



J. Paul Dubé, Ombudsman

BY EMAIL

October 29, 2024

Township of McGarry
c/o Mayor Bonita Culhane
27 Webster Street, PO Box 99
Virginiatown, ON P0K 1X0

Dear Members of Council for the Township of McGarry:

Re: Report – Office of the Ontario Ombudsman

I have completed my investigation into a complaint regarding a meeting of council for the Township of McGarry on September 1, 2023.

Please find my final report enclosed.

The Clerk-Treasurer indicated that my report would be shared with council and made available to the public no later than council's next meeting. At that time, I will also post a copy of the report on my website at www.ombudsman.on.ca.

Yours truly,

A handwritten signature in black ink, appearing to read 'Paul Dubé', written over a large, light blue circular watermark or background element.

Paul Dubé
Ombudsman of Ontario

CC: Karine Pelletier, Clerk-Treasurer

483 Bay Street, 10th Floor, South Tower / 483, rue Bay, 10^e étage, Tour sud
Toronto, ON M5G 2C9

Tel./Tél. : 416 586 3300 Facsimile/Télécopieur : 416 586 3485 TTY/ATS : 1-866-411-4211

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Ombudsman Report

**Investigation into a complaint about
a meeting of council for the Township of McGarry
on September 1, 2023**

**Paul Dubé
Ombudsman of Ontario**

October 2024

Complaint

- 1 My Office received a complaint about a meeting of council for the Township of McGarry (the “Township”) held on September 1, 2023. The complaint alleged that, in response to the former Mayor’s resignation, council inappropriately discussed how to fill the vacancy as well as specific candidates in closed session, and that this discussion did not fit within the exceptions to the open meeting rules in the *Municipal Act, 2001* (the “Act”).¹ The complaint also raised procedural concerns about notice of the meeting and alleged that council inappropriately voted in closed session.
- 2 My investigation determined that council for the Township of McGarry did not contravene the open meeting rules on September 1, 2023. Parts of council’s discussion fit within the cited exceptions for personal matters and advice subject to solicitor-client privilege. Although certain parts of council’s discussion did not fit within the exceptions to the open meeting rules on their own, requiring council to have parsed those parts of the discussion would have detracted from free, open, and uninterrupted discussion. Accordingly, council’s entire closed session discussion was permitted under the Act.
- 3 In addition, I found that the Township of McGarry provided notice for the emergency meeting in accordance with its procedure by-law. I also determined that council did not hold votes contrary to the *Municipal Act, 2001*.

Ombudsman jurisdiction

- 4 Under the Act, all meetings of council, local boards, and committees of either must be open to the public, unless they fall within prescribed exceptions.
- 5 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.
- 6 The Ombudsman is the closed meeting investigator for the Township of McGarry.

¹ SO 2001, c 25.

- 7 When investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the applicable governing procedures have been observed.
- 8 Our Office has reviewed and 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.
- 9 The Ontario Ombudsman also has the authority to conduct impartial reviews and investigations of hundreds of public sector bodies. This includes municipalities, local boards, and municipally-controlled corporations, as well as provincial government organizations, publicly funded universities, and school boards. In addition, the Ombudsman's mandate includes reviewing complaints about the services provided by children's aid societies and residential licensees, and the provision of French language services under the *French Language Services Act*. Read more about the bodies within our jurisdiction here: www.ombudsman.on.ca/have-a-complaint/who-we-oversee.

Investigative process

- 10 On November 22, 2023, my Office advised the Township of our intent to investigate this complaint.
- 11 We reviewed the Township's procedure by-law,² the open session agenda and audio recording, the open and closed session minutes, a closed session staff report, correspondence related to the emergency meeting, and relevant portions of the Act.

² Township of McGarry, by-law No 2021-57, *Being a By-law to provide rules for governing the order and procedures of the council of the Township of McGarry* (24 November 2021) [*Procedure By-law*].

- 12 My Office interviewed the current Mayor, the other current council member who was present on September 1, 2023,³ and the Clerk-Treasurer. We also spoke with the Township's two external counsel who had phoned in to the September 1, 2023 meeting.
- 13 My Office received full co-operation during our investigation.

Background

- 14 The Township's council is composed of a mayor and four councillors. The former Mayor resigned his position on August 30, 2023. The Clerk-Treasurer contacted the Township's external counsel and prepared a staff report for council to consider at an emergency council meeting.
- 15 On August 31, 2023, at 4:00 p.m., the Clerk-Treasurer posted an agenda on the Township's website that an emergency council meeting would take place on September 1, 2023 at 5:00 p.m.

September 1, 2023 meeting

- 16 Council met at the Township office on September 1, 2023 at 5:00 p.m. Council passed a motion waiving the notice period and the acting chair announced that council was meeting for the purpose of discussing the resignation of the former Mayor.
- 17 At 5:03 p.m., council resolved to go into closed session under the exceptions for personal matters about an identifiable individual and advice subject to solicitor-client privilege at sections 239(2)(b) and 239(2)(f) of the Act.
- 18 In closed session, council discussed matters related to the former Mayor's conduct and his resignation. Shortly after moving into closed session, the Township's two external counsel joined the meeting by phone. External counsel answered a few questions from the Clerk-Treasurer and council related to the former Mayor's resignation. After these brief exchanges, external counsel disconnected from the meeting.

³ Of the four councillors present on September 1, 2023, only the current Mayor and one other councillor were still members of council at the time of our interviews.

- 19 Council then discussed its options for filling the head-of-council vacancy, which included either holding a by-election or appointing someone to fill the vacancy. After discussing the two methods, council members each expressed their views, which were in favour of making an appointment. Those we interviewed said that no vote was taken.
- 20 Council next discussed whom it could appoint. Two members of council expressed and explained their interest in being considered to fill the vacancy. The other two members of council shared opinions about the experience and suitability of the interested councillors. Those we interviewed indicated that by the end of this part of the discussion, each councillor had an idea of which person they wanted to appoint as mayor, but no vote was taken.
- 21 Council next discussed its options for filling the councillor vacancy that would result from appointing a councillor to be mayor. As before, council discussed whether to fill such a vacancy through a by-election or an appointment. Those we interviewed stated that council members each expressed a preference for making an appointment, but no vote was taken.
- 22 Finally, council discussed whom it could appoint to the resulting councillor vacancy. While some interviewees recalled council discussing more than one name, those we interviewed all agreed that council discussed at least one specific individual along with that person's previous experience and other qualifications. The Clerk-Treasurer was asked to contact the individual to determine their interest in the position. Those we interviewed told my Office that there was no formal decision in closed session to appoint a specific person to the councillor position.
- 23 Council returned to open session at 7:36 p.m. and passed several resolutions to address the vacancies. Council declared the seat of the head of council to be vacant, directed the Clerk-Treasurer to fill the head-of-council vacancy by appointment, and appointed one of the councillors (the current Mayor at the time of this investigation) as head of council. Council next declared the current Mayor's former council seat vacant, directed the Clerk-Treasurer to fill the vacant council seat by appointment, and appointed the individual discussed in closed session as a councillor.
- 24 Aside from brief procedural questions and requests for recorded votes, council did not substantively debate the resolutions they passed in open session. Council passed a confirmatory by-law and adjourned at 7:44 p.m.

Analysis

- 25 Under the Act, all meetings of council, local boards, and committees of either of them must be open to the public, unless they fall within a prescribed exception in section 239 of the Act.
- 26 Council's resolution to proceed into closed session cited the exceptions for personal matters about an identifiable individual (section 239(2)(b)) and advice subject to solicitor-client privilege (section 239(2)(f)).

Applicability of the exception for personal matters about an identifiable individual

- 27 The exception for personal matters about an identifiable individual allows a meeting to be closed to the public when the discussion pertains to personal matters about an identifiable individual.
- 28 I have previously determined that "personal information" is information that can be reasonably expected to identify an individual.⁴ To qualify as "personal information," information must be about an individual in their personal capacity, rather than their professional, official, or business capacity. However, information about an individual in their professional capacity may qualify as personal information if it reveals something of a personal nature about the individual.⁵
- 29 I have previously found that a discussion scrutinizing the personal conduct and temperament of identifiable individuals, including council members, fit within this exception.⁶
- 30 At the September 1, 2023 meeting, council first discussed matters related to the former Mayor and his resignation, including scrutiny of his conduct. This part of the discussion fit within the exception for personal matters.
- 31 Council next discussed whether to appoint a new mayor or hold a by-election.

