



Ombudsman Report

**Investigation into complaints about meetings
held by council for the Township of Adjala-Tosorontio
on June 29, 2021 and March 1 and 7, 2022**

**Paul Dubé
Ombudsman of Ontario
July 2023**

Overview

- 1 My Office received complaints that council for the Township of Adjala-Tosorontio (the “Township”) contravened the open meeting rules on June 29, 2021, and March 1 and 7, 2022.
- 2 My review found that the subject matter of the meeting held on June 29, 2021 fit within the exceptions to the open meeting rules. However, the resolution to close the meeting to the public did not include a general description of the topic to be discussed *in camera*.
- 3 With respect to the sessions on March 1 and March 7, 2022, I found that council’s resolutions to move into closed session on both dates did not include a general description of the topic to be discussed *in camera*. I also found that council failed to vote on a resolution to move *in camera* on March 7, 2022.
- 4 Finally, I found that the Township’s procedural by-law does not adequately address public notice for special meetings of council. Further, I found that the Township’s minutes fell short of the requirements outlined in its procedural by-law.

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 Township of Adjala-Tosorontio.
- 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 In September 2022 we advised the Township of our intent to investigate the complaints regarding the June 29, 2021 and March 1 and 7, 2022 meetings of council.
- 11 Members of my Office's open meeting team reviewed relevant portions of the Township's procedural by-law, as well as the Act. We reviewed the meeting records, including agendas, minutes, and open session recordings, and e-mail correspondence provided to my Office in relation to the meetings being investigated.
- 12 Finally, members of my Office's open meeting team interviewed all members of council for the 2018-2022 term.
- 13 My Office received full co-operation in this matter.

June 29, 2021 meeting

- 14 Council convened in chambers for a special meeting at 4:00 p.m. on June 29, 2021. A resolution was passed at 4:03 p.m. to go *in camera*, citing the exception for solicitor-client privilege. The resolution did not include any further information about the topic to be discussed.
- 15 We were told that in closed session, council discussed an update on a development project and an update about a specific agreement. We were also told by some members of council that they discussed Township communications during the session; however, some members of council had difficulty recalling the details of the *in camera* discussion. We received contradictory information about this. We also received contradictory information about whether a direction to staff was provided during the closed session. On a balance of probabilities, I am satisfied that the topic of

Township communications was discussed and that direction was given to staff during the closed session.

- 16 We were told by some council members that council received legal advice related to all topics discussed and provided related direction to staff.
- 17 Of the seven members of council, one member was absent for this closed session. Another member arrived after the discussions about the update on the development project and about Township communications. A third member of council left the closed session after declaring a conflict of interest regarding the update on the development project. This third member of council returned to the closed session only for the discussion about a specific agreement.
- 18 The closed meeting minutes for this council meeting include a list of motions passed and a list of which members were present, but do not include information about the member who left and came back during the meeting. The closed meeting minutes also do not reflect the direction to staff during the closed session. Further, the open and closed meeting minutes do not include details about the content of the public or *in camera* discussions. The Township does not make audio or video recordings of its closed sessions.

Analysis

Application of the exception for solicitor-client privilege

- 19 In closing this meeting to the public, council cited the exception for advice subject to solicitor-client privilege at paragraph 239(2)(f) of the Act. This exception covers communication between the Township and its solicitor in seeking or receiving legal advice intended to be confidential.²
- 20 The purpose of the exception for solicitor-client privilege is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.³ The Supreme Court of Canada has stated that solicitor-client privilege applies when the following conditions are met:
 - There is a communication between a lawyer and a client;
 - Which entails the seeking or giving of legal advice; and
 - Which is considered to be confidential by the parties.⁴

² *Timmins (City of) (Re)*, 2017 ONOMBUD 4 at para 28, online: <<https://canlii.ca/t/h4rwt>>.

³ *Hamilton (City of) (Re)*, 2019 ONOMBUD 3 at para 33, online: <<https://canlii.ca/t/j2b49>>.

⁴ *Solosky v. The Queen*, 1980 1 SCR 821, online: <<https://canlii.ca/t/1mjtq>>.

- 21 We were told that two lawyers were present during the closed meeting and offered confidential advice about the topics discussed.
- 22 Accordingly, I am satisfied that council's discussions during the June 29, 2021 meeting fit within the exception for solicitor-client privilege.

