



Ombudsman Report

Investigation into Whether Members of Council for the Township of Leeds and the Thousand Islands Held Improper Closed Meetings on November 16, 2012 and February 19, 2013

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Complaint

- 1** Our Office received complaints alleging that certain members of the Council for the Township of Leeds and the Thousand Islands held two illegally closed meetings.
- 2** The first complaint concerned an informal gathering of the Mayor, Deputy Mayor and three councillors on the afternoon of November 16, 2012, in a back room at the municipal office in Lansdowne. The group gathered that day to decorate a trailer at the nearby fire hall for use as a float in upcoming Santa Claus parades in the region.
- 3** The second complaint related to a closed meeting of council's Personnel Committee on February 19, 2013, which was not publicized in advance.

Ombudsman jurisdiction

- 4** Under the *Municipal Act, 2001*, municipalities are required to pass by-laws setting out the rules of procedure for meetings. The law requires public notice of meetings, and that all meetings be open to the public, unless they fall within prescribed exceptions.
- 5** As of January 1, 2008, changes to the *Municipal Act* give 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** The Ontario Ombudsman is the default closed meeting investigator for the Township of Leeds and the Thousand Islands.
- 7** In investigating closed meeting complaints, my Office considers whether the open meeting requirements of the *Municipal Act* and the relevant municipal procedure by-law have been observed.

Investigative process

- 8** On February 20, 2013, my Office notified the Township we would be investigating whether council members improperly held an *in camera* meeting on November 16, 2012.
- 9** Initially, my investigators conducted interviews over the phone with council members and township staff. Given inconsistencies in the information we received, additional documentary evidence, including emails relating to the gathering, was requested on April 25, 2013. Relevant documents were received in May 2013.
- 10** During our investigation of the November 16, 2012 gathering, a second complaint about the February 19, 2013 meeting of the township's Personnel Committee was received. The investigation of this matter was joined with the one already in progress, as both of the complaints concerned meetings addressing compensation for senior staff.
- 11** Additional in-person interviews were held in August 2013.
- 12** The township council and staff co-operated fully during the course of our investigation.

Preliminary report

- 13** In accordance with our procedures, all of the Township's council members – including those who were not present at the November 16, 2012 gathering and February 19, 2013 Personnel Committee meeting– were given an opportunity to review a draft of this report containing preliminary investigative findings and analysis, and to offer responses before the report was finalized. They were given the option of receiving a copy of the preliminary report for review on the condition that they signed an undertaking to keep it confidential, in accordance with the requirements of the *Ombudsman Act*.
- 14** We received five confidentiality undertakings from the Township between October 11 and 21, 2013, and provided copies of the report accordingly.
- 15** After members of council received the preliminary report they retained a law firm to assist in their review and provide submissions to my Office. At the request of

council and its lawyers, the response deadline was extended from October 18 to November 12, 2013.

- 16** On November 12, 2013, we received the response from the lawyers representing the municipality. A copy of that response is appended to this report. I have considered this response in finalizing my report.

Previous investigation

- 17** This is not the first time my Office has considered whether the township violated the *Municipal Act* open meeting requirements. In April 2012, I found an illegal closed meeting was held on January 23, 2012, at which council members voted themselves a reported 60% pay increase. As a result, we urged the township to adopt a number of best practices to ensure compliance with the law in future. On May 13, 2013, the township adopted a new procedure by-law. The two meetings currently under investigation took place under the old procedure by-law.

The township's procedure by-law

- 18** The township's previous procedure by-law (By-Law No. 11-056) does not address committees. This oversight has been corrected in the new by-law, which also contains increased notification procedures.

When is a meeting a "meeting"?

Interpretation of the law

- 19** The term "meeting" is defined in section 238 of the *Municipal Act* as "any regular, special or other meeting of a council, of a local board or of a committee of either of them." The township's procedure by-law contains a similar definition. Neither provides any clear guidance as to what constitutes a "meeting" subject to the open meeting requirements.
- 20** Recognizing a need for clarity, in my report on my 2008 investigation into a closed meeting of council for the City of Greater Sudbury (regarding access to tickets to an Elton John concert), I arrived at a more practical approach. After a review of

the relevant case law and principles of openness, transparency, and accountability,¹ I formulated the following working definition:

To constitute a meeting covered by the *Municipal 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.²

- 21** This definition remains consistent with leading interpretations of the open meetings concept for the purpose of upholding a democratic municipal decision-making process that is transparent and accessible, while not depriving the public of the democratic opportunity to observe municipal government in process.³
- 22** In their response to my preliminary report, the lawyers representing the municipality submitted that my working definition of “meeting” is inconsistent with the decisions of the courts of Ontario. They took the position that in order to constitute a meeting, a matter must be “materially” advanced toward a decision. They argue that I should apply the standard of material advancement in assessing whether a meeting of the councillors took place in the Township’s *in-camera* meeting room on November 16, 2012.
- 23** In my 2008 investigative report concerning the City of Greater Sudbury, I extensively reviewed the relevant court cases, which have varied in their approaches to this issue. As I stated in that report:

In sum, it is clear that each of these approaches – the “arriving at a decision” approach; the “materially moving matters along” approach; and the assessment of whether the protagonists have come together for the purpose of working towards the ultimate resolution of a matter that requires the exercise of their power – derive from a purposive examination of the legislation. These are examples of democratic bodies engaged at

¹ 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 at paras. 42-92.

² *Ibid.*, paras 54-60

³ *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; Jason Reynar, *Transparent Municipal Governance: When Must a Meeting be Open?* (2011) 88 M.P.L.R. (4th) 68.

various stages in the exercise of the very kinds of power that the voters have a legitimate expectation of having input into, and where the appearance of integrity in the exercise of political power can be affected. The first two approaches are under-inclusive, for the principles can be engaged even without decisions being arrived at or deliberations being productive. I have therefore used these cases as inspiration given that they purport to embrace a principled approach, however imperfectly, but have restyled their standards by examining the broader question of whether the participants have 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.⁴

The approach I have adopted reflects the principles of transparency, openness and accountability underscoring the open meeting requirements.

Social gatherings

- 24** The *Municipal Act, 2001* does not create an absolute prohibition against members of council meeting informally outside chambers. For instance, it was not improper for members of council to volunteer to decorate the float together. Gatherings purely for social purposes do not attract the open meeting requirements, even if a quorum of council is present. The general danger with these types of events is that conversation may drift into improper areas. Council members must remain vigilant to ensure that they do not cross the line and convert social occasions into business meetings.
- 25** It would be unrealistic to expect council members never talk to one another outside of a public meeting. However, as I concluded recently in my investigative report concerning a lunch gathering of a group of council members from the City of London:

What does threaten the heart of democracy is when a quorum of council or a standing committee improperly gathers outside of council chambers, to the exclusion of the public ear and eye. The problem becomes especially acute as such gatherings progress along a continuum towards secrecy and seclusion, particularly on the eve of influential or controversial council votes.

⁴ *Ibid.*, footnote 1 at paragraph 85.

When council members come 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. This type of conduct should be avoided, as it violates the open meeting provisions of the *Municipal Act*.⁵

- 26** The problem with the November 16, 2012 gathering is that it was not simply a social function. As the next section of this report explains, aside from preparing the Santa Claus parade float at the fire hall, a quorum of council met privately in the *in camera* meeting room for the express purpose of addressing a contentious council issue.

November 16, 2012 gathering

The participants

- 27** There are seven members of council, including the Mayor and Deputy Mayor.
- 28** While there was some inconsistency in witness accounts, it is clear that a majority of council met on November 16, 2012. Those in attendance were: Mayor Frank Kinsella, Deputy Mayor Heidi Conarroe and Councillors Geraldine Dickson, Harold Emmons, and Wendy Merkley.

Floating an idea

- 29** Those present at the gathering on November 16 all testified they met to help decorate a float at the local fire hall for upcoming Christmas parades. All but one also acknowledged that, at some point, either before the decorating began or during a break, they gathered in a boardroom at the back of council chambers. This room is generally used to conduct closed sessions and is known as the “*in camera*” meeting room.

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*, at para. 26 and 27.



Figure 1 : Meeting room at the back of the township council chambers, known as the *in camera* meeting room.

- 30** The gathering was not an official meeting of council. There was no notice or agenda and no staff members were present. The door to the *in camera* meeting room was left open, but clearly the intent was for the participants to meet privately.
- 31** The evidence confirms the gathering was planned in advance. However, the participants diverged in their accounts of what was discussed. Estimates of the length of the meeting also varied significantly and ranged from a few minutes to half an hour.

The float decoration invitation

- 32** Councillor Merkley explained that initially she was responsible for co-ordinating the decoration of the float. She sent out an email to council members on November 8, 2012 about this activity. In the email, she noted at least four members of council would be joining the afternoon decorating session on Friday, November 16, 2012. However, the gathering soon evolved to include a secondary purpose.

Senior staff salary meeting invitation

- 33** The Deputy Mayor advised that sometime after she received Councillor Merkley's email, the Mayor asked her to send out another one asking councillors to be there an hour earlier, at 2 p.m. on November 16, 2012, to discuss staff salary issues.
- 34** The compensation scheme for senior staff salary was a longstanding and controversial issue at the township and had been on the council agenda on a number of occasions. In January 2012, the township hired a consultant to review and make salary recommendations. In May, council rejected the consultant's report and struck a Compensation Review Committee to consider staff salaries and benefits. In October 2012, the Mayor was appointed to fill a vacancy in the mayoral office resulting from the incumbent's illness. That month, the Compensation Review Committee made a presentation to council, and the Mayor requested that staff report back to council on November 13 with recommendations.
- 35** On November 13, 2012, the Chief Administrative Officer presented a report to council on the Management Compensation Plan, which was tabled. The next day, the Deputy Mayor sent the following email to all members of council:

Good Evening Council.

As per my conversation with Mayor Kinsella today, would everyone be amenable to meeting at 2 pm on Friday for an hour to sort out the salary issues before we decorate the trailer?

- 36** The Deputy Mayor received two responses to her email and both responses were copied to the entire group.

37 The first was from Councillor Dickson:

Hi all - meeting at 2 pm Friday to sort out issues and decorate the trailer is a great idea - see you there.

38 The second response was from Councillor Merkley:

I was just thinking about that this evening wondering when we ‘council’ were going to talk about the salary but how does that work, a quorum constitutes as a council meeting and that means 24 hrs. public notice?

39 The Mayor recalled mentioning to the Deputy Mayor that he had figures and documentation he wished to share with council about the salary issue, although he did not remember asking her to notify the other council members. He advised that the float decorating session presented an opportunity to distribute the information, which he understood would be considered by council at its next regular meeting on Monday, November 26, 2012. He observed that after receiving the Deputy Mayor’s email, he reconsidered whether council should gather to discuss the salary issue, but he did not communicate this change of mind to anyone.

The envelopes

40 All of the council members who gathered on November 16 explained that the Mayor handed out envelopes containing six pages of information about staff compensation, including the staff pay schedules from 2008 to 2012, Compensation Committee Recommendations, a summary sheet containing notes from the Compensation Committee, the Chief Executive Office and the Mayor. The same information was later provided to the two absent council members. The information contained in the envelope could normally be considered in closed session under the “personal matters about an identifiable individual” and/or “labour relations and employment negotiations” exceptions in s. 239(2)(b)(d) of the *Municipal Act*.

41 The Mayor included the following note with the materials he distributed:

Council Directions

Each Councillor to study information package handed out Nov. 16, 2012.

Councillors to decide

- 1) Do we pay senior managers according to
 - a) job differentials.
 - b) job appraisals
- 2) Do we want one pay schedule for senior Administration.

Handouts: Confidential.

- 1) Pay from 2008 to 2012.
- 2) Compensation Committee Recommendations.
- 3) Schedule "A" as submitted by CAO
- 4) Summary Sheet + notes from Compensation Com, CEO + Mayor.

- 42** The Township Clerk told our investigators she did not attend the gathering. However, she recalled the Mayor spoke with her over the phone that day and told her council members would be getting together prior to decorating the float to "discuss a couple of things." The Clerk said she cautioned the Mayor that if "quorum" (a majority of council with legal authority to conduct business) were

present, township staff would need to attend. Her evidence was that the Mayor responded that there would be no quorum and that he was just distributing paperwork. Around 2 p.m., the Mayor also asked her to make seven copies of some documents. The Clerk said she did so, and brought the documents (not in envelopes) to the *in camera* meeting room, where the Mayor and four other council members had assembled.

- 43** The Clerk explained that the documents she copied for the Mayor did not form part of an existing agenda for any upcoming township meetings. She observed that normally, all materials to be distributed to council are provided to her and she prepares a package, which is included with the meeting agenda identifying the item the documents relate to.

What happened in the *in camera* meeting room?

- 44** In his interviews with our Office, the **Mayor** indicated that at some point during the float decorating session at the fire hall, the group went to the nearby *in camera* meeting room for a break and refreshments. He said after the group had assembled in the meeting room, he distributed the envelopes and told everyone present there would be no discussion. He also said he repeated this caution when some participants asked questions. In his words:

So I just gave it to them, said “we will not discuss it,” and would you please put it in your cars, and, because I didn’t want it construed as a meeting. It was there for the – just distribution purposes. And so what I did is said, “this is the problem we’re facing, is we’ve got two different grids. We’ve got two different times. The things you need to pay attention to are grid placement and the salary schedules. When you open them, but that’s it, good luck and read it.”

- 45** The **Mayor** was adamant that the November 16, 2012 gathering was not a meeting. He noted decorating the float was a volunteer gesture and one could not predict who would show up at 2 p.m. during a workday. He emphasized that the door to the *in camera* meeting room was open at all times, and also observed:

...To have a legitimate council meeting, we need to have a clerk present, and without the clerk present to make an official record, technically you don’t have a council meeting... so there was no clerk present.

- 46** The Mayor estimated that the combined float decorating and *in camera* meeting room session took about two hours.
- 47** According to the **Deputy Mayor**, the group of five council members met in the *in camera* meeting room prior to decorating the float. She said once they were assembled, the Mayor handed out the envelopes, and read out the contents, reviewed the historical background of the staff salary issue and noted inconsistencies surrounding the information. She claimed no one commented on the salary information, and the Mayor reminded one council member who asked a question about the contents of the envelope that they were not holding a meeting on the issue. The Deputy Mayor also recalled that the Mayor mentioned that the door to the room had to remain open because they were not holding a closed council meeting. The Deputy Mayor expressed the view that no council business was advanced during the gathering, as they deliberately did not make any decisions. She recalled that the *in camera* meeting room gathering lasted about half an hour.
- 48** **Councillor Dickson** remembered that the group initially gathered in the *in camera meeting* room before working on the float. She said that after the Mayor gave out the envelopes, he instructed those present not to open them, but to take them home, as they were for discussion at a future meeting. She estimated the gathering lasted half an hour.
- 49** **Councillor Emmons** did not recall entering the *in camera* meeting room. He said the Mayor gave him the envelope with the staff salary information while the group was decorating the float at the fire hall, and that there was no discussion about it. However, the other participants all placed Councillor Emmons in the *in camera* meeting room, while the envelopes were distributed.
- 50** **Councillor Merkley** told us that the group first met in the *in camera* meeting room where the Mayor distributed the envelopes, and that they then moved to the fire hall to decorate the float. She recalled that in the room the Mayor responded to a question from one of the councillors and said there would be no discussion about the staff salary issue. She insisted the group did not discuss the staff salary issue and were only in the *in camera* meeting room for a few minutes.

Compensation back on the agenda

- 51** The issue of senior staff salaries was considered at the next regular council meeting on November 26, 2012, in one of two closed sessions held that day. It was addressed under the exception allowing *in camera* discussion of “personal

matters about an identifiable individual, including municipal employees.” The meeting minutes record no details of the discussion. This may reflect the fact that this session was irregular. According to staff witnesses, the Township Clerk was on vacation that day, and council members asked staff to leave the room and met privately for this closed session.

- 52** The senior staff salary issue was back again on council’s agenda on December 10, 2012, when the Mayor presented a report, dated November 28, 2012, on the Senior Salary Review. The report provides some background information and states:

Council spent significant time tracking down and crunching numbers to finally come to suggested salaries for senior managers as well as a series of directives for staff.

