



Ombudsman Report

**Investigation into a complaint about
a closed meeting held by the Town of
Plympton-Wyoming on June 24, 2020**

**Paul Dubé
Ombudsman of Ontario
February 2021**

Complaint

- 1 My Office received a complaint that council for the Town of Plympton-Wyoming (the “Town”) held a meeting on June 24, 2020 that did not fit within the closed meeting exceptions in the *Municipal Act, 2001*¹ (the “Act”). The complaint alleged that council discussed a council vacancy and appointed a new council member while *in camera*.

Ombudsman jurisdiction

- 2 Under the *Municipal Act*, 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 complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator. 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 Town of Plympton-Wyoming.
- 5 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.
- 6 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 procedures. 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 August 13, 2020, we advised the Town of our intent to investigate the complaint.
- 8 We reviewed relevant portions of the Town's by-laws and policies, the meeting records, and the Act. We interviewed members of council, the Clerk, and the Chief Administrative Officer.
- 9 My Office received full co-operation in this matter.

Background

- 10 Councillor Ron Schenk passed away after a battle with cancer in May 2020. His seat was declared vacant by council on June 10, 2020.
- 11 We were told that after the council seat was declared vacant, two individuals approached the Town to express interest in filling the vacancy. We were told that both individuals had previous experience working with the Town and were involved with the community.

The June 24, 2020 meeting

- 12 Council held a meeting on June 24, 2020. According to the meeting agenda, council proceeded into closed session to discuss three items. One of the items was a staff report regarding the council vacancy. The resolution to proceed *in camera* indicated that council cited the "personal matters" exception in subsection 239(2)(b) of the Act to discuss the council vacancy.
- 13 We were told by council members and staff present during the closed meeting that, while *in camera*, council received a staff report that outlined the Town's options to fill the vacant seat. The options were to hold a by-election or to appoint an interested individual. The staff report also provided information on the Town's past practice of filling council vacancies by appointing a runner-up from the previous municipal election. The staff report included the 2018 municipal election results.
- 14 Council discussed the merits of each option and considered factors such as the costs of calling a by-election and the impact of the COVID-19 pandemic. The minutes indicated that, following the discussion, council decided to

proceed by way of appointment rather than holding a by-election. We were told that council made this decision by verbal consensus.

- 15 Council subsequently discussed the two individuals who had expressed interest in the position. The closed meeting minutes indicated that council considered the individuals' qualifications and the fact that both individuals had run in the previous municipal election. Those we spoke to recalled discussing the individuals' personalities and if they would be well-suited for a council position.
- 16 According to the closed session minutes, council decided to consider a motion to appoint the runner-up from the 2018 election for the council seat in open session. None of the council members we spoke to recalled holding a formal vote in closed session, but most council members recalled that there was a verbal consensus.
- 17 After returning to open session, council passed the following motion:

That Mike Vasey be appointed to position of councillor on the Town of Plympton-Wyoming Council.

Differing versions of events

- 18 A staff member and one council member had different recollections of the *in camera* discussion. According to the staff member, the purpose of the June 24 meeting was to receive legal advice related to one of the individuals interested in filling the council vacancy. According to the staff member, council had decided to proceed with filling the council vacancy at a previous council meeting, but did not provide my Office with the date of that meeting.
- 19 The staff member told my Office that staff had sought legal advice prior to the meeting. They said that this legal advice was discussed by council *in camera* on June 24, and that council also discussed potential litigation involving the individual. One councillor out of the six council members had a similar recollection of the meeting.
- 20 The other five members of council we interviewed did not indicate that legal advice was received or discussed during the closed session. The majority of those we interviewed had similar recollections of the *in camera* discussion: That council discussed whether to fill a vacant council seat by appointment or by holding a by-election, and discussed the two individuals interested in the position. One member of council thought that legal issues involving one of the individuals may have been mentioned in passing. One

member of council provided comments on a preliminary version of this report to reiterate that they did not recall discussing legal advice during the closed session.

