Ombudsman
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Investigation into the closed meeting held by the City of Brockville's OPP Contact Adhoc Committee on March 7, 2016

Paul Dubé
Ontario Ombudsman
July 2016

Complaint

1 Our Office received two complaints about a meeting held by the OPP Contact Adhoc Committee for the City of Brockville on March 7, 2016. Both complaints alleged that the committee's meeting with representatives of the Ontario Provincial Police (the OPP) did not come within the closed meeting exception for "education and training" sessions in the *Municipal Act, 2001.*

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 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.

4 The Ombudsman is the closed meeting investigator for the City of Brockville.

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 March 17, 2016, we advised council for the City of Brockville of our intent to investigate this complaint.

7 Members of the Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the city's procedure by-law and the Act, as well as the meeting agenda and minutes. They also reviewed a PowerPoint presented by the OPP during the meeting, as well as other meeting handouts. They interviewed the City Manager, Mayor, and each committee member present at the meeting. They also spoke with the city's

Clerk and the Contract Analyst at the OPP Municipal Policing Bureau who arranged the meeting with the committee.

8 We received full co-operation in this matter.

The OPP Contact Adhoc Committee

9 The City of Brockville, like other municipalities in the province, is considering whether to contract with the OPP for its municipal policing needs. Municipalities wishing to contract with the OPP must go through the OPP's "costing" process to determine how much the OPP will charge the municipality for this service.

10 The City of Brockville established the OPP Contact Adhoc Committee in 2013 to facilitate the costing process. However, in the fall of 2013, before the city's costing process was complete, the OPP announced a moratorium on costings to allow it to review and revise its system for billing municipalities. The OPP Contact Adhoc Committee agreed to delay further meetings until the costing moratorium was lifted.

11 Following the finalization of OPP billing reform in late 2015, the city corresponded with the OPP about the status of the costing process. Based on the conversation between the city and OPP, a meeting was arranged for March 7, 2016, and the OPP Contact Adhoc Committee was revived. Currently, the committee consists of six members, including the Mayor, four councillors, and the Chair of the Brockville Police Services Board. The Chair of the Brockville Police Services Board is a non-voting committee member. About half of the committee's current members were on the committee when it was formed in 2013.

12 While the committee manages the flow of information between the OPP and the city, council as a whole will ultimately decide whether to contract with the OPP. During interviews, various committee members stressed that all decision-making related to the costing process will occur in public at council meetings. They further indicated that the committee structure was intended to make the costing process as transparent as possible. They advised that other municipalities may instead rely directly on staff to provide the OPP with the information necessary to complete the costing.

Council procedure

13 The City of Brockville's procedure by-law has not been updated since 1994.[1] In many important respects, the by-law fails to reflect the current procedural requirements of the *Municipal Act.* The Clerk told our Office she is aware of these shortcomings and that the city has been slowly working on drafting a new procedure by-law. She indicated that, in practice, the city follows the requirements in the Act when there is a conflict between the by-law and the Act.

14 Section 4 of the by-law provides that regular meetings of council will be held at 7:00 p.m. on the second and fourth Tuesday of each month unless council, by resolution, directs otherwise. Specific provisions exist for when these dates fall on holidays and during the summer. In addition, the Mayor may call special meetings with 48 hours' notice to the members of council. However, the by-law makes no provision for providing notice to the public of regular council meetings, special council meetings, or committee meetings. The Clerk indicated that in practice, the city posts all meeting agendas online by 4 p.m. the Friday before each council or committee meeting. The city also maintains an online calendar that contains the dates of upcoming council and committee meetings.

15 Section 8(1) of the by-law states that all meetings shall be open to the public, subject to the listed exceptions. The by-law fails to accurately reproduce the closed meeting exceptions from the *Municipal Act.* Instead, it contains a list of exceptions that appear to be taken from a 1984 report produced by a working committee tasked with implementing open meeting legislation.[2] The Clerk indicated that, in practice, the city does not use these provisions and instead relies on the closed meeting exceptions from the *Municipal Act.*

16 In addition, the by-law does not include any provision requiring that, before proceeding in camera, council shall state by resolution the fact of the holding of the closed meeting and the general nature of the matter to be considered. This type of resolution is required under section 239(4) of the Act. Further, section 8(4) of the by-law incorrectly indicates that "[r]esolutions may be passed during meetings closed to the public but must be adopted at a meeting of council". Under sections 239(5)(6) of the

[1] City of Brockville, by-law No 113-80 (consolidated copy), *Govern the Proceedings of Council* (24 June 1980).
[2] *Toronto (City) (Re),* 2009 CanLII 60399 (ON IPC), online: <http://canlii.ca/t/26g14>.

Act, in camera resolutions are limited to procedural matters or directions to staff.

17 The City of Brockville should comprehensively review and amend its procedure by-law to accurately reflect the *Municipal Act*'s current closed meeting provisions. Specifically, the city should ensure that the amended by-law:

- explicitly requires that public notice be provided for all regular and special council and committee meetings, in accordance with section 238(2.1) of the Act;
- accurately reproduces the closed meeting exceptions in section 239 of the *Municipal Act*;
- reflects section 239(4) of the Act, which requires a municipality to state by resolution the fact of the holding of a closed meeting and the general nature of the matter to be considered in camera; and
- prohibits the taking of a vote in camera unless the vote is for a procedural matter or for giving directions to staff, pursuant to sections 239(5)(6).

March 7, 2016 committee meeting

18 On March 7, 2016, 5:00 p.m., the OPP Contact Adhoc Committee met in the boardroom at Brockville's city hall. In accordance with the Clerk's standard practice, notice of the meeting was posted on the city's website the Friday prior to the meeting (March 4, 2016).

19 After resolving to receive correspondence from other municipalities, the committee resolved to move in camera, stating:

> THAT pursuant to Municipal Act, 2001, Section 239, Sub. 3.1, the Committee resolve itself into Closed Session for the purpose of:
>
> 1. The meeting is held for the purpose of educating or training the members.
> 2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

20 The agenda described the closed session's subject matter in the same way.

21 Numerous OPP representatives, primarily from the OPP's Municipal Policing Bureau, attended the meeting and closed session discussion. Once in closed session, the group of committee members and OPP representatives went around the room and introduced themselves. According to those we interviewed, this was the first time the committee members had met the OPP representatives, and the committee members expected they would develop ongoing relationships with some of the OPP representatives. During this introduction process, the OPP and the city identified who would act as contacts for various types of information and questions.

22 In addition to these introductions, the closed session minutes indicate that the Mayor spoke about the importance of having an open and transparent costing process. He specifically indicated that future meetings of the committee would be held in a public forum.

OPP presentation

23 Following the group's introduction and the Mayor's remarks, various representatives from the OPP gave a PowerPoint presentation to the committee. Our Office reviewed a copy of this presentation.

24 The presentation outlines the standard steps and timelines that each municipality must follow when going through the process of deciding whether to contract with the OPP. For the first step, the municipality must complete an "OPP Municipal Profile" form and facilitate an OPP site visit of the municipal police facility. In the second step, the OPP conducts a data assessment of this information and prepares a contract proposal that contains various terms, including the cost of the OPP's services. A municipality has six months after delivery of the contract proposal to decide whether or not to accept it. Step three only occurs if a municipal council accepts the OPP's proposal. It involves a hearing before the Ontario Civilian Police Commission, a contract sign-off, and ultimately, a transition to OPP policing.

25 After discussing the three steps, the presentation provided additional details about the integrated model of OPP service delivery, how the transition process works in practice, and a municipality's responsibilities throughout the process. The presentation ended by noting that additional information was available in the *OPP Municipal Policing Bureau Information Manual*; committee members were encouraged to read the

manual and bring questions forward to the OPP through the City Manager. A copy of the manual is publicly available on the OPP's website.[3] Committee members were also provided with other promotional and educational materials, including a sample process flowchart and template related to the costing process. The OPP representatives encouraged the committee to reach out to other comparator municipalities that had already gone through the costing process.

Committee's discussion

26 Throughout the presentation, committee members asked questions about the costing process. For instance, committee members asked about the total timeframe for the costing and whether the OPP would be providing costings for both the "stand alone" and the "integrated" policing model. Committee members also asked clarifying questions about how long the price in the OPP's contract proposal would stay the same, and whether the facility visit completed by the OPP prior to the costing moratorium would need to be repeated.

27 In addition, a committee member asked about whether the OPP's proposal would address certain anticipated costs related to contracting with the OPP, such as severance for the municipal police officers. After the OPP provided general information about what costs would and would not be included in the contract proposal, the committee voted to direct that staff approach a specific audit firm. The committee wanted staff to determine whether the firm would be able to conduct an independent financial assessment of the OPP costing proposal once received.

28 The committee also discussed what sort of background materials would help committee members better understand the costing process. The committee identified various information it wished to review in the future, including minutes from previous committee meetings, benchmark financial data, and policy information from the Association of Municipalities of Ontario.

29 When asked why the presentation and subsequent discussion occurred in closed session, the committee members had various responses. The majority said that the OPP asked that the meeting occur in camera. The committee members indicated that they accommodated the OPP's request since the OPP was an expert in its own process and would have a better

[3] Ontario Provincial Police, "Information Manual for OPP Municipal Policing Costing Process", online: <https://www.opp.ca/index.php?id=115&entryid=56e71d6e8f94ac5c3f31071b>.

idea of what would be discussed during the meeting. The City Manager, in addition to indicating that the OPP requested the meeting occur in camera, also advised that he felt it was important to allow committee members to ask questions in a private setting. He indicated that several of the committee members were new to the costing process because they were not part of the committee in 2013.

30 Our Office spoke with the Contract Analyst at the OPP Municipal Policing Bureau who arranged the meeting with the committee. We also reviewed email correspondence between the Contract Analyst and the City Manager. The Contract Analyst confirmed that he specifically asked to meet with the municipality in private. In his email to the City Manager, the Contract Analyst stated that the requested meeting "**is not meant to be held at a council meeting or a public meeting**" (emphasis added).

31 When asked why he made this request, the Contract Analyst said that the meeting was intended to be an informal "meet and greet" and training session between the OPP and the municipality. He felt this approach was appropriate because the meeting would only consist of introductions and general discussions about the costing process. The Contract Analyst indicated that he asks every municipality to schedule a similar, private meeting at the start of the costing process. He was unsure whether the OPP would be willing to accommodate a municipality's request to have the initial meeting in public.

Return to open session

32 The committee resolved to return to open session at 6:15 p.m. The committee did not report back. The meeting adjourned at 6:15 p.m.

Analysis

"Education and training" – s.239(3.1)

Scope of education and training exception

33 The committee relied on the "education and training" exception to meet in camera with the OPP and receive education about the OPP costing process.

34 Section 239(3.1) of the Act states that a meeting may be closed to the public if the meeting is held for the purpose of "educating or training"

members, and if no member discusses or otherwise deals with a matter in a way that materially advances the business or decision-making of council.

35 Any attempt to rely on this exception must be carefully scrutinized. As we noted in our 2009 report regarding closed meetings in the City of Oshawa:

> While there are an infinite number of topics that could potentially form the subject of an education session, it must be clear that the purpose of such a meeting relates to education only… A municipality cannot simply circumvent the open meeting law by characterizing a subject normally considered in open session as 'educational.'[4]

36 In our Office's 2014 investigation into a closed meeting in the Town of Moosonee, we determined that a consultant's presentation was not a proper use of the education or training exception.[5] In that case, Moosonee council went in camera to obtain information from a municipal advisor about specific grants the town would be receiving and about conditions attached to those grants. Our investigation determined that the information presented was not general in nature, but instead related to matters that directly impacted the business of the municipality. Following the presentation, Moosonee council voted in open session to approve the course of action presented by the municipal advisor.

37 Local Authority Services (LAS) has also stated that this exception may only be relied on where "the sole purpose is to provide education or training [and] where no transactional business or decision making occurs during the session".[6] In its report regarding a closed meeting in the County of Essex, LAS rejected the county's assertion that updating councillors regarding the status and progress of various initiatives of a local development corporation amounted to "educating and training". LAS stated that "[t]o conclude otherwise would allow Council to go into closed session any time a member wanted merely to impart information".[7]

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[4] Ombudsman of Ontario, *"The ABCs of Education and Training": Investigation into City of Oshawa Development Services Committee Special Meeting of May 22, 2008* (March 2009) at para 29 online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/reports-on-investigations/2009/the-abcs-of-education-and-training>.

[5] *Letter from Ombudsman of Ontario to the Town of Moosonee* (9 September 2014), online: <http://www.ombudsman.on.ca/Files/sitemedia/Documents/Moosonee-closing.pdf>.

[6] Local Authority Services, *Report to the Corporation of the County of Essex* (September 2009) at 13, online: <http://www.agavel.com/wp-content/uploads/2013/09/Essex_County_Report_Sep_18_Final.doc>.

[7] *Ibid* at pg 13.

38 On March 7, 2016, committee members went in camera to receive general education about the OPP costing process. The committee did not receive specific information about the OPP's forthcoming costing proposal or discuss whether the city should contract with the OPP for municipal policing services. Accordingly, these portions of the in camera meeting fell within the exception for education or training sessions in section 239(3.1) of the *Municipal Act*.

Materially advancing business or decision-making

39 In addition to receiving general education during the March 7, 2016 closed meeting, the committee also discussed engaging a local professional audit firm and directed staff to determine if the firm could assess the OPP costing proposal once it was received.

40 The Mayor told us that this matter was previously discussed during an open meeting of the committee on August 26, 2013. He said that during that meeting, the committee resolved to contract with an audit firm to do a financial analysis of the costing proposal, once received. The committee did not act on this resolution because of the costing moratorium. He explained that the purpose of the direction to staff during the March 7, 2016 meeting was to confirm that staff was proceeding with discussions with the specified audit firm. He considered that this resolution fell within the "education and training" exception since it assisted the committee to understand that it had previously decided to involve the audit firm. The Mayor also indicated that the direction helped staff understand that they were expected to involve the audit firm.

41 Under the *Municipal Act,* a committee can vote during a closed session on procedural matters and to direct or instruct staff. However, when a meeting is closed under the "education and training" exception, no votes can be taken that advance business or decision-making. When the committee voted to direct staff to approach the audit firm, it went beyond the educational purpose of the OPP's presentation about its general costing process.

42 The portion of the discussion relating to the audit firm and the committee's resulting direction to staff were intended to advance its consideration of the specific costing proposal, which it anticipated receiving. Accordingly, this portion of the committee's discussion and the resulting direction to staff did not fall within the "education and training" exception, or any exception, to the Act's open meeting requirements.

Resolution to proceed in camera

43 The committee's resolution to proceed in camera on March 7, 2016, only referenced the exception relied on to close the meeting to the public. Neither the resolution nor the agenda provided the public with additional information about what the committee intended to discuss once in camera.

44 Section 239(4) of the *Municipal Act* requires that the resolution to proceed into closed session include the general nature of the subject matter to be considered. 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".[8]

45 In a 2014 report regarding closed meetings in the Municipality of Kincardine, LAS interpreted this as requiring that "the wording of the resolution…do more than simply refer to the section of the *Municipal Act* that permits the closed meeting exception".[9] Rather, there is a requirement that municipalities add a "level of informative detail" to the resolution.

46 Our Office has also recommended that councils provide more substantive detail, where appropriate, in resolutions authorizing closed sessions. For instance, in our Office's 2015 review of closed meetings in the Municipality of South Huron, we noted that council's resolution to go in camera "should provide a brief description of the subject matter to be considered in closed session".[10]

47 In its resolution to proceed in camera on March 7, 2016, the OPP Contact Adhoc Committee merely cited the applicable closed meeting exception. The city should ensure that resolutions to enter closed session provide the public with a brief description of the subject matter to be considered in camera.

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[8] [2007] OJ No 919 at pg 151.
[9] Local Authority Services, *A Report to the corporation of the Municipality of Kincardine* (July 2014) at 8, online: <http://www.agavel.com/wp-content/uploads/2015/01/Kincardine-Investigation-Final-Report-July-2014.docx>.
[10] 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/Files/sitemedia/files/SouthHuronFinal_2015.pdf>.

Reporting back

48 Following its closed session discussion on March 7, 2016, the committee did not report back in open session about its in camera meeting. During interviews, committee members indicated that they were not familiar with the practice of reporting back.

49 Numerous closed meeting investigators, including our Office, have recommended that municipalities adopt the best practice of reporting back.[11] In a 2009 report regarding closed meetings in the County of Essex, LAS recommended that councils "report…in a general way, what happened at the closed session".[12] Similarly, Douglas R. Wallace noted in his 2009 investigation into closed meetings in the City of Ottawa that council should report in open session the fact that council had met in camera, the matters which were considered, and that no votes were taken other than to give directions to staff or to deal with procedural matters.[13]

50 The committee's current practice of not reporting back fails to provide even a general idea of what was discussed in camera. As a best practice, the city should report back after closed sessions and provide general information about what occurred in camera. In some cases, public reporting might consist of a general discussion in open session of subjects considered in closed session. This might be similar to the information in the resolution authorizing the session, together with information about any decisions, resolutions, and directions given to staff. In other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided publicly.

Opinion

51 The City of Brockville's OPP Contact Adhoc Committee did not contravene the *Municipal Act, 2001* on March 7, 2016, when it went in camera to acquire education and training about the OPP costing process. However, in addition to receiving this general information from the OPP, the

[11] Ombudsman of Ontario, *Investigation into whether council for the Municipality of Magnetawan held illegal closed meetings* (June 2015) at para 54, online: <http://www.ombudsman.on.ca/Files/sitemedia/files/FinalReport-Magnetawan_2015.pdf>.
[12] Local Authority Services, *A Report to the corporation of the County of Essex* (September 2009) at 17, online: <http://www.agavel.com/wp-content/uploads/2013/09/Essex_County_Report_Sep_18_Final.doc>.
[13] Douglas R Wallace, *Report to the council of the City of Ottawa,* online: <http://ottawa.ca/en/city-hall/accountability-and-transparency/accountability-framework/december-19-2008-january-6-2009>.

committee decided to advance the costing process by voting to direct staff to approach an audit firm to assess the OPP costing proposal once the city receives it. This discussion and direction to staff advanced the committee's business and decision-making and did not fall within the "education and training" exception, or any exception, to the *Municipal Act*'s open meeting requirements.

52 The committee should also note that the "education and training" exception is discretionary. The decision whether to contract with the OPP for municipal policing services is an important local issue, and it is likely that members of the community would have been interested in learning more about the costing process. As our Office has noted previously[14], the principles of openness and transparency suggest the city may wish to turn its mind to whether there is a pressing reason to hold education and training sessions in camera.

53 In addition, the City of Brockville contravened the requirements of section 239(4)(a) of the Act by failing to state the general nature of the matters to be considered in the resolution to proceed in camera. The city's procedure by-law also does not comply with section 239(2.1) of the Act, which requires that a municipality's procedure by-law provide for public notice of all meetings.

Recommendations

54 I make the following recommendations to assist the city in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of the OPP Contact Adhoc Committee for the City of Brockville should be vigilant in adhering to their individual and collective obligation to ensure the committee complies with its responsibilities under the *Municipal Act, 2001* and the city's own procedure by-law.

Recommendation 2

The committee 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.

[14] Letter from Ombudsman of Ontario to the Township of Brudenell, Lyndoch & Raglan (18 August 2014) at 3, online: <https://www.ombudsman.on.ca/Files/sitemedia/Documents/BLR-Closing-Letter---final.pdf>.

Recommendation 3

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

Recommendation 4

The committee should adopt the best practice of reporting back in open session following an in camera meeting.

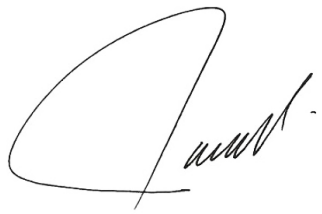
Recommendation 5

The City of Brockville should comprehensively review and amend its procedure by-law to accurately reflect the *Municipal Act*'s current closed meeting provisions.

Report

55 The city was given the opportunity to review a preliminary version of this report and provide comments to our Office. Comments received were considered in the preparation of this final report.

56 My report should be shared with council for the City of Brockville and made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ontario Ombudsman