- 53** In January 2013, the Mayor formed a Personnel Committee for the express purpose of reviewing the senior staff salary issue. On May 13, 2013, council approved recommendations from this committee. Our understanding is that the issue of senior staff salaries remains unresolved.

Analysis: Purpose of coming together

- 54** By November 14, 2012, when the Deputy Mayor sent out her email to council members, the purpose of the gathering on November 16 had evolved from a social activity to include a meeting one hour before the decorating session – to “sort out the salary issues.” In responding to the Deputy Mayor, Councillor Merkley questioned whether notice of the meeting was required as “a quorum constitutes a council meeting.” However, the group does not appear to have given any further thought to the procedural proprieties of meeting privately, without public notice, or staff present, to address an issue of council business.
- 55** The majority of the participants explained that the meeting took place before the float decorating began. This version of events is supported by the Clerk, who says she brought the documents to the Mayor in the *in camera* meeting room around 2 p.m. I do not accept the Mayor’s evidence that the meeting in the municipal offices took place during a break in decorating. Nor do I accept Councillor Emmons’ account that he was not at the municipal office, as it is contradicted by the four other council members and the Clerk.
- 56** There was considerable discrepancy in the evidence as to what was actually said in the *in camera* meeting room and how long the group of five was there. Given that

the original intention was that the group would meet an hour before decorating the float, I prefer the evidence of the Deputy Mayor and Councillor Dickson to the effect that the meeting lasted half an hour over Councillor Merkley's recollection that the gathering lasted only a few minutes.

- 57** The Mayor denied discussing the salary issue and recalled that when someone asked a question about it, he responded by saying that it would not be discussed. The Deputy Mayor, and Councillor Merkley also remembered this exchange. However, the Mayor admitted that his intent in distributing information about senior staff compensation on November 16 was to ensure that everyone had the same information before the issue came up for further discussion at council. The Mayor's directions enclosed in the envelopes were quite explicit. He wanted the councillors to consider how to pay senior managers, whether to do so according to job differentials or job appraisals, and whether one pay schedule was appropriate.
- 58** The Mayor also acknowledged that he instructed the group in the *in camera* meeting room that the problem with the senior staff compensation was that there were two different grids, and that they had to pay attention to the grid placement and the salary schedules.
- 59** Of the four council members who remembered attending the meeting, only the Deputy Mayor was able to provide any details of the discussion. Her evidence was that the Mayor read out the contents of the envelope and that he addressed the historical background and inconsistencies concerning the staff salary issue.
- 60** I do not accept that the Mayor was simply carrying out an administrative clerical function of delivering documents. If that was what was intended, he could simply have handed out the envelopes at the fire hall or followed the proper protocol by asking the Clerk to prepare and distribute them along with the relevant meeting agenda, prior to the next scheduled council meeting. The simple act of distributing documents would also take considerably less time than the 30 minutes the group spent in the *in camera* meeting room. The Mayor went further. He described the documents, summarized the nature of the issue, and instructed his colleagues to prepare to address the senior staff compensation issue at a council meeting.
- 61** The senior staff compensation issue had been before council on November 13, three days before the gathering, and was back on the table by November 26, its next regularly scheduled meeting. The test for determining if an illegal meeting has occurred does not require that council members reach a decision or that multiple members of council contribute to a discussion of council business. If information is conveyed about an issue to come before council, in a manner that informs future decision-making on a topic, the gathering may constitute an illegal

meeting. In this case, distribution of materials relating to senior staff compensation, and the Mayor's summary of the issue and instructions, laid the groundwork for council's consideration of the salary issue on November 16, 2012, in a manner that undoubtedly advanced council's understanding and deliberations relating to this issue on November 26.

- 62** It is clear that the purpose of the 2 p.m. meeting in the *in camera* meeting room was to lay the groundwork for future decision-making on the senior staff compensation issue. Accordingly, I find that the gathering was a meeting for purposes of the *Municipal Act*. Even if the subject matter could have been dealt with under an exception to the open meeting rules, council was required to comply with the notice and other procedural meeting requirements before gathering to consider the senior staff salary issue.
- 63** Contrary to the Mayor's opinion as expressed during this investigation, leaving a door open and meeting without staff present, does not save what would otherwise be an improper *in camera* session.
- 64** The lawyers retained by the municipality take issue with my characterization of what took place on November 16, 2012, primarily because they disagree with the definition of meeting I have adopted. They argue that council business was not materially advanced at the November 16, 2012 gathering and raise the following points in support of their position:
- The *in camera* meeting room is a boardroom, and while closed meetings are held there, it is also used for other purposes.
 - Leaving the door open is not consistent with an intention to meet privately.
 - Irrespective of the fact that both the Deputy Mayor and Councillor Dickson used the word "meeting" in their email correspondence, whether the get together constitutes a meeting for the purposes of the Act depends on both its purpose and substance.
 - It is improper to draw any inference from the various individual recollections of the amount of time they were together for the purposes of determining whether there was a "meeting."
 - The meeting was for distribution purposes, there was no discussion and no council business was advanced during the gathering.

- The Mayor in his role as the Chief Executive Officer is responsible for providing leadership to council and gathered members of council together for the sole purpose of distributing important documents, reminding them of the issues that needed to be considered, and encouraging all of them to give the matter serious study and consideration ahead of the next council meeting at which the matter would be discussed.

65 While the *in camera* meeting room might well be used for other purposes, clearly it was employed on November 16, 2012, to hold a private meeting of council members, planned in advance, and without notice to the public. The fact that the door was open during the gathering is irrelevant, since the public was unaware it was happening.

66 The e-mail correspondence arranging for the gathering referred to it as a “meeting,” and an hour was initially allotted to accommodate consideration of the senior staff salary issue. Clearly, this was not intended as a brief and chance encounter. In addition, the Deputy Mayor described to us how during the gathering the Mayor read out the contents of the envelope, and went on to address the historical background and inconsistencies relating to the senior staff issue. Her account was the most detailed. Her assessment of the time the meeting took and what transpired was the most persuasive. Together with other evidence, it points to the gathering on November 16, 2012 being a meeting both in purpose and substance.

67 The Mayor deliberately chose to raise an issue, highlight decision points that had to be addressed, and distribute materials in order to lay the groundwork for consideration of the senior staff issue at an upcoming meeting. This conduct went well beyond the administrative act of distributing paperwork.

Conclusion 1

68 Considering all the evidence, it is my view that the 2 p.m. meeting on November 16, 2012, held without notice to the public or observance of other procedural meeting requirements, in the very room where council normally conducts its *in camera* business, was an illegal closed meeting of council.

Closed meeting on November 26, 2012

- 69** While the closed session on November 26, 2012, was not the subject of complaint to my Office, I believe it warrants further attention. This meeting followed the illegal closed session on November 16, and continued council's consideration of the senior staff compensation issue. The Mayor's distribution of materials and directions to council members relating to senior staff salary on November 16 formed the basis for the further discussion on November 26. In addition, the circumstances surrounding this closed session were exceptional, as municipal staff members were not present.
- 70** The *Municipal Act* requires that the Clerk or their delegate record all council meetings (ss. 228, 239(7)(8)). Clearly, council violated this requirement when it ejected staff from the November 26 closed session. In addition, and possibly as a result, council also failed to keep an accurate and complete record of the meeting.
- 71** The municipality's lawyers object to my "investigating" the November 26, 2012 meeting in the absence of a complaint. Evidence relating to the meeting was directly relevant to my consideration of the November 16, 2012 gathering. It was part of a series of events concerning the senior staff salary issue, and the first meeting after the November 16 gathering where this issue was addressed. To look at the November 16 meeting in a vacuum without considering its context in relation to subsequent meetings would make my Office's consideration of this matter both artificial and incomplete. Furthermore, although the November 26 meeting was not a specific subject of complaint, when my Office encounters evidence of a lack of compliance and lack of understanding of the requirements of the *Municipal Act*, it is incumbent on me to address the matter. This is clearly in both the public and council's interests.

