeting in progress. The township provided notice of the time of the meeting and the fact that it would be conducted electronically.

- 45** Further specifics on how members of the public could observe the meeting in progress, such as the link to the webcast, were subsequently posted to the township's website and Facebook page. On April 1, a post indicated that a link would be provided prior to the meeting. The link was provided on the morning of April 2, approximately 10 hours prior to the meeting. The fact that all council meetings would occur by electronic participation for the duration of the declared emergency was also mentioned on multiple sections of the township's website.
- 46** As a best practice to promote transparency and accountability, and to eliminate any possible confusion, municipalities should provide clear instructions in the agenda or meeting notice indicating how members of the public can access a meeting that is being conducted electronically due to an emergency.
- 47** In response to this complaint, township staff undertook to provide this additional information to the public in future meeting notices. The Clerk also indicated that the township would be providing tutorials on how to participate in an electronic meeting. I commend the township for taking these steps to further enhance the public's ability to observe electronic meetings.

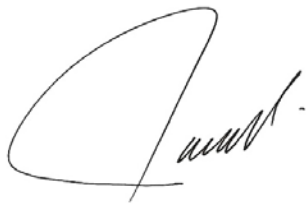
## Opinion

- 48** I wish to acknowledge at the outset the extraordinary circumstances of the COVID-19 pandemic and the resulting adjustments to normal operating procedures made by individuals and organizations, often very quickly. Municipalities in particular require the flexibility to enable them to continue providing essential services, while complying with regulatory requirements and keeping residents, staff and elected officials safe.
- 49** Amendments to the Act now permit municipalities to hold meetings electronically during a declared emergency. However, the open meeting rules continue to apply to such meetings. The requirement to hold meetings that are open to the public is not suspended in an emergency. I encourage municipalities to continue to strive to carry out their business in as transparent and open a manner as possible while protecting public health and safety.
- 50** Members of council for the Township of Russell did not contravene the open meeting rules in the *Municipal Act, 2001* when they held a special meeting by electronic participation on April 2, 2020.

- 51 While the initial agenda provided for the April 2 meeting may have led to some confusion, I commend the Township of Russell for taking additional steps to ensure that information about how to observe and participate in electronic meetings is widely available to the public. In the interest of openness and transparency, I urge all municipalities to do as much as possible to facilitate access by the public to any meetings held electronically.

## Report

- 52 Ombudsman staff reviewed a preliminary version of this report with the Mayor and Clerk on April 16, and provided the opportunity to comment. Any comments received were taken into account in preparing this report.
- 53 My report should be shared with council and made available to the public as soon as possible, and no later than the next council meeting.



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**Paul Dubé**  
Ombudsman of Ontario