



Ombudsman Report

**Investigation into whether
Council for the Town of Essex
held an illegal closed meeting by email
in April 2015**

**Barbara Finlay
Acting Ombudsman of Ontario
October 2015**

Complaints

- 1 On April 22, 2015, we received a complaint that council for the Town of Essex had decided by email to modify the prayer it used to open each council meeting, in light of a decision of the Supreme Court of Canada that prayers at a Quebec municipal council breached the municipality's duty of neutrality and infringed on individuals' freedom of conscience. The new prayer was used at an April 20, 2015 meeting of council without any acknowledgment that a decision had been made to change it.

Ombudsman jurisdiction

- 2 Under the *Municipal Act, 2001*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 3 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has properly closed 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.
- 4 My Office is the closed meeting investigator for the Town of Essex.
- 5 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

Investigative process

- 6 Members of the Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the city's procedure by-law and the Act, as well as relevant documentation relating to the complaints. They also conducted interviews with the Clerk, Chief Administrative Officer (CAO), Mayor and all councillors.
- 7 We received full co-operation in this matter.

Council procedure

- 8 In April 2015, section 7.1 of the town's procedure by-law (by-law 548, as amended) stipulated that meeting agendas include "Opening Prayer" as the first item. The content of the opening prayer was not stipulated. Section 7.1 was

amended on June 1, 2015 to remove the “Opening Prayer” item from meeting agendas.

Background: The Supreme Court decision

- 9** In an April 15, 2015 decision, the Supreme Court of Canada affirmed a decision of the Quebec Human Rights Tribunal under Quebec’s *Charter of Human Rights and Freedoms*.¹ The Tribunal had found that the City of Saguenay had breached its duty of neutrality and infringed on an individual’s freedom of conscience through its practice of opening meetings with a prayer, as provided for in a by-law.
- 10** On April 16, 2015, the Association of Municipalities of Ontario issued a background document about this decision to its members.² It noted the following:

The court in this case recognized that there are many Canadian traditions that are rooted in religion, particularly Christianity. However, they cannot be used in a way that discriminates against others, including atheists and non-theists. While the court made its decision on the basis of the specific facts in Saguenay, the implication is that reciting a prayer in a municipal council chamber will generally breach the duty of neutrality.

Municipal governments in Ontario may wish to review their own council meeting practices in light of this decision. Some municipalities have initiated a review of whether their prayer reflects the principles of this decision and the test of neutrality (for both theists and non-theists). Some councils have a moment of silence and self-reflection.

- 11** The Town of Essex complaint arose in the context of the actions taken by the Town in response to the Supreme Court of Canada decision.

The prayer emails

- 12** According to the complaint, council decided through a series of emails to modify the council prayer. OMLET staff reviewed emails received or sent by the Chief

¹ *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16.

² Association of Municipalities of Ontario, “Supreme Court of Canada Decision on Prayer before Council Meetings” (16 April 2015), online: <<https://www.amo.on.ca/AMO-Content/Policy-Updates/2015/Prayer-before-Council-Meetings.aspx>>.

Administrative Officer that related to the topic of prayer. These emails spanned the time from September 27, 2014 to April 22, 2015.

- 13** The emails from September and October 2014 indicate that the matter of prayer was discussed in general terms between the CAO and, on separate occasions, two members of council. In response to an inquiry from Councillor Sherry Bondy, the CAO suggested that the matter be raised with the new council early in its new term.³
- 14** On March 5, 2015, Councillor Bondy sent an email to the Clerk and the CAO, copied to council members, asking if the prayer matter could be added to a council agenda or discussed at a strategic planning session. No agendas of council after this date indicate that council planned to discuss the matter.
- 15** On April 15, 2015, there were a number of emails to the CAO from various individuals linking to news of the Supreme Court of Canada decision with respect to prayers in council meetings.
- 16** On April 16, 2015, at 7:30 a.m. Councillor Bondy again sent an email raising the prayer matter with the CAO, the Clerk and council members. The Clerk responded at 7:48 a.m.: "We will discuss this at [our] meeting this morning." Based on information received from the Clerk, this was a regular meeting attended by the Clerk, the CAO and the Mayor to review the agenda for the upcoming council meeting. At 8:55 a.m., the Clerk sent an email to the CAO with the wording of the council prayer in use at the time.
- 17** At 11:57 a.m., the CAO emailed all council members, the Clerk, and other staff, explaining the Supreme Court of Canada's decision with respect to council prayer. He proposed new language that "is inclusive and does not slight any one religion or individual's rights." He went on to state: "Prior to next week's Council meeting, I would appreciate your comments and feedback. If there is sufficient support it is suggested [the Clerk] open next week's session with the foregoing."
- 18** At 12:50 p.m., Councillor Randy Voakes replied "Support." At 1:07 p.m., Councillor Bondy wrote "I think that's perfect. Thank you". Councillor Bill Caixeiro, at 1:15 p.m., after making some general comments with respect to the Supreme Court decision, thanked the CAO "for putting some time and thought into those opening comments that we will use if approved going forward." At 3:18 p.m., Councillor Steve Bjorkman wrote "Support". At 8:28 p.m., Deputy Mayor

³ Following the October 26, 2014 municipal election, the Mayor and three councillors were re-elected, including Councillor Sherry Bondy. The three remaining councillors were newly elected.

Richard Meloche wrote “I would be in favour of using this prepared statement at the beginning of our meetings based on the Supreme Court ruling.”

- 19** On April 20, 2015, the CAO emailed council members, the Clerk and staff, stating: “With the exception of hearing back from Councillor Larry Snively, all other members of Council concurred with the proposed opening statement, thus we can expect to have [the Clerk] read it at Council this evening.” He also proposed minor modifications to the text based on discussions with other CAOs in the region.
- 20** At 11:39 a.m., Councillor Caixeiro responded “Looks good.” At 12:12 p.m., Councillor Voakes thanked the CAO for his work.
- 21** At 12:11 p.m., Councillor Bondy sent an email raising concerns she had heard from constituents that the prayer matter had not been discussed publicly. She stated that she would save further comments for a public meeting.
- 22** At 8:13 p.m., following the regular meeting of council at which the new opening prayer was used, Councillor Bondy forwarded to council and staff correspondence from a constituent with respect to the prayer matter and added:

For the benefit of the staff members mentioned and council members mentioned in the email I did have discussions with [the constituent] earlier today and shared with her our new direction and the will of council that was expressed through email.

- 23** On April 21, 2015, in a series of emails from Mayor Ron McDermott to the constituent, with council members and staff copied, the Mayor responded to various statements and allegations the constituent had made in the email to Councillor Bondy the prior evening. In one email, the Mayor stated:

I, the Mayor, asked administration to come up with something that was not along any Religious belief and we would contact Council to see if they were in favour or not. All but one Council members responded. All responses were on the positive side.

- 24** Finally, on April 22, 2015, the CAO sent an email to council members and staff with a document titled “Backgrounder on prayer at the onset of Essex Council meetings”. It provided context with respect to the prayer matter and recounted some of the discussions the CAO had, as reflected in the emails from 2014. The email then went on to explain the process of arriving at the new opening address:

In considering what advice to provide Council following the SCC ruling many options were reviewed, from eliminating any prayer or

passage at the onset of a Council meeting, or to amending it –or- to what some communities are purported to be doing, is to ignore the Supreme Court ruling and continue status quo. The option put in front of Council through email last week, albeit with little discussion, was to eliminate the prayer and alter some of the passage to make it more an “opening statement”; one which was intended to set the tone at the commencement of a Council meeting.

The CAO then concluded:

... I concur that this matter must be discussed further and given the receipt of [the constituent’s] letter there is reason to have this item on the agenda at an upcoming meeting of Council.

25 During interviews, members of council and staff asserted that the emails did not constitute a meeting of council. They characterized the emails as council members’ opinions, as operational or administrative matters, or as an attempt to stay within the spirit of the law as set out by the Supreme Court of Canada. Some council members believed no decision had actually been made via email, since the emails were a matter of the wording of the opening address and did not address or advance council business.

The April 20, 2015 meeting of council

26 The agenda for the April 20, 2015 regular meeting of council lists “Opening Address” as the first item. There is no mention of changes to the prayer/address in the agenda, nor in the minutes of the meeting.

Analysis

27 In a 2008 report,⁴ through review of the relevant case law and keeping in mind the underlying objectives of the open meeting legislation, the Ombudsman developed a working definition of “meeting” to assist in applying the law:

Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or

⁴ Ombudsman of Ontario, *Don’t Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 2008), online: <http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2_2.pdf>.

committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.

- 28** A series of emails between council members for the purpose of exercising the power or authority of council, or for the purpose of laying the groundwork necessary to exercise that power or authority, may constitute a meeting for the purposes of the Act's open meeting requirements. This was reinforced recently in two of the Ombudsman's reports about closed meetings in Leeds and the Thousand Islands.⁵
- 29** In the Town of Essex case, informal discussions took place by email about council prayer in September and October 2014 and March 2015 among individual members of council and members of staff. Such discussions are not prohibited by the open meeting provisions of the *Municipal Act*. There was no exercise of council's authority or laying the groundwork for the exercise of such authority.
- 30** The email communications in April 2015 were of a different nature however. In response to the email sent by the CAO on April 16, 2015, four councillors stated their support by email for the wording of a new opening address for council (Councillors Voakes, Bondy, Bjorkman, Meloche) and one implied his support (Councillor Caixeiro). The four members constitute a quorum of council.
- 31** In follow-up correspondence on April 20, 2015, the CAO stated that all members of council except Councillor Snively had responded to his recommendation, all in favour of the new wording. This was echoed in the Mayor's email of April 21, 2015 to the constituent. This implies that six of the seven members of council explicitly stated their approval of the new wording, either by email or by some other means.
- 32** There is no obligation under the *Municipal Act, 2001* for municipal councils to have an opening prayer or address. Section 238(2) of the Act states only that "every municipality and local board shall pass a procedure by-law for governing the calling, place and proceedings of meetings."

⁵ Ombudsman of Ontario, *Re: The Naughty Topic: Investigation into whether Council for the Township of Leeds and the Thousand Islands held illegal meetings between October 30 and December 1, 2014* (June 2015), online: <<https://ombudsman.on.ca/Resources/Reports/Township-of-Leeds-and-the-Thousand-Islands--Re--Th.aspx>>; Ombudsman of Ontario, *Investigation into whether Council for the Township of Leeds and the Thousand Islands held illegal closed meetings to discuss Council's Code of Conduct* (June 2015), online: <<https://ombudsman.on.ca/Resources/Reports/Township-of-Leeds-and-the-Thousand-Islands-%283%29.aspx>>.

- 33** The Town of Essex elected to include in its procedure by-law the standard order of business for council meetings, with the first item being an opening prayer, although the content of the prayer is not stipulated in the procedure by-law. OMLET staff were informed that the custom of saying a prayer at council was carried over to the Town of Essex from the former Colchester Township when, on January 1, 1999, the former towns of Essex and Harrow and the former townships of Colchester North and Colchester South were amalgamated.
- 34** Many of those we interviewed were of the opinion that the April 2015 email exchange was operational, i.e., that the CAO was seeking input on a purely administrative matter. There was a contention that staff could have changed the wording without even consulting council, and that there was therefore no exercise of the authority of council in the circumstances.
- 35** However, the CAO's email to council suggested wording for the prayer and made specific recommendations as would be contained in a staff report to council. Council's responses constituted an approval of the new wording. Even if administrative staff had the authority to change the prayer on their own, once staff opted to consult council and obtain council's approval, the content of the prayer became a matter for the exercise of council authority. This decision by council should have been made subject to the open meeting requirements.
- 36** It is acknowledged that council was trying to act quickly to respond to a matter it felt was urgent. Council and staff acted in good faith in order to ensure compliance with the law as clarified by the Supreme Court of Canada. In their haste however, they failed to turn their minds to the need for transparency and the open meeting requirements contained in the *Municipal Act*.

Opinion

- 37** Council for the Town of Essex held an illegal closed meeting when it exercised its authority and decided through a series of emails to modify the council prayer, in violation of the open meeting provisions of the *Municipal Act, 2001*.
- 38** I am making the following recommendations to assist the Town in improving its practices with respect to open meetings.

Recommendations

Recommendation 1

Members of council for the Town of Essex should avoid exercising the power or authority of council or laying the groundwork necessary to do so through serial email communications.

Recommendation 2

All members of council of the Town of Essex should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001*.

Report

- 39** The council and staff of the Town of Essex were provided with an opportunity to comment on my report. Any comments received were taken into account in preparing this report.
- 40** This report should be made available to the public as soon as possible, and no later than the next council meeting.



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Acting Ombudsman of Ontario