- 21 The Clerk told my Office that council did not discuss any potential litigation or legal advice during the closed session. In fact, according to the Clerk, staff had not sought legal advice prior to the June 24 meeting and, therefore, there was no legal advice to discuss.
- 22 Further, the closed session minutes for the June 24 meeting do not record any discussion relating to legal advice or potential litigation. The staff report received by council on June 24 does not contain any legal advice or information on legal issues involving the interested individuals.
- 23 Based on the documentary evidence and interviews we conducted, I find on a balance of probabilities that council did not discuss legal advice or potential litigation related to one of the interested individuals during the closed session on June 24.

The law

Applicability of the “personal matters” exception

- 24 The Town cited s. 239(2)(b), personal matters about an identifiable individual, when it moved into closed session to discuss the council vacancy on June 24, 2020.
- 25 The Information and Privacy Commissioner (IPC) has found that information will only qualify as personal for the purposes of the Act if it pertains to an individual in their personal capacity, rather than their professional capacity. However, information about a person in their professional capacity may still qualify if it reveals something personal about the individual.² My Office has consistently found that discussions relating to an identifiable individual’s employment history and qualifications for a particular job fit within the “personal matters” exception.³ Discussions about an individual’s conduct will generally be considered personal.⁴

² *Aylmer (Town) (Re)*, 2007 CanLII 30462 (ON IPC), online: <<https://canlii.ca/t/1scqh>>.

³ *Burk’s Falls / Armour (Village of / Township) (Re)*, 2015 ONOMBUD 26 (CanLII), online: <<https://canlii.ca/t/gtp6w>>.

⁴ *Madawaska Valley (Township) (Re)*, 2010 CanLII 24619 (ON IPC), online: <<https://canlii.ca/t/29p2h>>.

Parsing an *in camera* discussion

- 26 In *St. Catharines v. IPCO, 2011*, the Divisional Court found that it is unrealistic to expect municipal councils to split up discussions between open and closed sessions where it would “detract from free, open and uninterrupted discussion.”⁵ Topics that, on their own, do not fit within a closed meeting exception, may be discussed *in camera* where it would be unrealistic to expect council to parse the intertwined subjects. However, if the discussion can be separated, council is expected to return to open session for those portions of the discussion that do not fit within an open meeting exception.⁶

Analysis

First part of the discussion: Choosing a process to fill the vacancy

- 27 Council’s *in camera* discussion consisted of two distinct parts. The first part of council’s discussion was about the process the Town should use to fill the council vacancy. Council began the discussion by evaluating the different options available to the Town to fill the vacant council seat. The options were to hold a by-election or to appoint an interested individual. This discussion did not include any personal information about an individual. Rather, it was about the process by which the council seat would be filled and the reasons council wanted to proceed with an appointment instead of holding a by-election.
- 28 Accordingly, this portion of the discussion did not fit within the “personal matters” exception.
- 29 I have commented in previous reports that in the interests of transparency, discussions related to filling a council vacancy should be held in open session.⁷ A council vacancy is generally a topic of public interest. There is no reason why discussions involving the process by which the vacancy is filled should be held in closed session.

⁵ *St. Catharines (City) v. IPCO, 2011* ONSC 2346 (CanLII) at para. 42, online: <<https://canlii.ca/t/fkqfr>>.

⁶ *St.-Charles (Municipality of) (Re)*, 2016 ONOMBUD 2 (CanLII), online: <<https://canlii.ca/t/qt8dc>>.

⁷ See for example: *Welland (City of) (Re)*, 2017 ONOMBUD 20 (CanLII), online: <<https://canlii.ca/t/hqspm>>, and *The North Shore (Township of) (Re)*, 2018 ONOMBUD 9 (CanLII), online: <<https://canlii.ca/t/hvmv3>>.

