



Ombudsman Report

**Investigation into meetings held by
the Board of Health and the Executive Committee
of the Grey Bruce Health Unit
on May 10 and May 12, 2021**

**Paul Dubé
Ombudsman of Ontario
March 2023**

Complaint

- 1 My Office received a complaint about meetings held by the Grey Bruce Health Unit's Board of Health and its Executive Committee. The Grey Bruce Health Unit (the "Health Unit") is the public health unit for the upper-tier municipalities of Bruce County and Grey County. The complaint alleged that the Health Unit's Board of Health (the "Board") and the Board's Executive Committee (the "Committee") held meetings on May 10 and May 12, 2021 that did not comply with the open meeting rules under the *Municipal Act, 2001* (the "Act").¹
- 2 The Committee met on May 10, 2021, and the Board held a special meeting on May 12, 2021. Both the Board and the Committee relied on the exception for advice subject to solicitor-client privilege in section 239(2)(f) of the Act to proceed *in camera*. The complaint alleged that the exception did not apply because third parties were present during the closed sessions.
- 3 For the reasons set out below, I have concluded that the Grey Bruce Health Unit's Board of Health is a local board subject to the open meeting rules set out in the Act.
- 4 I have concluded that the May 10 and May 12, 2021 meetings were appropriately closed, as the discussions fit within exceptions to the Act's open meeting rules. However, the Committee and the Board contravened the requirement in section 239(4)(a) of the Act by passing resolutions to move into closed session without providing a general description of the subjects to be discussed. The Committee and the Board also contravened the requirement in the Act to record all proceedings in meeting minutes.

Ombudsman jurisdiction

- 5 Under the *Municipal Act, 2001*, all meetings of council, local boards, and committees of either must be open to the public, unless they fall within prescribed exceptions.
- 6 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. Municipalities may appoint their own investigator. The Act designates the Ombudsman as the default investigator for municipalities or local boards that have not appointed their own investigator to review complaints about whether the municipality or local board has complied with the open meeting rules.

¹ SO 2001, c 25.

- 7 The Ombudsman is the closed meeting investigator for the Grey Bruce Health Unit's Board of Health.
- 8 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the applicable procedure by-law have been observed.
- 9 My Office has investigated hundreds of closed meeting complaints 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.

Investigative process

- 10 In September 2022, my Office advised the Board of our intent to investigate this complaint.
- 11 Members of my Office's open meeting team reviewed the open and closed meeting agendas as well as the meeting minutes for the May 10 and May 12, 2021 meetings. We spoke with the Chair of the Board and the Board's former recording secretary.
- 12 My Office received full co-operation in this matter.

Background

The Board of Health

- 13 The Grey Bruce Health Unit is the public health unit for the upper-tier municipalities of Bruce County and Grey County. Pursuant to a Bruce County by-law, the Health Unit is governed by a Board of Health that is "responsible for the assessment, planning, delivery, management and evaluation of [public health] programs and services".² The Board has three members appointed by the County of Bruce, four members appointed by the County of Grey, and two members appointed by the province of Ontario.

² Bruce County, By-law No 2020-039, *A by-law to govern the proceedings of the Council and Committees of the Corporation of the County of Bruce*, s 28.

- 14 The Act defines a “local board” as “a municipal service board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities.” The Board fits within the definition of a “local board” in section 1(1) of the Act. It is subject to the open meeting rules under the Act.

The Executive Committee

- 15 The Executive Committee is a committee of the Board. Section 238(1) of the Act defines a “committee” as any advisory or other committee, subcommittee or similar entity of which at least 50% of the members are also members of one or more councils or local boards. The Committee is composed of three members, all of whom are also members of the Board of Health.³ Accordingly, the Committee meets the definition of a “committee” and is required to comply with the Act’s open meeting requirements.

May 10, 2021 Executive Committee meeting

- 16 The Committee met at 12:41 p.m. on May 10, 2021. In addition to the Committee members and the recording secretary, a lawyer, a third-party consultant and three staff members were also present.
- 17 My Office was told that prior to the May 10, 2021 meeting, the Health Unit received a letter from a lawyer threatening litigation against the Health Unit. The letter included a demand for the Health Unit to respond by a specific date. The meeting minutes state that the sole purpose of the meeting was to receive legal advice regarding the lawyer’s letter.
- 18 According to the meeting minutes, the Committee passed the following resolution to proceed into closed session:

THAT the Board of Health Executive Committee does now go into closed session at 12:42 PM to discuss advice subject to solicitor-client privilege.

- 19 The resolution did not provide a general description of what the Committee would discuss *in camera*.
- 20 The closed session minutes indicate that the lawyer present provided legal advice to the Committee. My Office was told that the legal advice pertained to

³ Grey Bruce Health Unit Board of Directors Executive Committee Terms of Reference at 1.

the lawyer's letter threatening legal action against the Health Unit. The closed session minutes also note that the Committee discussed litigation strategy.

- 21 My Office was told that, in addition to receiving legal advice, the Committee also discussed the public relations aspect of the potential litigation, with recommendations made by the third-party consultant and a staff member on litigation strategy. This portion of the discussion was not recorded in the closed meeting minutes.
- 22 We were told that the Committee provided direction to staff while in closed session.
- 23 The closed session was adjourned at 1:40 p.m.

May 12, 2021 Board of Health special meeting

- 24 The Board of Health met for a special meeting at 10:03 a.m. on May 12, 2021. In addition to the Board members and the recording secretary, two lawyers, a third-party consultant and three staff members were also present.
- 25 According to the meeting minutes, the purpose of the meeting was to obtain legal advice on three issues, which were not specified. As noted in the minutes, the Board passed the following resolution to proceed into closed session:

THAT the Board of Health does now go into closed session at 10:04 AM to discuss one item relating to advice subject to solicitor-client privilege, and further THAT, all Health Unit Staff shall remain present.
- 26 The resolution did not provide a general description of what the Board would discuss *in camera*.
- 27 The closed session minutes indicate that the two lawyers provided legal advice to the Board regarding the potential litigation that was discussed by the Committee on May 10, and a related employment law matter. The closed session minutes also outlined directions to staff as part of the Board's overall litigation and communication strategy.
- 28 We were told that the Board also discussed personal information about a Health Unit employee involved in the potential litigation, with recommendations made by the third-party consultant. The discussion included information about the employee's experience, competence and salary. We were told that this information was related to the Board's litigation and communication strategy. This portion of the discussion was not recorded in the closed meeting minutes.

- 29 My Office was also told that that the Board provided direction to staff during the closed session.
- 30 The closed session was adjourned at 11:46 a.m.

Analysis

Exception for solicitor-client privilege

- 31 The Committee and the Board cited the exception for advice subject to solicitor-client privilege before proceeding into closed session at both the May 10 and 12, 2021 meetings. During both closed sessions, in addition to lawyers, third parties were also present and participated in the discussions.
- 32 Under section 239(2)(f) of the Act, a meeting or part of a meeting may be closed to the public if the discussion includes communications between the local board and its solicitor in seeking or receiving legal advice intended to be confidential.⁴ The solicitor-client relationship exists exclusively between the local board and its solicitor. Consequently, the presence of a third party may constitute a waiver of solicitor-client privilege, in which case the exception in section 239(2)(f) of the Act might not apply.⁵
- 33 Nevertheless, my Office has found in previous cases that the presence of a third party does not automatically constitute a waiver of solicitor-client privilege. For example, in a letter to the Township of the North Shore, my Office found that the presence of the Township's Integrity Commissioner at a closed session did not constitute a waiver of solicitor-client privilege as the Integrity Commissioner provided operational advice that supplemented the confidential legal advice given by the solicitor.⁶
- 34 At the May 10 and 12, 2021 meetings, the Committee and Board received confidential advice from solicitors about appropriate steps to be taken in light of potential litigation. These portions of the closed session discussions fit within the exception for advice subject to solicitor-client privilege.

⁴ *Timmings (City of) (Re)*, 2017 ONOMBUD 4 at para 28, online: <<http://canlii.ca/t/h4rwt>>.

⁵ Letter from the Ontario Ombudsman to the Township of Ryerson (8 November 2013), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2013/township-of-ryerson-en>>; Letter from the Ontario Ombudsman to the Township of Adelaide Metcalfe (23 May 2012), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2012/township-of-adelaide-metcalfe>>.

⁶ Letter from the Ontario Ombudsman to the Township of the North Shore (9 July 2020), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2020/township-of-the-north-shore>>.

- 35 My review found that the presence of third parties at the closed sessions did not constitute a waiver of solicitor-client privilege. At the Committee meeting on May 10, 2021, a third-party consultant made recommendations in relation to the litigation strategy in response to the lawyer’s letter. A third-party consultant was also present during the Board meeting on May 12, 2021 and participated in discussions about the communication strategy regarding the potential litigation.
- 36 In each meeting, the third-party consultant provided insights that supplemented, and were informed by, the confidential legal advice given by the solicitor during the meeting. Accordingly, these portions of the closed sessions fit within the exception to the open meeting rules in section 239(2)(f) of the Act.

Exception for litigation or potential litigation

- 37 Although not cited in the resolution to proceed *in camera* for either the May 10 or 12, 2021 meetings, the Committee and the Board discussed potential litigation at both of these meetings.
- 38 Section 239(2)(e) of the Act allows a municipality or local board to proceed *in camera* to discuss “litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board.”⁷ The Act does not define what constitutes “litigation or potential litigation,” but my Office has determined that this exception is reserved for circumstances where the subject matter is related to ongoing litigation or involves a reasonable prospect of litigation.⁸
- 39 In order for a matter to be discussed *in camera* under the exception in section 239(2)(e), there must be more than a suspicion that litigation could arise. As the courts have explained with respect to litigation privilege, “in order for a document to be privileged it is not necessary that it be created at a time when there is a certainty of litigation but merely that litigation is in reasonable prospect. On the other hand, there must be more than a suspicion that there will be litigation”.⁹ Discussions about whether or not to litigate are also included in the exception.¹⁰

⁷ *Supra* note 1, s 239(2)(e).

⁸ Letter from the Ontario Ombudsman to the City of Timmins (May 9, 2017), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2017/city-of-timmins-2>>.

⁹ *CR (Re)*, 2004 CanLII 34368 at para 21 (ONSC), online: <<https://canlii.ca/t/1qz4w>>, citing *Carlucci v. Laurentian Casualty Co. of Canada*, [1991] OJ No 269.

¹⁰ *Head, Clara and Maria (United Townships of) (Re)*, 2012 ONOMBUD 8 at para 34, online: <<https://canlii.ca/t/gth4>>.

- 40 In this case, the meetings were called in order to strategize about the Health Unit's response to a letter from a lawyer threatening litigation. The letter included a demand for the Health Unit to respond by a specific date. The prospect of litigation was more than remote or speculative.
- 41 The information discussed by the Committee in closed session formed part of the litigation strategy being developed in response to the potential lawsuit. Accordingly, the discussion fit within the exception to the open meeting rules in section 239(2)(e) of the Act.
- 42 Similarly, on May 12, 2021 the Board discussed the potential litigation. Accordingly, this portion of the discussion fit within the exception to the open meeting rules in section 239(2)(e) of the Act.

Exception for personal matters about an identifiable individual

- 43 Although not cited in the resolution to proceed *in camera* for the May 12, 2021 Board meeting, we were told that part of the discussion included personal information about a Health Unit employee.
- 44 Under section 239(2)(b) of the Act, a meeting or part of a meeting may be closed to the public if the discussion would reveal personal information about an identifiable individual. Information about an individual in their professional capacity may qualify as personal information if it reveals something of a personal nature.¹¹ For example, in a letter to the Township of Huron-Kinloss, my Office found that council's discussion about a specific municipal employee's salary, job performance, and upcoming retirement was personal information and therefore appropriately held in closed session.¹²
- 45 While *in camera*, the Board discussed the employee's experience, competence and salary in the context of the Board's response to the lawyer's letter and the communication strategy. My Office was told that the employee's salary is subject to disclosure on the public sector salary disclosure list, which requires organizations receiving funding from the province to make public the names, positions, salaries and total taxable benefits of employees paid \$100,000 or more in the previous calendar year. However, the discussion included detailed information about the employee's compensation structure. This information qualifies as personal information because it reveals something of a personal nature about the employee. Information about the employee's experience and competence also qualifies as personal information.

¹¹ *Amherstburg (Town of) (Re)*, 2015 ONOMBUD 13 at para 22, online: <<https://canlii.ca/t/gtp5z>>.

¹² Letter from the Ontario Ombudsman to the Township of Huron-Kinloss (May 12, 2022), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2022/township-of-huron-kinloss>>.

- 46 Accordingly, the discussion about personal information of a Health Unit employee at the May 12, 2021 meeting fit within the exception for personal matters about an identifiable individual in section 239(2)(b) of the Act.

Procedural matters

Resolution to proceed *in camera*

- 47 Before moving into a closed session, section 239(4)(a) of the Act requires a municipality to state by resolution in open session that a closed meeting will be held, and the general nature of the matter to be considered at the closed meeting.
- 48 The Ontario Court of Appeal has determined that the resolution to close a meeting should provide a general description of the issue to be discussed in a way that maximizes the information available to the public without undermining the reason for excluding the public.¹³ My Office has stated that the resolution should include a brief description of the subject matter to be discussed, in addition to the specific exceptions being relied upon to move into closed session.¹⁴
- 49 In this case, the resolutions to proceed into closed session during the May 10 and 12, 2021 meetings did not include any information about the Committee or Board's intended discussion other than referencing the exception for advice subject to solicitor-client privilege. The Committee and Board could have disclosed that the discussion concerned a letter it received from a lawyer without undermining solicitor-client privilege.
- 50 Accordingly, the Committee failed to fulfill the requirements of the Act when it did not provide a general description of the issue to be discussed in its resolution to proceed *in camera* on May 10, 2021. The Board also failed to fulfill the requirements of the Act when it did not provide a general description of the issue to be discussed in its resolution to proceed *in camera* on May 12, 2021.

Adequacy of meeting minutes

- 51 My Office reviewed the open and closed meeting minutes for the May 10 and May 12, 2021 meetings. For the most part, the closed meeting minutes only reflected the comments made by the lawyers present as well as directions to

¹³ *Farber v. Kingston (City)*, 2007 ONCA 173 at para 21, online: <<https://canlii.ca/t/1qtzl>>.

¹⁴ *Temagami (Municipality of) (Re)*, 2021 ONOMBUD 3 at para 44, online: <<https://canlii.ca/t/jcx0>>.

staff. We found that the closed meeting minutes were missing portions of the discussion.

- 52** Section 239(7) of the Act requires that all resolutions, decisions and other proceedings that take place during a meeting be recorded without comment. This requirement applies whether the meeting is open or closed.
- 53** While the Act requires minutes to be recorded without “note or comment”, the requirement to keep a meeting record should be interpreted in a manner that is consistent with the intent of the open meeting provisions, which are directed at enhancing openness, transparency, and accountability.
- 54** In order to reflect all proceedings at a meeting, in accordance with the Act, my Office has suggested that minutes include a detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered.¹⁵ My Office has also noted that “[k]eeping complete and accurate minutes of closed session meetings ensures that members of the public feel confident that matters dealt with in closed session were appropriate for *in camera* discussion and that requirements of the *Municipal Act* and local by-laws have been followed.”¹⁶
- 55** My Office has found that a proper record of a closed meeting 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 documents considered;
 - any motions, including who introduced the motion and seconders; and
 - all votes taken, and all directions given.¹⁷
- 56** In this case, the closed meeting minutes did not record all substantive matters discussed in closed session at the May 10 and May 12, 2021 meetings, including information about an employee and public relations matters related to the potential litigation. While minutes are not required to record a verbatim transcript of the discussion at a meeting, the substance of all discussions should be recorded.

¹⁵ *Bonfield (Township of) (Re)*, 2021 ONOMBUD 14 at para 51, online: <<https://canlii.ca/t/jh0vt>>.

¹⁶ *Tehkummah (Township of) (Re)*, 2018 ONOMBUD 3 at para 60, online: <<https://canlii.ca/t/hvmtmp>>.

¹⁷ *Ibid* at para 59.

57 Minutes that do not reflect the entirety of issues and matters discussed and decisions made during a meeting do not provide the accurate record required to protect the local board, should the meeting be subject to an investigation or litigation. Incomplete minutes also leave officials without a record to consult in future in order to understand how an issue was considered or a decision was reached.

Opinion

- 58 The Executive Committee of the Grey Bruce Health Unit's Board of Health did not contravene the *Municipal Act, 2001* on May 10, 2021 when it went *in camera* because its discussion fit within the exceptions for advice subject to solicitor-client privilege and litigation or potential litigation.
- 59 The Grey Bruce Health Unit's Board of Health did not contravene the *Municipal Act, 2001* on May 12, 2021 when it went *in camera* because its discussion fit within the exceptions for advice subject to solicitor-client privilege, litigation or potential litigation, and for personal matters about an identifiable individual.
- 60 The Board of Health and the Executive Committee contravened the requirements of section 239(4)(a) of the Act at the May 10 and 12, 2021 meetings by passing resolutions to move into closed session without providing a general description of what would be discussed.
- 61 The Board of Health and the Executive Committee also contravened the requirements of section 239(7) of the Act on May 10 and 12, 2021 by failing to keep a record of all proceedings in meeting minutes.
- 62 I recognize that the Board and the Committee did not intend to contravene the Act on May 10 and 12, 2021. I encourage the Board and the Committee to continue to strive to maximize openness and transparency in their meeting practices.

Recommendations

- 63 I make the following recommendations to assist the Grey Bruce Health Unit's Board of Health in fulfilling its obligations under the Act and enhancing the transparency of its meetings:

Recommendation 1

All members of the Board of Health for the Grey Bruce Health Unit and its committees should be vigilant in adhering to their individual and collective obligation to ensure that the local board complies with its responsibilities under the *Municipal Act, 2001*.

Recommendation 2

The Board of Health for the Grey Bruce Health Unit and its committees should ensure that resolutions to proceed *in camera* 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.

Recommendation 3

The Board of Health for the Grey Bruce Health Unit and its committees should ensure that meeting records are complete and accurately reflect all of the substantive and procedural items discussed.

Report

- 64** The Board of Health was given the opportunity to review a preliminary version of this report and provide comments to my Office. All comments we received were considered in the preparation of this final report.
- 65** In its response, the Board affirmed its commitment to ensuring compliance with its responsibilities under the *Municipal Act, 2001*. I applaud the Board's commitment to improving the accountability and transparency of its meeting practices.
- 66** This report will be published on my Office's website, and should be made public by the Board. In accordance with section 239.2(12) of the *Municipal Act*, the Board is required to pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario