



Ombudsman Report

**Investigation into closed meetings held by
council for the Town of Fort Erie on
December 4 and December 6, 2017**

**Paul Dubé
Ombudsman of Ontario
April 2018**

Complaint

- 1 In January 2018, my Office received a complaint about meetings held by council for the Town of Fort Erie on December 4 and December 6, 2017. The complaint alleged that council had violated the *Municipal Act, 2001* (the “Act”) by holding in camera discussions regarding a potential partnership with a post-secondary institution that did not fit within the cited closed meeting exception.

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 complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 4 The Ombudsman is the closed meeting investigator for the Town of Fort Erie.
- 5 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s procedure by-law have been observed.

Investigative process

- 6 On January 23, 2018, we advised the Town of Fort Erie of our intent to investigate this complaint.
- 7 Members of my Office reviewed relevant portions of the town’s procedure by-law and the Act, as well as the meeting record, the Clerk’s closed meeting notes, and audio recordings of both meetings. We also reviewed a consultant’s report discussed during the closed meetings and interviewed the town’s Mayor, Clerk, and Chief Administrative Officer (CAO).

- 8 My Office received full co-operation with our investigation.

Council procedure

- 9 The town's procedure by-law (by-law no. 42-2015) states that all meetings shall be open to the public except as provided in section 239 of the *Municipal Act*.¹ Under the by-law, the onus is on the Mayor and members of council to ensure that only appropriate matters are discussed in camera and that proper procedures are followed.
- 10 Section 4.5 states that a special council meeting may be called: i) at any time by the Mayor; ii) upon the direction of a majority of council at a regular meeting; or iii) by the Clerk, upon receipt of a petition of the majority of the members of council.
- 11 The town's procedure by-law also states that closed sessions may be recorded digitally, and we were told that this is the town's typical practice. I commend the town for audio recording its closed sessions, as it increases the transparency of council meetings and provides the clearest, most accessible record for closed meeting investigators to review.

December 4, 2017 special council meeting

- 12 On December 4, 2017, council met for a special council meeting at 5:00 p.m. in Conference Room No. 1.
- 13 After the meeting convened in open session, council passed a resolution to proceed into closed session at 5:02 p.m. The resolution stated:

Council does now go into closed session...to discuss the following...[p]ursuant to Section 239(2)(c) of the *Municipal Act, 2001* – A proposed or pending acquisition or disposition of land by the municipality or local board.

¹ The Municipal Corporation of the Town of Fort Erie, *Being a By-law to Adopt Council Rules of Procedure and to Repeal By-law No. 42-2015*, by-law no. 36-2016, online: <[http://www.forterie.ca/bylaws/2016-036/\\$FILE/36-2016%20Council%20Rules%20of%20Procedure.pdf](http://www.forterie.ca/bylaws/2016-036/$FILE/36-2016%20Council%20Rules%20of%20Procedure.pdf)>.

- 14 The meeting agenda did not provide any additional information about council's intended discussion.
- 15 In addition to members of council and town staff, members of the Fort Erie Economic Development and Tourism Corporation (the "EDTC"), and two representatives of a post-secondary institution (the "institution") attended the closed session.

Council discussion

- 16 In preparation for the December 4 special meeting, council was provided with a confidential report prepared by a consultant retained by the EDTC. The report provided an independent review of a potential partnership with an identified post-secondary institution.
- 17 At the start of the closed session, the CAO explained council would have the opportunity to ask the institution's representatives questions about the proposed partnership and then privately discuss the proposal.
- 18 Following this explanation, a staff member from the EDTC made a presentation summarizing the proposed partnership. After outlining the basic concept of the project, the EDTC staff member provided details on the anticipated timeline for next steps and discussed the real estate needs of the project. The institution's representatives also provided information about the proposed partnership, including the potential outcomes of the project and the possible benefits for the town.
- 19 Council was invited to ask questions concerning the project. Many questions related to the projected outcomes of the partnership, while others related to anticipated costs to the town, including the need for the town to provide physical space for the project.
- 20 After answering these questions, the institution's representatives left the meeting at 6:00 p.m. and council continued to discuss the project with town and EDTC staff members. Some councillors requested additional information regarding the project and another special council meeting was scheduled to discuss the project.
- 21 During the closed session, the CAO specifically reminded council that the discussion had been closed to the public under the "acquisition or disposition of land" exception because there was a possibility of purchasing a location to house the project. However, there was no discussion about specific locations to house the project.

- 22 Council reconvened from closed session at 6:10 p.m. The meeting was adjourned at 6:11 p.m.

December 6, 2017 special council meeting

- 23 In response to council's request for further information about the proposed partnership, council met again on December 6 for a special meeting of council.
- 24 After the meeting convened in open session at 7:00 p.m., council passed the following resolution to proceed in camera:

Council does now go into closed session...to discuss the following...[p]ursuant to Section 239(2)(c) of the *Municipal Act, 2001* – A proposed or pending acquisition or disposition of land by the municipality or local board.

- 25 In addition to members of council and town staff, an EDTC staff member was also present for the closed session discussion.

Council discussion

- 26 Once in camera, council discussed the details of the proposed partnership with the post-secondary institution, including the financial implications for the town. Council also discussed detailed information from the consultant's earlier report and the need for a partnership agreement with the institution setting out various terms.
- 27 In addition, council discussed the possibility of renting or purchasing property for the project. Specific sites for lease or purchase were discussed as potential locations, and council was told that town and institution staff had visited some of these sites in the summer of 2017. However, town staff explained that the town had not yet targeted a specific property to house the project and that no negotiations were underway.
- 28 Following this discussion, council directed staff to bring a report to council answering various questions about the partnership and providing further information on the project specifics.
- 29 Council reconvened from closed session at 8:30 p.m. with a report that staff proceed as directed. The meeting adjourned at 8:31 p.m.

Analysis

Closed meeting exception

“Acquisition or disposition of land” – s. 239(2)(c)

- 30** Council relied on the “acquisition or disposition of land” exception found in section 239(2)(c) to hold its closed session discussions in camera on December 4 and December 6, 2017.
- 31** The acquisition or disposition of land exception allows council to discuss the sale, lease, or purchase of land within a closed session, with the primary purpose being to protect the municipality’s bargaining position in property negotiations.² The exception does not apply to discussions that involve speculation about a land transaction or discussions about land transactions that may or may not happen in the future.³ Rather, the discussion must involve an actual land transaction that is currently pending or has been proposed.⁴
- 32** In a February 2015 report to the City of Niagara Falls, our Office considered a meeting closed under the acquisition or disposition of land exception where council discussed the possibility of establishing a downtown campus in partnership with a post-secondary institution.⁵ During the meeting, council referenced property owned by the municipality, as well as private properties that could be impacted if a downtown campus were established. However, the discussion did not address how the properties were to be appraised or sold, and there was no discussion about putting specific properties on the market. Our Office determined that this discussion did not fall within the “acquisition or disposition of land” exception because council

² Letter from Ombudsman of Ontario to Town of Ajax (28 March 2014), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2014/town-of-ajax>>.

³ Ombudsman of Ontario, *Investigation into whether Council for the Town of Fort Erie held an illegal closed meeting on December 10, 2014* (April 2015), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/town-of-fort-erie>>.

⁴ Ombudsman of Ontario, *Investigation into whether Councils for Armour Township and the Village of Burk’s Falls held illegal closed meetings on January 16, 2015* (October 2015), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/village-of-burk-s-falls-armour-township>>.

⁵ Ombudsman of Ontario, *Investigation into whether Council for the City of Niagara Falls held an illegal meeting on October 8, 2013* (February 2015), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/city-of-niagara-falls>>.

did not discuss the acquisition or disposition of city lands with a view to protecting the city's bargaining position in property negotiations.

December 4, 2017 closed meeting

- 33** With respect to the December 4 closed meeting, council's discussion focused on the nature of the proposed partnership with the post-secondary institution. Staff from the EDTC and the institution's representatives made presentations to council regarding the partnership, the project, timelines, and potential benefits to the town. When given the opportunity to ask questions, council requested additional information regarding the project's structure, outcomes, and benefits.
- 34** When asked why council felt this discussion came within the acquisition or disposition of land exception, the Mayor said that the meeting was closed to the public because of the unique nature of the proposed project. The Mayor believed that the partnership proposal would be of interest to competing parties, including other post-secondary institutions, and should be kept confidential.
- 35** I appreciate the Mayor's concern, and as of January 1, 2018, amendments to the *Municipal Act* have introduced four new closed meeting exceptions to allow for in camera discussion of some negotiations and sensitive commercial information.⁶ However, at the time of the December 4 and December 6, 2017 meetings, the new closed meeting exceptions were not in force and could not be relied on to proceed in camera.
- 36** Instead, council relied on the acquisition or disposition of land exception, which is limited to instances where council is discussing a proposed or pending land transaction. In this case, the consultant's report noted that the major cost for the town to enter into the partnership would be the provision of space, but council did not discuss any specific properties that it planned to purchase or lease. Accordingly, council was not entitled to rely on the "acquisition or disposition of land" exception to close its discussion to the public during the December 4, 2017 council meeting.

⁶ *Municipal Act, 2001*, S.O. 2001, c. 25, at s. 239(2)(i) and (j)

December 6, 2017 closed meeting

- 37** During the December 6 in camera meeting, council again discussed the proposed partnership with the post-secondary institution. Portions of this discussion focused on the need for space to house the project, and council considered whether to rent or purchase a location to support the partnership. Council also discussed specific sites that could be of interest if the town was to move forward with the partnership. However, EDTC staff noted during the closed session that the town did not know what property it wished to target for purchase or lease. Other portions of the discussion related to the general nature of the project, including detailed questions about the information presented in the consultant's report and the proposed agreement with the post-secondary institution.
- 38** Although council spoke to the need for space and identified specific properties that could be appropriate should the partnership proceed, during the December 6 closed session the town was still in the early decision-making stage of whether or not to partner with the institution. Council had not identified a specific property that it wished to purchase or lease and had taken no practical steps to acquire a property. Accordingly, the municipality had no bargaining position to protect and council was not entitled to rely on the "acquisition or disposition of land" exception to close its December 6, 2017 discussion to the public.

Procedural matters

Resolution to proceed into closed session

- 39** Section 239(4)(a) of the Act requires that the resolution to proceed into closed session include the general nature of the subject matter to be considered.
- 40** As noted by the Court of Appeal in *Farber v. Kingston (City)*, "the resolution to go into closed session 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".⁷
- 41** Our Office has also recommended that councils provide more substantive detail in resolutions authorizing closed sessions. For instance, in our

⁷ *Farber v. Kingston (City)*, 2007 ONCA 173 at para 21

Office's 2015 review of closed meetings in the Municipality of South Huron, we noted that council's resolution "should provide a brief description of the subject matter to be considered in closed session".⁸

- 42** In our review of the December 4 and December 6, 2017 special council meeting minutes, we noted that the resolutions to proceed into closed session only stated the exception under which the meeting was being closed. No information about the intended subject matter was included in the resolution. A more descriptive resolution would have provided greater information to the public without undermining the reason for meeting in camera. In the interest of transparency, the Town of Fort Erie should ensure that resolutions to enter closed session contain at least a general description of the issue to be discussed.

Opinion

- 43** Council for the Town of Fort Erie contravened of the *Municipal Act, 2001*, and the town's procedure by-law on December 4 and December 6, 2017, when it went in camera to discuss a proposed partnership with a post-secondary institution.
- 44** During the meetings, council discussed the nature of a potential partnership with the post-secondary institution, including how the proposed project would be structured and its potential benefits for the community. While council did discuss the need to provide land for the proposed project, it did not discuss acquiring or disposing of identified properties. Rather, council was in the early stages of deciding whether to proceed with the partnership, had not turned its mind to a specific property to purchase or lease, and was not acting with a view to protecting its bargaining position in property negotiations.
- 45** My investigation also found that council for the Town of Fort Erie violated section 239(4)(a) of the *Municipal Act, 2001* by failing to state by resolution the general nature of the matters to be considered in closed session.

⁸ Ombudsman of Ontario, *Investigation into closed meetings held by council for the Municipality of South Huron* (February 2015) at para 58, online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/municipality-of-south-huron>>.

Recommendations

- 46 I make the following recommendations to assist the town in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of council for the Town of Fort Erie should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

Council for the Town of Fort Erie should ensure that no subject is discussed in closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 3

Council for the Town of Fort Erie should ensure that its resolutions to proceed in camera 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.

Report

- 47 The Town of Fort Erie was given the opportunity to review a preliminary version of this report and provide comments. Comments received were considered in the preparation of this final report.
- 48 In its response, the town stated that council's December 6 meeting was held as an extension of council's December 4 discussion, which was impacted by time constraints. The town's comments also noted that specific locations for potential rent, lease, or acquisition were discussed at the December 6 meeting. My report found that neither the December 4 nor December 6 council discussions fit within the cited exception, and viewing the second meeting as an extension of the first would not change that analysis. Regarding the discussion of potential properties, council was in the early stages of the decision-making process and was not acting with a view to protect its bargaining position with a proposed or pending land acquisition. Accordingly, the closed meeting exception did not apply.

49 My report should be shared with council for the Town of Fort Erie and should be made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ontario Ombudsman