- 30 This portion of council’s discussion about how to fill the council vacancy and its decision to proceed by way of appointment could have been parsed from the second part of council’s discussion. Council should have held this portion of its discussion in open session, before closing the meeting to discuss personal information about identifiable individuals.
- 31 In its response to a preliminary version of this report, council members told us that they felt the entire discussion was appropriate for *in camera* consideration. Council members indicated that filling the vacant seat was a sensitive topic and that the meeting was held during a time of stress for municipal staff and council members.
- 32 My Office has found previously that the circumstances surrounding a meeting, including the perceived sensitivity of the meeting topic or intense public scrutiny, are not sufficient to bring the discussion within the closed meeting exceptions.⁸ The Town did not identify any reason why council’s discussion about the procedure to fill the vacant seat could not have been held in open session prior to moving into closed session to discuss the interested individuals. The two parts of the *in camera* discussion were clearly distinct and could have been easily parsed into two separate discussions in order to adhere to the open meeting rules.

Second part of the discussion: Consideration of specific individuals

- 33 The second part of council’s discussion was broader, and focused on the interested individuals who might be appointed to fill the council vacancy. Council discussed the qualifications and experience of two individuals interested in the council vacancy. For example, council scrutinized both individuals’ community involvement, past performance, and potential to work cooperatively with the rest of council. As part of this discussion, council considered the fact that both individuals had run in the 2018 municipal election and that, in the past, the Town had appointed a runner-up in the election to a vacant council seat.
- 34 Portions of the second part of council’s discussion fit within the “personal matters” exception. The portions of council’s discussion that examined the qualifications, experiences, and personalities of the two identifiable individuals qualified as personal information and fit within the “personal matters” exception.

⁸ See for example: *Amherstburg (Town of) (Re)*, 2015 ONOMBUD 13 (CanLII), online: <<https://canlii.ca/t/gtp5z>>.

- 35 However, there were portions of the second part of council's discussion that did not include personal information. Information about the 2018 election results and the Town's past practice when filling a council vacancy is publicly available, and does not qualify as personal information. This part of the discussion on its own would not fit within the "personal matters" exception.
- 36 Those we spoke with said that council would not have been able to parse this part of the discussion. When considering whether to follow its past practices, council members discussed if they wanted to work with the interested individuals and their qualifications. Based on the evidence gathered, parsing this discussion would have detracted from council's ability to have a free, uninterrupted discussion. The narrow circumstances outlined by the Court in *St. Catharines* therefore applied to this portion of council's closed session discussion, and this portion of the discussion was permitted to take place *in camera*.

Decisions made in closed session

- 37 During the closed session, council made two decisions by verbal consensus: To fill the council vacancy by way of appointment, and to bring a motion in open session to appoint the runner-up from the 2018 election to the council seat.
- 38 Council for the Town did not hold a formal vote when it made the two decisions, but did reach consensus in both cases. A verbal consensus is considered to be a vote of council for the purposes of the open meeting rules. In a 2015 investigation into illegal vote allegations during closed sessions in the Town of South Bruce Peninsula, my Office found that the clerk acted based on an implied consensus. In that case, the minutes of the closed session did not show that any formal procedural resolution was made, nor any formal vote taken, such as by show of hands or roll call.⁹ In that report, my Office found that a direction based on council consensus is, for all intents and purposes, a vote of council.
- 39 Although the Act generally prohibits voting in closed session, section 239(6) permits voting in certain circumstances. This section states that council may vote *in camera* if the meeting is otherwise permitted to be closed to the public, and if the vote is for a procedural matter, or to provide directions to officers, employees or agents. As a best practice, I have recommended in

⁹ *South Bruce Peninsula (Town of) (Re)*, 2015 ONOMBUD 25 (CanLII), online: <<https://canlii.ca/t/gtp6t>>.

the past that councils should clearly identify the specific procedural matter, or direction given, formally vote on it, and record the vote in the closed meeting minutes.¹⁰ This is for the benefit of staff and council so that there is no confusion about what direction, or procedural matter, was voted on during a properly closed meeting of council.