Resolution to move into closed session

- 23 Section 239(4) of the Act establishes a procedural obligation for a municipal council, local board, or committee to state by resolution in open session that a closed meeting will be held. The general nature of the matter to be discussed at the closed meeting must also be stated. In addition to the requirements under the Act, section 5.11 of Township's procedural by-law requires a resolution to include the general topic for the *in camera* discussion as part of its closed meeting procedure, as well as the grounds for closing the meeting.
- 24 As the Court of Appeal noted in *Farber v. Kingston*, the resolution to go into a closed meeting 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.⁵ My Office has previously found that the requirement to provide the general nature of the subject to be discussed in the closed meeting is generally not satisfied by citing solely the exception from the Act.⁶
- 25 Publicly stating that a meeting will be closed to the public and identifying what issues will be discussed in the closed session is not a mere procedural technicality. This obligation enhances the transparency of local democracy and ensures that decision-makers are accountable when they discuss matters behind closed doors.⁷ Failing to comply with this requirement can result in a loss of public confidence in municipal governance.⁸
- 26 In this case, the resolution to move *in camera* included the fact that council intended to close the meeting to the public and cited the relevant exception from the Act. However, the resolution did not include the general nature of the matter to be considered *in camera*. No further description of the topic to be discussed *in camera* was provided to the public beyond the reference to the exception for solicitor-client privilege.

⁵ *Farber v. Kingston (City)*, 2007 ONCA 173 [*Farber*], online: <<https://canlii.ca/t/1qtzl>>.

⁶ *Brockville (City of)*, 2016 ONOMBUD 12 at para 53 online: <<https://canlii.ca/t/h2ssr>>.

⁷ *Casselman (Municipality of) (Re)*, 2022 ONOMBUD 14 (CanLII) at para 18, online: <<https://canlii.ca/t/jrkx7>>.

⁸ *Farber*, *supra* note 5 at para 35.

- 27 The Township could have indicated that council intended to discuss an update on a development project and a specific agreement, without undermining the reason for the closed meeting, which was to receive related legal advice.

Meeting minutes

- 28 Section 239(7) of the Act requires that a municipality record, without note or comment, all resolutions, decisions and other proceedings at its meetings. This obligation applies to both open and closed meetings.
- 29 Keeping complete and accurate minutes of closed meetings ensures public confidence that matters dealt with in closed session are appropriate for *in camera* discussion and that the requirements of the *Municipal Act* and local by-laws have been followed.⁹ Complete and accurate minutes of closed meetings also greatly assist my Office when it conducts an investigation.
- 30 Records of a closed meeting should include the following:¹⁰
- Where the meeting took place;
 - When the meeting started and adjourned;
 - Who chaired the meeting;
 - Who was in attendance, with specific reference to the Clerk or other designated official responsible for recording the meeting;
 - Whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
 - A detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered;
 - Any motions, including who introduced the motion and seconders;
 - All votes taken, and all directions given.
- 31 Section 6.11(b) of the Township's procedural by-law also requires that meeting minutes include the time at which a member leaves a meeting (if it is prior to adjournment) and the time at which a member enters a meeting (if it is after commencement).

⁹ *Plympton-Wyoming (Town of) (Re)*, 2021 ONOMBUD 4 (CanLII) at para 60, online: <<https://canlii.ca/t/jd49k>>.

¹⁰ *Amherstburg (Town of) (Re)*, 2022 ONOMBUD 11 at para 55, online: <<https://canlii.ca/t/jr5rc>>.

- 32 The June 29, 2021 closed meeting minutes fail to note when a member of council left for a portion of the meeting. Moreover, the closed meeting minutes do not include the directions that council gave to staff during the closed meeting.
- 33 Finally, both the open and closed meeting minutes lack details about the content of the open and closed meeting discussions. Accordingly, the Township failed to meet its obligations under section 239(7) of the Act.
- 34 Many municipalities have chosen to make audio or video recordings of closed meetings to ensure that a complete record exists. Audio or video recordings can assist greatly in case of an investigation, and enhance the public's confidence in the municipality's compliance with the open meeting rules. Had the Township made an audio or video recording of its closed sessions, a complete and reliable record of the discussion would have been available to assist during our inquiries given the contradictory information we received from interviewees.

March 1 and 7, 2022 sessions

- 35 A petition for a special meeting of council, signed by a majority of members of council, was received by the Clerk on the morning of March 1, 2022 for a meeting to be held that same evening. According to the petition, the purpose of the meeting was "CAO / HR Verbal Update." Notice of the meeting was posted online for the public at 10:03 a.m.
- 36 Council convened virtually on March 1, 2022 at 6:00 p.m. When the meeting began, members of council discussed whether the meeting was called in accordance with the Township's notice requirements. Members of council also debated whether the meeting was a special meeting of council or an emergency meeting. Ultimately, the Mayor ruled that the meeting would not proceed given the short notice, but this decision was reversed by a majority of council members voting to continue the meeting, as permitted by the procedural by-law.
- 37 At 6:13 p.m., council resolved to move into closed session in accordance with paragraph 239(2)(b) of the Act to consider personal matters about an identifiable individual, including municipal or local board employees.

- 38 In closed session, council discussed the performance of an identifiable Township employee. Given the lengthy council discussion in closed session, a resolution was passed to allow council to reconvene in open session at 11:04 p.m. and to report that the special council meeting would continue on a subsequent day. The meeting was not formally adjourned and no confirmatory by-law was adopted.
- 39 The March 1, 2022 meeting of council continued at 6:00 p.m. on March 7, 2022. A resolution was made at 6:00 p.m. to move immediately *in camera* in accordance with paragraph 239(2)(b) of the Act to discuss personal matters about an identifiable individual, including municipal or local board employees.
- 40 The content of this resolution was stated aloud before moving *in camera*, and it was further stated that this closed session was a continuation of the previous closed session on March 1, 2022. A mover and a seconder for the resolution were stated, but no vote on the motion was taken.
- 41 Council then proceeded *in camera* and received and discussed advice from external counsel in relation to the performance of an identifiable Township employee.
- 42 Although no vote was formally taken to move *in camera*, no point of order was called prior to going *in camera*. We were also told that no objections were raised *in camera* on this point. Our interviews revealed that several members of council believed that council had merely recessed on March 1, 2022 and could still proceed into closed session under the resolution adopted on March 1, 2022.
- 43 When council returned to open session, a member of council raised the issue that there had been no vote to close the meeting. The Clerk recommended that the meeting be adjourned. Members of council left the meeting, such that quorum was lost and the meeting adjourned at 8:50 p.m.

Analysis

- 44 One of the complaints made to my Office alleged that council violated the Township's procedural by-law on March 1, 2022 by holding the meeting less than 24 hours after public notice was given. The complainant also indicated that the subject matter of the closed meeting as announced prior to the meeting did not match what was actually discussed *in camera* on March 1, 2022. A separate complaint alleged that, on March 7, 2022, council did not follow its procedural by-law by moving *in camera* without a vote.

Public notice for special meetings

- 45** Section 238(2.1) of the Act requires that the Township’s procedural by-law provides for public notice of meetings. This requirement applies to all meetings of council, committees, or local boards, including special or emergency meetings.
- 46** Section 7.8 of the procedural by-law requires notice of special meetings be provided to the public “as soon as is practicable.”
- 47** I am concerned that the Township’s procedural by-law does not currently provide for public notice of special meetings that specifies the date, time, and place of the meeting. In this case, the notice did include this information; however, the public notice was posted at 10:03 a.m. on March 1, 2022, less than eight hours before the meeting.
- 48** Giving notice “as soon as is practicable” does not communicate to the public clearly and predictably when and where a council meeting will be held. I urge the Township to amend its procedural by-law to specify that the date, time, and place be included in a public notice for a special meeting, as well as define clear timeframes for providing public notice of its special meetings.

Public notice for emergency meetings

- 49** I also considered whether this was an emergency meeting, as suggested by some members of council. Section 7.9 of the procedural by-law provides that public notice is not required for emergency meetings of council, provided that the Clerk has attempted “to notify Members and the public about the Meeting and publish the agenda as soon as possible and in the most expedient manner available.”
- 50** The term “emergency” is defined in the procedural by-law as “a situation or impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise.” My Office has recognized that a procedure by-law may allow for a council meeting to be held as soon as practicable in the face of a “bona fide emergency” requiring urgent action.¹¹

¹¹ *South Bruce Peninsula (Town of) (Re)*, 2015 ONOMBUD 25 (CanLII) at para 51, online: <<https://canlii.ca/t/gtp6t>>.

- 51 In this case, council discussed the performance of an identifiable Township employee on March 1, and then again on March 7, 2022. The discussion does not meet the stringent standard set by the procedural by-law (i.e. a “danger of major proportions” caused by “the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise”).
- 52 My Office has already opined that an “emergency” generally requires “unexpected circumstances requiring immediate or urgent action.”¹² I also note that the *in camera* discussion about this topic on March 1, 2022 was ultimately resumed a week later, on March 7, 2022, which suggests that the decision council needed to come to was able to wait close to a week. Accordingly, I find that this was not an “emergency meeting” as defined in the procedural by-law, and public notice was required.

Moving into closed session on March 1 and 7, 2022

- 53 One complainant told my Office that the topic of the closed meeting as announced prior to the meeting did not match what was actually discussed *in camera*. My Office was told that the subject announced prior to the meeting was “CAO / HR Verbal Update” but that the Chief Administrative Officer (CAO) was not present for the closed session.
- 54 My review indicates that the *in camera* discussions on March 1 and 7, 2022 included updates from Township staff concerning the performance of an identifiable Township employee. I am satisfied that the subject “CAO / HR Verbal Update” referred to in the petition generally matches the *in camera* discussions that occurred, despite the CAO’s absence.
- 55 However, the mention of a “CAO / HR Verbal Update” is only contained in the petition for the special meeting; both the resolution to move *in camera* and the agenda merely cited paragraph 239(2)(b) of the *Municipal Act*, without providing further details.
- 56 The resolution to move *in camera* contained insufficient details for the public to know what would be discussed in closed session. The resolution could have included more details such as “HR verbal update,” as this information had already been made public in the petition for a special meeting. As explained above, merely citing the applicable exception and failing to include the general nature of the subject to be discussed will generally contravene

¹² *Magnetawan (Municipality of) (Re)*, 2015 ONOMBUD 20 (CanLII), online: <<https://canlii.ca/t/gtp6h>>.

section 239(4) of the Act. The resolution passed on March 1, 2022 failed to comply with the Act's requirements for resolutions to close a meeting.

- 57 Similarly, the resolution to move *in camera* on March 7, 2022 merely cited paragraph 239(2)(b) of the Act, without providing further details. Pursuant to section 239(4) of the Act, council failed to include the general nature of the subject matter to be discussed in closed session in the resolution to move *in camera*.

Voting to move into closed session on March 7, 2022

- 58 It is clear that there was no formal vote of council to adopt the resolution to move *in camera* on March 7, 2022. My Office nevertheless confirmed that a resolution to move *in camera* was read, proposed, and seconded.
- 59 Some members of council told my Office that they believed that a resolution to move *in camera* was not necessary because the session on March 7, 2022 was a continuation of the March 1, 2022 meeting and that council was merely in a recess between these two sessions.
- 60 Although the March 7, 2022 discussion was a continuation of the discussion on March 1, 2022, these were two distinct closed session meetings. On March 1, 2022, council moved out of closed session before adjourning the meeting. When it reconvened on March 7, 2022, council went again into a closed session, which required it to pass a new resolution to close the meeting. Each time council closes a meeting to the public, a resolution must be passed that complies with the requirements in the Act, even if the closed sessions occur during the same meeting.
- 61 Although the failure to formally vote on the resolution was a procedural irregularity, it is clear in this case that council reached a consensus on the resolution to proceed *in camera*. In the future, council should be vigilant to ensure that the proper voting procedure is followed before moving *in camera*.

Meeting minutes

- 62 As was the case for the June 29, 2021 meeting, the closed meeting minutes for the March 1 and 7, 2022 sessions were sparse – they note who chaired the sessions, who was present, and what resolutions were adopted, but they do not provide any detail on the substance of council's discussions. The minutes also incorrectly state that the meeting took place in council chambers. In reality, the March 1, 2022 session took place in chambers, but

the session on March 7, 2022 took place virtually. As set out above, the Township should take care to ensure that minutes accurately reflect the proceedings of meetings.

Opinion

- 63 Council for the Township of Adjala-Tosorontio did not contravene the *Municipal Act, 2001* on June 29, 2021 when it went *in camera* to discuss an update on a development project, an update on a specific agreement, and Township communications. The discussions fell within the closed meeting exception for solicitor-client privilege, provided at paragraph 239(2)(f) of the Act.
- 64 Council for the Township of Adjala-Tosorontio contravened section 239(4) of the *Municipal Act, 2001* on June 29, 2021 and March 1 and 7, 2022 when it failed to state by resolution the general nature of the matters to be considered *in camera*. Moreover, the failure to formally vote on the resolution to move *in camera* on March 7, 2022 was a procedural irregularity.
- 65 Council for the Township of Adjala-Tosorontio also contravened section 239(7) of the Act on June 29, 2021 by failing to record all proceedings of the meeting in the meeting minutes.

Recommendations

- 66 I make the following recommendations to assist the Township of Adjala-Tosorontio in fulfilling its obligations under the *Municipal Act, 2001* and enhancing the transparency of its meetings:

Recommendation 1

All members of council for the Township of Adjala-Tosorontio should be vigilant in adhering to their individual and collective obligation to ensure compliance with their responsibilities under the *Municipal Act, 2001* and the Township's procedural by-law.

Recommendation 2

When proceeding *in camera*, council for the Township of Adjala-Tosorontio should be vigilant in ensuring that its voting procedure is followed.

Recommendation 3

When proceeding *in camera*, council for the Township of Adjala-Tosorontio should ensure that its resolutions provide a general description of the issues to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.

Recommendation 4

Council for the Township of Adjala-Tosorontio should ensure that meeting records are complete and accurately reflect all votes, directions to staff, and substantive and procedural items discussed.

Recommendation 5

The Township of Adjala-Tosorontio's procedural by-law should be amended to provide clear timeframes for public notice of its special meetings.

Report

- 67 Council for the Township of Adjala-Tosorontio was provided the opportunity to review a preliminary version of this report and provide comments to my Office. No comments were received.
- 68 This report will be published on my Office's website, and should also be made public by the Township of Adjala-Tosorontio. 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