



Ombudsman Report

**Investigation into a complaint about a gathering held by
members of council for the Municipality of Casselman on
May 27, 2021**

**Paul Dubé
Ombudsman of Ontario
August 2022**

Complaint

- 1 My Office received a complaint about a gathering held by members of council for the Municipality of Casselman (the “Municipality”) on May 27, 2021.
- 2 The complaint was regarding an informal gathering of a quorum of council in an office at Casselman Town Hall during a video call about a development project. The complainant was concerned that the discussion during the video call advanced council business, so that the presence of a quorum of council during this call constituted an illegal closed meeting under the *Municipal Act, 2001*.

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001*¹ (the “Act”), all meetings of a council, local board, and committee of either must be open to the public unless they fall within prescribed exceptions.
- 4 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 Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 5 The Ombudsman is the closed meeting investigator for the Municipality of Casselman.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the municipality’s governing procedures have been observed.
- 7 Since 2008, my 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

- 8 On June 22, 2021, we advised the Municipality of our intent to investigate the complaint regarding the May 27, 2021 gathering of council members.
- 9 Members of my Office's open meeting team reviewed relevant portions of the Municipality's by-laws, as well as the Act.
- 10 We reviewed documents relevant to the video call, including minutes taken by the developer of the project and the list of invitees for the video call. My Office also reviewed documents relevant to the development project, including closed session directives and minutes of meetings spanning 2021, as well as meeting materials for a council meeting held on January 25, 2022.
- 11 Finally, members of my Office's open meeting team interviewed the three members of council who were present at the May 27, 2021 gathering. We also spoke to staff members who had knowledge of the video call, including the former Chief Administrative Officer and Treasurer, the Clerk, the Director of Planning and Economic Development, the Chief Building Official, and a consultant working on the development project.
- 12 My Office received full co-operation in this matter.

Background

- 13 Throughout 2021, the Municipality of Casselman worked with a neighbouring municipality on a development project that would straddle their shared border. Prior to the video call considered in this report, the development project was discussed by Casselman's council in closed session on February 9, March 9, and March 25, 2021.
- 14 After the video call on May 27, 2021, the development project was again considered in closed session on July 13, 2021.
- 15 The site plan agreement for the project was discussed and approved by council on January 25, 2022, in open session.

May 27, 2021 video call

- 16 On May 27, 2021, a video call related to the development project took place between staff of the Municipality of Casselman and the neighbouring municipality, the mayor of each municipality, and representatives of the developer.
- 17 My Office was told that the purpose of the video call was to provide the developer with answers to questions on issues such as zoning, permits, and drainage, in order for them to be able to move forward with the project. The developer needed both municipalities on the call to clarify and provide feedback on these issues.
- 18 Although the minutes taken by the developer during the video call do not contain timestamps, based on the meeting documents and interviews, my Office has determined that the meeting began between 1 p.m. and 1:30 p.m. and lasted approximately one hour.
- 19 The minutes taken by the developer during the video call and the interviews conducted by my Office indicate that the discussion covered various aspects of the project including environmental assessments, project approval and construction, site plan approvals, and natural gas and hydro services. According to the minutes, the Mayor of Casselman also agreed in principle that the Municipality of Casselman would be “taking the lead on all aspects related to the project.”
- 20 The Mayor joined the video call from his office at Town Hall. At the Mayor’s invitation, another member of council who was interested in the development project was also present in the Mayor’s office to listen to the video call in its entirety.
- 21 Another member of council told us they just happened to pass by the Mayor’s office shortly after the video call began, and that the Mayor invited them into the office to listen to the call. This council member listened to the video call for approximately 20-30 minutes and recalled that participants were discussing environmental issues.
- 22 Both members of council stayed silent during the video call. Their presence was never disclosed to other participants on the video call and they were not visible on the screen.

Analysis

- 23** Subsection 238(1) of the Act sets out a two-part test to determine whether a gathering meets the definition of a “meeting.” A regular, special or other meeting of a council is a “meeting” under the Act where: (i) a quorum of members is present, and (ii) members discuss or deal with a matter in a way that materially advances council’s business or decision-making.
- 24** Per section 237 of the Act, to form a quorum of council, a majority of members must be present. Council for Casselman is composed of five members, so three members must be present to constitute a quorum.
- 25** In this case, for at least half of the video call, a quorum of council was not present. Although two members of council were present for the entire duration of the hour-long video call, the third member of council was present for 20-30 minutes only. Nevertheless, considering the uncertainty as to the sequence and timeline of specific discussions during the video call, we reviewed the entire call to determine whether any council business or decision-making was materially advanced.
- 26** In a previous report to the Municipality, I considered what it meant to materially advance the business or decision-making of council:

[...] “materially advances” involves considering the extent to which the discussions at issue moved forward the business of the municipality, based on factual indicators.

Discussions, debates or decisions that are intended to lead to specific outcomes or to persuade decision-makers one way or another are likely to “materially advance” the business or decision-making of a council, committee or local board. Mere receipt or exchange of information is unlikely to “materially advance” business or decision-making, as long as there is no attempt to discuss or debate that information as it relates to a specific matter that is or will be before a council, committee or local board.²

² *Casselman (Village of) (Re)*, 2018 ONOMBUD 11 at para 30-31, online: <<https://canlii.ca/t/hvmtk>>.

- 27 In that report, I further indicated that mere updates on recent activities or communication of information are unlikely to materially advance business or decision-making. However, votes, agreements, direction or input to staff, and discussion or debates of a proposal, course of action, or strategy are likely to materially advance business or decision-making.³
- 28 I also must consider whether the subject discussed is council business or not. To this effect, I have previously looked at whether the information received by members of council could inform the future business and decision-making of council.⁴ Conversations which relate to matters or decisions set to come back to council are especially likely to constitute discussions about council business under the Act.⁵
- 29 The discussions during the video call were technical and informational in nature: They related to detailed courses of action for staff to move the project forward, rather than to council business.
- 30 My Office's review of council minutes prior to and subsequent to the video call revealed that most matters discussed during the video call were dealt with by staff rather than by council.
- 31 As noted in the minutes, during the video call, the Mayor of Casselman agreed in principle that Casselman would be taking the lead on the project and that this could include site plan preparation and planning. While council for Casselman considered the development project again during a July 2021 closed meeting and a January 2022 open meeting, I am satisfied that the statement of the Mayor on May 27, 2021 did not relate to the council business considered during those subsequent meetings, which included the site plan approval.
- 32 Accordingly, I am satisfied that no council business or decision-making was materially advanced during the video call.
- 33 Although the gathering of members of council on May 27, 2021 did not technically contravene the Act, I am very concerned about the actions of the members of council for Casselman who attended the video call without disclosing their presence, and of the Mayor who did not alert the other participants on the call about their presence.

³ *Ibid* at para 41.

⁴ *Letter from the Ontario Ombudsman to the City of Elliot Lake* (10 August 2012) at p 5, online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2012/city-of-elliott-lake>>.

⁵ *Brockton (Municipality of) (Re)*, 2017 ONOMBUD 6 at para 69, <<https://canlii.ca/t/h4rwz>>.

- 34 During interviews conducted by my Office, members of council stressed that they had the right to stay informed on important municipal projects with significant impacts for their community. My Office recognizes that a culture of silence among council members outside of council chambers is neither realistic nor respectful of democratic governance in municipalities.⁶ However, council members' desire to proactively engage outside of council chambers with important municipal projects does not negate the public's expectation of open governance.
- 35 I am very concerned that the actions of the members of council in this case came very close to the line. Members of council should be aware that their presence at a gathering -- including at a meeting of staff -- could transform that gathering into a meeting subject to the open meeting rules. To maximize the transparency of the Municipality's practices in future, if council members plan to attend a meeting of staff, they should first consider the subject and purpose of the discussion and whether a quorum of council will be present. In any case, where council members attend a virtual gathering - - including a meeting of staff -- the identity of all persons who are present, even if they are just observing, should always be disclosed. This should be the case regardless of whether they are present for the entire discussion or only for a portion of it.

Confidentiality

- 36 In the course of their interviews with my Office, members of council told us that they were displeased that my Office would not disclose the identity of the individual who made this complaint. One person told my Office that a member of council made inquiries with an interviewee to attempt to identify the complainant. Some of those we spoke with expressed concerns about possibly facing reprisal for communicating with my Office.
- 37 The *Ombudsman Act*⁷ contains confidentiality provisions to enable and encourage individuals to come forward with their concerns without fear of reprisal. Closed meeting complaints affect the democratic interests of the public as a whole, and there is no reason to disclose the identity of individual complainants. To do so could arguably contravene the legislation.⁸

⁶ Letter from the Ontario Ombudsman to Loyalist Township (6 December 2021), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2021/loyalist-township>>.

⁷ RSO 1990, c O.6.

⁸ *London (City of) (Re)*, 2012 ONOMBUD 6 at para 66, online: <<https://canlii.ca/t/gtth0>>.

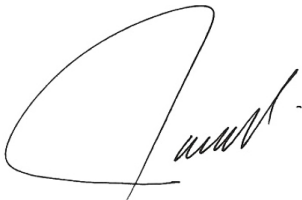
- 38 When my Office assesses closed meeting complaints and identifies problems, we make recommendations and best practice suggestions to the municipality. Such complaints should be viewed as opportunities for municipalities to improve their local governance processes and strengthen transparency and accountability. As such, it is wholly inappropriate for municipal officials to launch a search into a complaint's origins. Any reprisal for submitting a complaint or communicating with my Office is taken extremely seriously.

Opinion

- 39 Council for the Municipality of Casselman did not contravene the *Municipal Act, 2001* on May 27, 2021 when members of council gathered to listen in on a video call. The gathering was not a "meeting" as defined under the Act. Nonetheless, I strongly encourage the Municipality to maximize the transparency of its practices by disclosing the presence of all participants at any virtual gathering.

Report

- 40 Council for the Municipality of Casselman 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.
- 41 The Municipality indicated that my report would be made available to the public at the next council meeting. It will also be published on our website at www.ombudsman.on.ca.



Paul Dubé
Ombudsman of Ontario