⁴ *Amherstburg (Town of) (Re)*, 2022 ONOMBUD 11 at para 19 [*Amherstburg*], online: <<https://canlii.ca/t/jr5rc>>; *Nipissing (Township of) (Re)*, 2023 ONOMBUD 2 at para 22 [*Nipissing*], online: <<https://canlii.ca/t/jv6ch>>.

⁵ *Nipissing*, *supra* note 3 at para 23.

⁶ *Lanark Highlands (Township of) (Re)*, 2018 ONOMBUD 1 at para 52, online: <<https://canlii.ca/t/hvmtf>>; *Lanark Highlands (Township of) (Re)*, 2021 ONOMBUD 15 at paras 37, 45, online: <<https://canlii.ca/t/jhx9n>>; *Greater Sudbury (City of) (Re)*, 2017 ONOMBUD 2 at para 49–53, online: <<https://canlii.ca/t/h4rwp>>.

- 32 In a 2021 report to the Town of Plympton-Wyoming, I investigated a closed meeting about the process for filling a council vacancy. I determined that the discussion of whether or not to hold a by-election or make an appointment did not fit within the exception for personal matters.⁷
- 33 In this case, the part of council's discussion about which method to use to fill the vacancy did not fit within the exception for personal matters because council did not discuss any personal matters about any identifiable individuals.
- 34 Council subsequently considered the interest and experiences of two members of council who indicated they wished to be considered for the head-of-council position.
- 35 In my report to the Town of Plympton-Wyoming mentioned above, I found that discussion of individuals' community involvement, past performance, and potential to work cooperatively with the rest of council qualified as personal information that fit within this exception.⁸
- 36 In this case, council discussed the experiences of two members of council and shared their views about their suitability for the head-of-council position. Council considered personal information about the members of council, and accordingly this part of the discussion fit within the exception for personal matters.
- 37 Council subsequently discussed whether to fill the resulting council vacancy through a by-election or through an appointment. As with the discussion concerning the head-of-council vacancy, this part of the discussion did not fit within the exception for personal matters because council did not discuss any personal matters about any identifiable individuals.
- 38 Finally, council discussed whether or not to appoint at least one named individual. Council discussed at least one individual's experience and why that individual would be suited to the council position before contacting the individual.
- 39 I have previously investigated a closed meeting where there were differing accounts about the specific individuals discussed as potential appointees to council. In a 2018 report to the Township of The North Shore, I concluded

⁷ *Plympton-Wyoming (Town of) (Re)*, 2021 ONOMBUD 4 at paras 27–28 [*Plympton-Wyoming*], online: <<https://canlii.ca/t/jd49k>>.

⁸ *Ibid* at para 34. I have reached a similar conclusion elsewhere: *Johnson (Township of) (Re)*, 2021 ONOMBUD 1 at paras 40–41 [*Johnson*], <<https://canlii.ca/t/jckq4>>.

that as council members agreed that at least one individual's qualifications and experiences had been discussed, the exception for personal matters applied to the discussion.⁹

- 40 Those we interviewed collectively indicated that council discussed at least one individual's experience and qualifications. Accordingly, this part of the discussion fit within the exception for personal matters.

Applicability of the exception for advice subject to solicitor-client privilege

- 41 Council also cited the exception for advice subject to solicitor-client privilege at section 239(2)(f) of the Act. This exception applies to discussions between a municipality and its solicitor in seeking or receiving legal advice intended to be confidential and includes communications for that purpose.¹⁰ The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.¹¹
- 42 I have previously noted that communication will only be found to be subject to solicitor-client privilege if it is: (1) between a client and their solicitor, where the solicitor is acting in a professional capacity; (2) made in relation to the seeking or receiving of legal advice; and (3) intended to be confidential.¹²
- 43 In a 2022 report to the Township of McMurrich/Monteith, I investigated a meeting where the township's lawyers provided advice at the beginning of a closed session regarding a development, but then did not participate further when the discussion shifted to a related topic. Despite the lawyers' remaining present, no legal advice was sought or given, and the rest of council's discussion focussed on other matters. I found that the latter part of the discussion did not fit within the exception for solicitor-client privilege.¹³
- 44 In this case, external counsel were present during the first part of the closed meeting related to council's discussion of the former Mayor's resignation. I am satisfied that council sought and received legal advice during this part of

⁹ *The North Shore (Township of) (Re)*, 2018 ONOMBUD 9 at paras 64–65 [*The North Shore*], online: <<https://canlii.ca/t/hvmv3>>.

¹⁰ *Amherstburg*, *supra* note 3 at para 26.

¹¹ *McMurrich/Monteith (Township of) (Re)*, 2022 ONOMBUD 4 at para 20, online: <<https://canlii.ca/t/jncmn>>.

¹² *Ibid* at para 21.

¹³ *Ibid* at para 25.

the discussion, and accordingly this part of the discussion fit within the exception for advice subject to solicitor-client privilege.

- 45 However, my investigation determined that the lawyers left before this discussion ended, and were no longer participating in the meeting by the time council began to discuss what method to use to fill the head-of-council vacancy. Those we interviewed did not recall receiving or discussing legal advice during the remainder of council's discussion.
- 46 Although the legal advice sought and received during the first part of council's discussion may have touched on matters relevant to the latter part of the discussion, council's subsequent discussion was not about seeking or receiving any legal advice, or considering any legal advice previously received. Accordingly, the exception for advice subject to solicitor-client privilege did not apply to the parts of the discussion concerning how to fill the council vacancies.

Parsing the discussion

- 47 The parts of council's discussion regarding how to fill both the head-of-council vacancy and the resulting council vacancy did not fit within either of the cited exceptions. However, the parts of the discussion immediately before and after these were appropriate for *in camera* consideration. Accordingly, it is necessary to determine whether the discussion could have been parsed.
- 48 In *St. Catharines v IPCO, 2011*, the Divisional Court found that it is unrealistic to expect municipal councils to split up discussions between open and closed sessions where it would "detract from free, open and uninterrupted discussion."¹⁴ In other words, where it would be unrealistic to expect council to parse intertwined subjects, topics that do not otherwise fit within a closed meeting exception may still be discussed *in camera*.¹⁵ However, if the topics can be separated, council is expected to return to open session for those portions of the discussion that do not fit within an open meeting exception.
- 49 Those we interviewed explained that the five parts of the discussion were discrete topics, and council finished its discussion of each topic before moving to the next. In particular, the discussion about the former Mayor's

¹⁴ *St. Catharines (City) v IPCO*, 2011 ONSC 2346 at para 42, online: <<https://canlii.ca/t/fkqfr>>.

¹⁵ *Plympton-Wyoming*, *supra* note 7 at para 26.

resignation was not connected to the remainder of the discussion about addressing the council vacancies.

- 50 In my Office's reports to the Town of Plympton-Wyoming and the Township of The North Shore, I previously investigated closed meetings where each council discussed how to fill a singular vacant councillor's seat. Both meetings concerned discussions about what method to use for filling the vacancy, both councils preferred to make an appointment, and both councils then discussed at least one individual's qualifications.¹⁶ In those cases, I determined that the discussions about which method to use to fill each vacancy should not have occurred in closed session, while the discussion of potential appointees fit within the exception for personal matters.¹⁷
- 51 In those cases, there were only two parts of the closed session discussion: consideration of the method to fill the vacancy and discussion of potential appointees. Those two parts of the discussions could have easily been parsed between open and closed sessions.
- 52 In this case, however, council discussed five matters in closed session, of which the first, third, and fifth fit within at least one exception to the open meeting rules. It would have been unrealistic to require council to have parsed its discussion because that would entail council moving repeatedly between open and closed sessions. While doing so would have been procedurally feasible, I find that it would have detracted from free, open, and uninterrupted discussion. Accordingly, council's entire discussion was appropriate for *in camera* consideration.
- 53 Although I have concluded that the open meeting rules permitted council's closed session discussion, in the future, council may wish to structure its conversations about council vacancies so that general discussions concerning the process for filling vacancies that do not involve legal advice or personal information can occur in open session. This would increase the openness and transparency of council's decision-making about these important topics.