February 19, 2013 Personnel Committee meeting

- 72** On January 28, 2013, during a regular council meeting, the Mayor named the Deputy Mayor and Councillors Merkley and Dickson as the inaugural members of the Personnel Committee of Council. According to the Deputy Mayor's email to staff on February 10, 2013, the function of the committee was to review senior management needs, specifically regarding salaries, and make recommendations to council. On February 18, 2013, at a special council meeting, the committee was also tasked with negotiating a tentative agreement for remuneration and retention of senior staff for ratification by council.

- 73** On February 10, 2013, the Deputy Mayor, on behalf of the Personnel Committee, sent an email, copied to council, to four members of senior staff, asking them to appear before the committee on the morning of February 19, 2013. The email explains the committee wanted the staff members to discuss a range of topics including their role, additional responsibilities and opportunities they were interested in, their current salary and their proposed future salary. The township did not provide public notice of the meeting. The Deputy Mayor explained this was because the procedure by-law did not apply to committees, an omission which has since been corrected.
- 74** The meeting on February 19, 2013 began in council chambers. The three members of the committee were present, along with a member of staff who was delegated to record the proceedings. The agenda for the meeting stated that the committee would be going *in camera* to consider “employee negotiations.” At the outset of the meeting, the committee passed a resolution to go into closed session to discuss “labour relations or employee negotiations.” The committee then met with the three senior staff members individually in the *in camera* meeting room and discussed a number of issues.
- 75** The minutes of the meeting are quite detailed. They record that during the session, three staff members were interviewed about their experience and views relating to compensation frameworks, their position description and salary and other matters relating to senior staff compensation. The staff members indicated that the minutes were an accurate reflection of the discussion.

Analysis: Committees and open meetings

- 76** Committees of council are required to comply with the open meeting rules. The *Municipal Act* defines “committee” to mean any advisory or other committee, subcommittee or similar entity of which at least 50% of the members are also members of one or more councils or local boards. The Personnel Committee, composed entirely of council members, clearly comes within this definition and is subject to the open meeting requirements including providing notice of its meetings.
- 77** Disturbingly, during our investigation, the Mayor expressed some misconceptions about the application of the open meeting requirements to committees. His understanding was that the notice and other procedural formalities only had to be observed if a committee was composed of a quorum of council members. He

explained that, in order to avoid having quorum, with the associated procedural formalities, he did not attend the Personnel Committee meetings.

- 78** The municipality’s lawyers acknowledge that when the Personnel Committee met on February 19, 2013, the procedure by-law contained no provisions expressly requiring public notice of committee meetings, as contemplated by the *Municipal Act*. This situation has since been remedied. The lawyers further submit that the *Municipal Act* does not itself require that public notice of meetings be given, and argue that it cannot be said that the Personnel Committee violated the Act. I believe this is an overly technical approach to the open meeting rules. Municipalities are required to issue procedure by-laws that provide for public notice of meetings. If notice of a meeting is not given, whether contrary to a procedure by-law or because the procedure by-law is inherently deficient, it naturally follows that the meeting itself was held in violation of the Act.

Exception 239(2)(d) – Labour relations or employee negotiations

- 79** There are no reported court cases interpreting the “labour relations or employee negotiations” exception in the *Municipal Act*. In the context of Ontario’s information and privacy legislation, certain records relating to “labour relations and employment related matters” are not accessible to the public. Although the law that has developed under the freedom of information regime is not binding on my Office when considering the *Municipal Act*, the principles applied provide some guidance.
- 80** The Ontario Court of Appeal has found that the ordinary meaning of the phrase “labour relations” in the *Freedom of Information and Protection of Privacy Act* extends to relations and conditions of work beyond those of collective bargaining, including remuneration outside of a traditional employment arrangement.⁶
- 81** The Information and Privacy Commissioner’s office has also determined that two consultant reports relating to a management compensation plan could not be accessed under a similar provision in the *Municipal Freedom of Information and Protection of Privacy Act*. While the Commissioner’s office observed that some of the information in the records was general in nature – for example, one included a review of best practices and the other included consideration of compensation

⁶ Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner), [2003] O.J. No. 4123 (C.A.) considering s. 65(6)3 of the *Freedom of Information and Protection of Privacy Act*.

programs in other institutions – the focus of both records was on compensation matters relating to the city’s workforce.⁷

- 82** According to the evidence, the Personnel Committee met with the three senior staff members on February 19, to obtain additional information and opinions to assist in its consideration of the senior staff compensation. Its mandate was to make recommendations to council about this issue and negotiate a tentative agreement with employees on remuneration and retention. The municipality was acting as an employer and dealing directly with the terms of employment for senior managers. The focus of these discussions was on compensation matters relating to the Township’s workforce. Accordingly, this discussion could be closed using the “labour relations or employee negotiations” exception.
- 83** Given that the committee was seeking the personal opinions of specific employees, including on their individual employment situations, the “personal matters relating to an identifiable individual” (s. 239(2)(b)) might also have been used to justify closing the meeting.

Conclusion 2

- 84** Although the Personnel Committee was entitled to meet in closed session under the exception it cited, the meeting violated the *Municipal Act* requirements of the Act, as no public notice was given.

Recommendations

- 85** It is troubling that some council members for the Township of Leeds and the Thousand Islands continue to lack clear understanding of their obligations under the open meeting requirements of the *Municipal Act*. Collectively and individually, council members are charged with the responsibility of ensuring the public’s right to observe democracy in process, including the right to notice of meetings. Yet, as demonstrated in the two meetings under investigation, the public’s right to notice was frustrated. While I am encouraged that the Township has moved to amend its flawed procedure by-law, additional steps are necessary to ensure that the requirements of the *Municipal Act* are followed both in letter and in spirit.

⁷ Order MO-2455, City of Toronto, August 31, 2009.

86 In addition to problems with the two meetings under investigation, council met in closed session on the same senior staff compensation issue on November 26, 2012, without staff present, and kept no record of the closed discussion, as required under the Act. Where meeting records are deficient, there is no ready or independent way to confirm whether participants restricted their discussions to matters clearly coming within the exceptions to the open meeting requirements. In accordance with s. 239(7) of the *Municipal Act*, a municipality is required to record, without note or comment, all resolutions, decisions and other proceedings at its meetings.

87 Ideally, a written record of a closed meeting should include reference to:

- where the meeting took place;
- when the meeting started and adjourned;
- who chaired the meeting;
- who was in attendance, with specific reference to the clerk or other designated official responsible for recording the meeting;
- whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
- a detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered;
- any motions, including who introduced the motion and seconders; and
- all votes taken, and all directions given.

88 In the interests of transparency, a number of Ontario's municipalities audio record or allow for the broadcast of their open meetings. This is a sound and reasonable approach as it helps to ensure that there is a clear, comprehensive and accessible meeting record.

89 Several jurisdictions in the United States require that municipal closed meetings be electronically recorded or videotaped, and others have adopted this practice to enhance the accountability and transparency of their proceedings. For example, the Illinois *Open Meetings Act* states that all public bodies must keep a verbatim record of all their closed meetings in the form of an audio or video recording⁸. Similarly, Iowa's legislation⁹ requires that audio recordings be made of all closed sessions, and Nevada requires that public bodies record audio of open and closed meetings or use a court stenographer to transcribe the proceedings¹⁰.

⁸ 5 ILCS 120/2.06

⁹ Iowa Code § 21.5(4)

¹⁰ N.R.S 241.035(4)

90 As I noted in my 2011-2012 Annual Report on Closed Municipal Meetings, the practice of audio recording both open and closed meetings is in the interest of all of Ontario's municipalities. It demonstrates a municipality is confident it is following the rules, and inspires community trust in the transparency and accountability of local government. It also saves time and resources for all concerned. Having a clear, accessible record for closed meeting investigators to review means that many investigations take significantly less time and require fewer interviews. Municipalities that electronically record their closed sessions include the Municipality of Lambton Shores, the Town of Midland, the Townships of Madawaska Valley and Tiny, and the City of Oshawa. I encourage the Township of Leeds and the Thousand Islands to consider adopting this practice.

Recommendation 1:

The Township of Leeds and the Thousand Islands should adopt a written policy and/or written guidelines and ensure that council and committee members are educated on the open meeting requirements of the *Municipal Act, 2001*. This should include a definition of what constitutes a "meeting" that upholds the public's right to observe municipal government in process, and an explanation of how it applies to informal discussions of council and committee business.