- 40 The first decision made by council was to fill the vacancy by way of appointment. Council was not entitled to make this decision during the closed session. As I found above, the discussion about whether to call a by-election or proceed by appointment did not fit within the “personal matters” exception. Under the Act, no votes can be made during a meeting that is not properly closed to the public. Accordingly, this vote was contrary to the open meeting rules.
- 41 The second decision was for a motion to be brought in open session to appoint the runner-up for the council race from the 2018 municipal election. The closed meeting minutes record the decision without indicating that it was a direction to staff or for a procedural matter. In comments on a preliminary version of this report, council clarified that this decision was intended to be a direction to staff to bring the motion forward.
- 42 In a 2019 letter to the City of Hamilton, the Ombudsman wrote that when a city committee decided that a matter should be brought forward by staff for consideration by council, it was a direction to staff permitted in a closed session.¹¹
- 43 Votes to give direction to staff or officers are permitted in closed session, and this portion of the discussion fit within the “personal matters” exception. I accept council’s submission that, when it decided that a motion should be brought in open session, it was intended to be a direction to staff. Accordingly, this vote was permitted *in camera*. Going forward, council should take care to ensure that directions to staff are expressly phrased as such.

¹⁰ *South Bruce Peninsula (Town of) (Re)*, 2015 ONOMBUD 25 (CanLII), at para 67, online: <https://canlii.ca/t/gtp6t>.

¹¹ Letter from Ombudsman of Ontario to the City of Hamilton (4 July 2019), online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2019/city-of-hamilton-2>.

Opinion

- 44 Council for the Town of Plympton-Wyoming contravened the *Municipal Act, 2001* on June 24, 2020, when it discussed how to fill the council vacancy in closed session. This portion of the discussion did not fit within the exception cited under the *Municipal Act, 2001* for “personal matters”. Further, because the discussion was not permitted to be closed to the public, council was not permitted under the Act to decide to fill the vacancy by appointment rather than by holding a by-election.
- 45 The portion of council’s discussion regarding the two individuals interested in filling the council vacancy fit within the “personal matters” exception under the Act. Council’s vote to consider a motion in open session was permitted in closed session, as it was a direction to staff. However, council should take care to explicitly identify directions to staff when they are given in future.

Recommendations

- 46 I make the following recommendations to assist council in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

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

Recommendation 2

The Town of Plympton-Wyoming 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

Council for the Town of Plympton-Wyoming should ensure that its *in camera* votes comply with sections 239(6) of the *Municipal Act, 2001*.

Report

- 47 The Town was given the opportunity to review a preliminary version of this report and provide comments to our Office. We received comments from council and two individual council members, which were considered in the preparation of this final report.
- 48 In its response, council for the Town of Plympton-Wyoming submitted that it found that the section of this report summarizing the different versions of events conveyed during interviews to be confusing and unnecessary.
- 49 As the closed meeting investigator for the Town, my role is to conduct an investigation, weigh the evidence, and make findings and recommendations where necessary. At times, I am presented with conflicting evidence. In such cases, I must weigh all the evidence and decide, on a balance of probabilities, which to accept. In my report, I summarize the evidence I obtained, and provide reasons for my conclusions, including my decision to prefer certain pieces of evidence over others.
- 50 The comments I received from one individual council member included background to the June 24, 2020, meeting. The council member explained that the circumstances surrounding the meeting were contentious and council had taken steps to ensure that it acted correctly on June 24.
- 51 I understand that council felt the subject matter discussed during this meeting was sensitive. However, the closed meeting exceptions are not intended to shield council from the public's scrutiny of sensitive or contentious topics. It bears repeating that the exceptions in the *Municipal Act* are to be interpreted and applied narrowly, to maximize the information discussed in public. As stated in my Office's 2014 report about the City of Welland:

Although there may have been a desire to maintain confidentiality in order to protect various interests of the city, I must emphasize again that council cannot bring a matter *in camera* simply because it is considered sensitive or confidential or potentially against the city's interest to discuss it publicly. Matters can only be discussed *in camera* if they fit squarely within the exceptions to the open meeting requirements.¹²

¹² *Welland (City of) (Re)*, 2014 ONOMBUD 7 (CanLII), at para 72, online: <<https://canlii.ca/t/gtmhx>>.

- 52 This report will be published on my Office's website and should also be made public by the Town of Plympton-Wyoming. In accordance with s. 239.2(12) of the *Municipal Act, 2001*, council should pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario