



J. Paul Dubé, Ombudsman

## BY EMAIL

December 1, 2021

Council for the Municipality of Temagami  
c/o Suzie Fournier, Clerk  
PO Box 220  
7 Lakeshore Drive  
Temagami, ON P0H 2H0

Dear Council for the Municipality of Temagami:

### **Re: Closed meeting complaint**

My Office received a complaint about electronic closed meetings held by council for the Municipality of Temagami (the “Municipality”) on March 8, 2021 and March 25, 2021. The complaint alleged that the notices for both meetings did not provide information about how members of the public could access a live broadcast of either meeting, and that as a result, council’s resolution to go *in camera* was not passed during any portion of the meeting that was open to the public.

The complaint also alleged that during the meeting on March 8, 2021, council discussed a topic that did not fit within the exception cited for advice subject to solicitor-client privilege and that council’s resolution to go into closed session did not provide a general description of the matter to be discussed.

I am writing to advise that my Office’s review determined that the topic discussed in closed session on March 8, 2021 fit within the exception cited and that the resolution passed by council did provide a general description of the matter to be discussed in closed session.

However, my review determined that council contravened the *Municipal Act, 2001* by failing to ensure the public could observe the resolution to go *in camera* being passed at the meeting on March 8, 2021 and the meeting on March 25, 2021.

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## Ombudsman's role and authority

As of January 1, 2008, the *Municipal 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.<sup>1</sup> Municipalities may appoint their own investigator. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own. My Office is the closed meeting investigator for the Municipality of Temagami.

Our Office has investigated hundreds of closed meetings 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 procedure. Summaries of previous Ombudsman decisions can be found in the digest at: [www.ombudsman.on.ca/digest](http://www.ombudsman.on.ca/digest).

## Review

My Office reviewed the meeting agendas, minutes, and documentation provided by the complainant and municipal staff relating to how notice of both meetings was provided to the public. We also spoke with the Clerk and reviewed audio recordings of both the open and closed portions of the March 8, 2021 meeting.

Staff explained that during the COVID-19 pandemic, council meetings have been held via electronic participation, without in-person attendance by the public. On March 8 and March 25, 2021, electronic meetings were held via Zoom exclusively to discuss topics council intended to discuss *in camera*. Our review found that no portion of either meeting was broadcast live and members of the public were not able to observe any part of these meetings.

Staff provided documentation indicating that notices for the meetings on March 8 and March 25, 2021 were posted to the Municipality's website and Facebook page. However, staff acknowledged that neither meeting notice included a link to a Zoom broadcast, which the Municipality normally includes in notices for meetings where council intends to discuss items in open session. Staff explained that the Municipality instead later posted audio

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<sup>1</sup> SO 2001, c 25.

recordings online of the open portions of each meeting – that is to say, before council moved into closed session and then after council rose from closed session.

Shortly before these meetings, on February 3, 2021, the Ombudsman issued a report to the Municipality which made several recommendations, including that it “should ensure that its resolution to proceed *in camera* is passed during an open session, recorded in the meeting minutes, and captured by the audio recording of the meeting” and that it “should ensure that it provides notice of its meetings, including open sessions that precede *in camera* meetings.”<sup>2</sup>

When my Office spoke with staff regarding the complaint about the meetings on March 8 and March 25, 2021, staff confirmed that the Municipality had initially been under the impression that posting audio recordings of the resolution to go *in camera* was sufficient to comply with the open meeting requirements. Once my Office clarified the steps that would be required to fully address the recommendations in the report, staff undertook to implement these changes going forward.

#### *Meeting on March 8, 2021*

The minutes indicate that the meeting on March 8, 2021 was called to order at 5:01 p.m. on Zoom. Council passed a resolution to go into closed session to discuss “(2)(F) advice that is subject to solicitor-client privilege, including communications necessary for that purpose regarding getting advise (sic) on future involvement with Au Château [Home for the Aged].”