Recommendation 2:

All members of council for the Township of Leeds and the Thousand Islands should refrain from using social gatherings to conduct Township business behind closed doors.

Recommendation 3:

All members of council for the Township of Leeds and the Thousand Islands should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its statutory responsibilities under the *Municipal Act, 2001* as well as its own procedures and by-laws.

Recommendation 4:

The Township of Leeds and the Thousand Islands should record audio and/or video of all *in camera* meetings and store such recordings in a confidential and secure fashion for future reference.

Report

- 91 My report should be shared with the Township of Leeds and the Thousand Islands and be made available to the public as soon as possible, and no later than the next council meeting.



André Marin
Ontario Ombudsman

Appendix: Response



Cunningham Swan
LAWYERS

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Professional Corporation
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November 12, 2013

Mr. André Marin
Ombudsman of Ontario
Bell Trinity Square
483 Bay Street
10th Floor, South Tower
Toronto Ontario
M5G 2C9

Dear Sir:

RE: Our Client: The Corporation of the Township of Leeds and the Thousand Islands
Re: Ombudsman's Preliminary Report dated October 2013

We represent The Corporation of the Township of Leeds and the Thousand Islands.

Thank you for providing us with a copy of your Preliminary Report following your investigation into whether members of Council held an improper closed meeting on November 16, 2012, and whether the municipality's Personnel Committee failed to give proper notice of a closed meeting on February 19, 2013.

We have now had the opportunity to review it with the municipality and wish to make the following submissions on those aspects of your Preliminary Report with which the municipality disagrees.

The nature of those areas of disagreement can be summarized as follows:

- (a) The municipality respectfully submits that you exceeded your jurisdiction by undertaking an investigation and making recommendations in respect of the Closed Meeting on November 26, 2012, for which no request for an investigation was filed by any person.
- (b) The municipality respectfully submits that you have improperly adopted your own "working" definition of what constitutes a meeting for purposes of the *Municipal Act, 2001*, that incorrectly interprets the established common law of Ontario as determined

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by the Ontario Court of Appeal, the Ontario Divisional Court and the Ontario Superior Court of Justice.

- (c) The municipality respectfully submits that you have made an incorrect finding that the gathering of members of Council on November 16, 2012 constituted a "meeting" for purposes of the *Municipal Act*.
- (d) The municipality respectfully submits that you have made an incorrect finding that the failure to give public notice of the Personnel Committee Meeting on February 19, 2013, violated the *Municipal Act*.

EXCEEDING YOUR JURISDICTION

Section 239.1 of the *Municipal Act, 2001*, (the "Act") permits a person to request that an investigation be undertaken to determine whether a municipality has complied with section 239 of the Act or its own procedural by-law before holding a meeting closed to the public. In the absence of an independent investigator appointed by the municipality, the Ontario Ombudsman is the default investigator.

Your Preliminary Report states that two complaints received allege a failure by the municipality to comply with section 239 of the Act and/or its own procedural by-law before holding meetings closed to the public. The first complaint relates to the informal gathering of members of Council on November 16, 2012; the second relates to a closed meeting of the Personnel Committee on February 19, 2013.

The municipality acknowledges that you have the lawful authority to investigate those complaints and make findings and recommendations in respect of those two meetings in accordance with the requirements of the *Municipal Act* and *Ombudsman's Act*.

Your Report indicates, however, that you also undertook an investigation of and made findings in respect of the closed meeting of Council held on November 26, 2012, for which you acknowledge you never received a complaint. Specifically, your Report opines that Council offended sections 228 and 239(7) and (8) of the Act when it asked staff to leave the closed meeting at which senior staff compensation issues were being discussed and failed to keep what you consider to be an accurate and complete record of the meeting.

In our view, sections 239.1 and .2 of the *Municipal Act, 2001*, are clear that your mandate to investigate is limited to only those matters for which a request for an investigation has been filed. It is not, in our respectful submission, an invitation for you to broaden your investigation into an examination of other meetings of Council for which there has been no complaint. In our view, to do so represents an exercise of your authority that exceeds your lawful jurisdiction under the Act and is improper. Instead, your investigation must be limited to only those meetings that were the subject of the original complaints.

For these reasons therefore, we respectfully request that your Preliminary Report be revised to remove all references and findings in respect of the closed meeting of Council held on November 26, 2012.

IMPROPER DEFINITION OF MEETING

Your Preliminary Report properly states that section 238 (1) of the Act defines a "meeting" to mean "any regular, special or other meeting of the Council, of a local board or of a committee of either of them." To better understand when a meeting has been convened, your report indicates that as part of your investigation of the Council of the City of Greater Sudbury in 2008, your office adopted the following "working" definition of what constitutes a meeting.

"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."

While your efforts to help bring greater clarity to what constitutes a meeting are commendable, we respectfully submit that you have articulated criteria and thereby developed legal tests that are not consistent with decisions of the courts of Ontario.

Indeed, an examination of your Report dated April 25, 2008, in respect of the City of Greater Sudbury suggests that, rather than embrace the findings of the various Ontario courts on what level of activity and discussion must occur before it can be said that there has been a meeting, you chose instead to make your own findings, even seeking to distinguish some of the courts' findings where they did not fit with your own views on the issue.

In our view, this approach is improper. More importantly, it has resulted in the application of tests and use of criteria for evaluating whether the gathering of Council members on November 16, 2012, constituted a meeting that are much less onerous than those articulated by the courts. Specifically, by applying your own concept of "doing the groundwork", you have concluded that a "meeting" occurred on that date when an objective examination of the facts and application of the law as defined by the courts would clearly rebut that conclusion.

Rather than your "working" definition, we respectfully submit that the proper definition of a meeting is the one articulated in the unanimous decision of the Ontario Divisional Court in *Southam Inc. et al. vs. Ottawa (City) Council* wherein the Court states:

"... a function at which matters which would ordinarily form the basis of Council's business are dealt with in such a way as to move them materially along the way in the overall spectrum of a Council decision. In other words, is the public being deprived of the opportunity to observe a material part of the decision-making process?" [Our emphasis]

At the core of the Court's definition is the notion that members of Council must not just be assembled in the same place, but must engage in a degree of discussion and activity that "materially" advances the decision-making process. In our view, it is this concept of materiality when assessing what Council is doing or discussing at a particular moment that is critical to the issue of whether a "meeting" has occurred.

Implicit in this definition is that there may indeed be some discussion or activity among the assembled members of Council related to a municipal issue, but that in itself does not mean that there has been a "meeting". The discussion must go beyond just identifying and acknowledging a particular issue that Council must ultimately decide. Instead, Council must actually delve into the substantive (i.e. material) elements of the issue.

This is consistent with the definition of "material" found in the *Concise Oxford Dictionary* to mean "significant; important: Law (of evidence or a fact) significant or relevant, especially to the extent of determining a cause or affecting a judgment".

By comparison, your "groundwork" test is much less onerous. Again, according to the *Concise Oxford Dictionary*, "groundwork" is defined to mean any "preliminary or basic work". In the context of the municipal decision-making process, it could mean the most trivial or insignificant activity or discussion, which the Ontario Courts have clearly stated does not constitute a meeting.

We therefore request that, before issuing your final report, you revisit the evidence gathered during your investigation and evaluate it in the context of the applicable law in Ontario.

INCORRECT FINDING OF A "MEETING" ON NOVEMBER 16, 2012

Your Preliminary Report reviews the evidence gathered during your investigation and arrives at the conclusion that the informal gathering of Council members on November 16, 2012, constituted a closed meeting. You arrive at this conclusion despite the repeated and consistent evidence of all of the participants that there was no material discussion of the staff compensation issue.

You have also chosen to ignore the numerous statements of the participants that the Mayor repeatedly cautioned them that it was not a properly constituted meeting and that they understood they could neither ask questions nor engage in any discussion of the issue.

Instead, you have focused on irrelevant items and discrepancies in the different individuals' recollection of various immaterial aspects of an event that took place some 6 to 8 months prior to your investigation to make findings of credibility and draw adverse inferences in order to arrive at your conclusion. Those include,

- (a) Repeatedly characterizing the room in which the members of Council gathered on November 16, 2012 as the "in camera" meeting room implying that since they gathered there then it must have been an "in camera" meeting. The room is a boardroom and, while closed meetings are held there, it is used for many other purposes. The fact that members of Council gathered in it on this particular date is completely irrelevant to the issue of whether it was a meeting, whether closed or open.
- (b) Concluding that "clearly the intent was for the participants to meet privately" while acknowledging that the boardroom door was left open. Leaving the door open is hardly consistent with an intention to meet privately.
- (c) Focusing on the Deputy Mayor's e-mail asking members of Council whether they would be "amenable to meeting" and Councillor Dickson's response confirming that "meeting" was a great idea. Irrespective of whether individuals use the word "meeting" in its generic or legal sense when talking about getting together, the issue of whether the gathering constitutes a "meeting" for purposes of section 239 of the Act depends on both its purpose and substance.
- (d) Assuming that since the Deputy Mayor and Councillor Dickson recalled the meeting lasting for as long as one-half hour, this was consistent with holding a substantive discussion, but ignoring Councillor Merkley's recollection that it lasted only a few minutes and the Mayor and Councillor Emmons having no clear recollection of how long it had lasted. Irrespective of how long the members of Council were together in the boardroom, the issue is whether the nature of the discussion among them materially advanced their consideration of the substantive issues concerning staff compensation. In the face of the other and more consistent evidence concerning the nature of the discussions, it is, in our view, improper for you to draw any inference whatsoever from the various individual's recollection of the amount of time they were together for the purpose of making your finding on the core issue of whether there was a "meeting".
- (e) Implying that the Mayor, having advised the Clerk that Council members would be getting together to "discuss a couple of things" and asking her to make copies of some documents beforehand, was compelling evidence of a meeting for purposes of the Act. Instead, your focus should be on what the Mayor and other members of Council have consistently stated in their evidence was actually discussed. As we point out below, an examination of that evidence demonstrates clearly that there was nothing about those discussions that materially advanced the decision-making process.

In our view, the answer to the question of whether there was a meeting within the meaning of the Act is answered by the consistent and repeated evidence of all of the participants on the critical issue of what was actually discussed. Those include,

- (a) The Mayor's evidence that,
- a. he had information that would be considered by Council at its next meeting that he wished to "distribute";
 - b. his assurance to the Township Clerk that "he was just distributing paperwork";
 - c. his handwritten covering memorandum that only listed the enclosed documents, identified (without comment) the issues that needed to be decided and encouraged members of Council to study the matter carefully;
 - d. his advice to "everyone present there would be no discussion" and his repeated caution that they were meeting for "just distribution purposes" and "we will not discuss it";
- (b) The Deputy Mayor's evidence that
- a. "the Mayor handed out the envelopes, and read out the contents, reviewed the historical background of the staff salary issue and noted inconsistencies surrounding the information";
 - b. "no one commented on the salary information";
 - c. "the Mayor reminded one council member who asked a question about the contents of the envelope that they were not holding a meeting on the issue"; and
 - d. "no Council business was advanced during the gathering";
- (c) Councillor Dickson's evidence that the Mayor "instructed those present not to open [the envelopes], but to take them home, as they were for discussion at a future meeting";
- (d) Councillor Emmons' evidence that "there was no discussion about [the envelope with the staff salary information]";
- (e) Councillor Merkley's evidence that
- a. "the Mayor responded to a question from one of the councillors and said there would be no discussion about the staff salary issue"; and
 - b. "the group did not discuss the staff salary issue".

Taken together, all of this uncontroverted evidence is, in our respectful submission, entirely consistent with a finding that a "meeting" as defined by the Superior Court of Justice did not take place. Given that everyone present was very aware that they could not discuss the issue and has been consistent in his or her evidence that the staff salary issue was not discussed, there is simply insufficient evidence on which you can properly conclude that the staff salary issue was "materially" advanced at that time.

Instead, all that can be said of this gathering was that the Mayor in his role as the Chief Executive Officer responsible for providing leadership to Council gathered the members of Council together for the sole purpose of distributing important documents, reminding them of the issues that needed to be considered and encouraging all of them to give the matter serious study and consideration ahead of the next Council meeting at which the matter would be discussed. In our view, those actions alone do not constitute a material advancing of the decision-making process sufficient to support a finding that there was a "meeting" within the meaning of the Act as defined by the courts.

In the words of the Superior Court of Justice, nothing that occurred on that day moved Council materially along the way in the overall spectrum of making a decision on the issue of staff compensation or deprived the public from knowing that a material part of the decision-making process had taken place. Instead, it was nothing more than a process of distributing important information together with encouragement from the Mayor that members of Council should study it carefully ahead of the meeting at which it would be discussed.

It is only when your "groundwork" test is adopted that you are able to conclude that a meeting occurred. As the Oxford dictionary definition above so clearly demonstrates, even the most modest amount of activity or discussion in respect of a particular issue could be interpreted as groundwork. Indeed, saying anything about any issue that may come before Council could, by your definition, qualify as "groundwork".

For example, an informal gathering of members of Council in the hall of the Township offices during which the Clerk approaches them, distributes their agenda packages for the next meeting and informs them that she has completed her report on a specific matter that they had requested and included it in the agenda package could, according to your "groundwork" test, qualify as a "meeting" for purposes of the Act.

In our respectful submission, your use of your own "groundwork" test rather than the "materiality" test articulated by the Ontario Superior Court of Justice has resulted in you arriving at an incorrect conclusion that the informal gathering of members of Council on November 16, 2012, constituted a meeting for purposes of the *Municipal Act, 2001*. With the greatest respect, your definition has never been adopted by the courts of Ontario and until it is, we respectfully submit that it is improper for you to apply it.

For this reason therefore, we request that you revise your Preliminary Report by applying the proper legal definition of what constitutes a "meeting" to the facts in the Leeds and the Thousand Islands Township situation. If you do, we respectfully submit that you will conclude that the gathering of members of Council on November 16, 2012, was not a meeting within the meaning of the Act.

INCORRECT FINDINGS ON THE PERSONNEL COMMITTEE MEETING ON FEBRUARY 19, 2013.

The complaint in respect of the closed Personnel Committee meeting on February 19, 2013 is that it was not publicized in advance and therefore did not comply with the municipality's procedural by-law required under subsection 238 (2) the *Municipal Act*. It is this issue of conformity with the procedural by-law that you are authorized to investigate under section 239.1 of the Act.

Section 238 (2) requires every municipality to pass a procedure by-law for "governing the calling, placing proceedings of meetings." Under subsection (2.1) "[T]he procedure by-law shall provide for public notice of meetings."

Your Preliminary Report concludes that the Personnel Committee meeting on February 19, 2013, "violated the *Municipal Act* requirements of the Act, as no public notice was given." We respectfully submit that this finding is improper because the *Municipal Act* contains no explicit requirement for the giving of public notice in respect of committee meetings. Instead, it merely requires that Council pass a procedure by-law providing for the giving of public notice of meetings.

In the case of the Township of Leeds and the Thousand Islands, its procedure by-law in effect at the time of this particular meeting was By-law No. 11-056. That by-law contained no provisions expressly requiring the giving of public notice of committee meetings. While the Procedure By-law may have been deficient in terms of what was required by section 238 (2.1) of the Act, it cannot be said that the failure to give notice of the Personnel Committee meeting violated the Procedure By-law or the *Municipal Act*.

Accordingly, the most that your investigation can conclude is that Procedure By-law 11-056 failed to comply with the *Municipal Act*; however, even that finding would now be moot because Council enacted a new Procedural By-law 13-022 on May 13, 2013 that contains explicit requirements for the giving of notice of meetings of committees as required by the Act.

We therefore request that you amend your conclusion to accord with the findings that you may make in accordance with the *Municipal Act*.

Finally, you note that the Mayor "disturbingly ... expressed some misconceptions about the application of the open meeting requirements to committees" based on his understanding of what constitutes a Committee. This is not denied, however, your finding that these misconceptions are disturbing is excessive and unnecessary.

The definition of what constitutes a committee based on the number of councillors who are members of it is a matter of legal interpretation and, while the Mayor may have been mistaken, it is hardly a mistake worthy of being characterized as disturbing. It is especially


unwarranted given that the Mayor had only held office for a few months after the incumbent had suddenly resigned mid-term.

We therefore request that you delete the word "disturbingly" in your report. It adds nothing.

As requested, we are enclosing the original copy of the Preliminary Report delivered to us in accordance with our Undertaking.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP



Timothy J. Wilkin
Professional Corporation

TJW:kj

Enclosure

cc: Mayor Frank Kinsella and Members of Council, Leeds and the Thousand Islands Township
Ms. Milena Avramovic, CAO, Leeds and the Thousand Islands Township

ⁱ 5 O.R. (3d) 726



Cunningham Swan
LAWYERS

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November 12, 2013

Mr. André Marin
Ombudsman of Ontario
Bell Trinity Square
483 Bay Street
10th Floor, South Tower
Toronto Ontario
M5G 2C9

Dear Sir:

RE: Our Client: The Corporation of the Township of Leeds and the Thousand Islands
Re: Ombudsman's Preliminary Report dated October 2013

We represent The Corporation of the Township of Leeds and the Thousand Islands.

Thank you for providing us with a copy of your Preliminary Report following your investigation into whether members of Council held an improper closed meeting on November 16, 2012, and whether the municipality's Personnel Committee failed to give proper notice of a closed meeting on February 19, 2013.

We have now had the opportunity to review it with the municipality and wish to make the following submissions on those aspects of your Preliminary Report with which the municipality disagrees.

The nature of those areas of disagreement can be summarized as follows:

- (a) The municipality respectfully submits that you exceeded your jurisdiction by undertaking an investigation and making recommendations in respect of the Closed Meeting on November 26, 2012, for which no request for an investigation was filed by any person.
- (b) The municipality respectfully submits that you have improperly adopted your own "working" definition of what constitutes a meeting for purposes of the *Municipal Act, 2001*, that incorrectly interprets the established common law of Ontario as determined

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by the Ontario Court of Appeal, the Ontario Divisional Court and the Ontario Superior Court of Justice.

- (c) The municipality respectfully submits that you have made an incorrect finding that the gathering of members of Council on November 16, 2012 constituted a "meeting" for purposes of the *Municipal Act*.
- (d) The municipality respectfully submits that you have made an incorrect finding that the failure to give public notice of the Personnel Committee Meeting on February 19, 2013, violated the *Municipal Act*.

EXCEEDING YOUR JURISDICTION

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Your Preliminary Report states that two complaints received allege a failure by the municipality to comply with section 239 of the Act and/or its own procedural by-law before holding meetings closed to the public. The first complaint relates to the informal gathering of members of Council on November 16, 2012; the second relates to a closed meeting of the Personnel Committee on February 19, 2013.

The municipality acknowledges that you have the lawful authority to investigate those complaints and make findings and recommendations in respect of those two meetings in accordance with the requirements of the *Municipal Act* and *Ombudsman's Act*.

Your Report indicates, however, that you also undertook an investigation of and made findings in respect of the closed meeting of Council held on November 26, 2012, for which you acknowledge you never received a complaint. Specifically, your Report opines that Council offended sections 228 and 239(7) and (8) of the Act when it asked staff to leave the closed meeting at which senior staff compensation issues were being discussed and failed to keep what you consider to be an accurate and complete record of the meeting.

In our view, sections 239.1 and .2 of the *Municipal Act, 2001*, are clear that your mandate to investigate is limited to only those matters for which a request for an investigation has been filed. It is not, in our respectful submission, an invitation for you to broaden your investigation into an examination of other meetings of Council for which there has been no complaint. In our view, to do so represents an exercise of your authority that exceeds your lawful jurisdiction under the Act and is improper. Instead, your investigation must be limited to only those meetings that were the subject of the original complaints.

For these reasons therefore, we respectfully request that your Preliminary Report be revised to remove all references and findings in respect of the closed meeting of Council held on November 26, 2012.

IMPROPER DEFINITION OF MEETING

Your Preliminary Report properly states that section 238 (1) of the Act defines a "meeting" to mean "any regular, special or other meeting of the Council, of a local board or of a committee of either of them." To better understand when a meeting has been convened, your report indicates that as part of your investigation of the Council of the City of Greater Sudbury in 2008, your office adopted the following "working" definition of what constitutes a meeting.

"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."

While your efforts to help bring greater clarity to what constitutes a meeting are commendable, we respectfully submit that you have articulated criteria and thereby developed legal tests that are not consistent with decisions of the courts of Ontario.

Indeed, an examination of your Report dated April 25, 2008, in respect of the City of Greater Sudbury suggests that, rather than embrace the findings of the various Ontario courts on what level of activity and discussion must occur before it can be said that there has been a meeting, you chose instead to make your own findings, even seeking to distinguish some of the courts' findings where they did not fit with your own views on the issue.

In our view, this approach is improper. More importantly, it has resulted in the application of tests and use of criteria for evaluating whether the gathering of Council members on November 16, 2012, constituted a meeting that are much less onerous than those articulated by the courts. Specifically, by applying your own concept of "doing the groundwork", you have concluded that a "meeting" occurred on that date when an objective examination of the facts and application of the law as defined by the courts would clearly rebut that conclusion.

Rather than your "working" definition, we respectfully submit that the proper definition of a meeting is the one articulated in the unanimous decision of the Ontario Divisional Court in *Southam Inc. et al. vs. Ottawa (City) Council* wherein the Court states:

"... a function at which matters which would ordinarily form the basis of Council's business are dealt with in such a way as to move them materially along the way in the overall spectrum of a Council decision. In other words, is the public being deprived of the opportunity to observe a material part of the decision-making process?" [Our emphasis]

At the core of the Court's definition is the notion that members of Council must not just be assembled in the same place, but must engage in a degree of discussion and activity that "materially" advances the decision-making process. In our view, it is this concept of materiality when assessing what Council is doing or discussing at a particular moment that is critical to the issue of whether a "meeting" has occurred.

Implicit in this definition is that there may indeed be some discussion or activity among the assembled members of Council related to a municipal issue, but that in itself does not mean that there has been a "meeting". The discussion must go beyond just identifying and acknowledging a particular issue that Council must ultimately decide. Instead, Council must actually delve into the substantive (i.e. material) elements of the issue.

This is consistent with the definition of "material" found in the *Concise Oxford Dictionary* to mean "significant; important: Law (of evidence or a fact) significant or relevant, especially to the extent of determining a cause or affecting a judgment".

By comparison, your "groundwork" test is much less onerous. Again, according to the *Concise Oxford Dictionary*, "groundwork" is defined to mean any "preliminary or basic work". In the context of the municipal decision-making process, it could mean the most trivial or insignificant activity or discussion, which the Ontario Courts have clearly stated does not constitute a meeting.

We therefore request that, before issuing your final report, you revisit the evidence gathered during your investigation and evaluate it in the context of the applicable law in Ontario.

INCORRECT FINDING OF A "MEETING" ON NOVEMBER 16, 2012

Your Preliminary Report reviews the evidence gathered during your investigation and arrives at the conclusion that the informal gathering of Council members on November 16, 2012, constituted a closed meeting. You arrive at this conclusion despite the repeated and consistent evidence of all of the participants that there was no material discussion of the staff compensation issue.

You have also chosen to ignore the numerous statements of the participants that the Mayor repeatedly cautioned them that it was not a properly constituted meeting and that they understood they could neither ask questions nor engage in any discussion of the issue.

Instead, you have focused on irrelevant items and discrepancies in the different individuals' recollection of various immaterial aspects of an event that took place some 6 to 8 months prior to your investigation to make findings of credibility and draw adverse inferences in order to arrive at your conclusion. Those include,

- (a) Repeatedly characterizing the room in which the members of Council gathered on November 16, 2012 as the "in camera" meeting room implying that since they gathered there then it must have been an "in camera" meeting. The room is a boardroom and, while closed meetings are held there, it is used for many other purposes. The fact that members of Council gathered in it on this particular date is completely irrelevant to the issue of whether it was a meeting, whether closed or open.
- (b) Concluding that "clearly the intent was for the participants to meet privately" while acknowledging that the boardroom door was left open. Leaving the door open is hardly consistent with an intention to meet privately.
- (c) Focusing on the Deputy Mayor's e-mail asking members of Council whether they would be "amenable to meeting" and Councillor Dickson's response confirming that "meeting" was a great idea. Irrespective of whether individuals use the word "meeting" in its generic or legal sense when talking about getting together, the issue of whether the gathering constitutes a "meeting" for purposes of section 239 of the Act depends on both its purpose and substance.
- (d) Assuming that since the Deputy Mayor and Councillor Dickson recalled the meeting lasting for as long as one-half hour, this was consistent with holding a substantive discussion, but ignoring Councillor Merkley's recollection that it lasted only a few minutes and the Mayor and Councillor Emmons having no clear recollection of how long it had lasted. Irrespective of how long the members of Council were together in the boardroom, the issue is whether the nature of the discussion among them materially advanced their consideration of the substantive issues concerning staff compensation. In the face of the other and more consistent evidence concerning the nature of the discussions, it is, in our view, improper for you to draw any inference whatsoever from the various individual's recollection of the amount of time they were together for the purpose of making your finding on the core issue of whether there was a "meeting".
- (e) Implying that the Mayor, having advised the Clerk that Council members would be getting together to "discuss a couple of things" and asking her to make copies of some documents beforehand, was compelling evidence of a meeting for purposes of the Act. Instead, your focus should be on what the Mayor and other members of Council have consistently stated in their evidence was actually discussed. As we point out below, an examination of that evidence demonstrates clearly that there was nothing about those discussions that materially advanced the decision-making process.

In our view, the answer to the question of whether there was a meeting within the meaning of the Act is answered by the consistent and repeated evidence of all of the participants on the critical issue of what was actually discussed. Those include,

- (a) The Mayor's evidence that,
 - a. he had information that would be considered by Council at its next meeting that he wished to "distribute";
 - b. his assurance to the Township Clerk that "he was just distributing paperwork";
 - c. his handwritten covering memorandum that only listed the enclosed documents, identified (without comment) the issues that needed to be decided and encouraged members of Council to study the matter carefully;
 - d. his advice to "everyone present there would be no discussion" and his repeated caution that they were meeting for "just distribution purposes" and "we will not discuss it";

- (b) The Deputy Mayor's evidence that
 - a. "the Mayor handed out the envelopes, and read out the contents, reviewed the historical background of the staff salary issue and noted inconsistencies surrounding the information";
 - b. "no one commented on the salary information";
 - c. "the Mayor reminded one council member who asked a question about the contents of the envelope that they were not holding a meeting on the issue"; and
 - d. "no Council business was advanced during the gathering";

- (c) Councillor Dickson's evidence that the Mayor "instructed those present not to open [the envelopes], but to take them home, as they were for discussion at a future meeting";

- (d) Councillor Emmons' evidence that "there was no discussion about [the envelope with the staff salary information]";

- (e) Councillor Merkley's evidence that
 - a. "the Mayor responded to a question from one of the councillors and said there would be no discussion about the staff salary issue"; and
 - b. "the group did not discuss the staff salary issue".

Taken together, all of this uncontroverted evidence is, in our respectful submission, entirely consistent with a finding that a "meeting" as defined by the Superior Court of Justice did not take place. Given that everyone present was very aware that they could not discuss the issue and has been consistent in his or her evidence that the staff salary issue was not discussed, there is simply insufficient evidence on which you can properly conclude that the staff salary issue was "materially" advanced at that time.

Instead, all that can be said of this gathering was that the Mayor in his role as the Chief Executive Officer responsible for providing leadership to Council gathered the members of Council together for the sole purpose of distributing important documents, reminding them of the issues that needed to be considered and encouraging all of them to give the matter serious study and consideration ahead of the next Council meeting at which the matter would be discussed. In our view, those actions alone do not constitute a material advancing of the decision-making process sufficient to support a finding that there was a "meeting" within the meaning of the Act as defined by the courts.

In the words of the Superior Court of Justice, nothing that occurred on that day moved Council materially along the way in the overall spectrum of making a decision on the issue of staff compensation or deprived the public from knowing that a material part of the decision-making process had taken place. Instead, it was nothing more than a process of distributing important information together with encouragement from the Mayor that members of Council should study it carefully ahead of the meeting at which it would be discussed.

It is only when your "groundwork" test is adopted that you are able to conclude that a meeting occurred. As the Oxford dictionary definition above so clearly demonstrates, even the most modest amount of activity or discussion in respect of a particular issue could be interpreted as groundwork. Indeed, saying anything about any issue that may come before Council could, by your definition, qualify as "groundwork".

For example, an informal gathering of members of Council in the hall of the Township offices during which the Clerk approaches them, distributes their agenda packages for the next meeting and informs them that she has completed her report on a specific matter that they had requested and included it in the agenda package could, according to your "groundwork" test, qualify as a "meeting" for purposes of the Act.

In our respectful submission, your use of your own "groundwork" test rather than the "materiality" test articulated by the Ontario Superior Court of Justice has resulted in you arriving at an incorrect conclusion that the informal gathering of members of Council on November 16, 2012, constituted a meeting for purposes of the *Municipal Act, 2001*. With the greatest respect, your definition has never been adopted by the courts of Ontario and until it is, we respectfully submit that it is improper for you to apply it.

For this reason therefore, we request that you revise your Preliminary Report by applying the proper legal definition of what constitutes a "meeting" to the facts in the Leeds and the Thousand Islands Township situation. If you do, we respectfully submit that you will conclude that the gathering of members of Council on November 16, 2012, was not a meeting within the meaning of the Act.

INCORRECT FINDINGS ON THE PERSONNEL COMMITTEE MEETING ON FEBRUARY 19, 2013.

The complaint in respect of the closed Personnel Committee meeting on February 19, 2013 is that it was not publicized in advance and therefore did not comply with the municipality's procedural by-law required under subsection 238 (2) the *Municipal Act*. It is this issue of conformity with the procedural by-law that you are authorized to investigate under section 239.1 of the Act.

Section 238 (2) requires every municipality to pass a procedure by-law for "governing the calling, placing proceedings of meetings." Under subsection (2.1) "[T]he procedure by-law shall provide for public notice of meetings."

Your Preliminary Report concludes that the Personnel Committee meeting on February 19, 2013, "violated the *Municipal Act* requirements of the Act, as no public notice was given." We respectfully submit that this finding is improper because the *Municipal Act* contains no explicit requirement for the giving of public notice in respect of committee meetings. Instead, it merely requires that Council pass a procedure by-law providing for the giving of public notice of meetings.

In the case of the Township of Leeds and the Thousand Islands, its procedure by-law in effect at the time of this particular meeting was By-law No. 11-056. That by-law contained no provisions expressly requiring the giving of public notice of committee meetings. While the Procedure By-law may have been deficient in terms of what was required by section 238 (2.1) of the Act, it cannot be said that the failure to give notice of the Personnel Committee meeting violated the Procedure By-law or the *Municipal Act*.

Accordingly, the most that your investigation can conclude is that Procedure By-law 11-056 failed to comply with the *Municipal Act*; however, even that finding would now be moot because Council enacted a new Procedural By-law 13-022 on May 13, 2013 that contains explicit requirements for the giving of notice of meetings of committees as required by the Act.

We therefore request that you amend your conclusion to accord with the findings that you may make in accordance with the *Municipal Act*.

Finally, you note that the Mayor "disturbingly ... expressed some misconceptions about the application of the open meeting requirements to committees" based on his understanding of what constitutes a Committee. This is not denied, however, your finding that these misconceptions are disturbing is excessive and unnecessary.

The definition of what constitutes a committee based on the number of councillors who are members of it is a matter of legal interpretation and, while the Mayor may have been mistaken, it is hardly a mistake worthy of being characterized as disturbing. It is especially

unwarranted given that the Mayor had only held office for a few months after the incumbent had suddenly resigned mid-term.

We therefore request that you delete the word "disturbingly" in your report. It adds nothing.

As requested, we are enclosing the original copy of the Preliminary Report delivered to us in accordance with our Undertaking.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP



Timothy J. Wilkin
Professional Corporation

TJW:kj

Enclosure

cc: Mayor Frank Kinsella and Members of Council, Leeds and the Thousand Islands Township
Ms. Milena Avramovic, CAO, Leeds and the Thousand Islands Township

¹ 5 O.R. (3d) 726