



Ombudsman Report

**Investigation into whether
Council for the City of Owen Sound
held illegal closed meetings in August 2014**

“A Contentious Lot”

**André Marin
Ombudsman of Ontario
October 2014**

Complaints

- 1 On August 11, 2014, my Office received a complaint that council for the City of Owen Sound made a decision by email instead of in an open meeting of council. According to the complainant, council decided by email that a vacant industrial lot was in compliance with the city's property standards bylaw.
- 2 On August 14, 2014, my Office received another complaint that council for the City of Owen Sound held a meeting on August 13, 2014, without proper notice to the public. According to the complainant, a quorum of council met near the same vacant industrial lot discussed in the first complaint and advanced council business while there.
- 3 The vacant lot in question in both complaints is the site of the former Black Clawson Kennedy (BCK) factory. Known as the BCK lot, it has been the subject of property standards complaints to the city over a period of several years.

Ombudsman jurisdiction

- 4 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.
- 5 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.
- 6 My Office is the closed meeting investigator for the City of Owen Sound.
- 7 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

- 8 Members of my 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 spoke to the Clerk and conducted interviews with the Mayor, all city councillors and the City Manager.
- 9 My Office received full co-operation in this matter.

When is a meeting a “meeting”?

Definition of “meeting”

- 10** The *Municipal Act, 2001* defines a “meeting” as “any regular, special or other meeting of a council, of a local board or of a committee of either of them.”¹ This definition is circular and not particularly helpful in determining whether a meeting has actually occurred.
- 11** In a 2008 report,² through review of the relevant case law and keeping in mind the underlying objectives of open meeting legislation, I developed a working definition of “meeting” to assist in the interpretation of the definition contained in the Act:
- Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.³
- 12** This definition remains consistent with leading interpretations of the open meetings law and reinforces the right of the public to observe municipal government in process.⁴

Quorum

- 13** When determining if a meeting has occurred, the concept of a legal quorum is an important consideration. Alone, it is not conclusive, but having a quorum means a sufficient number of members are present to legally transact business. It is obvious that once a gathering constitutes a quorum of a council or committee, the opportunity and risk of those individuals collectively exercising their authority increases.

¹ s. 238(1)

² Ombudsman of Ontario, *Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 25, 2008), online: http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2_2.pdf.

³ *Ibid* at paras 54-60.

⁴ *London (City) v. RSJ Holdings Inc.*, [2007] 2 S.C.R. 588, 2007 SCC 29 at para. 32; *Southam Inc. v. Ottawa (City)* (1991), 5 O.R. (3d) 726 (Ont. Div. Ct.) at paras. 12-18; *Southam Inc. v. Hamilton-Wentworth Economic Development Committee* (1988), 66 O.R. (2d) 213 (Ont. C.A.) at paras. 9-12.

Individual discussions and serial meetings/emails

- 14** The *Municipal Act, 2001* does not prohibit members of council, committees and local boards from ever discussing city business outside of a formal meeting. It is expected that some informal conversations about municipal business will take place amongst individual members of such bodies. As I observed in a past report involving council for the City of London:

It is a healthy thing in a democracy for government officials to share information informally before making policy decisions. I agree that to expect council members never to talk to one another outside of a public meeting is unrealistic and would have the effect of unnecessarily chilling speech.⁵

- 15** However, municipal officials must be cautious to ensure that informal private discussions do not transform into meetings where city business is transacted or the groundwork is laid for such. This is of particular concern when a quorum of a body is involved.
- 16** A problem also arises if, through serial individual discussions, members of a municipal body collectively engage in decision-making or in laying the groundwork for the future exercise of the body's authority. In an April 2008 investigation, I considered whether sequential phone calls between the Mayor and individual councillors for the Township of Nipissing could be considered a "meeting" for the purpose of the open meeting requirements.⁶
- 17** In that case, the Mayor convened a special meeting of council and proceeded to telephone one councillor at a time. A quorum of council was never present in the same room or on the phone during any of the conversations. However, as a result of the calls, council collectively came to a consensus to approve additional costs related to the purchase of a fire vehicle. In considering these circumstances, I observed:

It is not necessarily the form that a meeting takes that should be determinative, but its substance. In my view, a meeting of council is not limited to a physical gathering of its members. Sequential telephone conversations of council members, for the purpose of exercising the power or authority of the council or for the purpose of doing the

⁵ Ombudsman of Ontario, *In the Back Room*: Investigation into whether members of Council for the City of London held an improper closed meeting on February 23, 2013 (October 2013), online: https://ombudsman.on.ca/Files/sitemedia/Images/Reports/London_BT_Final-EN_1.pdf

⁶ Ombudsman Ontario, Investigation into Council of the Township of Nipissing Special Meeting of April 25, 2008 (February 6th, 2009), online: <https://ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/nipissingfinaleng.pdf>

groundwork necessary to exercise that power or authority, may constitute a meeting...⁷

Informal gatherings

- 18** The *Municipal Act, 2001* also does not prevent council members from meeting informally outside of council chambers.
- 19** However, when a group of council members comes together informally, there is an increased danger that they, intentionally or otherwise, may obtain information and enter into discussions that lay the groundwork to exercise their power and authority.
- 20** Gatherings of this sort can also attract public distrust because of their timing, particularly if they occur close to influential or controversial decision-making. It is challenging to confirm after the fact whether or not discussions in informal gatherings drifted into improper areas. As I noted in my 2012 report on an investigation of a private breakfast meeting involving members of a Hamilton city committee:

Unlike formal meetings when minutes are kept, it is difficult to accurately reconstruct the conversational record of informal gatherings. It is challenging in these circumstances to assure the public that no improper discussions have taken place... [C]ouncillors should be cautious when meeting informally, especially when they represent a quorum of a decision-making body, to ensure that any discussions do not stray into areas that might constitute laying the groundwork for future decision-making.⁸

The BCK lot email

- 21** According to the complaint received, council decided through email communications that a vacant industrial lot was in compliance with the city's property standards by-law. We requested that the city provide to my Office any emails exchanged amongst council members regarding the BCK lot or the property standards by-law, between June 25 and August 9, 2014.

⁷ *Ibid* at paras 29-30.

⁸ Ombudsman of Ontario, Investigation into whether the City of Hamilton's NHL Proposal Sub-Committee held an improperly closed meeting (February 2012), online: http://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/HamiltonNHL-final-EN-forweb_1.pdf at para 24.

22 Of the documentation provided to our Office, only one email related to by-law enforcement at the BCK lot. The email, dated August 9, 2014, is from the Mayor to all members of council, and copied to the City Manager. In it, the Mayor writes:

[...] Bylaw [enforcement] has stated the improved fencing complies with property standards bylaw – also – that the south end of the property tall grass will be cut next week. As promised – I will be meeting with this owners’ group here very soon [...]

23 According to the Mayor, this email was to inform council of the status of by-law enforcement around the BCK lot. A concerned citizen had started an online petition to press the issue of by-law enforcement, alleging that the Mayor was not doing anything about citizen concerns about the lot. As such, the Mayor contacted the by-law enforcement unit of the local police and asked if there were any compliance issues. She was told there were not. This information was reflected in the email to council.

24 From what the councillors and the City Manager told us, their understanding of the email was consistent with the Mayor’s account. While there was some variation as to the specific reasons for the email – some mentioned the petition, media coverage about the property and the upcoming election – all agreed that it was an information email updating council on the situation involving the BCK lot.

25 All interviewees stated that the email did not reflect a decision of council. By-law enforcement in Owen Sound has been delegated to the local police. As such, any decisions about compliance with the property standards by-law are made by by-law enforcement officers, not by council.

26 No one we interviewed recalled any other emails among councillors related to the enforcement of the property standards involving the BCK lot. Three councillors stated that the only other correspondence they were involved in with respect to the BCK lot was with a concerned citizen, not fellow council members.

Analysis

27 The evidence we obtained confirmed that there was no decision made by council via email about the enforcement of the city’s property standards by-law with respect to the BCK lot. All staff and council members we interviewed confirmed that the purpose of the email was to provide information to council that the Mayor received from the local police, who are responsible for by-law enforcement. This is confirmed by reviewing the full text of the email. There

was no evidence of any exercise of the authority of council in the email communication, nor any laying of the groundwork to exercise this authority.

- 28** The August 9, 2014 email did not constitute a “meeting” for purposes of the *Municipal Act*.

The August 13 gathering at the lot

- 29** The documentation we received included two emails related to the August 13, 2014, gathering at the BCK lot.
- 30** The first, dated August 12, 2014, is from a concerned citizen and addressed to the majority of council (all but Mayor Haswell and Councillor McManaman), informing them about a meeting the citizen was invited to with the BCK lot owner and the Mayor. The email said the meeting was set for 3:30 p.m. the next day – Wednesday, August 13 – and the citizen invited the councillors to attend.
- 31** The second, dated August 13, 2014, is from the Mayor to councillors, informing them that a gathering would take place at 3:30 p.m. that day at the BCK lot with the owner and neighbours in attendance, to “drive home the point that the entire community would like to see a real improvement to his property.”
- 32** The city also provided us with this list of council and staff members who attended the August 13 gathering:
- Mayor Deborah Haswell
Councillor David Adair
Councillor Jan Chamberlain
Councillor Peter Lemon
Councillor Jim McManaman
Ruth Coursey, City Manager
- 33** In her covering email to us, the Clerk stated that “not all councilors were present for the entire gathering although no notes were taken on when councilors arrived and left.” She also indicated that members of the public were also present, though attendance was not taken.
- 34** Our interviews confirmed that those council members and staff listed in the city’s response to our documentation request were indeed present. A number of members of the public were also in attendance.
- 35** Council members and staff were advised of the gathering in different ways. Councillor Chamberlain found out on Facebook, Councillor Adair and the City Manager were informed in person by the Mayor on the day of the gathering,

and Councillors Lemon and McManaman attended at the invitation of the concerned citizen. The four councillors who did not attend all indicated they also were invited by the concerned citizen.

- 36** Those interviewed were consistent in expressing that the purpose of the gathering was to bring the BCK lot owner and concerned citizens together in order to discuss citizens' concerns about the property. It was described as an information-sharing exercise, an opportunity to listen, and as facilitation. Councillor Lemon described it as a "protest meeting" and said he was there to protest, as he himself is one of the neighbours of the lot.
- 37** According to the council members who attended and the City Manager, the gathering opened with introductions of those in attendance, followed by preliminary remarks from the property owner, the concerned citizen and the Mayor. Once these preliminaries were concluded, all in attendance were invited to walk around the lot. They then split into groups of two or three people.
- 38** Councillors Chamberlain and Lemon and the City Manager indicated that they did not participate in the walk around the site; the former left and the latter said he discussed another matter with the City Manager. Councillor Adair and Mayor Haswell both said they walked with one community member, while Councillor McManaman walked with two others. The gathering ended informally, as, in the words of Councillor Adair, "people sort of drifted off."
- 39** All interviewees were emphatic that no decisions were made. Councillor McManaman stated that, other than introducing themselves at the outset, he did not believe councillors said much of anything. Councillor Lemon admitted to expressing his dissatisfaction with the by-law enforcement process prior to the walkabout. However, he considered this to be a general comment – one he has made on multiple occasions in various settings – and not a case of advancing council business.
- 40** The Mayor, the City Manager and several councillors expressed the opinion that the gathering of August 13 was a reasonable measure that any municipal actor would take in order to bring together citizens and the property owner in order to discuss matters of mutual concern.

Subsequent action by council

- 41** At the open meeting of council on September 8, 2014, a deputation was brought that detailed concerns about the BCK lot and council's actions relating to it. After this deputation, the Chief of Police gave a presentation describing to council how by-law enforcement operates, explaining that their emphasis is on compliance. As a result of these discussions, council resolved to direct the By-

law Committee “to review the City's property standards by-law and enforcement procedures respecting vacant lots.”

Analysis

- 42** My investigation established that the gathering at the BCK lot on August 13, 2014, was not a meeting of council for purposes of the *Municipal Act*. The purpose of the gathering was to bring concerned citizens and the property owner together in order to facilitate discussions of citizens’ concerns about the property. Although quorum is not determinative, it appears from the information gathered that a quorum of council was only present for the first part of the gathering, at which time only introductions and preliminary remarks were made. Any discussions thereafter involved citizens sharing their concerns and did not advance or lay the groundwork for future council business. Although one councillor admitted to making a statement about his concerns about by-law enforcement, there is no evidence that this led to any further discussion among council members or to any decisions being made. In any case, decisions regarding by-law enforcement are made by police services, not by city council.
- 43** The resolution to direct the By-law Committee “to review the City’s property standards by-law and enforcement procedures respecting vacant lots” was a result of the deputation and presentation of the Chief of Police at the September 8 meeting.

Opinion

- 44** The email of August 9, 2014, and the gathering at the BCK lot of August 13, 2014, did not constitute meetings for the purposes of the open meeting provisions of the Act. In neither case was there an exercise of the authority of council or laying of the groundwork to exercise such authority.
- 45** Under the circumstances, it is my opinion that the events of August 2014 described herein did not violate the open meeting provisions of the *Municipal Act, 2001*.

Report

- 46** This report should be shared with council for the City of Owen Sound and made available to the public as soon as possible, and no later than the next council meeting.



André Marin
Ombudsman of Ontario