



Ombudsman Report

**Investigation into a complaint about a meeting held
by the Township of Leeds and the Thousand Islands
on August 11, 2020**

**Paul Dubé
Ombudsman of Ontario
April 2022**

Complaint

- 1 My Office received a complaint about a closed meeting held by council for the Township of Leeds and the Thousand Islands (the “Township”) on August 11, 2020. The complaint concerns an alleged improper discussion and vote in closed session about the results of a confidential preliminary engineering study for a proposed internet broadband network.

Ombudsman jurisdiction

- 2 Under the *Municipal Act, 2001*¹ (the “Act”), all meetings of a council, local board, and committees of either must be open to the public unless they fall within prescribed exceptions.
- 3 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 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 Township of Leeds and the Thousand Islands.
- 5 In investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the municipality’s governing procedures have been observed.
- 6 Since 2008, our 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

- 7 On June 9, 2021, we advised the Township of our intent to investigate the August 11, 2020 meeting.
- 8 Members of my Office's open meeting team reviewed relevant portions of the Township's by-laws and policies, as well as the Act. We reviewed the meeting records, including the agenda and minutes. We interviewed all members of council who were present at the August 11, 2020 meeting. We also interviewed the Chief Administrative Officer, the Director of Planning, the Director of Community and Business, and the Internet Broadband Working Group lead, who is a resident of the Township.
- 9 My Office received full co-operation in this matter.

Background

- 10 In 2019, the Township decided to formally study how to implement high-speed internet throughout its territory, to address underserved areas and ensure reliable broadband network for the entire community. The Township formed a working group to lead this project, composed of a councillor, the Chief Administrative Officer, the Director of Planning, and the Internet Broadband Working Group lead.
- 11 Council approved funding for a study to determine the approximate cost and timeline to deliver broadband internet across the Township. The Township retained a company specializing in telecommunications network construction to prepare the study.
- 12 The study resulted in a report, which contained a roadmap for the implementation of a broadband internet network throughout the Township. The study report outlined costs and physical network details and presented a network design unique to the Township's topography. The study report also set out a sample rollout framework with priorities, budgets, business models, and schedules. Those details were intended to assist council in determining whether it could proceed with a public-private partnership to create a municipal internet utility.

August 11, 2020 council meeting

- 13 Council held a special meeting on August 11, 2020 at 6:00 p.m. to discuss several matters, including the broadband project. The meeting took place virtually, with the working group lead and the Director of Planning both present. The broadband internet project was discussed three times during the meeting.
- 14 First, the working group lead presented a slideshow at approximately 6:35 p.m. in open session, outlining the broadband project history, its present status, and the next steps. This included information about submitting an application for funding to the province's Improving Connectivity for Ontario ("ICON") broadband project funding program, for which applications were due on August 20, 2020.
- 15 Later that evening, council reviewed, in open session, a planning report drafted by the Director of Planning. The planning report noted that the study report contained financial and proprietary information that would compromise partnership negotiations if made public. The planning report also discussed the ICON funding process. The planning report included a high-level summary of the study results, and a series of recommendations for council.
- 16 Around 7:40 p.m., council unanimously adopted those recommendations and voted to receive the planning report as information, recognize the importance of providing a reliable broadband network, accept the study results, and authorize staff to proceed with a request for proposals to seek a project partner and pursue funding options.
- 17 Council then resolved to go into closed session at 7:41 p.m., and, in relation to the broadband internet project, cited the exception at s. 239(2)(i) of the Act, which pertains to discussions about information provided to a municipality by a third party. No description of the general topic to be discussed was noted in the resolution.
- 18 In closed session, the working group lead presented the results of the study and council discussed the project and costs associated with moving forward.
- 19 Council also discussed the Township's application for ICON funding, including how much of a financial contribution from the Township that staff should indicate council would support, should the funding be received.

- 20 Council returned to open session around 8:46 p.m. and did not mention the internet broadband project again before adjourning the meeting at 8:53 p.m.
- 21 The Township submitted an application for ICON funding on August 18, 2020, one week after the closed meeting. The application reflects a municipal contribution of \$3 million. We were told that council did not discuss the application further after the closed session on August 11, 2020.

Analysis

- 22 Our review indicates that during closed session, council discussed two subjects related to the broadband project: First, the information from the study about the network design, cost, and process, and second, the ICON application and the municipality's potential financial contribution to the project. Below, we assess whether each portion of the discussion was permitted to take place in a closed meeting.

The study report

Applicability of the exception for information supplied in confidence by a third party – s. 239(2)(i)

- 23 In its resolution to close the session, council cited the exception for information supplied in confidence by a third party, at s. 239(2)(i). The purpose of this exception is to protect confidential information about third parties, where the disclosure of confidential information could interfere with the competitive position of a third party in negotiations.²
- 24 While not binding on our Office, a review of decisions of the Information and Privacy Commissioner (the "IPC") can be instructive in determining if the exception at s. 239(2)(i) applies to the information in the study report.³ Consistent with the interpretations of the IPC, I am satisfied that the exception applies if the information discussed:
- i. Falls into one of the listed types: Trade secret, scientific, technical, commercial, financial, or labour relations information;

² *Greater Sudbury (City of) (Re)*, 2021 ONOMBUD 10 at para 40, online: <<https://canlii.ca/t/jfvt3>>.

³ Order M-326, *Etobicoke (City) (Re)*, 1994 CanLII 6973 (ON IPC) [Order M-326], online: <<http://canlii.ca/t/1rmhh>>; Order PO-2018, *Ontario (Management Board Secretariat) (Re)*, 2002 CanLII 46420 (ON IPC), online: <<http://canlii.ca/t/1r3k4>>; Order PO-1763, *Ontario Lottery Corporation (Re)*, 2000 CanLII 20949 (ON IPC), online: <<http://canlii.ca/t/1rd0x>>.

- ii. Was supplied in confidence, whether explicitly or implicitly, to the municipality by a third party;
 - iii. Relates and belongs to the third party, rather than the municipality; and
 - iv. If disclosed, 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.
- 25** This exception is intended to protect confidential information belonging to a third party.⁴ The information from the study report, which was discussed in closed session, related to information about the Township, and was provided by a company hired by the Township. The company, which specialized in telecommunications network construction, had no information of its own at stake. Rather, the Township, as the commissioner of the study, owned the information contained within it.
- 26** Accordingly, the third prong of the test is not satisfied. The exception at s. 239(2)(i) can therefore not apply.

Applicability of the exception for information belonging to the municipality– s. 239(2)(j)

- 27** Despite council not citing the “information belonging to the municipality” exception when going into closed session, we considered during our review whether this exception applied to the discussions about the study report and the ICON application.
- 28** For this exception to apply, a municipality must demonstrate that the discussion was about:
- i. A trade secret, or financial, commercial, scientific or technical information;
 - ii. that belongs to the municipality or local board; and
 - iii. has monetary value or potential monetary value.⁵

⁴ *St.-Charles (Municipality of) (Re)*, 2019 ONOMBUD 6 at para 29 [*St.-Charles*], online: <<https://canlii.ca/t/j2p1h>>.

⁵ *Hamilton (City of) (Re)*, 2019 ONOMBUD 3 at para 48 [*Hamilton*], online: <<https://canlii.ca/t/j2b49>>.

- 29** As set out above, the first component of the discussion focused on the information contained within a study report that detailed the technical infrastructure plan and associated costs, as well as construction timelines and phases for seeking a project partner.
- 30** First, the study report contained information that fit the definitions of commercial, technical, and financial information.
- 31** “Commercial information” is information relating to the buying, selling or exchange of merchandise or services.⁶ Council’s discussion about the technical details of the study report, such as proposed phases of operations, construction timelines, and geographic priorities for network construction, included “commercial information”.
- 32** “Technical information” is information usually prepared by a professional that describes the construction, operation or maintenance of a structure, process, equipment or thing.⁷ In this case, the study report was a preliminary engineering report containing information about building and operating an internet broadband network. This information fits within the definition of “technical information”.
- 33** “Financial information” is information relating to the use or distribution of money, containing or referring to specific data.⁸ Council’s discussion about certain specific elements from the study report, which included specific data related to the overhead costs of constructing the network, fit within the definition of “financial information”.
- 34** Second, the Township commissioned a company specializing in telecommunications network construction to prepare the study for the Township. The information contained within the study and discussed by council belongs to the Township.
- 35** Third, the final prong of the test is whether the information discussed had monetary value or potential monetary value.⁹ Information that affects an organization’s ability to secure contracts does not equate to information with a monetary value.¹⁰ The record must have an intrinsic value – that is, it

⁶ Order PO-3570, *Office of the Public Guardian and Trustee (Re)*, 2016 CanLII 4760 (ON IPC), online: <<https://canlii.ca/t/gn7c4>>.

