



Ombudsman Report

Investigation into a complaint about
a closed meeting held by
the Township of Sables-Spanish Rivers
on September 25, 2019

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Ombudsman of Ontario
September 2020

Complaint

- 1 My Office received a complaint that council for the Township of Sables-Spanish Rivers had discussed two items in closed session on September 25, 2019 that did not fit into the “personal matters” exception in the *Municipal Act, 2001*.¹
- 2 The complaint also alleged that when the Mayor announced council was going into closed session during the September 25, 2019 meeting, he told the public in attendance that the meeting was over. However, as set out in the meeting minutes, council reconvened in open session after the conclusion of the closed session and passed two resolutions. According to the complaint, the public was thereby denied access to the open session that followed the closed session.

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 the topics discussed fall within prescribed exceptions.
- 4 As of January 1, 2008, the Act gives Ontarians 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 investigators. 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 Township of Sables-Spanish Rivers.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures were followed.
- 7 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.² This searchable repository was created to provide easy access to the Ombudsman’s decisions on, and

¹ SO 2001, c 25, s 239(2)(b).

² <https://www.ombudsman.on.ca/digest/digest-home>

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.

Investigative process

- 8 On January 23, 2020, I advised the township that we would investigate the concerns raised by the complainant about the meeting of September 25, 2019.
- 9 Members of my Office's Open Meeting Team reviewed relevant portions of the township's procedure by-law and the Act. We reviewed the minutes from the open and closed sessions of the meeting on September 25, 2019, including relevant documentation. We also interviewed the members of council and the township's clerk.

Council procedures

- 10 The township's procedure by-law provides that regular meetings of council are to take place on the second and fourth Wednesday of each month at 7:00 p.m. Public notice is to be provided by posting the schedule of meetings on the township's website at the beginning of each year and on the front door of the township office.
- 11 Agendas for regular meetings of council are posted to the township's website on the Friday before each meeting. Regular meeting agendas follow a standard format that includes an "In Camera / Closed Session" as a standing item prior to "Other Business" and "Adjournment."
- 12 Meetings of council and its committees are to be open, subject to listed exceptions. The exceptions in the township's bylaw only partially mirror those in the *Municipal Act, 2001*, as they do not include the newer discretionary exceptions that came into force on January 1, 2018, nor the mandatory exception with respect to Ombudsman investigations. Moreover, the wording of the township's bylaw does not differentiate between the discretionary exceptions and the mandatory exceptions to open meetings.
- 13 As a best practice, the township should update its procedure bylaw to reflect the open meeting rules provided for in the Act. After reviewing a preliminary version of this report, the township confirmed that it plans to

undertake a comprehensive review of its procedure bylaw, including the bylaw's open meeting rules.

The September 25, 2019 meeting

- 14 According to the minutes, the September 25 open meeting began at 6:00 p.m. The minutes do not record the location of the meeting.
- 15 During interviews, we were told that when council was set to discuss an open session agenda item described as "Request for Proposals – Arena Canteen," council decided that it should instead be discussed in closed session.
- 16 Council passed a resolution to close the meeting to discuss "personal matters about identifiable individuals including municipal employees and council members, respecting the Massey Medical Clinic, Public Works Department and Parks & Recreation Department."
- 17 According to the complaint, after the resolution to close the meeting was passed, the Mayor announced that council was going into closed session, thanked the public for coming, and told them that the meeting was "over."
- 18 Members of council and the Clerk told us they did not hear the Mayor indicate that the meeting was over before closing the meeting. One councillor told us that the Mayor said, "We are going into closed, good night, thank you for coming," which they said could be interpreted as meaning the meeting was over.
- 19 Neither the open nor the closed session minutes indicate the time at which the closed session began.
- 20 The minutes state that, while in closed session, council discussed a request for proposals related to the arena canteen, matters related to municipal staff, and a claim against the municipality. Council then resolved to return to open session.
- 21 In interviews, we were told that due to limited space in the municipal building, any members of the public who want to wait for the end of the closed session do so outside in the parking lot.
- 22 In this case, we were told that no members of the public returned to council chambers when council came out of closed session. However, we were

also told that no member of council or staff checked the parking lot on September 25 to see if members of the public were there waiting to come back in to observe the remainder of the meeting.

- 23 Once back in open session, the minutes reflect that council passed two resolutions. First, council resolved not to accept any proposals received during the RFP for the arena canteen. Second, council resolved to direct staff to apply for funding for a public works intern.
- 24 According to the minutes, council adjourned after passing the two resolutions. The minutes do not indicate at what time the meeting ended.

Analysis

Discussion about the arena canteen

- 25 The complaint alleged that council's discussion about an RFP for the arena canteen was not permitted to take place in a closed meeting.
- 26 The Clerk told us that council's September 25, 2019 closed session discussion about the request for proposals fell within the "Parks & Recreation" item listed in the resolution to go into closed session. According to information we reviewed, the municipality had issued a request for proposals on September 4, 2019 regarding the lease and operation of the canteen at the local arena. The successful applicant would lease the canteen from the municipality and sell snacks and meals to arena patrons.
- 27 The Mayor, most members of council, and the Clerk told us that council discussed the request for proposals during the closed session. One member of council told us that the discussion instead took place in open session immediately following the conclusion of the closed session, because council had forgotten to discuss it in closed session.
- 28 Despite varying recollections, those we interviewed consistently indicated that council discussed personal information relating to a bidder for the arena canteen contract. The closed session minutes also reflect this.
- 29 The "personal matters" exception applies to discussions that reveal personal information about an individual. In most cases, individuals who respond to a request for proposals are acting in their professional capacity, such that discussions about bidders would not normally be considered personal matters.

- 30** The Information and Privacy Commissioner has established a two-part test to distinguish personal information from professional information for the purposes of the open meeting rules:
- In what context do the names of individuals appear? Is it in a personal or business context?
 - Is there something about the particular information that, if disclosed, would reveal something of a personal nature about the individual?³
- 31** In some cases, the Ombudsman has found that discussions about an individual in a professional capacity can cross the threshold into personal matters. For example, discussion about an individual's suitability for employment has been determined to fit in the "personal matters" exception. In a 2015 report about the Town of Amherstburg, my Office found this type of discussion was permissible because some council members expressed opinions about an individual's suitability for a position and the discussions were personal in nature.⁴
- 32** Similarly, in a 2018 report about the Town of Amherstburg, we investigated a complaint that a meeting was closed illegally under the "personal matters" exception.⁵ In that case, council discussed an incident involving an individual, identified by name, and the members' related concerns about their conduct. I found that the discussion fit in the exception because council discussed the conduct of identified individuals and allegations that they acted inappropriately.⁶
- 33** In this case, although a bidder was discussed in a business context with respect to the canteen, our investigation found that council's discussion about the individual's personal suitability and conduct fit within the "personal matters" exception.

Discussion about a grant application to the Northern Ontario Heritage Fund

³ Aylmer (Town) (Re), 2007 CanLII 30462 (ON IPC), <<http://canlii.ca/t/1scqh>>.

⁴ Amherstburg (Town of) (Re), 2015 ONOMBUD 13 (CanLII) ("Amherstburg 2015"), <<http://canlii.ca/t/gtp5z>>. See also Hamilton (City of) (Re), 2019 ONOMBUD 7 (CanLII) at paras 80-81, <<http://canlii.ca/t/j2pwf>>.

⁵ Amherstburg (Town of) (Re), 2018 ONOMBUD 8 (CanLII) ("Amherstburg 2018"), <<http://canlii.ca/t/hvmv1>>.

⁶ Amherstburg 2018, *ibid*, at paras 65-67.

- 34 The complaint alleged that council's discussion about a grant to hire a Public Works intern did not fit within the exceptions to the open meeting rules.
- 35 The meeting agenda indicated that one of the items for the closed session agenda was "Public Works Staffing," and the resolution to go into closed session mentioned the same. However, no discussion or resolution with respect to this item was recorded in the closed session minutes.
- 36 In interviews, one person told us that council discussed staffing in the Department of Public Works during the closed session on September 25, 2019. This person said that this matter was discussed in camera because it included a discussion about an employee's ability to perform certain tasks. They said that council discussed and accepted a proposal from staff to apply for a grant from the Northern Ontario Heritage Fund to fund an internship to support the department.
- 37 All other witnesses we interviewed told us that council did not discuss the grant application in closed session, and instead discussed the matter in open session following the closed meeting.
- 38 The closed session minutes do not refer to the Northern Ontario Heritage Fund or to hiring an intern. The open session minutes indicate that, during the open session, council resolved to direct staff to apply to the Northern Ontario Heritage Fund for a Public Works intern.
- 39 In the circumstances, we are unable to confirm whether the internship discussion took place in open or closed session. Accordingly, I considered whether the discussion would have been permitted in camera if it did occur.
- 40 My Office has determined that discussions about an employee's qualifications and conduct may fit into the "personal matters" exception if they go beyond the professional. In a 2018 report about the Township of The North Shore, I explained that discussions about the job performance of an individual are inherently personal in nature.⁷
- 41 In this case, council's discussion about the grant application included a discussion about an individual's job performance. Accordingly, if the discussion did occur in closed session, it would have been permitted under the exception for personal matters about an identifiable individual.

⁷ The North Shore (Township of) (Re), 2018 ONOMBUD 9 (CanLII), <<http://canlii.ca/t/hvmv3>>.

Alleged exclusion of the public after the closed session

- 42 The complaint alleged that prior to the closed session, the Mayor told the public that the meeting was over, so that they did not know they could return to observe the open session that followed the closed meeting.
- 43 The Clerk and all members of council but one told us the Mayor did not say that the meeting was over before council went into closed session.
- 44 We were told that, because of the layout of the township offices, any members of the public who wished to wait outside during the closed session would need to leave the building and wait in the parking lot. All members of council told us that no one checks the parking lot to see if members of the public are waiting, and the Clerk did not recall herself or other staff checking the parking lot after the closed session on September 25.
- 45 Most members and the Clerk told us that council routinely schedules the closed sessions at the end of the meeting to allow members of the public to leave if they wish; most said that council rarely conducts business after closed sessions. However, some members said council does sometimes pass resolutions and conduct other business after the closed session.
- 46 Indeed, after the September 25 closed session, council passed two resolutions in open session: one with respect to the request for proposals and the other with respect to the internship grant.
- 47 As my Office observed in a 2015 report about Clarence-Rockland, *Access Denied*:

The right of citizens to attend public meetings and view council proceedings in action is a longstanding one, and is the foundation of the municipal open meeting requirements.⁸

Moreover, municipalities are obligated “to ensure that the public can freely observe all open meetings of council and committees.”⁹

⁸ Clarence-Rockland (City of) (Re), 2015 ONOMBUD 1 (CanLII), at para 31, <<http://canlii.ca/t/gtp5p>>.

⁹ Hamilton (City of) (Re), 2019 ONOMBUD 7 (CanLII), at para 106 <<http://canlii.ca/t/j2pwf>>.

- 48 In this case, the public did not have the opportunity to observe municipal government in process during the entire September 25 meeting, because council did not take the necessary steps to ensure that people knew additional business would be conducted in open session after the closed session.
- 49 Some of those we interviewed acknowledged that more could be done to ensure public attendance after a closed meeting, including checking to see if anyone is waiting to come back in after closed session. In the interest of transparency, council should ensure that members of the public understand their right to observe all portions of open meetings, including the resolution to proceed in camera and the portion of the meeting that follows a closed session.

Procedural matters

Voting

- 50 While not the focus of the complaint, during the course of our investigation, we noted that the closed session minutes for September 25 record decisions that were not procedural or directions to staff. The resolutions related to staff wages, an offer of employment to a named individual, and paying out a claim to a named individual.
- 51 Subsections 239(5) and (6) of the *Municipal Act, 2001* provide that voting in a closed meeting is permitted only if the closed meeting is otherwise authorized and the vote is for a procedural matter or for giving direction or instructions to officers, employees, agents of the municipality or persons under contract.
- 52 When asked about the wording of the resolutions, staff suggested that it is the township's normal practice to vote only on directions to staff while in closed session, but acknowledged that in this case, the resolutions were not directions or procedural.
- 53 Council for the Township of Sables-Spanish Rivers should take care to ensure that its resolutions comply with the rules in the *Municipal Act*, and that decisions made in closed session are limited to procedural matters or directions to staff.

Meeting records

- 54** Section 239(7) of the *Municipal Act, 2001* requires that a municipality record, without note or comment, all resolutions, decisions and other proceedings during a meeting. While the Act prohibits notes or comments from being included in the official record, this does not mean that the subjects discussed at a meeting should not be documented.
- 55** Our Office has provided best practice recommendations about sufficient minutes in past reports. The requirement to keep a meeting record should be interpreted consistently with the open meeting provisions, which exist to enhance openness, transparency and accountability in municipal governance.¹⁰
- 56** In a report about the Township of Bonfield, my Office provided recommendations about this. The record should include:
- 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; (emphasis added)
 - Any motions, including who introduced the motion and seconders; and
 - All votes taken, and all directions given.¹¹
- 57** The minutes in this case failed to indicate the location of the meeting, or the time that the closed session began or ended. They do not state the time that the meeting ended.

¹⁰ Tehkummah (Township of) (Re), 2018 ONOMBUD 3 (CanLII), para 57, <<http://canlii.ca/t/hvmtmp>>.

¹¹ Bonfield (Township of) (Re), 2015 ONOMBUD 35 (CanLII), at para 55, <<http://canlii.ca/t/gtp7j>>. Emphasis added.

- 58 The minutes of the September 25 meeting also do not include a full description of the subjects discussed, both in closed session and in open session. Instead, they are almost entirely limited to a list of resolutions passed. As a result, it was impossible for my Office to determine, on the basis of the meeting records, which topics were discussed during the meeting and when.
- 59 As the meeting records failed to sufficiently reflect the proceedings on September 25, we sought information about the topics discussed through interviews with council members and staff. Unfortunately, those we interviewed had conflicting memories of many substantive aspects of the meeting. Some believed certain topics were discussed during the closed session, while others told us these same topics were discussed in open session. Memories of the content of the closed session discussions also varied significantly between witnesses.
- 60 Many municipalities opt to make audio or video recordings of closed meetings to ensure that a complete record exists. We currently know of 25 municipalities that have implemented this important practice: The Regional Municipality of Niagara, the Townships of Adelaide Metcalfe, McMurrich/Monteith, North Huron, and Brudenell, Lyndoch and Raglan; the Towns of Amherstburg, Collingwood, Fort Erie, Midland, Pelham, and Wasaga Beach; the Cities of Brampton, Elliot Lake, London, Niagara Falls, Oshawa, Port Colborne, Sarnia, Sault Ste. Marie, Thorold, and Welland; and the Municipalities of Brighton, Central Huron, Meaford, and Southwest Middlesex.
- 61 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 created an audio or video recording of council's September 25 meeting, a complete and reliable record of the discussion would have been available to assist during this investigation.

Opinion

- 62 Council for the Township of Sables-Spanish Rivers did not violate the open meeting rules when it discussed personal matters about identifiable individuals during a closed meeting on September 25, 2019.

- 63 Council for the Township of Sables-Spanish Rivers did violate the open meeting rules by failing to ensure that the public could observe a portion of its open meeting that followed a closed session on September 25, 2019.
- 64 To improve its meeting practices going forward, and to comply with best practices, the Township of Sables-Spanish River should ensure that no decisions are made or votes taken in a closed meeting – except for procedural matters or to give direction to officers, employees, agents, or contractors. The township should also ensure that meeting records fully reflect the proceedings of all meetings, and consider audio or video recording closed meetings to provide for a reliable record of all future discussions.

Recommendations

- 65 I make the following recommendations to assist council in fulfilling its obligations under the Act and enhancing the transparency of its meetings:

Recommendation 1

All members of council for the Township of Sables-Spanish Rivers should be vigilant in adhering to their individual and collective obligations to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

The Township of Sables-Spanish Rivers should ensure that the public has access to observe all open sessions of council and its committees, including those that take place after a closed session.

Recommendation 3

The Township of Sables-Spanish Rivers should ensure that votes in closed session are limited to procedural matters and directions to staff.

Recommendation 4

The Township of Sables-Spanish Rivers should ensure that open and closed meeting records are complete and accurately reflect all of the substantive and procedural items discussed.

Recommendation 5

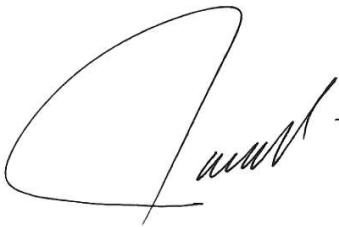
The Township of Sables-Spanish Rivers should review and amend its procedure by-law to accurately reflect the current closed meeting provisions of the *Municipal Act, 2001*.

Recommendation 6

The Township of Sables-Spanish Rivers should implement a practice of audio or video recording closed session meetings.

Report

- 66** Council for the Township of Sables-Spanish Rivers was provided with the opportunity to review a preliminary version of this report and provide comments. All comments received were considered in the preparation of this final report.
- 67** Given the ongoing COVID-19 pandemic, our normal preliminary review process was adjusted in this case to reflect the township's remote meeting practices. We thank members of council and township staff for their co-operation and flexibility during this process.
- 68** This report will be published on my website at www.ombudsman.on.ca. The township should also make this report available to the public. In accordance with s. 239.2(12) of the *Municipal Act, 2001*, council should pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario