



Ombudsman Report

**Investigation into a complaint about a meeting
held by council for the Municipality of Brockton
on February 14, 2023**

**Paul Dubé
Ombudsman of Ontario**

November 2023

Overview

- 1 My Office received a complaint that council for the Municipality of Brockton (the “Municipality”) contravened the open meeting rules on February 14, 2023. The complaint alleged that a partnership proposal was improperly discussed in the course of the *in camera* portion of the meeting.
- 2 My review has found that the discussion of the partnership proposal at the February 14, 2023 meeting did not fit within any of the open meeting exceptions. As such, the Municipality contravened the open meeting rules by discussing this matter in closed session.

Ombudsman jurisdiction

- 3 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.
- 4 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.
- 5 The Ombudsman is the closed meeting investigator for the Municipality of Brockton.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the municipality’s governing procedures have been observed.
- 7 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.

¹ SO 2001, c 25.

Investigative process

- 8 On May 16, 2023, my Office advised the Municipality of our intent to investigate this complaint.
- 9 Members of my Office’s open meeting team reviewed relevant portions of the Municipality’s procedural by-law, as well as the Act. We reviewed email correspondence and the meeting records, which included the agenda and minutes. We also reviewed the minutes for a January 19, 2023 meeting of the Brockton Police Services Board, as the partnership proposal in question was also discussed at that meeting.
- 10 Finally, a member of my Office’s open meeting team spoke with the individual who supplied the information about the partnership proposal to the Municipality, and interviewed the Mayor of the Municipality.
- 11 My Office received full co-operation in this matter.

Background

- 12 Council for the Municipality met on February 14, 2023 to discuss, amongst other matters, a “camera partnership proposal” put forth by a local business.
- 13 The Clerk told our Office that the partnership proposal was put to council in closed session because she believed that it was implied that the information was supplied in confidence given the financial and commercial nature of the information. She indicated that she believed the idea to be novel, and she was aware that the project proponent sought to expand their services with other potential partners in the future.
- 14 The Clerk told my Office that she did not ask the project proponent whether the information was confidential, but no objection was expressed to her when she communicated that the matter would be discussed *in camera*. The project proponent told us that the information was not intended to be treated confidentially. The Mayor told my Office that his correspondence with the project proponent on February 10, 2023 suggested discontent from the project proponent that the matter would be discussed in closed session.
- 15 My Office was also made aware that prior to the council meeting, the Brockton Police Services Board allowed a delegation in open session from the project proponent with respect to the same partnership proposal. The minutes of that meeting note that the Board “discussed the proposal, and

privacy concerns involved, suggesting that the matter was outside of the Municipality and Police Services Board's jurisdiction".

February 14, 2023 council meeting

- 16 On February 14, 2023 at 7:00 p.m., council for the Municipality met in council chambers. At 7:20 p.m.,² council resolved to move *in camera* to discuss five issues, only one of which is the subject of the complaint to my Office. The resolution described this as a "camera partnership proposal" and cited the exception for information supplied in confidence by a third-party at paragraph 239(2)(i) of the Act to discuss it *in camera*.
- 17 We were told that, once in closed session, council considered the pricing and the overall idea of the partnership proposal. We were told that there were no discussions about possible negotiations with the project proponent. Direction to staff was provided to communicate to the project proponent council's decision on the partnership proposal.
- 18 Council moved back to open session at approximately 8:24 p.m. and approved the direction to staff provided in closed session. The meeting was adjourned at 8:26 p.m.

Analysis

The exception for information supplied in confidence

- 19 In closing the February 14, 2023 meeting to the public, council cited the exception for information supplied in confidence at paragraph 239(2)(i) of the Act.
- 20 The purpose of the exception for information supplied in confidence is to protect confidential information belonging to a third party.³ In a recent report, I explained that this exception will apply when:
 - i. The information discussed falls into one of the listed types: trade secret, scientific, technical, commercial, financial, or labour relations information;

² The minutes note that council moved into closed session at 7:10 p.m., but this appears to be a mistake upon reviewing the audio-visual recording of the meeting.

³ *St.-Charles (Municipality of) (Re)*, 2019 ONOMBUD 6 at para 29, online: <<https://canlii.ca/t/j2p1h>>.

- ii. The information discussed was supplied confidentially, whether explicitly or implicitly, to the municipality by a third party; and
- iii. If disclosed, the information discussed could reasonably be expected to cause harm, either by prejudicing significantly the competitive position or interfering significantly with the contractual or other negotiations of a person, group of persons or organization.⁴

Application of the exception

The information discussed fell into the listed types

- 21 Of the types of information listed in the exception, “commercial” and “financial” are the most likely to apply to the partnership proposal in question.
- 22 Financial information is information relating to the use or distribution of money, containing or referring to specific data, whereas commercial information is information relating to the buying, selling or exchange of merchandise or services.⁵
- 23 In this case, council discussed concerns about a partnership proposal that would have made a new service available within the Municipality. The information discussed is squarely “commercial information”. Furthermore, some of the information discussed, namely the pricing, fits within the definition of “financial information”.

The information discussed was not supplied confidentially

- 24 In this case, the information was supplied by the project proponent to the Municipality, but in order for the exception to apply, it must have been supplied in confidence.
- 25 Although not binding on our Office, the Information and Privacy Commissioner has considered the “in confidence” requirement in the context of an analogous exception under freedom of information legislation. In these cases, the Information and Privacy Commissioner has stated that the party resisting disclosure must establish “that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the

⁴ *Bruce (County of) (Re)*, 2022 ONOMBUD 7 (CanLII), online: <<https://canlii.ca/t/jpbf9>>.

⁵ *Leeds and the Thousand Islands (Township of) (Re)*, 2022 ONOMBUD 5 at paras 31, 33, online: <<https://canlii.ca/t/jnkk9>>.

information was provided”.⁶ All circumstances of the case are considered to assess whether there was an expectation of confidentiality, including whether the information was:

- Communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- Treated consistently by the third party in a manner that indicates a concern for confidentiality;
- Not otherwise disclosed or available from sources to which the public has access; and
- Prepared for a purpose that would not entail disclosure.⁷

26 In this case, the information was provided to the Municipality without any explicit indication that such information should be kept confidential, and the Municipality did not ask the supplier for clarification. Later communication between the project proponent and the Mayor confirmed that it was not the project proponent’s intention that the information be kept confidential. The project proponent told us that the information was not confidential and was not intended to be treated as such by the Municipality.

27 Looking at all the circumstances of the case, there is no indication that the project proponent had an expectation of confidentiality. Rather, it appears that staff, in good faith, decided this matter should be discussed in closed session because commercial and financial information was involved.

28 However, the exception for information supplied by a third party only applies if that third party intended to supply the information in confidence, regardless of whether the municipality itself believes the information is sensitive. To ensure they are complying with the Act, a municipality should confirm directly with a third party if information is intended to be kept confidential before citing this exception.

The reasonable expectation of harm was not clearly established

29 Although I have already found that the information was not supplied to the Municipality in confidence, I also considered whether the third requirement in the exception was met. In order to fit within this exception, a municipality must

⁶ *Ontario Securities Commission (Re)*, 2004 CanLII 56412 (ON IPC), online: <<https://canlii.ca/t/1r1js>>.

⁷ *Ibid.*

show that disclosure of the information could reasonably be expected to cause harm.

- 30 In interpreting the harm requirement in the context of an analogous third-party exception under freedom of information legislation, the Supreme Court of Canada explained that the requirement is to “demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm”.⁸ The onus is on the party seeking to withhold information to supply “detailed and convincing” evidence to establish a reasonable expectation of harm.⁹ While this decision dealt with the text of another Act, and is therefore not binding on our Office, the similarity between the text of these exceptions makes it highly persuasive.¹⁰
- 31 We were told by the Mayor and the Clerk that there was a risk of competitors getting hold of the commercial information, that the business concept was novel, and that any competitor could replicate the idea if it had been discussed publicly. We were also told that the municipality was aware that the project proponent intended to expand its services.
- 32 However, the project proponent told us that the business idea discussed was not proprietary, that there would be no actual harm in discussing it publicly, and that the information may have already been public before the meeting, after having been discussed in open session at a meeting of the Brockton Police Services Board.
- 33 Accordingly, I am not satisfied that this part of the test was met in this case. Where a municipality relies on the exception for information supplied in confidence, it should first inquire into what concrete harms the third party expects if the information were to be disclosed publicly.

Opinion

- 34 Council for the Municipality of Brockton contravened the *Municipal Act, 2001* on February 14, 2023 when it discussed a partnership proposal *in camera*. The discussions did not fit within the closed meeting exception for information supplied in confidence, provided at paragraph 239(2)(i) of the Act, or any other closed meeting exceptions.

⁸ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), [2014] 1 SCR 674, online: <<https://canlii.ca/t/g6lzb>>.

⁹ *Corporation of the Town of Arnprior v Information and Privacy Commissioner of Ontario*, 2016 ONSC 2904 (CanLII) at paras 22-24, online: <<http://canlii.ca/t/gpqlx>>.

¹⁰ *Pelham (Town of) (Re)*, 2022 ONOMBUD 9 (CanLII), online: <<https://canlii.ca/t/jpsh5>>.

Recommendations

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

Recommendation 1

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

Recommendation 2

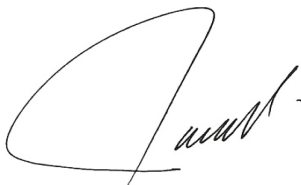
Council for the Municipality of Brockton should ensure that no subject is discussed in a closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 3

As a best practice, before it relies on paragraph 239(2)(i) to move *in camera*, the Municipality of Brockton should confirm with the third party whether or not the information was supplied in confidence, and, where appropriate, inquire into what concrete harms could be expected if the information was disclosed publicly.

Report

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

Ce rapport est aussi disponible en français