⁷ Order PO-1805, *Ontario Hydro (Re)*, 2000 CanLII 20800, online: <<https://canlii.ca/t/1r24c>>.

⁸ Order PO-2010, *Ontario (Natural Resources) (Re)*, 2002 CanLII 46412, online: <<https://canlii.ca/t/1r3jv>>.

⁹ *Hamilton*, *supra* note 5 at para 49.

¹⁰ *Ibid* at paras 55-7.

must have a marketplace – which the organization would be deprived of should the record be disclosed.¹¹

- 36 In this case, the study report created a roadmap for how and where an internet broadband network could be installed to serve the Township. It specified important technical details and presented a network design unique to the Township’s needs and geography.
- 37 Township officials told us that they had no intent to sell the information from the study report because they planned to build and operate the network with a partner. However, they were aware that the study report contained information that telecommunication companies in the area would consider valuable. They explained that private companies might be interested in purchasing the information in order to extend their networks to profitable parts of the Township.
- 38 Thus, the exception at s. 239(2)(j) applies to the part of the meeting where council discussed the contents of the study report related to the proposed municipal broadband network and associated utility.

The Improving Connectivity for Ontario (ICON) application

Applicability of the exception for information belonging to the municipality – s. 239(2)(j)

- 39 In order to fall within the scope of the exception at s. 239(2)(j) of the Act, the discussions relating to the ICON application and the municipality’s potential financial contribution to the broadband project must also satisfy the test set out above, at paragraph 28.
- 40 The ICON funding application and the information about the Township’s contribution to the broadband project comes within the definition of “financial information”. The discussion about the amount of money the Township might contribute to the project, as well as the potential sums the Township might receive from ICON, related to distribution and use of money.
- 41 Furthermore, the financial contribution discussed related to the Township’s financial position and the study report’s suggested costs for the Township to proceed with its project. This information belongs to the Township.

¹¹ Order PO-2166, *Ontario (Natural Resources) (Re)*, 2003 CanLII 53917 (ON IPC) [Order PO-2166], online: <<https://canlii.ca/t/1r16q>>.

- 42 However, the information discussed does not have any monetary value. As set out above, the test requires that the information have real or potential monetary value, such that disclosure would deprive the municipality of that value. Financial harm or adverse effects are not relevant considerations, nor is the cost incurred to create the record.¹² Instead, in order for a matter to fit within this exception, the information must have monetary value, in that it could be sold to another party.
- 43 In response to a preliminary version of this report, the Township submitted that the information discussed about the ICON application had monetary or potential monetary value because, if disclosed, it could impact the municipality's financial position. The IPC has interpreted the phrase "monetary value or potential monetary value" in the context of freedom of information legislation and has found that such information must have a real or potential market. While not binding on my Office, a review of such decisions of the IPC can be instructive for my own analysis.
- 44 For example, in a decision about an appraisal report obtained by the Town of South Bruce Peninsula ahead of land sale negotiations, the IPC found that the appraisal report itself had no inherent monetary value as contemplated by this subsection.¹³
- 45 In another decision, a municipality had stopped providing businesses with waste collection services. It claimed that a list of those businesses had monetary value because the list could be sold to private waste collectors. The IPC found there was no evidence of any actual monetary value, as there was no evidence that the municipality intended to, or even could, sell the list. The requirement for information to have a real or potential market in order to be found to have "monetary value" has been applied consistently by the IPC for the last three decades.¹⁴
- 46 There is no clear or potential monetary value in the numbers listed in the ICON application or in the amount that council indicated it would consider contributing to the project. I am not satisfied that the information about how

¹² *Hamilton*, *supra* note 5 at paras 53-60. See also: Order M-326, *supra* note 3; Order M-654, *Metropolitan Separate School Board (Re)*, 1995 CanLII 6783 (ON IPC) [Order M-654], <<https://canlii.ca/t/1rhzw>>; Order PO-2166, *supra* note 11; Order PO-3629, *Ontario Power Generation (Re)*, 2016 CanLII 46208 (ON IPC) [Order PO-3629], online: <<https://canlii.ca/t/gsmnl>>.

¹³ IPC, MO-2532, *Town of South Bruce Peninsula (Re)*, 2010 CanLII 38706 (ON IPC), online: <<http://canlii.ca/t/2bkqp>>.

¹⁴ See, for example, Order M-326, *supra* note 3; Order M-654, *supra* note 12; Order PO-2166, *supra* note 11; Order PO-3629, *supra* note 12.

much the Township might contribute to the internet broadband project has any intrinsic monetary value.

47 The exception at s. 239(2)(j) is therefore not met.

Applicability of the exception for plans and instructions for negotiations– s. 239(2)(k)

48 Although the exception at s. 239(2)(k) was not cited by the Township to move into a closed session on August 11, 2020, a member of council told us during interviews that they believed this exception applied to the discussion about ICON funding.

49 Section 239(2)(k) of the Act allows discussions about plans and instructions for negotiations to be closed to the public in order to protect information that could undermine a municipality’s bargaining position in negotiations. In order for the exception to apply, the municipality must show that:

- i. The *in camera* discussion was about positions, plans, procedures, criteria, or instructions;
- ii. The positions, plans, procedures, criteria, or instructions are intended to be applied to negotiations;
- iii. The negotiations are being carried on currently, or will be carried on in future; and
- iv. The negotiations are being conducted by or on behalf of the municipality.¹⁵

50 Although the planning report and the study report were intended as parts of a process leading to future negotiations with a possible project partner, we did not find evidence that the discussion about a funding application was related to future negotiations.

51 During our interviews, we were told that Council’s discussion focused on the financial contribution that staff should indicate in the ICON application, rather than any current or future negotiations with potential project partners.

52 In any case, the application for funding was not a negotiation with the funding body, and the Township was not engaged in negotiations with any other party with respect to the content of its application. Referring to the Oxford English Dictionary’s plain definition of the word “negotiate”, widely

¹⁵ *St. Catharines (City of) (Re)*, 2019 ONOMBUD 1, online: <<https://canlii.ca/t/hxrk5>>.

accepted by courts in case law,¹⁶ to negotiate is “to confer (with another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to a settlement or compromise.” On its face, merely indicating an amount of money for a funding application does not suggest any efforts to come to a “mutual agreement”, to “settle” or to “compromise”.

53 This exception does not apply.

Parsing the discussion

54 Matters that would not usually fit within an exception can sometimes be discussed in closed session if the matters relate to a discussion on a single topic, and if splitting the information would require unreasonable interruption to the conversation.¹⁷ However, if the discussion can be separated, council is expected to return to open session for the portions of the discussion that do not fit within an open meeting exception.¹⁸

55 In this case, the discussions relating to the study and the Township’s detailed plans for its municipal internet broadband utility can be distinguished from the discussion relating to the ICON application funding and the amount council wished to contribute to the global cost of the project. Based on members’ recollections of the meeting, the funding application was its own topic during the closed session, and was not interwoven with the rest of council’s discussion. One member of council we interviewed even thought that the funding application had been discussed during the open portion of the meeting.

56 Council discussed the study report extensively in open session before closing the meeting to the public. The ICON application could have been raised as part of that discussion, so that the topics reserved for the closed meeting were limited to those that fit within one of the exceptions to the open meeting rules.

¹⁶ See, for example: *Commercial Union Life Assurance Co of Canada v John Ingle Insurance Group Inc.*, (2002) 61 OR (3d) 296 (ON CA) (CanLII), online: <<https://canlii.ca/t/1ct1s>> at paras 52-53.

¹⁷ *St.-Charles*, *supra* note 4 at para 28.

¹⁸ *Plympton-Wyoming (Town of) (Re)*, 2021 ONOMBUD 4, online: <<https://canlii.ca/t/jd49k>>.

Resolution to proceed *in camera* – s. 239(4)

- 57** Before moving into a closed session, the Act, at s. 239(4), requires municipalities to state by resolution in open session that a closed meeting will be held and the general nature of the matter to be considered. The general description should maximize the information available to the public without undermining the reason for excluding the public.¹⁹ I have also previously recommended that councils provide more substantive detail in resolutions authorizing closed sessions.²⁰
- 58** In this case, the agenda for the August 11, 2020 meeting only referenced the exceptions. No further information about the proposed discussion topics was provided in the resolution.
- 59** The Township failed to meet its obligation to provide the general nature of the matter to be discussed in the resolution to go into closed session. This is particularly unfortunate considering that I have addressed this issue with the Township in the past.²¹

Voting in closed session

- 60** 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. For the purposes of the open meeting rules, reaching a consensus is considered to be a vote.²²
- 61** Before the August 11, 2020 meeting was closed to the public, council provided direction to staff to seek a project partner for the implementation of the broadband network. This vote is recorded in the open session meeting minutes. The direction to staff did not provide any detail about the financial contribution of the Township.
- 62** Our interviews revealed that after discussing the cost of the project during the closed meeting, council discussed applying for ICON funding and considered how much money the Township would contribute if the funding were obtained. It was suggested that the Township should indicate a

¹⁹ *Farber v Kingston (City)*, 2007 ONCA 173 (CanLII) at para 21, online: <<https://canlii.ca/t/1qtzl>>.

²⁰ *Kirkland Lake (Town of) (Re)*, 2021 ONOMBUD 12 at para 39, online: <<https://canlii.ca/t/jgvld>>.

²¹ Letter from the Ombudsman to the Township of Leeds and the Thousand Islands (8 September 2016), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2016/township-of-leeds-and-the-thousand-islands-en>>.

²² *South Bruce Peninsula (Town of) (Re)*, 2015 ONOMBUD 25, online: <<https://canlii.ca/t/gtp6t>>.

commitment of \$3 million, or 10% of the total cost of the project, subject to conditions, on the application. No objections were expressed and a vote by consensus occurred.

- 63 The Township's ICON funding application included a \$3 million municipal contribution when it was submitted one week later. We were told that council did not discuss the Township's financial contribution again following the closed meeting, indicating that staff believed council had reached a consensus and provided direction as to the content of the application.
- 64 As the discussion related to the ICON application did not come within any open meeting exception, council was not permitted to hold any vote in this portion of the closed session.

Opinion

- 65 Council for the Township of Leeds and the Thousand Islands did not contravene the *Municipal Act, 2001* on August 11, 2020 when it went *in camera* to discuss the report for the study it had commissioned regarding a broadband internet network. The discussion fell within the closed meeting exception for information belonging to the municipality at s. 239(2)(j) of the Act.
- 66 Council did violate the Act on August 11, 2020 when it discussed a funding application and the related financial contribution of the municipality in closed session. As this portion of the discussion did not fit within any of the exceptions to the open meeting rules, council also contravened the Act when it directed staff, by consensus, regarding the content of the funding application.
- 67 Council for the Township of Leeds and the Thousand Islands contravened s. 239(4) of the Act on August 11, 2020 when it failed to state by resolution the general nature of matters to be considered *in camera*.

Recommendations

- 68 I make the following recommendations to assist the Township of Leeds and the Thousand Islands in fulfilling its obligations under the Act and enhancing the transparency of its meetings:

Recommendation 1

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

Recommendation 2

The Township of Leeds and the Thousand Islands 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

The Township of Leeds and the Thousand Islands should ensure that its *in camera* votes, including a vote by consensus, comply with s. 239(6) of the Act. In order for council to vote in closed session, it must meet the requirements under s. 239(6) and the meeting must have been properly closed.

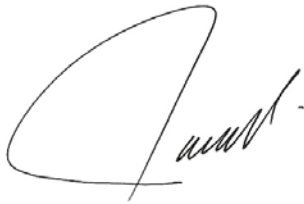
Recommendation 4

When proceeding *in camera*, the Township of Leeds and the Thousand Islands should pass a resolution that clearly sets out the fact of the closed meeting and the general nature of the matters to be discussed.

Report

- 69 Council for the Township of Leeds and the Thousand Islands was given the opportunity to review a preliminary version of this report and provide comments to my Office. Due to restrictions in place related to COVID-19, some adjustments were made to the normal preliminary review process and we thank council and staff for their co-operation and flexibility. All comments we received were considered in the preparation of this final report.

- 70 In its response, council for the Township noted that it disagreed with my findings relating to the ICON funding application and that my interpretation of the closed meeting exceptions is unduly narrow.
- 71 Closed meeting exceptions are not intended to preclude public scrutiny of sensitive or contentious topics, even where the municipality may have an interest in discussing matters in private. Exceptions in the *Municipal Act* are to be interpreted and applied narrowly, to uphold the public's right to observe municipal government in process.
- 72 The *in camera* discussions relating to the ICON funding application did not fit within any exceptions contained in the *Municipal Act* and should have occurred in open session. There is no exception to the open meeting rules in the *Municipal Act* for discussions about information a municipality considers sensitive.
- 73 This report will be published on my Office's website, and should also be made public by the Township of Leeds and the Thousand Islands. 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