My Office reviewed the audio recording and confirmed that council received legal advice from external counsel about this matter during the meeting. The minutes indicate that council rose from closed session and reported on one topic that was discussed *in camera*, following which the meeting was adjourned at 6:21 p.m.

#### *Meeting on March 25, 2021*

The minutes indicate that the meeting on March 25, 2021 was called to order at 5:52 p.m. on Zoom. Council passed a resolution at 5:54 p.m. to proceed into closed session to discuss “(3)(a) a request under the *Municipal Freedom of Information and Protection of Privacy Act*, if the council, board, commission or other body is the head of an institution for

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<sup>2</sup> *Temagami (Municipality of) (Re)*, 2021 ONOMBUD 3, online: <<https://canlii.ca/t/jcxs0>>.

the purposes of that Act regarding Municipal Freedom of Information request received.” The minutes indicate that the meeting was adjourned at 6:30 p.m.

### *Applicability of the exception for advice subject to solicitor-client privilege*

The exception for advice subject to solicitor-client privilege applies to discussions that include communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential. The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.

The Supreme Court of Canada has found that solicitor-client privilege applies when three pre-conditions are met: (1) There is a communication between a lawyer and a client; (2) which entails the seeking or giving of legal advice; and (3) which is considered to be confidential by the parties.<sup>3</sup>

During the meeting on March 8, 2021, council received confidential advice from external legal counsel about the Au Château Home for the Aged. Accordingly, this topic fit within the exception.

### *Resolution to proceed into closed session*

The complaint to my Office alleged that council did not provide a sufficiently detailed description of the reason for going into closed session at its March 8, 2021 meeting.

Section 239(4)(a) of the Act provides that before moving into closed session, a municipality must state by resolution that a closed meeting will be held and the general nature of the matter to be considered. In *Farber v. Kingston (City)*, the Ontario Court of Appeal determined that the resolution to go into a closed meeting should provide a general description of the issue(s) to be discussed in a way that maximizes the information available to the public while not undermining the reason for closing the meeting.<sup>4</sup> As such, my Office has stated that the resolution should include a brief description of the subject matter to be considered in closed session in addition to the specific exceptions being relied upon.<sup>5</sup>

<sup>3</sup> *Solosky v. The Queen*, 1979 CanLII 9 (SCC), online: <<https://canlii.ca/t/1mjtq>>.

<sup>4</sup> *Farber v. Kingston (City)*, 2007 ONCA 173.

<sup>5</sup> *Temagami (Municipality of) (Re)*, 2021 ONOMBUD 3, online: <<https://canlii.ca/t/jcxs0>>.

In this case, the resolution to go into closed session indicates that the purpose of the discussion was to get advice on the Municipality's future involvement with the Au Château Home for the Aged, and cites the applicable exception under the Act. Accordingly, the resolution does include a general description of the matters to be discussed.

### *Live broadcast of electronic meetings*

As my Office has noted in previous closed meeting investigation reports, amendments to the *Municipal Act, 2001* now allows municipalities to amend their procedure by-laws to permit a quorum of members to participate electronically in meetings. However, this has not changed the basic requirement to hold meetings that are open to the public.<sup>6</sup>

Whenever the public is excluded from in-person attendance, it is imperative that whatever alternative electronic format is selected enables the public to observe all portions of a meeting except the duly constituted and permitted closed portions.<sup>7</sup> This includes the resolution to go into closed session and any business or report back that occurs after council has reconvened in open session.

Publishing a recording of a meeting after it has already taken place is not a substitute for enabling the public to observe a meeting while it is happening.<sup>8</sup> The Supreme Court of Canada has found that the open meeting requirements set out in the *Municipal Act, 2001* demonstrate that the public has "the right to observe municipal government in process."<sup>9</sup> Accordingly, it was not sufficient that the Municipality posted audio recordings of open portions of the meetings held on March 8 and March 25, 2021 after the fact.

Furthermore, section 239(4) of the *Municipal Act, 2001* requires that municipalities pass a resolution in open session prior to going *in camera*:

Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution ...the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting[.]

This requirement is not a mere formality. As the Ontario Court of Appeal has explained, it allows the municipality to provide a general description of the matters to be discussed in a way that maximizes information available to the public without undermining the reason for

<sup>6</sup> *Russell (Town of) (Re)*, 2020 ONOMBUD 1, online: <<https://canlii.ca/t/j6n2t>>.

<sup>7</sup> *Richmond Hill (City of) (Re)*, 2021 ONOMBUD 8, online: <<https://canlii.ca/t/jf6b3>>.

<sup>8</sup> *Clarence-Rockland (City of) (Re)*, 2015 ONOMBUD 1, online: <<https://canlii.ca/t/gtp5p>>.

<sup>9</sup> *London (City) v RSJ Holdings Inc.*, 2007 SCC 29 at para 32.

closing the meeting.<sup>10</sup> If the resolution to close a meeting is passed when council is already in closed session, it does not provide any information to the public, disclosing neither the fact of the closed meeting nor the general nature of the matter(s) to be considered.

In previous reports issued by my Office, I have noted that even where a closed session is the only anticipated agenda item, the meeting must begin in open session and the public must be able to attend or otherwise observe that portion of the meeting. Even where a meeting may only be open to the public for a few minutes prior to council going *in camera*, municipalities must ensure that the public can observe the open portion of such meetings.<sup>11</sup>

### *Notice of electronic meetings*

To ensure the public can actually observe electronic meetings in progress when in-person attendance is not possible, the notice of the meeting must include information that enables the public to access a live broadcast of the meeting. This is no different from the requirement that notice of in-person meetings inform the public of the place where the meeting will be held.

The notice for the meetings on March 8 and March 25, 2021 did not comply with this requirement. However, during the course of my review, staff from the Municipality confirmed that going forward, the Municipality would ensure that all meeting notices provide a link to a live broadcast and that the Municipality would take steps to ensure that the public could observe all resolutions to go *in camera* passed in an electronic meeting as they occur. Staff confirmed the implementation of these changes as of the council meeting held on April 26, 2021. Staff explained that when council goes into closed session, any members of the public who have logged onto the live broadcast are placed in a virtual waiting room until the open meeting resumes.

## **Conclusion**

My review found that council for the Municipality of Temagami did not contravene the *Municipal Act, 2001* when it discussed a matter in closed session on March 8, 2021 related to the Au Château Home for the Aged under the exception for advice subject to solicitor-client privilege. Furthermore, council's resolution go *in camera* to discuss this item did in fact provide a general description of the matter to be considered.

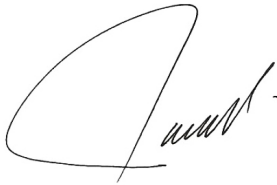
<sup>10</sup> *Farber v. Kingston (City)*, 2007 ONCA 173 (CanLII), online: <<https://canlii.ca/t/1qtzl>>.

<sup>11</sup> *Richmond Hill (City of) (Re)*, 2021 ONOMBUD 8, online: <<https://canlii.ca/t/jf6b3>>.

However, my review found that the meetings on March 8 and 25, 2021 did not comply with the open meeting rules set out in the Act because they failed to ensure the public could observe the resolution to go *in camera* being passed. Although audio recordings of the open portion of each meeting were posted after the meetings had taken place, because no live broadcast was available, the public was not able to observe council's resolution to go *in camera*. Staff acknowledged this oversight and confirmed that this issue has been rectified so that members of the public are able to observe all open portions of meetings even when the only scheduled agenda item is a topic proposed for discussion *in camera*. I commend the Municipality of Temagami for its responsiveness and commitment to ensuring transparency in accordance with the *Municipal Act, 2001*.

I would like to thank the Municipality for its co-operation during my review. The Clerk confirmed that this letter will be included as correspondence at an upcoming council meeting.

Sincerely,



Paul Dubé  
Ombudsman of Ontario

Cc: Suzie Fournier, Clerk, Municipality of Temagami