¹⁶ *Plympton-Wyoming*, supra note 7 at paras 13–15; *The North Shore*, supra note 9 at paras 61, 64

¹⁷ *Plympton-Wyoming*, supra note 7 at para 32; *The North Shore*, supra note 9 at para 67.

Procedural matters

Notice

- 54 The complaint alleged that the Township did not provide public notice of the September 1, 2023 emergency council meeting at 5:00 p.m. The Clerk-Treasurer provided my Office with correspondence that showed that notice of the meeting was uploaded to the Township's website on August 31, 2023 at 4:00 p.m., the day before the meeting.
- 55 The Act does not specify how notice of meetings must be provided to the public. However, section 238(2.1) of the Act requires that every municipality's procedure by-law provide for public notice of meetings. I have previously found that adequate notice includes the time, date, and location of a meeting.¹⁸
- 56 The Township's procedure by-law has a specific provision regarding emergency meetings that arise in the case of the death, resignation, or illness of the mayor or a member of council, which allows the head of council or the Clerk to summon an emergency meeting without notice. The procedure by-law requires council to waive notice on a two-thirds vote and agree to meet for a named purpose.¹⁹
- 57 In this case, the Clerk-Treasurer also provided approximately 25 hours' notice of council's emergency meeting. The agenda posted online provided information about the time, date, and location of the meeting. At the September 1, 2023 meeting, council passed the required motion to waive notice and listed the former Mayor's resignation as the meeting's purpose. Accordingly, I find that the Township complied with its procedure by-law in providing notice of the emergency meeting.

Voting

- 58 The complaint alleged that council inappropriately voted to appoint a new mayor and a new councillor in closed session, contrary to the Act.
- 59 Section 239(6) of the Act permits a municipality to hold a vote in closed session if the meeting discussion fits within an exception to the Act, and if the vote is for a procedural matter or for giving directions or instructions to municipal staff. I have also previously determined that reaching a

¹⁸ *Johnson, supra* note 8 at para 48.

¹⁹ *Procedure By-law, supra* note 2, ss 1.1, 6.17.

consensus can be considered a vote for the purposes of the open meeting rules.²⁰

- 60 In this case, those we interviewed told my Office that no votes or informal consensus occurred in closed session. While individual council members may have crystallized their preferred approaches or appointees during the closed session discussions, the open session audio recording and minutes confirmed that council formally passed all their resolutions to address the vacancies in open session. Accordingly, council did not contravene section 239(6) of the Act.

Opinion

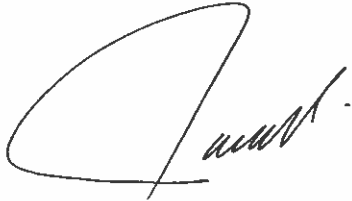
- 61 Council for the Township of McGarry did not contravene the *Municipal Act, 2001* on September 1, 2023 when it met in closed session to discuss the former Mayor's resignation as well as potential appointees to fill the head-of-council vacancy and the resulting council vacancy. Although the parts of council's discussion concerning the methods for filling the vacancies did not fit within the exceptions to the open meeting rules on their own, requiring council to have parsed the discussion between open and closed session would have detracted from free, open, and uninterrupted discussion. Accordingly, council's entire discussion fit within the exceptions to the open meeting rules.
- 62 Council for the Township of McGarry did not contravene its procedure by-law, as it provided sufficient notice for the September 1, 2023 meeting.
- 63 Council for the Township of McGarry did not contravene section 239(6) of the *Municipal Act, 2001*, as it did not hold improper votes in closed session to address the council vacancies.

Report

- 64 Council for the Township of McGarry was given the opportunity to review a preliminary version of this report and provide comments to my Office. All comments received were considered in the preparation of this final report.

²⁰ *Leeds and the Thousand Islands (Township of) (Re)*, 2022 ONOMBUD 5 at para 60, online: <<https://canlii.ca/t/jnkk9>>.

- 65 The Township told my Office that it was in the process of developing a policy concerning council vacancies to increase the openness and transparency of council's decision-making. I recognize the steps taken by the Township to increase the transparency of future council discussions.
- 66 The Clerk-Treasurer indicated that my report would be shared with council and made available to the public at the next council meeting. This report will also be published on our website at www.ombudsman.on.ca.



Paul Dubé
Ombudsman of Ontario