

Press Pause

Investigation into
a meeting of council for the
Regional Municipality of Niagara
on December 7, 2017

OMBUDSMAN REPORT

Paul Dubé, Ombudsman of Ontario
July 2018





ONTARIO'S WATCHDOG

1-800-263-1830

www.ombudsman.on.ca

Press Pause

GENERAL COUNSEL

Laura Pettigrew

DIRECTOR, SPECIAL OMBUDSMAN RESPONSE TEAM

Gareth Jones

COUNSEL

Joanna Bull

Lauren Chee-Hing

LEAD INVESTIGATOR

Chris McCague

INVESTIGATORS

Rosie Dear

Amanda Driscoll

Domonie Pierre

Elizabeth Weston

EARLY RESOLUTION OFFICER

Kirsten Temporale

Office of the Ombudsman of Ontario

We are:

An independent office of the Legislature that resolves and investigates public complaints about Ontario government organizations and municipalities, universities and school boards. The Ombudsman recommends solutions to individual and systemic administrative problems.

Our Values:

Fair treatment

Accountable administration

Independence, impartiality

Results: Achieving real change

Our Mission:

We strive to be an agent of positive change by promoting fairness, accountability and transparency in the public sector.

Our Vision:

A public sector that serves citizens in a way that is fair, accountable and transparent.



Ontario Ombudsman



@Ont_Ombudsman



OntarioOmbudsman



Ombudsman Report

Investigation into
a meeting of council for the
Regional Municipality of Niagara
on December 7, 2017

“Press Pause”

Paul Dubé
Ombudsman of Ontario

July 2018

Table of Contents

| | |
|---|----|
| Executive summary | 5 |
| Complaints | 7 |
| Investigative process | 8 |
| Opening and closing council meetings | 10 |
| Getting the facts straight | 11 |
| Events of the council meeting, December 7, 2017 | 11 |
| Minute by minute: How the meeting unfolded | 12 |
| To close or not to close | 13 |
| Closing the meeting | 14 |
| Clearing the room | 14 |
| The closed session commences | 15 |
| Meeting interrupted: Discovery of the recording device | 15 |
| Chaos ensues | 17 |
| Dealing with the digital recorder | 17 |
| Calling the police | 19 |
| Meeting discussions resume | 20 |
| Meeting interrupted again: Discovery of the laptop | 20 |
| The closed session closes | 21 |
| The open session resumes | 22 |
| Back in closed session | 22 |
| Open session resumes and ends | 22 |
| Meanwhile, outside council chambers | 23 |
| The citizen blogger is barred from the meeting | 23 |
| The journalist submits his notes | 23 |
| The journalist is barred from the meeting and the building | 24 |
| Return of the laptop | 25 |
| The digital recorder and the police | 26 |
| Apologies and policies | 26 |
| The law | 27 |
| <i>Municipal Act and Trespass to Property Act</i> | 27 |
| <i>Canadian Charter of Rights and Freedoms</i> | 27 |
| Freedom of expression and the right to liberty and security of the person | 28 |
| Freedom of the press | 28 |

| | |
|--|----|
| Unreasonable seizure | 28 |
| Barring from the meeting | 29 |
| Expulsions under the Municipal Act | 29 |
| Freedom of expression, freedom of the press, and the right to liberty and security of the person | 30 |
| The citizen blogger, the journalist and the Charter | 32 |
| Barring the journalist from Regional Headquarters | 33 |
| Unreasonable seizure | 34 |
| The citizen blogger | 35 |
| The journalist | 36 |
| Lessons learned | 37 |
| The power of apology | 40 |
| Seizure of items | 41 |
| Defining improper conduct | 41 |
| Chair's authority to expel | 42 |
| <i>Trespass to Property Act</i> | 43 |
| Was the meeting improperly closed to the public? | 44 |
| Resolving to close the meeting | 44 |
| Discussions about legal advice and personal matters | 45 |
| Discussion about the recording devices | 46 |
| Improvements to meeting procedures | 47 |
| Closed meeting timing | 47 |
| Audio or video recording | 47 |
| Keeping up to date | 48 |
| Locked doors | 49 |
| Opinion | 50 |
| Recommendations | 51 |
| Response | 53 |

Executive summary

- 1 What began as a regular meeting of council for the Regional Municipality of Niagara on December 7, 2017 ended as a controversial evening attracting considerable media attention and censure. While the public waited in the lobby during a private council session, regional councillors and staff hastily reacted to the discovery of a digital recorder and laptop in council chambers. By the time the public was permitted back in for continuation of the open session, regional officials had confiscated the property of a citizen blogger and a journalist, ejected both from the meeting, and the journalist from the building.
- 2 Tensions were already high when council met at 6:30 p.m., set to consider a controversial report from its Integrity Commissioner, which found a councillor in breach of the regional code of conduct. Only hours before the meeting, the councillor had informed the region that he was taking a leave of absence.
- 3 At 7:55 p.m., council began discussing the Integrity Commissioner's report and whether to go into a closed session to receive legal advice about it. During this debate, a citizen blogger left his seat at the media desk to use the washroom, leaving his digital recorder to capture anything he missed.
- 4 At 8:02 p.m., council went into closed session to get legal advice from the region's solicitor, and the public was asked to leave the room. A member of the region's staff told two journalists present that they were welcome to leave their equipment behind. One took his laptop with him; the other left his laptop on the media desk.
- 5 After a few minutes, a member of council discovered that the citizen blogger's digital recorder was running during their confidential discussion. The meeting abruptly halted, and chaos ensued as regional staff and officials scrambled to respond to the discovery, while some council members called out suggestions. In the confusion that followed, no one thought to adjourn the meeting.
- 6 The Regional Chair told staff to call the police, remove the recorder from council chambers, and bar its owner from the rest of the meeting. The Chief Administrative Officer (CAO) directed staff to remove and confiscate the device, and bar its owner from the rest of the meeting.
- 7 Once the digital recorder was removed, the confidential discussions resumed – only to be interrupted again when someone remarked that the laptop left behind by one of the journalists might also be recording the meeting. There was no evidence of this, but it didn't stop the Chair and the CAO from directing that the laptop also be removed.

- 8 The citizen blogger left regional headquarters after a heated discussion with a security guard, who informed him that his digital recorder had been confiscated. When the police arrived, a staff member informed the journalist whose laptop was removed that he had to leave the building immediately, leaving him with the impression that he would be charged with trespassing if he refused.
- 9 By the next day, the region recognized that mistakes had been made. The journalist's laptop was returned at 12:30 a.m., after counsel for his newspaper objected to the seizure. Later that day, the region issued a public apology for the "inconvenience" it caused the journalist, and the Regional Chair acknowledged that the region lacked appropriate policies and procedures to respond to such an event. The digital recorder was eventually handed to local police, but no charges were laid in connection with the recording of the private session.
- 10 My Office received 11 complaints about the regional municipality's treatment of the citizen blogger and the journalist. One of the individuals who contacted us also complained that the closed session discussions violated the *Municipal Act's* open meeting rules.
- 11 Municipalities are entitled to take steps to maintain order during council meetings and on municipal property. Under the *Municipal Act, 2001*, the Regional Chair can expel individuals from a meeting for improper conduct. The *Trespass to Property Act* allows the region to expel and bar individuals from municipal property in appropriate circumstances. Still, as a level of government that affects the rights and interests of citizens, the region has an overriding responsibility to act in accordance with the *Canadian Charter of Rights and Freedoms* when exercising these powers.
- 12 My investigation found that the region rushed to judgment by seizing the digital recorder and excluding the citizen blogger from the meeting without first questioning whether there was an innocent explanation for the recording device. In the case of the journalist, there was no evidence justifying seizure of his laptop, his exclusion from the meeting or his ejection from the building. While there may have been some valid concerns about the recording of the confidential session by the citizen blogger, the region's actions towards the journalist constitute the type of conduct that courts have consistently found to be a violation of *Charter* rights.
- 13 The region has taken steps to improve its policies and procedures in response to the incident. Its procedural by-law was amended to recognize the right of the public and the media to attend public meetings under the *Charter* and to address unauthorized recording of meetings. However, I believe that the region should do

more to recognize the seriousness of its actions of December 7, 2017, and to improve its policies and procedures relating to seizure of personal property, as well as its response to disruptive conduct.

- 14 As for the legality of the closed meeting, I have determined that regional council was discussing subjects that could be considered in closed session, but it did commit procedural errors. Our investigation also discovered that the exterior doors to regional headquarters were locked more than an hour before the meeting ended, interfering with public access to the meeting in violation of the open meeting rules. I have made recommendations to improve meeting practices in future.
- 15 Although the events of December 7, 2017 were unanticipated, they are not unprecedented in municipal administration. The region could have avoided its improvident responses to discovery of the digital recorder and laptop by having appropriate policies and procedures in place, by implementing best practices stemming from similar situations, and by exercising sound judgment.
- 16 The region was provided with an opportunity to comment on a preliminary version of this report and my recommendations. Five members of council provided their comments individually, as did the region's external legal counsel. However, through its external counsel, the region declined to respond to any of my recommendations, and regional council never met to formally consider them. In the interests of the citizens it serves and represents, I strongly encourage the region to accept and implement my recommendations, to better ensure that fairness, accountability, and proper consideration of the law guide its actions in future.

Complaints

- 17 The Regional Municipality of Niagara is one of the 10 most populous upper-tier municipalities in Ontario: Its population was 447,888 in 2016. The 12 lower-tier municipalities it encompasses are the cities of Niagara Falls, Port Colborne, St. Catharines, Thorold, and Welland; the towns of Fort Erie, Grimsby, Lincoln, Niagara-on-the-Lake, and Pelham; and the townships of Wainfleet and West Lincoln. Regional council is comprised of 31 council members, including the mayor of each of the lower-tier municipalities within the region.
- 18 In December 2017, my Office received 6 complaints about the December 7, 2017 meeting of regional council, including from a local Member of Provincial Parliament. The complainants told us that the region had improperly seized a journalist's property and expelled him from a council meeting. They also

complained that a citizen blogger's property was seized improperly. One of the individuals further complained that discussions held by council in closed session during the meeting did not fit within any of the exceptions to the open meeting rules in the *Municipal Act*.

- 19 Given the seriousness of the concerns raised in these complaints, I assigned this matter to my Office's Special Ombudsman Response Team, which is responsible for conducting all of our larger-scale and systemic investigations.

Investigative process

- 20 Since 1975, the Ontario Ombudsman has had the authority to impartially review and investigate complaints about provincial government organizations. As of January 1, 2016, the Ombudsman's authority was expanded to include municipalities, universities, and school boards as well. The Ombudsman carries out impartial and independent reviews and investigations of complaints concerning the administrative conduct of public sector bodies, including municipal councils, local boards and municipally-controlled corporations.
- 21 My role with respect to municipalities is to review and investigate complaints about municipal government administration. Elected officials are generally responsible for setting broad public policy. I do not have the authority to direct municipal council decision-making or to require municipal councils to decide matters in a certain fashion. Instead, when problems are identified, I may make recommendations to a municipality to improve its processes, as well as to strengthen local governance and accountability.¹
- 22 The *Ombudsman Act* sets out the opinions I may reach and recommendations that I may make to address maladministration. For instance, section 21 of the *Ombudsman Act* provides that after investigating a matter, I may be of the opinion that the decision, recommendation, act, or omission that I investigated:
- a) appears to have been contrary to law;
 - b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory;
 - c) was based wholly or partly on a mistake of law or fact; or

¹ The Ombudsman does not have the authority to investigate complaints about municipal police forces. During this investigation, we reviewed the actions of the Regional Municipality of Niagara with respect to engaging the Niagara Regional Police Service. The actions and decisions of the police are beyond the scope of my investigation.

d) was wrong.

- 23** I also have broad authority to make recommendations based on my opinion, including:
- a) that the matter should be referred to the appropriate authority for further consideration;
 - b) that the omission should be rectified;
 - c) that the decision or recommendation should be cancelled or varied;
 - d) that any practice on which the decision, recommendation, act or omission was based should be altered;
 - e) that any law on which the decision, recommendation, act or omission was based should be reconsidered;
 - f) that reasons should have been given for the decision or recommendation; or
 - g) that any other steps be taken.
- 24** I am also the Closed Meeting Investigator for the Regional Municipality of Niagara. Under the *Municipal Act, 2001*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions. The *Act* gives citizens the right to request an investigation into whether a municipality has complied with the *Act* and its own procedure by-law in closing a meeting to the public.
- 25** Section 14.1(7) of the *Ombudsman Act* provides that if I am of the opinion, after completing an investigation, that the meeting appears to have been closed contrary to the *Municipal Act* or a procedure by-law, I shall report my opinion, and the reasons for it, to the municipality and may make such recommendations as I think fit.
- 26** In this case, I reviewed complaints about the December 7, 2017 meeting of regional council as part of my general authority over municipalities. I also reviewed whether the closed sessions of the meeting complied with the open meeting rules, in my capacity as Closed Meeting Investigator.
- 27** On December 14, 2017, I advised council for the Regional Municipality of Niagara of my intention to investigate the events of December 7, 2017.
- 28** After announcing my investigation, my Office received an additional **5** complaints about the December 7 meeting.
- 29** The investigation was conducted by four investigators from our Special Ombudsman Response Team, assisted by members of our Legal team, one Investigator, and two Early Resolutions Officers. We obtained and reviewed

relevant documentation, including meeting documents, emails and text messages. We reviewed the region's video of the open meeting, relevant building security videos, as well as a portion of the audio recording of a closed session captured on the digital recording device left in council chambers by the citizen blogger. Privileged information was redacted from the recording by the region before a copy of the recording was provided to my Office. The region does not make audio or video recordings of its closed meetings.

- 30 We interviewed 13 staff members and the 28 members of council who attended the December 7 meeting, as well as 11 other witnesses. We travelled to the region to conduct in-person interviews and to tour regional headquarters. We also reviewed meeting and security practices of other Ontario municipalities to identify best practices.
- 31 The region co-operated with our investigation by providing requested documents and making staff and elected officials available for interviews.
- 32 Consistent with the requirements of s.18(3) of the *Ombudsman Act* and my Office's practice in all formal investigations, the region was given an opportunity to review and respond to my findings and recommendations. Council members and senior regional staff were given the chance to review confidential copies of a preliminary version of this report between June 12 and June 29, 2018. We received responses from five individual council members and from the region's external counsel. These responses were considered in the preparation of this final report, and are summarized in the Response section.

Opening and closing council meetings

- 33 Before reviewing the events relating to the council meeting of December 7, 2017, it is helpful to consider some of the basic procedural requirements for council meetings. The *Municipal Act, 2001* provides that council must hold meetings open to the public, except where the subject discussed fits within one of 14 limited exceptions.² Before holding a closed session, also called an *in camera* meeting,³ council must pass a resolution stating the fact of the closed meeting and the general nature of the matter to be considered. The municipal clerk or their delegate must keep a record of the closed meeting. Voting in a closed meeting is not permitted, except for procedural reasons or to give direction to staff or officers.

² *Municipal Act, 2001*, SO 2001, c 25, s 239.

³ The phrase "*in camera*" is a legal term that means "in private."

- 34 The agenda for the December 7, 2017 regular public meeting of council set out 21 items, including a closed session after “other business” to consider certain committee reports.

Getting the facts straight

- 35 The region’s video of the public meeting provided helpful information about some events. However, in this case, many significant events and discussions took place during closed session. The only recording of the closed session available was retrieved from the citizen blogger’s digital recorder, which captured a limited portion of the discussion before it was turned off. Other events unfolded outside of council chambers. Accordingly, in piecing together what happened in closed session and its aftermath, we relied heavily on witness interviews. As many witnesses had conflicting recollections, we considered several factors in assessing the evidence and arriving at an understanding of the relevant facts. For instance, when a majority of witnesses confirmed a sequence of events that aligned with a timeline we could independently verify, such as through review of security video, we tended to accept that version.
- 36 In our account of the incident in this report, we refer to the actions and decisions of some members of senior staff. This is to ensure that the facts are clear, given the complexity of the narrative. We do not identify individuals by name, but only by title, as the focus of our investigation was not on the actions of any one person, but rather on the decisions, acts, and omissions of the region as a public sector body.

Events of the council meeting, December 7, 2017

- 37 Regional staff and council members told us they knew in advance that the regular council meeting scheduled for 6:30 p.m. on December 7, 2017 might be controversial. The agenda included consideration of a report by the region’s Integrity Commissioner, which found that a councillor had violated the code of conduct and recommended he be reprimanded by council. The person who had complained about the councillor had also requested to speak at the meeting. To add to the tension, regional staff notified council that afternoon that the councillor had taken a leave of absence.
- 38 Council meetings are held in council chambers at regional headquarters in Thorold. They are streamed live online. Witnesses who were present at the meeting told us that the public gallery was fairly full on the evening of December

7, with estimates ranging from 60 to 80 people. Some members of council described a heightened sense of activity in council chambers that night.

- 39** Council members sit around a horseshoe made up of two rows of desks, each at a seat labeled with their name. Of the 31 members of regional council, three councillors were absent on December 7, including the one who was the subject of the Integrity Commissioner's report. Across the top of the horseshoe sat the Regional Chair, flanked by regional staff. Senior staff at the meeting included the region's Chief Administrative Officer (CAO), Acting Clerk, General Manager, and in-house solicitor. Two Acting Deputy Clerks were also present to take minutes.
- 40** There were three people sitting behind the councillors' horseshoe, at a desk that the region reserves for members of the media. One was a citizen blogger, while the other two were journalists with local newspapers. The region's video of the open session of the meeting shows several items on the media desk at the start of the meeting, including a camera with a large lens sitting atop a black hat and what might be a scarf, a small recording device, glasses of water, laptops, pads of paper, and pens. The citizen blogger told us that he has difficulty writing because of a disability, so he digitally records meetings. The region permits members of the public to record meetings, although its procedural by-law states that those using a recording device during a meeting may not do so in a way that disrupts or obstructs the meeting.⁴
- 41** A security guard on contract with the region was also at regional headquarters that night. He told us that no one had ever given him explicit instructions about his role during council meetings or with respect to closed sessions, but he understood that he was there to ensure no one became unruly or disrupted the meeting.⁵

Minute by minute: How the meeting unfolded

- 42** The Regional Chair called the meeting to order at 6:31 p.m. After some opening preliminaries, council voted to allow the member of the public who had made the code of conduct complaint about the councillor to address council. She began speaking just before 7:30 p.m., after other agenda items had been considered.

⁴ The Regional Municipality of Niagara, by-law No 120-2010, *Procedural By-law*, s 2.7.

⁵ In response to the preliminary version of this report, the region's external counsel indicated that the Acting Clerk had provided direction to the security guard, including that he was to stand outside the door during a closed meeting and place a sign saying the meeting was closed. However, the guard told us that he was never given instructions relating to closed meetings by the region, and instead he pieced his role together based on his experience in other municipalities. The guard told us that he found the sign and decided to place it by the door himself, rather than on the instruction of any regional staff.

She urged council to impose sanctions beyond those recommended by the Integrity Commissioner, including barring the councillor from committees and a financial penalty. Several councillors asked questions and made comments, and one council member said a motion would be brought forward later in the meeting to propose sanctions.

- 43 At approximately 7:55 p.m., the Chair called for a mover and seconder for council to receive the Integrity Commissioner's report. Before calling for a vote, the Chair asked the region's in-house solicitor to comment on the matter. The solicitor responded that, if council was seeking legal advice, it should be discussed in closed session because it involved an identifiable individual.⁶

To close or not to close

- 44 The Chair consulted with the CAO and the Acting Clerk, asking whether council should require members of the public to leave the room so that it could meet with the solicitor in private. Council members told us that the region normally tries to hold closed sessions at the end of council meetings to avoid inconveniencing the public. The Chair asked if the item could be moved to the closed session that was scheduled for later that evening.
- 45 Two councillors suggested that council receive the report and allow related motions to be made in public, as council could close the meeting afterwards if needed to receive legal advice. The Chair responded that they needed to check with the solicitor and expressed concern about the nature of the discussion taking place.
- 46 The Chair then asked the solicitor again for her advice. She stated that she was prepared to provide advice about an identifiable individual and recommended council go into closed session before dealing with the motion relating to the Integrity Commissioner's report. Council continued to discuss whether a motion should be made regarding penalties arising from the Integrity Commissioner's report before going into closed session.
- 47 On the audio recording captured by the citizen blogger's device, a door can be heard opening and closing near the media desk while council was talking. The citizen blogger, who could be seen earlier on video sitting at the media desk, told us that he left council chambers to use the washroom during this discussion, and that council had not yet decided whether to close the meeting. He also told us that he left his digital audio recorder running on the desk to avoid missing part of

⁶ One of the discretionary exceptions that council can use to close its meetings to the public applies when the subject matter to be considered is "personal matters about an identifiable individual, including municipal or local board employees." (*Municipal Act, 2001*, SO 2001, c 25, s 239(2)(b))

the meeting. He said that when he left the room, his camera was sitting atop his hat and scarf, and his recorder was in plain sight on the desk.

Closing the meeting

- 48 After further discussion about how council should consider the Integrity Commissioner's report, the Chair acknowledged an "appetite" for council to go into closed session and invited a motion to close the meeting. The motion was moved and seconded. Neither the Chair nor the moving or seconding councillors can be heard stating what council was to discuss in closed session, or which exceptions to the open meeting requirements council relied on to close the meeting. The meeting minutes indicate that the meeting was closed to receive legal advice regarding the Integrity Commissioner's report.⁷ However, council members had differing recollections of which exception(s) were actually relied on to close the meeting.⁸
- 49 The motion to go into closed session was carried at 8:02 p.m. This was not a scheduled closed session.
- 50 The Chair apologized to the people in the public gallery, stating that council was going into a closed meeting to receive legal advice and would invite them to return after it ended.

Clearing the room

- 51 It took approximately two and a half minutes to clear the room for the closed meeting. Members of the public left the gallery. Video from the region's security cameras shows that some people left the building, while others stayed to wait in the main lobby outside council chambers.
- 52 Council members told us that they chatted to one another and to staff as the room was emptying. One remembers stepping out to make a phone call. A member of staff told us he went to the audio/video booth to confirm that the meeting video was no longer streaming online.
- 53 According to regional staff, no instructions were given to the public about leaving items in the room. The region's security guard told us he has never been instructed to check the room for belongings, or to ensure that all members of the public have left the room. Instead, when he hears the Chair announce a closed

⁷ Council may close a meeting to consider "advice that is subject to solicitor client privilege." (s.239(2)(f))

⁸ We were told variously that the exceptions relied upon were: Personal matters about an identifiable individual (s.239(2)(b)), labour relations or employee negotiations (s.239(2)(d)), and/or advice subject to solicitor-client privilege (s.239(2)(f)).

session, he moves outside of the chamber doors and places a sign near the door that advises the public not to enter during the closed session.

- 54 Members of council told us they presume that the Clerk checks that the room is cleared, but that this is not a formal practice. The Acting Clerk told us that he checked the gallery that night to confirm that everyone had left before the closed session. In interviews, members of council told us that journalists usually leave their equipment on the media desk during closed meetings, and staff confirmed that there is no check done of the desk prior to a closed session. One staff member told us he noticed the citizen blogger's camera hanging slightly off the end of the desk, so he pushed it back onto the desk while walking past.
- 55 A senior staff member told us that he advised the two newspaper journalists that they could leave their belongings on the media desk, and that it would not be a very long closed session. One journalist told us he replied that he was leaving for the night, so he took his things and left the room. The other left his laptop open on the desk, with its case and his notes. He told us he left his computer in the room because he had a good connection to the Internet and did not want to lose it, as he would need to upload his story later that evening. Members of council told us that it is normal for members of the public and journalists to leave belongings in chambers. There was nothing unusual about the journalist leaving his computer in chambers when council went into closed session.
- 56 The citizen blogger was still out of the room when council resolved to go *in camera*. His belongings, including the digital audio recorder, remained on the media desk. This recorder captured a portion of the closed session, which assisted us in understanding what occurred during those few minutes.

The closed session commences

- 57 The closed session began at 8:05 p.m. During the first two minutes of the session, the region's solicitor provided legal advice. At 8:07 p.m., the CAO can be heard on the audio recording asking all non-essential staff to leave the room, noting that the only staff who should remain were those working in legal services and human resources.

Meeting interrupted: Discovery of the recording device

- 58 Shortly after staff were asked to leave the room, someone can be heard on the audio recording pointing out that they needed a clerk. Witnesses who were present at the closed session told us that the two Deputy Clerks left the meeting, and the Acting Clerk took over as the minute-taker. On the recording, someone can be heard saying that the Acting Clerk was "now on duty."

- 59** Council members told us that during the shuffle while some staff were leaving the room, they noticed a member of the public re-enter to retrieve a cell phone from his coat.⁹ We spoke to this individual, who told us that the security guard was not standing at the door to chambers when he entered, but that as he exited, the guard told him he could not come back into the room.
- 60** Some councillors recalled that after seeing this person retrieve his phone, they discussed whether a device like a cell phone could be recording the closed session. One councillor told us that, as staff were leaving the room, he walked behind the row of seats near the media desk, and noticed that a considerable number of personal items had been left behind.
- 61** On the audio recording, at 8:08 p.m., one councillor can be heard saying, “I’ve found a recording device that they’ve left on.” He can be heard telling someone nearby that the device was “under his hat.” A councillor told us that he lifted a hat on the media desk and found the recording device underneath it. He could not explain precisely why he did so, but said he became suspicious about the possibility of someone recording the session.
- 62** Two councillors told us they saw the councillor lift the hat and find the device, and six other council members said they saw the councillor holding a hat. While three council members recalled seeing the hat covering the device, another recalled that the device was on the desk with nothing on top of it. Seven council members told us they did not see the hat or the recording device, but noticed activity around the media desk and heard comments about a recording device. The volume of some voices captured on the recording increases around the point when the device is discovered. This could be due to various factors, including the fact that some individuals had moved closer to the device at that point.
- 63** There is no conclusive evidence that the increase in volume was attributable to a hat or other object being lifted off the device. In any event, nothing turns on whether or not the recording device was under the hat prior to its discovery. My investigative focus was not on whether the recording device was concealed by a hat, but rather on the region’s response to its discovery.
- 64** One council member recalled walking over to look at the device immediately after it was discovered, and seeing a red light, indicating that the device was

⁹ Four individuals we interviewed told us that the member of the public entered council chambers later in the meeting, after the discovery of the recording device. However, five people we interviewed, including the member of the public involved, told us that he entered at this point in the evening. Further, on the audio recording, someone can be heard saying, “...his phone back” at this point in the meeting, which may be a reference to the member of the public.

recording. Another councillor who sits close to the media desk told us that he also approached the desk, lifted the device and put it back down. He remembers advising the CAO that the meeting should be stopped.

Chaos ensues

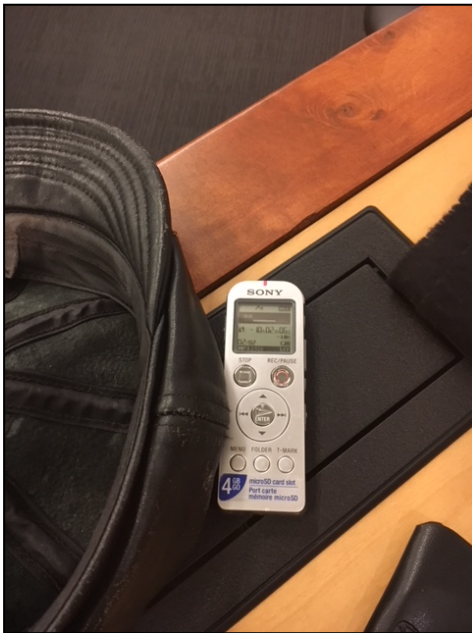
- 65 The Chair told us that when the device was found, he stopped the meeting and the regional solicitor stopped providing legal advice. Councillors began talking all at once, offering suggestions and comments. Some described the situation as “a circus,” “pandemonium,” or “chaos.”
- 66 On the audio recording, some statements made close to the recording device can be heard clearly, but many others cannot be made out in the jumble of voices.
- 67 A council member can be heard interrupting the discussion to tell the CAO: “A recording device was left on in here – under a hat.” Someone can be heard saying, “Get security,” followed by the CAO saying: “Please, let’s take control here. Sir, advise security... Please don’t touch the equipment. Let’s get control here...” The CAO called for the security guard to be brought into council chambers.

Dealing with the digital recorder

- 68 The security guard, who was out in the lobby at this time, remembers the Acting Clerk coming out to ask him to come into council chambers, as there was an issue. He was told a device was recording. The guard remembers seeing a number of belongings at the desk where the recorder was found, including a coat, hat, and large camera. He saw that the device was actively recording, indicated by a red light. Three members of council also recall seeing the red light on the recorder.
- 69 On the audio recording, the CAO can be heard saying: “Sir... I’m going to ask you to take all the equipment that the Clerk’s gonna show you, too. Ask who is the individual who belongs to that. Please do not let that individual back in this room for the rest of the evening.” The CAO can be heard saying that he wants to know the name of the person who owns the equipment.
- 70 The Acting Clerk told us that the CAO instructed him to check out the device. On the audio recording, councillors can be heard saying, “Take a picture.” The Acting Clerk told us he walked over to the media desk, confirmed that the device was recording, and took a picture of it with his phone. This photo, and others we obtained in this investigation, can be found on p. 18.



*Photos, from top left:
(1 and 2) Two views of Niagara regional council chambers, facing and from the chair. (3) The media desk. (4) December 7, 2017 – photo of the citizen blogger’s recording device, taken by the Acting Clerk (para 70). (5) December 7, 2017, 8:44 p.m., Niagara Regional Police, the General Manager and the journalist – photo taken by a member of the public (para 105). All other photos taken by Ombudsman staff during our investigation.*



- 71 On the audio recording, the Acting Clerk and the security guard can be heard clarifying which items the guard was to remove. The guard asks: “You want to return all the property, including this?” The Acting Clerk then states to the room: “The first question and the reply may have been recorded.” The CAO replies: “Alright, then confiscate the...,” and the Acting Clerk can be heard saying: “Alright, confiscate it. Tell them we’ll give it back to them...”¹⁰ At this point, the Acting Clerk turned the recorder off. The audio recording on the device ended at 8:11 p.m.
- 72 The security guard told us that he was instructed to tell the digital recorder’s owner that it had been “seized by the Clerk,” to emphasize that he was not seizing it himself. He said he began to gather all of the other belongings left behind by the public and media in chambers, as directed by regional staff.
- 73 The Acting Clerk told us that after turning off the recorder, he took it to his office and locked it in a drawer. Two individuals told us they thought the Acting Clerk had the recorder with him in council chambers later in the meeting, but the Acting Clerk said it remained locked in a drawer for the night. The Acting Clerk said he returned to the meeting after locking up the recorder.
- 74 Regional staff told us they believed that the meeting was “paused” or “in limbo” during this time, as the Acting Clerk was not in his seat taking minutes. The region’s solicitor recalls the Chair saying that, as they were without a Clerk, the meeting was paused. Councillors told us they talked to each other, but the regional solicitor said there was no discussion amongst council as a whole. Council did not resolve to adjourn or come out of closed session, and the chambers doors remained closed.

Calling the police

- 75 One councillor told us that he suggested they should call the police. Two other council members recall other voices echoing the suggestion to call the police. No mention of the police can be heard on the audio recording, but many people are speaking at once in the room, making some statements inaudible. The Chair recalled asking that the device be removed, saying the owner could not attend the rest of the meeting, and agreeing with the suggestion to call the police. The CAO recalled the Chair directing staff to call the police and to ensure the owner of the equipment did not return to the meeting.

¹⁰ In response to the preliminary version of this report, the region’s external counsel submitted that the CAO did not direct staff to “confiscate” any device. However, the audio recording of the closed meeting that we reviewed captures the CAO directing staff to “confiscate” the recording device, after the Acting Clerk indicated that it may have recorded a portion of the closed session discussion.

- 76 The CAO told us that he stood up to go and call the police, but the Chair stopped him, as he was needed in the meeting, and suggested that the General Manager call instead. The General Manager remembers the Chair telling him to call the police, which he left the room to do. The General Manager told us that the CAO also directed him to have the owner of the device removed from the premises.
- 77 The General Manager called the Niagara Regional Police at 8:13 p.m. Police records provided to our Office indicate that the caller said that a member of the public was illegally recording information in council chambers, using a device found under a hat. The notes state that the individual's name was unknown. In an incident report prepared shortly after the meeting, the General Manager recalled identifying the citizen blogger by name, and stating that the region wanted police to remove the device, press charges for illegally recording a council meeting, and remove the individual from the premises.
- 78 The General Manager told us he went out into the lobby after calling the police to tell the security guard they were on the way. He then returned to the meeting.

Meeting discussions resume

- 79 Eight council members recalled that at some point after the recording device was turned off, the closed session discussions briefly resumed. Recollections of the length of the discussion ranged from 30 seconds to 15 minutes. At least four council members did not recall resuming the discussions before the focus turned to another electronic device in the room.

Meeting interrupted again: Discovery of the laptop

- 80 Although recollections varied as to whether meeting discussions resumed and if so, for how long, everyone we interviewed recalled that attention was called to a laptop on the media desk. In our interviews, council members told us someone pointed out that a laptop computer on the media desk was "on," though no one was sure who first mentioned it. This revelation sparked discussion amongst the council members about the possibility that the laptop could also be recording the closed meeting.
- 81 The security guard, who was still in chambers gathering belongings from the public gallery, told us that many people in the room were talking at once, with council members calling out suggestions and asking questions, like "What do we

do?”¹¹ He recalled hearing someone comment about the laptop on the media desk, but said he was not instructed to do anything with the laptop and did not touch it.

- 82** A councillor and a staff member each told us they looked at the laptop and confirmed it was on. However, none of the witnesses we interviewed saw any evidence to suggest the laptop was recording.
- 83** Several councillors and staff told us that although individual council members were commenting on the situation, council as a whole did not make any decisions or direct staff with respect to the recording device or the laptop. Some councillors explained they believed that staff members were making decisions about the situation. According to all present, no one asked the regional solicitor for advice.
- 84** The Chair told us that he directed that the laptop be removed and that anyone who was recording shouldn't be permitted back into the meeting. The CAO told us he asked the Acting Clerk to remove the laptop from the room.¹² The Acting Clerk, who had returned from putting the digital recorder in his office, confirmed that he removed the laptop. The Acting Clerk told us that, upon his return to council chambers, the CAO told him that they would have to remove the journalist as well as the blogger. The Acting Clerk recalled that when he asked why the journalist had to be removed, the CAO responded that both device owners had to leave because it wasn't known who had done what.

The closed session closes

- 85** Council members and the staff who remained in council chambers told us the closed meeting discussion continued after the laptop was removed. The region's solicitor confirmed that, when the meeting recommenced, she provided council with legal advice. Others who were present said a member of regional staff also answered personal questions relating to the councillor's leave. They told us council did not reach consensus or make any decisions during the closed session, but most believed consideration of the Integrity Commissioner's report would be deferred until the councillor in question returned from leave.

¹¹ In response to the preliminary version of this report, the region's external counsel commented that the security guard was not in council chambers when the laptop was discovered. They did not provide a source or any evidence for this statement. The guard himself told us that he was present when the laptop was discovered, and had a clear memory of councillor's statements related to that discovery.

¹² In response to the preliminary version of this report, the region's external counsel noted that the CAO believed he was carrying out the Chair's directions when he instructed staff with respect to the devices and ejections from the meeting.

- 86 The closed session minutes indicate that council moved back into open session at 8:58 p.m.

The open session resumes

- 87 With the public back in the room, the Chair apologized for breaking up the open session and explained that council would not be addressing the Integrity Commissioner's report. However, one councillor stated that an earlier motion regarding the report should still be addressed.
- 88 After some discussion relating to this issue, a resolution to close the meeting again passed at 9:02 p.m. As with the prior motion, the resolution did not indicate what council would discuss in the closed session or which exception it relied upon to close the meeting. The meeting minutes state that council closed the meeting to discuss advice subject to solicitor-client privilege with respect to the Integrity Commissioner's report. Staff told us that when council went into closed session this second time, they "did a sweep of the room" to ensure that all members of the public had left.

Back in closed session

- 89 Council members told us that once they were in closed session again, they discussed some of the legal advice provided during the first closed session, and how it related to the Integrity Commissioner's report.
- 90 The minutes indicate that the closed session ended at 9:06 p.m. and the public meeting resumed.

Open session resumes and ends

- 91 Back in open session, council voted to withdraw the motion brought forward concerning the Integrity Commissioner's report, then passed a motion to defer consideration of the report until the relevant councillor returned. The Chair stated that the decision was based on the legal advice received *in camera*.
- 92 There was no mention during the remainder of the open meeting about the events relating to the recording device, the laptop or their owners.
- 93 According to the minutes, the meeting adjourned at 9:45 p.m.¹³ In an incident report written shortly thereafter, the CAO stated that he directed the Acting Clerk

¹³ Although the meeting agenda listed a closed session near the end of the meeting, according to the region's video of the meeting and the minutes, council did not close the meeting again that evening.

to secure the journalist's notes, which were left on the media desk.

Meanwhile, outside council chambers...

- 94 While council was dealing with the discovery of the digital recorder and laptop and conducting the closed session in fits and starts, there was considerable related activity occurring outside of council chambers.

The citizen blogger is barred from the meeting

- 95 The citizen blogger told us that as he left the bathroom, he saw the security guard holding his coat, hat, scarf, camera, and empty digital recorder case. The guard told us he asked the citizen blogger whether the items were his, and, with this confirmed, told him the region had confiscated the digital recorder, which was in the possession of the Acting Clerk. The guard told us the citizen blogger then accused him of stealing his property, and started taking pictures of him.
- 96 The citizen blogger confirmed that the guard returned his belongings, other than the digital recorder. He also told us that the guard explained he was "barred" from going back into council chambers to observe the rest of the meeting. Security video shows the citizen blogger leaving the building at 8:22 p.m. and then returning briefly before departing again at 8:24 p.m.

The journalist submits his notes

- 97 When the Acting Clerk came out of the closed meeting with the laptop, the journalist it belonged to was waiting with other members of the public in the lobby. According to the journalist and the Acting Clerk, the Acting Clerk apologized, saying he had been told to take the computer, and the journalist could get it back in the morning. The journalist asked if he could send his notes and a partially completed story to his editor before his laptop was taken, and the Acting Clerk permitted him to do so in the Clerk's office.
- 98 The Acting Clerk went to one of the Deputy Clerks in the lobby and asked her to stay with the journalist while he sent an email to his editor. The Deputy Clerk recalled that the Acting Clerk explained that the laptop had been in the closed meeting, introduced her to the journalist, and said the region would be "hanging on to the computer" after the journalist sent his email. The Acting Clerk then returned to council chambers.
- 99 The journalist and Deputy Clerk went into an office area off the lobby where he could email his editor. The journalist made a two-minute phone call to his editor at 8:24 p.m. to update him on the situation, and sent his email at 8:27 p.m. The

Deputy Clerk then put his laptop in her office, which is in the secured area by the Clerk's office. Both she and the journalist returned to the lobby to wait for the open meeting to resume.

The journalist is barred from the meeting and the building

- 100** Two police officers arrived at regional headquarters at 8:37 p.m. They recalled the security guard escorting them in, as the external doors to the building were locked. The General Manager told us a member of staff came into council chambers to tell him that the police had arrived, and he left to meet them. He said he told the officers that the region found a device recording a closed meeting, and it wanted the citizen blogger to be removed from the premises for the evening. The security guard told him the citizen blogger had already left the building, and he recalled the police officers telling him that the region should hold on to the recorder and they would return in the morning to "secure the evidence." The officers remember being told that a recorder was found under a hat, that the region had seized it, and that the citizen blogger had left the building after being asked to do so. According to the police, staff told them they planned to return the recorder to the citizen blogger the next day.¹⁴
- 101** The General Manager told us that the CAO came out of chambers while he was talking to the police, saying that the journalist "has to go, too." The General Manager told us he was confused about why the journalist had to leave, and asked the CAO to confirm this direction, which he did. The General Manager told us he assumed something else had been found in chambers in his absence.
- 102** The CAO told us that he understood the Chair's direction was to bar both the citizen blogger and the journalist from the meeting, so he instructed the General Manager accordingly. He told us that he did not intend for them to be removed from the building, but he understood that his direction could have been interpreted that way.
- 103** The police officers told us that the General Manager said another individual had been found recording the meeting on his laptop. According to police, the General Manager pointed to the journalist and said, "we want him removed." The officers told us they suggested staff talk to the journalist directly and ask him to leave, which the General Manager did in a calm manner. The police said they stood 10 to 15 feet away during that conversation.

¹⁴ In response to the preliminary version of this report, the region's external counsel stated, without citing a specific source, that the police were directing and advising staff how to handle the recording device. However, we spoke directly to the police officers involved during our investigation and our report reflects their account of the incident.

- 104 The General Manager told us that he had to confirm the journalist's identity by asking another staff member. He then approached the journalist and introduced himself. He told us he didn't realize that the police officers were standing behind him while he talked to the journalist, and that when he realized they were there, he said: "We don't want to deal with these guys." He told us that he said this "in a joking manner."
- 105 The journalist's recollection of the comment differs. He recalls the General Manager saying: "If you don't go now, you'll have to deal with these two gentlemen." The police officers' recollection accords with the journalist's: They told us the General Manager said something along the lines of, "If you don't leave, you'll have to answer to these two guys back here."¹⁵ A photo taken during this conversation, at 8:44 p.m., shows the two officers standing behind the General Manager while he spoke to the journalist (see p. 18).
- 106 The journalist told us he asked if he could call his office, but the General Manager said no, he had to leave immediately. He recalled that the officers did not speak to him, and no one explained who had made the decision or what authority supported his removal. He told us that, given the police presence and the General Manager's comment, he was under the impression that if he did not leave the building, he would have been charged with trespassing.
- 107 The journalist can be seen on the region's security footage leaving the building at 8:46 p.m. The police officers are shown leaving a minute later. They did not take the digital audio recorder or the laptop with them.

Return of the laptop

- 108 After the meeting finally ended, approximately eight members of council and regional staff went to a local restaurant to socialize. The Chair told us that around 11 p.m., he got a telephone message from a lawyer acting for the journalist's employer, asking for the return of the laptop. The Chair, CAO and Human Resources Director, who were all at the restaurant, discussed the situation. Other regional staff who were not present at the restaurant, including the solicitor, also spoke by phone about the situation. The Chair told us he didn't realize the region had kept the laptop, and directed that it be returned. Two members of regional staff met the journalist at the regional headquarters and returned the laptop and the journalist's notes around 12:30 a.m.

¹⁵ In response to the preliminary version of this report, the region's external counsel submitted that we should be mindful of the fact that the police were standing 10 to 15 feet behind regional staff during this exchange when considering the police officers' recollections of the incident. We do not have any reason to doubt the veracity or accuracy of the statements made to us by Niagara Regional Police.

The digital recorder and the police

- 109 The Acting Clerk and the General Manager told us they went to the local police station the morning after the meeting, intending to pursue charges against the citizen blogger and give police the recording device. They said they were told the attending officer would not be on duty until later that evening.
- 110 At 1:38 p.m., the Acting Clerk sent an email to the police, stating again that the region wanted to provide the recorder to them. He sent a second email at 6:22 p.m. to say he was taking the recorder home, and asked the police to call him to arrange for its delivery. Around 8 p.m., the officer contacted the Acting Clerk to say that the investigative unit would follow up with the region on Monday, December 11.
- 111 The Acting Clerk said he took the recorder back to regional headquarters around 10 p.m. that evening. Finally, on December 12, a police officer went to regional headquarters and took possession of the recorder
- 112 To date, no charges have been laid by police with respect to this incident.

Apologies and policies

- 113 It did not take long for the region to signal its regret for the way the events of December 7 unfolded. The region issued a public statement the next day, in which it apologized for “the inconvenience” caused to the journalist. The Chair told us he called the journalist on Sunday, December 10, and apologized. He also acknowledged that the region lacked some policies and procedures that needed to be put in place.
- 114 Several regional staff and council members, including the CAO, told us they also personally apologized to the journalist.
- 115 In an email to all members of council on December 10, the CAO wrote that the region was working on a media policy that would allow only accredited journalists to access the media area. He wrote that the region’s response to the incident on December 7 was “not what it should have been,” but that “stopping the meeting, as was done, was a prudent course of action.” The CAO also wrote that “decisions around the removal of electronic devices were miscommunicated amongst staff,” and noted that he had been in council chambers and not observing the events in the lobby.

The law

- 116 Seizing personal property, barring individuals from a council meeting, and requiring that a member of the public leave municipal property are serious steps. The region has since acknowledged with hindsight that its response to the events of December 7, 2017 could have been handled differently. Still, it is important to consider its actions in light of the relevant law, including the *Municipal Act, 2001*,¹⁶ the *Trespass to Property Act*,¹⁷ and the *Canadian Charter of Rights and Freedoms*.¹⁸
- 117 Under the *Ombudsman Act*, one of the opinions that I may reach is that a decision, recommendation, act, or omission appears to have been contrary to law. Accordingly, in arriving at an opinion on a matter under investigation, I must consider relevant laws, including the *Charter*. While I consider the *Charter* and may make recommendations for corrective action, I cannot – and do not purport to – impose *Charter* remedies.

Municipal Act and Trespass to Property Act

- 118 As the head of council, the Regional Chair has the authority under the *Municipal Act, 2001*, to “expel any person for improper conduct at a meeting.”¹⁹ The CAO also has the authority under the *Municipal Act* to exercise general control and management of the affairs of the municipality for the purpose of ensuring its efficient and effective operation.²⁰ In some cases, that authority can be used to exclude individuals from municipal property. The *Trespass to Property Act* generally permits the occupier of land, or an authorized person, to direct that individuals leave the premises immediately. Failing to leave immediately when directed to do so is a provincial offence.²¹

Canadian Charter of Rights and Freedoms

- 119 Municipalities, like other levels of government, must respect the rights and freedoms protected by the *Charter*. *Charter* rights are only subject to such

¹⁶ *Municipal Act, 2001*, SO 2001, c 25.

¹⁷ *Trespass to Property Act*, RSO 1990 c T21.

¹⁸ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, c 11.

¹⁹ *Supra* note 16, s 241(2); *supra* note 4, s 2.7.

²⁰ *Supra* note 16, s 229(a).

²¹ *Supra* note 17, s 2(1)(b); See also *Bracken v. Fort Erie (Town)*, 2017 ONCA 668 at paras 70 – 71.

“reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”²² When considering whether a limit is justified, the courts consider a number of factors, including the importance of its purpose and whether it is fair, not arbitrary, and minimally impairs the freedom protected by the *Charter*.²³ The region’s conduct in barring the citizen blogger and the journalist from attending the remainder of the open meeting, seizing their property, and expelling the journalist from the building engaged several *Charter* rights.

Freedom of expression and the right to liberty and security of the person

- 120** Normally, members of the public are entitled to attend open council meetings. In the municipal context, the courts have found that freedom of expression, protected by s.2(b) of the *Charter*, includes the right to attend and observe council meetings in person.²⁴
- 121** Section 7 of the *Charter* also states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Barring an individual from a public place can be a contravention of this right, provided the individual is using the space in a manner consistent with its public purpose.²⁵

Freedom of the press

- 122** Section 2(b) of the *Charter* also specifically protects freedom of the press.²⁶ According to the Supreme Court of Canada, freedom of the press includes the right to gather information and transmit news.²⁷

Unreasonable seizure

- 123** In addition, section 8 of the *Charter* protects against the unreasonable seizure of property by government, in situations where an owner has a reasonable expectation of privacy.²⁸

²² *Supra* note 18, s 1.

²³ *R v Oakes*, [1986] 1 SCR 103, [1986] SCJ No. 7.

²⁴ *Bracken v Regional Municipality of Niagara Corporation*, 2015 ONSC 6934 at para 56; *Gammie v South Bruce Peninsula (Town)*, 2014 ONSC 6209.

²⁵ *Gammie v South Bruce Peninsula (Town)*, 2014 ONSC 6209 at para 106.

²⁶ *Supra* note 18, s 2(b).

²⁷ *Canadian Broadcasting Corp. v Lessard*, [1991] 3 SCR 421 at paras 429-430, [1991] SCJ No 87.

²⁸ *R v Cole*, 2012 SCC 53 at para 35.

Barring from the meeting

Expulsions under the Municipal Act

- 124** The Regional Chair told us that he believed that both the owner of the digital recorder and the laptop might have been recording the closed session improperly. Accordingly, he said he directed staff to remove both devices from the council chamber, and announced to the room that the owners of those devices should not be allowed back into the meeting. He told us that that when he gave this direction to staff, he was not using his authority to expel individuals from a meeting for disruptive conduct. If that is the case, it is unclear what authority, if any, was used to bar these individuals from attending the remainder of the council meeting.
- 125** If one accepts that the Regional Chair must have exercised his statutory authority under the *Municipal Act*, even though he didn't realize it, a case might be made to justify barring the citizen blogger from the rest of the meeting. The region's procedural by-law forbids use of a digital recording in a way that disrupts or obstructs a meeting. Digitally recording a confidential closed session of council could constitute improper conduct supporting exclusion, particularly if it was demonstrated that the recording was done deliberately. If the citizen blogger had concealed the recorder under his hat, as some witnesses suggested, that might suggest that his intent was to improperly capture the confidential discussion. However, the evidence on this point was inconclusive and the region took no steps to establish what occurred before the expulsion.
- 126** Witnesses also confirmed that it was not unusual for the media and other members of the public to leave personal items behind during closed meetings. Regional staff and officials did not consider that there might have been an innocent explanation for the incident. The citizen blogger told us he left his recorder running on the media desk when he went to use the washroom during the open session because he didn't want to miss any information. However, no one questioned him about the recorder when it was discovered; the Chair simply reacted peremptorily to have him barred from the rest of the meeting.
- 127** The case of the journalist is even more problematic. There was simply no evidence that his laptop was recording the closed session.²⁹ Even if the citizen blogger had intentionally concealed a recording device under his hat, this would not have implicated the journalist. In fact, a senior member of regional staff

²⁹ In response to the preliminary version of this report, the region's external counsel submitted that, because the laptop was on and its screen was lit, there was no evidence to suggest that it was not recording. However, evidence that a computer is powered on is not evidence that it is audio recording.

specifically gave the journalist permission to leave his laptop behind while members of the public were cleared from chambers. Barring the journalist was completely unwarranted.

- 128 This incident highlights the importance of ensuring that any exercise of the Chair’s discretion to exclude someone from a meeting is based on a solid evidentiary foundation.

Freedom of expression, freedom of the press, and the right to liberty and security of the person

- 129 The citizen blogger and the journalist had a legal right to attend the open portions of the December 7 meeting in accordance with the *Municipal Act* and the *Charter*.³⁰ Ontario courts have set a high bar when it comes to infringing individual rights to attend public council meetings. The recent case of *Gammie v. South Bruce Peninsula* illustrates the approach taken by the courts and is directly on point.³¹
- 130 In *Gammie*, the Town of South Bruce Peninsula discovered a recording device had been left running in council chambers by a member of the public during a closed session. The town turned the recording device over to the police and warned the resident against leaving his recorder in the room during closed meetings. However, over a year later, the town discovered that the individual had again left behind a recording device in a closed meeting. In response to that and other incidents, council passed a series of resolutions barring him from town property, including for council meetings, and restricting his communication with town staff.
- 131 In *Gammie*, the court considered whether barring the man from attending council meetings violated his right to freedom of expression and to liberty and security of the person under s. 2(b) and 7 of the *Charter*. It observed that attending a council meeting is protected expression, as “[c]hambers are a centre of political life for the residents of the Town...”³² While noting that the *Charter* right does not extend to unprotected forms of expression like violence or threats of violence, the court suggested that the town could have acted with more care to restrict only the unprotected “disruptive expression” – for example, it could have simply prohibited the resident from possessing recording devices at council meetings.³³

³⁰ The public’s right to observe local government meetings in process is set out in s. 239 of the *Municipal Act*, which provides that meetings shall be open to the public, subject to 14 narrow and specific exceptions; *Supra* note 18, s 2(b), 7.

³¹ *Supra* note 25.

³² *Ibid* at para 80.

³³ *Ibid* at para 92.

- 132** The court found the restrictions the town imposed were not a reasonable limit on the individual's right to free expression. The measures the town adopted were not designed to minimally impair the individual's right or to restrict his right only to the extent necessary to promote the town's objective of preventing disruptions to council meetings.
- 133** It also concluded that the ban deprived the resident of his right to liberty and security of the person under s. 7 of the *Charter*, as he was using a public space in a manner consistent with the public purpose for that space.³⁴
- 134** The region is not a stranger to litigation around *Charter* rights. In the *Regional Municipality of Niagara v. Bracken*, the Ontario Superior Court of Justice considered the constitutionality of a trespass notice the region issued to a member of the public.³⁵ Prior to a council meeting, while standing in the public gallery, the individual had videotaped and questioned a member of council about why she was suing him. The councillor felt this behaviour was intimidating and threatening. Citing that incident and an ongoing pattern of confrontational behaviour, regional staff issued a trespass notice barring the individual from attending regional headquarters, including for council meetings, for a year.
- 135** As in the *Gammie* case, the court found that attending a council meeting is expression protected by s. 2(b) of the *Charter*. The court rejected the region's argument that barring the individual was not a violation of his rights because he could watch council meetings online or on television. The court reasoned that the individual's freedom of expression included actually being able to attend and participate in open public council meetings, provided he is not violent, does not threaten violence and abides by the applicable rules.³⁶ The court also found that the trespass notice did not represent a reasonable limit on the *Charter* right. It observed that the individual's right was not minimally impaired, as the region could have achieved the objective of maintaining order at council meetings through less restrictive means.
- 136** In another case, the Ontario Court of Appeal considered a trespass notice issued by the Town of Fort Erie to a protester.³⁷ The notice prohibited the person from entering municipal property as well as protesting outside the town hall for one year. The court found that the individual's peaceful protest was expression protected by the *Charter*. The court also explained that the town's legal right to

³⁴ *Ibid* at para 106.

³⁵ *Bracken v Regional Municipality of Niagara Corporation*, 2015 ONSC 6934.

³⁶ *Ibid* at para 56.

³⁷ *Bracken v. Fort Erie (Town)*, 2017 ONCA 668.

exclude trespassers was subject to implied limits and had to be exercised for a valid public purpose such as preventing unlawful activity, securing the safety of persons, preventing the appropriation of public space for exclusive private use, and preventing obstructions of the operation of government and the provision of government services.³⁸

- 137 Town staff told the court that they felt threatened by the individual and excluded him to keep staff and the public safe, but the court found that this was a misapprehension of the facts, as there was no evidence that he was violent or threatened violence.
- 138 In addition, the court found the exclusion unwarranted because the town's actions were not a minimal impairment of the individual's rights. In that case, the first person to actually address the protester was a police officer, who instructed him that a trespass notice had been issued and that he was required to leave the premises.³⁹ The court noted that there were many options open to the town, such as talking to the protester and cautioning him not to use a megaphone near the municipal building, and asking him to lower the volume and to keep a respectful distance from people entering the town hall.

The citizen blogger, the journalist and the Charter

- 139 When viewed against the backdrop of these *Charter* cases, it is clear that the Regional Municipality of Niagara made serious missteps in barring both the citizen blogger and the journalist from the rest of the December 7 council meeting. The fact that the citizen blogger left his digital recorder on during a confidential closed meeting session might have warranted the region taking steps to address the situation. Even so, the region made no attempt to question him about the circumstances or to ascertain whether the recorder had been left in chambers through inadvertence. It also allowed various individuals to leave their personal items in chambers during the closed meeting, had no rules about turning recording devices off during such sessions, and issued no warnings to that effect.⁴⁰

³⁸ *Ibid* at para 75.

³⁹ *Ibid* at para 79.

⁴⁰ In response to the preliminary version of this report, the region's external counsel submitted that the Chair has the authority to remove individuals from a council meeting under the *Municipal Act*, and that there are no parameters which limit this authority. They stated that removing an individual does not translate to a *Charter* violation. However, as set out in this report, the additional parameters limiting the Chair's authority to exclude the public from a council meeting reflect relevant case law. The courts have consistently found that such exclusions are subject to *Charter* scrutiny.

- 140 The region’s response to the journalist is also concerning from a *Charter* perspective. Barring the journalist from the rest of the meeting represented a hurried attempt to address a problem that did not exist. There was no evidentiary basis to believe that the journalist’s laptop was recording the closed session. Indeed, other devices had also been left in chambers; one person entered during the closed session to retrieve his phone while staff left the room. The journalist was simply lumped in with the citizen blogger in the heat of the moment, and presumed guilty of illegally recording the meeting. It is clear that his rights to freedom of expression, freedom of the press, and to liberty and security of the person were arbitrarily and casually infringed as a result. There was no justification for the limitation on his rights in these circumstances.

Barring the journalist from Regional Headquarters

- 141 The Chair told us that he only intended staff to exclude the owners of the devices from the meeting, not the entire municipal building. He also told us that he intended to direct staff only to remove them if their device was found to be recording the meeting. The CAO confirmed that he understood the Chair’s direction to be to bar both owners of the devices from the meeting. Unfortunately, that message appears to have been lost in translation. When the General Manager left chambers to call the police, he understood the CAO’s direction was to have the citizen blogger removed from the premises.
- 142 After the police arrived, the CAO told the General Manager that the journalist “has to go, too,” without explaining that he meant just from the meeting. The Acting Clerk told us he also heard the CAO’s direction. Both the General Manager and the Acting Clerk told us they thought the CAO meant the journalist had to leave the building. It is unsurprising, given the CAO’s choice of words, that regional staff believed that the exclusion extended to the building, not just the meeting.
- 143 Although the General Manager did not explicitly reference the *Trespass to Property Act*, he did tell the journalist he had to leave the building – in the presence of the police. The journalist told us he believed that if he did not leave, he would have been charged with trespassing. Police witnesses also confirmed that staff told them the journalist would have to leave. Based on the evidence, it is clear that the General Manager was effectively exercising authority, based on a misapprehension of the CAO’s instruction, under the *Trespass to Property Act*.
- 144 Municipalities are entitled to exercise their right under the *Trespass to Property Act* to prohibit entry to municipal property, but they must do so judiciously and fairly. The courts have cautioned that there is a risk of arbitrary action when

municipalities restrict access without a governing by-law or policy.⁴¹ The region does not have a specific policy relating to the *Act*.

- 145** Given the facts, it is apparent that barring the journalist from the building was not justified under the *Trespass to Property Act* or otherwise. It is also clear that this conduct would not pass muster under the *Charter*. The region clearly infringed the journalist's rights of freedom of expression, freedom of the press and to liberty and security of the person when it required that he leave a public space without any justification.

Unreasonable seizure

- 146** Section 8 of the *Charter* protects every person's privacy by preventing unreasonable searches and seizures of personal property by the government. The courts have concluded that any non-consensual examination of property is a search and any non-consensual taking of property is a seizure.⁴² However, the *Charter* does not bar all intrusions on individual privacy. The Supreme Court of Canada has found that a person will receive the protection of *Charter* only where they have a reasonable expectation of privacy based on the totality of the circumstances.⁴³
- 147** Unsurprisingly, most of the court cases involving this *Charter* protection concern the actions of police. They seek to strike a balance between the public's interest in being free from government intrusion and the state's interest in ensuring that the community is protected from crime.⁴⁴ The courts consider various factors in determining whether an individual has a reasonable expectation of privacy, including the location of the seizure and the nature of the seized property.
- 148** The courts have explained that there is a strong expectation of privacy in information contained in electronic devices like laptops and cellphones, which may include intimate details about personal lifestyle and choices.⁴⁵
- 149** Seizures that are conducted without a warrant or consent are presumed to be unlawful.⁴⁶ However, they can be supported if it is found that the seizure was

⁴¹ *Supra* note 37.

⁴² *R v Dymont*, [1998] 2 SCR 417 at 28, [1988] SCJ No. 82, and *R v Cole*, 2012 SCC 53 at para 59.

⁴³ *R v AM*, 2008 SCC 19.

⁴⁴ *Hunter et al. v Southam Inc.*, [1984] 2 SCR 145 at para 159-60, [1984] 6 WWR 577.

⁴⁵ *Supra* note 28 at para 2.

⁴⁶ *Supra* note 44 at para 161.

otherwise authorized by law, the law itself is reasonable, and the manner in which the seizure was carried out is reasonable.⁴⁷

- 150** In the case of *R. v. Cole*,⁴⁸ the Supreme Court of Canada found that a teacher's section 8 rights were not violated by a school board when it searched and seized his work-issued laptop, which contained explicit photos of a student. Before the laptop was turned over to police, the school board copied the images and temporary Internet files from the laptop's browser history. The court considered whether the board improperly searched and seized the information stored on the laptop. It found that the seizure was authorized by law because school officials have a statutory duty to maintain a safe school environment pursuant to the *Education Act*.⁴⁹ The board also had a reasonable belief that the laptop contained explicit photographs of a student. The court concluded that the board's seizure was carried out in a reasonable manner and did not violate the *Charter*.

The citizen blogger

- 151** The citizen blogger told us he often records public council meetings using his digital recording device. He then uses those recordings to write articles about local events and politics for his website. He did not indicate that there was any private information on the digital recorder. However, it was his personal property.
- 152** Members of the public have no right to listen to the private discussions of councillors in a closed meeting, either directly or by recording those discussions.⁵⁰ A person who wilfully intercepts a private communication to which they are not a party may also be guilty of a criminal offence under the *Criminal Code of Canada*.⁵¹ Under the circumstances, the concern by those in the closed meeting when it was discovered that the confidential discussion was being recorded is understandable. It was also not unreasonable for those present to believe that the recording might be illegal and warrant consulting the police.
- 153** Unfortunately, without a policy and procedure to deal with such incidents, or any attempt to inquire into what had occurred or to seek legal advice about to what to do, the region's response was disorganized, rushed and misinformed. The police were called, and staff told us they asked police for advice about a device illegally

⁴⁷ *Supra* note 28 at para 37.

⁴⁸ *Ibid.*

⁴⁹ *Education Act*, RSO 1990, c E2, s 265.

⁵⁰ Section 239 of the *Municipal Act* permits council to hold a meeting closed to the public, subject to specified exceptions; s. 6(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act* provides that a municipality can maintain the confidentiality of records that would reveal the substance of deliberations in a meeting closed in accordance with a statute.

⁵¹ *Criminal Code of Canada*, RSC, 1985, c C-46, s183, 184.

recording a closed meeting. However, according to the responding officers, they were not asked to take possession of the digital recorder or to investigate whether illegal activity had taken place.

- 154 It would have been preferable for the region to have taken a more proportionate and practical approach to the situation. For instance, it could have asked the citizen blogger about the circumstances surrounding his leaving the recorder on, before taking other action. If the region believed a crime had been committed, it should have left the device in place for the police to investigate the scene and examine the device.

The journalist

- 155 The journalist told us that he used the laptop issued by his employer to assist him with his reporting duties. During the council meeting on December 7, he took notes on his laptop throughout the meeting and was simultaneously preparing his story with a 10 p.m. deadline for the next day's newspaper edition.
- 156 In this case, the laptop contained notes and the work product of a member of the media, which has additional protections under section 2(b) of the *Charter*. The journalist's expectation of privacy was high and his privacy interest in the laptop clearly engaged the *Charter*.
- 157 Some members of council speculated that the journalist's laptop might have been recording the closed session. In fact, there was absolutely no evidence to suggest that the laptop left in the chambers by the journalist, consistent with past practice, was recording sound. Under the circumstances, the seizure of his laptop was completely unwarranted and a clear infringement of his right under s. 8 of the *Charter* to be free from unreasonable seizure. The limits placed on the journalist's rights were not justified and therefore contrary to law.
- 158 A more reasonable response would have been to ask the journalist to confirm that the laptop was not recording the meeting, or to politely request that it be removed for the remainder of the closed session.

Lessons learned

- 159** After the incidents of December 7, 2017, the region recognized that it required more guidance for such situations. In January 2018, regional staff created a checklist for staff to consult when a meeting goes into closed session. The checklist calls for staff to visually confirm that all members of the public, media, and non-essential staff have left council chambers, and that all personal belongings have been removed from the gallery and media areas. The checklist states that staff are also to ask council members to turn off cellphones and place them on their desks. In addition, it provides that they should confirm that regional staff responsible for video recording and streaming the open portions of the meeting have left the audio/visual room, and that a red light, indicating that the video streaming has stopped, is lit at the back of the room.
- 160** In January 2018, the region also hired an external consultant to conduct research, engage with journalists, and report on how the region should interact with the media and the public before, during, and after closed session meetings.⁵²
- 161** The consultant's report, *In Camera & the Media*, dated February 8, 2018, noted that the rise of social media and advances in technology have led to a proliferation of citizen journalists, as almost everyone carries a device in their pockets that can be used to take notes, photographs and audio/video recordings. It stated that, at that time, the region had no formal protocol in place for closed meetings, and that recent events, including those on December 7, highlighted the need for one.
- 162** The report made a number of recommendations to the region, including that it develop a closed meeting protocol recognizing the *Charter*, appoint a media liaison, hire a security guard or sergeant-at-arms for meetings, and consider creating an antechamber for closed meetings. It also recommended that if council continues to hold closed meetings in chambers, the region should ensure members of the public take all portable belongings with them, and set a process for permitting large or bulky items to stay in the room. In addition, the report recommended the region begin making audio or video recordings of its closed meetings and adopt a protocol addressing "transgressions," such as the discovery of an unauthorized recording device.

⁵² The consultant's report was considered by the Committee of the Whole on March 1, 2018. Online: <<https://www.niagararegion.ca/council/Council%20Documents/2018/cotw-agenda-march-01-2018.pdf>>.

- 163** A staff report addressing the consultant's recommendations and related information was provided to council on February 8, 2018. It acknowledged that the region had no protocols in place to manage an emergency or disruption during closed meetings.⁵³ The staff report also acknowledged that council chambers are public property, which the public is entitled to use in accordance with the right to freedom of expression.
- 164** The staff report noted that, although the *Municipal Act* entitles the head of council to expel any person for improper conduct, the region had no policy framework or protocol related to such expulsions. It stated that regional staff are not trained to handle events in the public areas of council chambers, and such events can be complex and contentious. The staff report recommended the region amend its procedural by-law and enact policies and procedures to address these concerns, including with respect to calling the police for assistance, the use and placement of security cameras, and locking public access doors during council meetings. It further recommended that the region adopt a media relations policy.
- 165** After council considered the staff report, in March 2018, the region's procedural by-law was updated. The by-law now expressly recognizes citizen and media rights under the *Charter* with respect to public meetings. It establishes a process for having security personnel attend meetings to oversee the media and public gallery, and sets out procedures for responding to disruptions in meetings. The by-law now provides that, after a vote to close a meeting, the Chair must remind all members of the public and media leaving the room that they should take their personal belongings and equipment. The Clerk may permit heavy or bulky equipment to remain if it is powered off, unplugged, and pointed away from the council seating areas.
- 166** If an unauthorized recording device is discovered in a closed session, the procedural by-law provides that the Regional Clerk or their designate is to attempt to locate the owner of the device and ask them to demonstrate that the device did not record the closed meeting. If the individual is found to have inadvertently recorded the closed session, they will be asked to erase the recording to the satisfaction of the Clerk. If the individual does not comply, local police may be called.
- 167** In addition to the amendments to the procedural by-law, the region approved a *Managing Public Spaces in a Safe and Welcoming Environment Policy* on March

⁵³ A summary of the consultant's report, along with a staff report commenting on its findings and recommendations, went to council on February 8, 2018. The Regional Municipality of Niagara, agenda CL 02-2018, *Council Order of Business* (February 8, 2018) at 719-722, online: <<https://www.niagararegion.ca/council/Council%20Documents/2018/council-agenda-feb-08-2018.pdf>>.

22, 2018. The region told us this policy would be formally introduced to staff in June 2018.

- 168** The policy echoes the process set out in the procedural by-law for responding to disruptive behaviour at a meeting. It also sets out steps for staff to follow in response to improper conduct in spaces managed by the region outside of a meeting. The policy requires staff to document incidents, including identifying all individuals involved, witnesses, and staff present, and to provide a report to the corporate leadership team.
- 169** In addition to these policies, in May 2018, regional staff provided council with options for creating a separate room for closed meetings, and for additional security personnel during meetings. These recommendations were approved by council on July 5, 2018, before this report was finalized.⁵⁴
- 170** Also on July 5, 2018, council approved two new policies relating to the December 7 incident. The *Media Relations Policy* references the protection of freedom of expression and of the press in the *Charter*. It provides for the designation of a regional media liaison and various media spokespersons, and sets out a process to address complaints from and about the media. It also describes the responsibilities of staff and officials with respect to the media. The *Management of Personal Items, Equipment and Disruptive Behaviour Prior to a Closed Session of Council or Committee Policy* repeats the requirements with respect to closed meetings already established in the region's amended procedural by-law, including the process to be followed if personal belongings are left in council chambers.
- 171** The region has also installed signs in council chambers, at the entrance to chambers, and at the main reception desk, stating:
- Niagara Region is committed to providing exceptional services in a safe and respectful environment. Our staff and guests deserve to be treated with the same mutual respect. Aggressive or intimidating behaviour, harassment, or coarse language will not be tolerated. Thank you for your co-operation.
- 172** The region has taken a considerable number of concrete actions to address perceived gaps in its policies and procedures in the wake of its response to the discovery of the recording device and the laptop during the closed session on

⁵⁴ See "Update on Report CAO 05-2018: Improving the Business of Council," staff report to regional council, included in the agenda package for the July 5, 2018 meeting of regional council at 567-603, online: <<https://www.niagararegion.ca/council/Council%20Documents/2018/council-agenda-july-05-2018.pdf>>.

December 7, 2017. While I commend its efforts, there are some additional improvements that I believe should be made to provide greater clarity, accountability, transparency and fairness.

The power of apology

- 173** The Chair and some regional staff and council members told us they extended personal apologies to the journalist. The region also apologized in a public statement about the “inconvenience” caused to him. However, the power of a sincere, direct and comprehensive formal apology cannot be overstated. In Ontario, the *Apology Act, 2009*, specifically recognizes the importance of apologies and insulates them from use in litigation and other proceedings.
- 174** In the case of the journalist, the region acted carelessly and precipitously in seizing his laptop, barring him from attending the rest of the meeting, and unceremoniously ejecting him from regional headquarters. In my view, its previous apology does not adequately reflect the seriousness of its conduct. The region improperly applied the *Municipal Act*, the *Trespass to Property Act*, and infringed the journalist’s *Charter* rights to freedom of expression, freedom of the press, liberty and security of the person, and his right to be free from unreasonable seizure. The region should issue a full and frank public apology to the journalist. I make this recommendation in the interest of accountability and transparency owed to the citizens and journalists of Niagara Region. Contrary to what external counsel has suggested, it is not an attempt to impose a remedy under the *Charter*.

Recommendation 1

The Regional Municipality of Niagara should provide a full and frank public apology to the journalist for acting unreasonably and without legal justification, and for infringing his *Charter* rights, when it seized his personal property and expelled him from a council meeting and municipal property on December 7, 2017.

- 175** The region has not made any attempt to apologize to the citizen blogger. I recognize that digitally recording a closed session without consent is problematic and in some instances may be illegal. However, the region allowed personal items to remain in council chambers during closed meetings. The citizen blogger was never offered an opportunity to explain why the recorder was left in the room. Under the region’s new process for dealing with disruptions to meetings, anyone found recording a closed session would first be offered an opportunity to explain before any further steps were taken. This process also recognizes that such situations may be inadvertent. Accordingly, I recommend the region also

issue a public apology to the citizen blogger for assuming the worst, and acting impulsively in response to the incident.

Recommendation 2

The Regional Municipality of Niagara should publicly apologize to the citizen blogger for rushing to judgment and failing to follow a fair and reasonable process when it expelled him from a council meeting and seized his personal property on December 7, 2017.

Seizure of items

- 176 The region's new procedural by-law and *Managing Public Spaces in a Safe and Welcoming Environment Policy* mentions various *Charter* rights. However, there is no specific reference to the right to be free from unreasonable search and seizure. These documents contemplate the possibility of regional staff calling the police when individuals refuse to co-operate with requests relating to disruptive behaviour. If the region's intent is that staff will never search or seize personal property, and that this should be left to the police where appropriate, its by-law and relevant policies should explicitly say so. However, if it contemplates that there may be circumstances warranting search or seizure, it should make provision for this in its by-law and policies.

Recommendation 3

The Regional Municipality of Niagara should clarify its intent with respect to the authority of staff to seize personal property in its procedure by-law and policies, with reference to the rights protected by the *Canadian Charter of Rights and Freedoms*.

Defining improper conduct

- 177 The region's amended procedural by-law and its *Managing Public Spaces in a Safe and Welcoming Environment Policy* both address expulsion for improper conduct at meetings and in other public spaces. The policy also states that improper conduct may include verbal or non-verbal discrimination, as defined in the *Ontario Human Rights Code*. However, neither the revised by-law or the policy defines the term "improper conduct," nor do the proposed new policies. In order to ensure consistent application of the region's new process, and to provide general information to the public about conduct that will not be accepted during a council meeting, the region should amend its policy to include a specific definition of "improper conduct."

- 178 I recognize that the municipality requires some flexibility in evaluating incidents. However, at a minimum, it should generally define “improper conduct” and refer to categories or examples of impugned behaviour that the policy is intended to address. For example, the City of Waterloo’s *Respectful Behaviour Policy* not only provides a definition of inappropriate behaviour, but also lists specific examples.⁵⁵

Recommendation 4

The Regional Municipality of Niagara should ensure that any by-law or policy that references “improper conduct” include a definition of that term, including reference to specific categories or examples.

Chair’s authority to expel

- 179 Expelling an individual from a meeting is a serious step and subject to *Charter* scrutiny. Such decisions should not be made lightly, but objectively and based on evidence. At present, there is no specific reference in the procedural by-law or the *Managing Public Spaces in a Safe and Welcoming Environment Policy* to the need to confirm evidence exists to support a finding of improper conduct before expelling someone from a meeting. In addition, there is no expectation that specific reasons be given to support this action. The region should amend these documents and ensure any relevant policies adopted in future state that expulsion should not take place unless the Chair is satisfied that evidence exists to support expulsion. They should also be revised to require that reasons be formally recorded in the minutes for the exercise of the Chair’s authority. These improvements would avoid arbitrary decision-making, and render the expulsion process more accountable, transparent, and fair.

Recommendation 5

The Regional Municipality of Niagara should amend its procedural by-law and relevant policies to state that expulsion from a meeting should not take place unless the Chair is satisfied that evidence exists to support expulsion.

⁵⁵ City of Waterloo, policy A-009, *Respectful Behaviour Policy* (January 13, 2014) at 6.1.1, 6.1.2., online: <https://www.waterloo.ca/en/contentresources/resources/government/Corporate_Policies/A-009_Respectful_Behaviour_Policy_accessible.pdf>.

Recommendation 6

The Regional Municipality of Niagara should amend its procedural by-law to specify that, where the Chair exercises his authority under the *Municipal Act, 2001* to expel an individual from a meeting, the reasons for the expulsion must be recorded in the meeting minutes.

Trespass to Property Act

- 180** As a result of the confusion surrounding the direction of the Chair and the CAO, the General Manager inappropriately ejected the journalist from municipal property. The region now has a policy relating to managing public spaces, which does contemplate asking someone to leave municipal property and engaging the police if they refuse. However, it still does not have any policy that references or establishes a specific framework for the exercise of authority under Ontario's *Trespass to Property Act*.
- 181** As was recently observed by the Ontario Court of Appeal, when exercising authority under the *Trespass to Property Act*:
[...] the risk of arbitrary action is higher in the absence of a well-crafted by-law, and there are greater opportunities for uncertainty as to what sorts of actions will be permitted."⁵⁶
- 182** A trespass policy can create greater certainty and clearer expectations for staff and the public. For example, the City of Windsor has a trespass policy that sets out the conduct that might necessitate a notice of trespass and the steps that can be taken to address it.⁵⁷
- 183** As I noted in my May 2017 report *Counter Encounter*, on our investigation related to a trespass situation in the Township of Red Rock, a trespass policy should provide examples of the kind of conduct it covers, the process for applying the policy, and the available remedies, which might include excluding the individual from municipal property or issuing a trespass notice under the *Act* for a defined period.⁵⁸ Such policies should also provide an opportunity for those affected to appeal. Some municipalities have included trespass procedures in policies that cover various aspects of inappropriate conduct by members of the public,

⁵⁶ *Supra* note 37.

⁵⁷ City of Windsor, policy, *Notice of Trespass Policy* (May 27, 2013), online: <<https://www.citywindsor.ca/cityhall/Policies/Policies/Trespass%20Policy.pdf>>.

⁵⁸ Ombudsman of Ontario, *Counter Encounter: Investigation into a complaint about the Township of Red Rock* (May 31, 2017) online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/reports-on-investigations/2017/counter-encounter>>.

including interaction over the phone and by email. The City of Waterloo's *Respectful Behaviour Policy*⁵⁹ addresses trespass situations and also provides for appeals of any actions taken under the policy.

- 184 The region should specifically address how it will deal with its authority under the *Trespass to Property Act*, either as part of an unreasonable/improper conduct policy or as a standalone policy.

Recommendation 7

The Regional Municipality of Niagara should set out in writing its expectations and processes regarding the exercise of its authority under the *Trespass to Property Act*, either as a standalone policy or part of a broader policy respecting unreasonable or improper conduct.

Was the meeting improperly closed to the public?

- 185 In addition to complaints about the treatment of the citizen blogger and the journalist, we also received and investigated a complaint that council's discussions in closed session on December 7 breached the open meeting provisions of the *Municipal Act*.

Resolving to close the meeting

- 186 In order to exclude the public from a meeting, a council must pass a resolution closing the meeting. Under the open meeting rules, the resolution must state the fact of the closed meeting and the general nature of the topic to be discussed.⁶⁰ In *Farber v. Kingston*, the Ontario Court of Appeal emphasized that the resolution should provide a general description of the issue to be discussed in a way that maximizes the information available to the public, while not undermining the reason for excluding the public.⁶¹
- 187 According to the meeting minutes, the region closed the December 7 public meeting twice under s. 239(2)(f) of the *Municipal Act*, which permits council to close a meeting if the subject matter being considered is "advice that is subject to solicitor-client privilege, including communications necessary for that purpose."⁶²

⁵⁹ *Supra* note 55.

⁶⁰ *Supra* note 16, s 239(4).

⁶¹ *Farber v. Kingston*, 2007 ONCA 173.

⁶² *Supra* note 16, s 239(2)(f).

- 188 However, even though the meeting minutes indicate that council relied on this exception, the video recording does not reflect this. A review of the video shows that no exception was cited when the motion was made and passed, and no general description of the subject matter to be discussed was given. In fact, council members we spoke to had varied and conflicting views about which exception council had relied on to close the meeting.
- 189 In response to the preliminary version of this report, the region’s external counsel submitted that the subject to be discussed in the closed session was “clearly evident from the discussion immediately preceding the motion.” This response indicates a failure on the part of the region to appreciate the importance of the legal requirement in the *Municipal Act* for council to state the general nature of the subject to be discussed in the resolution itself.
- 190 The resolution to move *in camera* should not be treated as a mere procedural technicality by council when it has a desire to exclude the public from its discussions. It is a significant accountability measure that ensures council only engages in discussion of permitted subjects in closed session. Failure to comply with the closed meeting procedural requirements can result in a loss of public confidence in municipal government. Members of the public who attend council meetings are entitled to hear a general description of the matters to be discussed *in camera*, including, as a best practice, the exception relied upon, before they are excluded from a meeting.

Recommendation 8

The Regional Municipality of Niagara should ensure that any resolution to close a meeting state the exceptions relied upon and a general description of the subject matter to be discussed in closed session.

Discussions about legal advice and personal matters

- 191 We were told in interviews that the region’s solicitor provided legal advice throughout the initial closed meeting discussion. A member of regional staff also answered questions about the personal circumstances of the councillor who was the subject of the Integrity Commissioner’s report. After staff and officials dealt with the recording device and the laptop, the closed meeting discussions resumed on these topics.
- 192 The exception in s. 239(2)(f) of the *Act* permits council to discuss and receive legal advice in a closed meeting to protect the confidentiality of legal advice

between the municipality and its solicitor.⁶³ Municipal councils are allowed to exclude the public from such discussions in order to facilitate communication between municipal officials and lawyers without fear of disclosure. The discussions on December 7 fit within this exception and were permitted to be held in closed session.

- 193** Although the region did not cite the exception for “personal matters about an identifiable individual” (s. 239(2)(b)), the discussion about an individual’s personal circumstances was also permitted under that exception. This exception applies to discussions involving information that pertains to an individual in their personal capacity – or in their professional capacity, if it reveals something personal about the individual.⁶⁴
- 194** Generally, an Integrity Commissioner’s report on its own would not fit within the personal matters exception because it relates to a councillor in his or her capacity as elected official. In this case, however, information relating to the councillor’s personal circumstances was discussed, and fit within the personal matters exception.
- 195** Almost immediately after the meeting was reopened to the public, it was briefly closed again under the solicitor-client advice exception, because council needed some additional clarification about the legal advice it had just received. This closed session lasted only four minutes and it also fit within the exceptions in s. 239(2)(b) and (f).

Discussion about the recording devices

- 196** When the digital recorder and the laptop were discovered in the closed session, the meeting derailed. Council’s discussion about the Integrity Commissioner’s report halted, and the regional solicitor stopped providing advice. The dynamic of the meeting shifted. Instead of a co-ordinated council discussion, individual council members and staff began to talk amongst themselves and make general comments. However, council as a whole did not take any steps to formally adjourn the closed session.
- 197** Technically, the closed session continued, and council should have taken formal steps to adjourn the meeting. Amendments to the region’s procedural by-law in March 2018 should assist if such situations arise in future. The by-law now

⁶³ *Amherstburg (Town of)*, 2015 ONOMBUD 33 (CanLII).

⁶⁴ See *Russell (Township of) (Re)*, 2015 ONOMBUD 29 (CanLII); See also *Aylmer (Town) (Re)*, 2007 CanLII 30462 (ON IPC).

provides that, in the case of an emergency, a meeting is deemed suspended to allow staff to respond. In the case of a non-emergency event, including the discovery of a recording device, the by-law provides that the Chair is to suspend the meeting to allow staff to address the situation.

Improvements to meeting procedures

- 198** Although the subject matter of the closed session of the December 7 council meeting fell within the exceptions permitted in the *Municipal Act*, our investigation revealed several general shortcomings in the region's meeting procedures. Accordingly, I am making recommendations to improve its practices.

Closed meeting timing

- 199** The December 7, 2017 meeting agenda called for a closed session to be held after "other business." This is consistent with the region's procedural by-law, which sets out the order in which various agenda items must be considered.⁶⁵ However, it is not uncommon for issues requiring closed session consideration to arise during the course of open council meetings. In this case, the region found it necessary to seek legal advice about an agenda item in closed session before proceeding with the rest of the agenda. This was not an unreasonable approach, but a strict reading of the procedural by-law would appear to fetter council's ability to enter into closed sessions as circumstances arise. For greater clarity, the region should amend its procedural by-law to provide council with clear authority to exercise discretion to consider matters in closed session when required, outside of the set agenda order.

Recommendation 9

The Regional Municipality of Niagara should amend its procedural by-law to clarify council's authority to exercise discretion to hold a closed session outside of a set agenda order.

Audio or video recording

- 200** The region makes video recordings of its open council and committee meetings, which are available on its website. This is a positive practice that promotes transparency. However, without a similar record of its closed sessions, trying to reconstruct what happened in a case like this one is challenging. We had to rely largely on the citizen blogger's partial audio recording and various witness accounts to piece together what happened.

⁶⁵ *Supra* note 4, s. 5.3.

- 201** Some members of council told us they believe it would be helpful if the region made audio or video recordings of its closed meetings, to assist in any investigations and to encourage council to keep discussions on track. The February 2018 consultant's report also recommended audio or video recording closed meetings, recognizing it as a practice long encouraged by my Office.
- 202** In our more than 10 years of investigating closed meetings, our Office has always promoted audio or video recording closed meetings as a best practice, because it fosters public trust and saves time and resources if an investigation is required. At present, we are aware of 20 municipalities in Ontario that follow this practice.

Recommendation 10

The Regional Municipality of Niagara should make audio or video recordings of all closed meetings of council, its local boards, and committees of either.

Keeping up to date

- 203** The region updated its procedural by-law to reflect new exceptions to the closed meeting rules that came into effect January 1, 2018. However, the by-law omits the mandatory exception in s. 239(3)(b) of the *Act* for discussions about an ongoing investigation by the Ontario Ombudsman, an appointed ombudsman, or an appointed closed meeting investigator. The by-law was also not updated to reflect the amended definition of meeting in s. 239(1) of the *Act*. The region should revise its by-law to reflect the current state of the open meeting law.

Recommendation 11

The Regional Municipality of Niagara should update its procedural by-law to reflect the open meeting provisions in the *Municipal Act, 2001*.

Locked doors

- 204** During our investigation, as we reviewed the December 7 video from the region's security cameras, we were surprised to see that at 8:36 p.m., a facilities employee locked the main outside doors to regional headquarters.⁶⁶ This is where the public enters for evening public council meetings. A minute later, the police arrived and had to be let into the building. Between 8:48 and 9:10 p.m., the security video shows five additional individuals having to rely on others to let them in. They each waited up to 90 seconds before gaining access. During this time, both open and closed council meeting discussions were taking place. The December 7 council meeting ended at 9:45 p.m.
- 205** The *Municipal Act* and the *Charter* protect the right to personally observe public council meetings.⁶⁷ In this case, locking the doors during an ongoing regional council meeting improperly interfered with public access, and effectively converted an open session into a closed one.
- 206** In order to determine how this breach occurred, we interviewed the facilities employee who locked the doors. He said that the facilities employee on duty normally locks the entrance doors before their shift ends. He explained that he tries to wait as late as possible to lock them, especially if there is a public meeting in progress. He told us that, in accordance with the region's standard practice, he locked the doors on December 7 and let the security guard know he had done so. The security guard could not recall this discussion, but did note that he had raised concerns about locked doors during council meetings previously with senior management. The region told us it has no records relating to concerns about the locked doors.
- 207** My Office has investigated three similar situations. In each case, we found that locked entrance doors rendered an otherwise open council meeting illegal. The fact that doors are locked inadvertently or without council knowledge is irrelevant.⁶⁸

⁶⁶ In response to the preliminary version of this report, the region's external counsel submitted that the exterior doors to regional headquarters are locked automatically on a timer. However, the evidence we obtained was that one of the three doors at the entrance used by the public to access council meetings is locked automatically, while the other two are locked manually by staff. In the region's security footage of the lobby from December 7, 2017, regional staff can be seen manually locking the entrance doors while the meeting was taking place. Staff also confirmed to us in interviews that they manually lock the doors.

⁶⁷ *London (City) v. RSJ Holdings Inc.*, 2007 SCC 29 at para 32; *supra* note 11; *supra* note 25.

⁶⁸ *London (City of) (Re)*, 2016 ONOMBUD 4 (CanLII); *Fort Erie (Town of) (Re)*, 2016 ONOMBUD 3 (CanLII); and *Russell (Township of) (Re)*, 2017 ONOMBUD 21 (CanLII).

- 208 In December 2017, the region had no policy or procedure relating to public access doors during meetings. It did not train its staff on the importance of ensuring public access to open meetings, or keep records of when the entrance doors were locked or unlocked.
- 209 In May 2018, a staff report to council acknowledged: “Previously the doors were locked at 9 p.m., which in turn, prevented public access to the building.” The report indicated that the region plans to develop a policy respecting the security of public access doors. As an interim measure, staff have been directed to ensure the public doors remain open throughout council meetings.
- 210 To prevent further contravention of the law, the region should continue to take steps to remedy the problematic practice of locking public entrances during open meetings. It should develop a clear procedure on when public entrances should be locked, and train its staff accordingly. This procedure should account for after-hours use of buildings by the public, and ensure that records are kept relating to when doors are locked.

Recommendation 12

The Regional Municipality of Niagara should develop a procedure respecting the public access to municipal property during meetings, including after-hours meetings, and provide for records to be kept of when the doors to regional headquarters are locked and unlocked.

Recommendation 13

The Regional Municipality of Niagara should train its staff on the procedures for locking doors and ensuring public access during meetings.

Opinion

- 211 My investigation confirmed that the Regional Municipality of Niagara acted unreasonably, wrongly, and without legal justification when it expelled a journalist from municipal property and seized his personal property during a council meeting on December 7, 2017. I also found that the Regional Municipality of Niagara acted unreasonably and without due care when it ejected a citizen blogger from the council meeting on December 7, 2017, and seized his digital recording device. In addition, the region had no policies or procedures in place to address improper conduct during a council meeting, trespass, seizure of personal property, or protecting confidential information during closed meetings.

- 212 It is my opinion that the region's actions were contrary to law, unreasonable, unjust and wrong, in accordance with s. 21(1)(a), (b) and (d) of the *Ombudsman Act*.
- 213 As for the closed portions of the meeting, the Regional Municipality of Niagara did not violate the *Municipal Act, 2001* when it discussed advice subject to solicitor-client privilege and personal matters about an identifiable individual.
- 214 However, the Regional Municipality violated the *Municipal Act, 2001* when it failed to pass a resolution in public stating the general nature of the subjects to be discussed in the closed session.
- 215 Further, my investigation found that the Regional Municipality of Niagara's actions were unreasonable, contrary to law and wrong, as set out in s. 21(1)(a), (b) and (d) of the *Ombudsman Act*, when it permitted the public access doors to regional headquarters to be locked for more than an hour during its public meeting on December 7, 2017. The locked access doors also rendered that portion of the meeting illegal under the *Municipal Act, 2001*.
- 216 It is important for the region to be transparent about its efforts to implement my recommendations. Accordingly, it should report publicly and to my Office every six months on its progress, until I am satisfied that steps have been taken to address my recommendations.

Recommendation 14

The Regional Municipality of Niagara should report publicly, and to my Office, in six months' time on its progress in implementing my recommendations, and at six-month intervals thereafter until such time as I am satisfied that adequate steps have been taken to address them.

Recommendations

- 217 To address the concerns that I have identified in my investigation, I make the following recommendations:
- 1. The Regional Municipality of Niagara should provide a full and frank public apology to the journalist for acting unreasonably and without legal justification, and for infringing his *Charter* rights, when it seized his personal property and expelled him from a council meeting and municipal property on December 7, 2017.**

2. **The Regional Municipality of Niagara should publicly apologize to the citizen blogger for rushing to judgment and failing to follow a fair and reasonable process when it expelled him from a council meeting and seized his personal property on December 7, 2017.**
3. **The Regional Municipality of Niagara should clarify its intent with respect to the authority of staff to seize personal property in its procedure by-law and policies, with reference to the rights protected by the *Canadian Charter of Rights and Freedoms*.**
4. **The Regional Municipality of Niagara should ensure that any by-law or policy that references “improper conduct” include a definition of that term, including reference to specific categories or examples.**
5. **The Regional Municipality of Niagara should amend its procedural by-law and relevant policies to state that expulsion from a meeting should not take place unless the Chair is satisfied that evidence exists to support expulsion.**
6. **The Regional Municipality of Niagara should amend its procedural by-law to specify that, where the Chair exercises his authority under the *Municipal Act, 2001* to expel an individual from a meeting, the reasons for the expulsion must be recorded in the meeting minutes.**
7. **The Regional Municipality of Niagara should set out in writing its expectations and processes regarding the exercise of its authority under the *Trespass to Property Act*, either as a standalone policy or part of a broader policy respecting unreasonable or improper conduct.**
8. **The Regional Municipality of Niagara should ensure that any resolution to close a meeting state the exceptions relied upon and a general description of the subject matter to be discussed in closed session.**
9. **The Regional Municipality of Niagara should amend its procedural by-law to clarify council’s authority to exercise discretion to hold a closed session outside of a set agenda order.**
10. **The Regional Municipality of Niagara should make audio or video recordings of all closed meetings of council, its local boards, and committees of either.**

- 11. The Regional Municipality of Niagara should update its procedural by-law to reflect the open meeting provisions in the *Municipal Act, 2001*.**
- 12. The Regional Municipality of Niagara should develop a procedure respecting the public access to municipal property during meetings, including after-hours meetings, and provide for records to be kept of when the doors to regional headquarters are locked and unlocked.**
- 13. The Regional Municipality of Niagara should train its staff on the procedures for locking doors and ensuring public access during meetings.**
- 14. The Regional Municipality of Niagara should report publicly, and to my Office, in six months' time on its progress in implementing my recommendations, and at six-month intervals thereafter until such time as I am satisfied that adequate steps have been taken to address them.**

Response

- 218** The *Ombudsman Act* (s. 18(3)) requires that I give public sector bodies affected by my investigations an “opportunity to make representations” regarding my reports and recommendations. As is my Office’s practice in all formal investigations, I provided the region with an opportunity to comment on a preliminary version of this report and recommendations before they were finalized.
- 219** The region was given 17 calendar days to review the report and respond (from June 12 to the end of June 29, 2018). Regional council is entitled, under the *Municipal Act*, to meet in order to consider my report and recommendations. I was disappointed to learn that it never did so. In the end, I received comments from five individual members of council and from the region’s external counsel.
- 220** Although most public sector bodies do not deal with my Office through legal counsel, they are entirely within their rights to retain legal counsel to provide them with advice and guidance throughout the investigative process, and to make representations through counsel on my reports and recommendations before they are finalized. However, it is unfortunate and counterproductive when legal counsel bring an adversarial approach to their involvement in an Ombudsman investigation, as happened in this case.
- 221** The Regional Chair pledged full co-operation with this investigation, but the region’s external counsel, ostensibly on behalf of their client, attempted through

its response to influence our investigative process, challenge our well-established statutory authority, and dictate the content of my report.

- 222** Many of the external counsel's assertions betrayed what I can only describe as a disturbing lack of understanding of my Office and its authority. I believe it is important to address these points and set the record straight for the benefit of all Ontario stakeholders, to guard against misinformation.
- 223** The Office of the Ontario Ombudsman was established more than 40 years ago as an impartial fact-finding body with the authority to resolve matters through investigation and the publication of non-binding reports and recommendations. The Ombudsman is intended to be a flexible and non-adversarial alternative to litigation in the courts, which can be time-consuming, costly, and complex. The scope of my authority is set out in the *Ombudsman Act*, and examples of my Office's work – dozens of reports on our investigations, including details of the process followed for each one – are readily available on our website.
- 224** Nevertheless, the external counsel's response began by claiming that they only became aware of our preliminary report review and comment process from a media article published on June 27.⁶⁹ This was surprising, given that my staff discussed our process with external counsel and regional staff before the preliminary version of this report was provided to them. We advised external counsel that the *Ombudsman Act* sets out provisions relating to preliminary reports and the Ombudsman also determines the Office's procedure under the Act. We noted that regional council could direct that its external counsel provide representations on the report to our Office. We explained that the preliminary reporting process was an opportunity for the region to identify any inaccuracies, provide additional clarification, raise concerns, or comment on the report's findings, conclusions and recommendations, which were all preliminary and confidential at that stage.
- 225** External counsel also claimed that the region was not afforded sufficient opportunity to review the preliminary report. Yet before they received it, they told my staff that a deadline extension would be requested if a special meeting was required to consider and comment on the report. No such request was made.
- 226** In questioning some of the most basic aspects of my Office's role, external counsel argued that the Ombudsman has no authority to make findings


⁶⁹ The article noted that the Ombudsman always provides preliminary versions of investigation reports to public sector bodies for a response, and may include and comment on their responses in his final reports: Grant LaFleche, "Region faces deadline to respond to Ombudsman report", *The St. Catharines Standard*, (27 June 2018), online: <<https://www.stcatharinesstandard.ca/news-story/8700137-region-faces-deadline-to-respond-to-ombudsman-report/>>.

respecting the law, but can only render an opinion. For example, they asserted that I had no authority to conclude that the region contravened the *Municipal Act* when it locked external access doors during a council meeting. They also challenged my authority to conclude that the region infringed the journalist's *Charter* rights when it seized his laptop and excluded him from municipal headquarters.

- 227** In fact, the *Ombudsman Act* contemplates that I will reach conclusions and opinions and make recommendations, including relating to the legality of administrative conduct. It would be impossible for me to carry out my statutory duty if I were precluded from making findings of law. When I do so, I do not act as a court or tribunal, but as a legislative officer tasked with assessing the relevant facts independently and impartially and arriving at my own view of the legality, correctness, and reasonableness of the conduct of public sector bodies. For instance, in my view, based on the language of the *Municipal Act* and relevant court decisions, locking the doors to a municipal meeting effectively renders an otherwise public meeting illegally closed. Similarly, it is my opinion that the region's actions towards the journalist constitute the type of conduct that courts have consistently found to be a violation of *Charter* rights.
- 228** External counsel also submitted that I cannot impose legally enforceable orders or remedies under the *Charter*. They are correct on this point and I have never sought to do so. Instead, I make non-binding recommendations under the *Ombudsman Act*.
- 229** But they also submitted that I have no authority to make findings of fact, or to prefer certain evidence over other evidence collected in the course of my investigation. The fact is, I am often faced with contradictory and inconsistent evidence in an investigation, particularly one of this size and complexity, which involved more than 50 interviews and the review of extensive documentary, video, and audio evidence. It is common for witness recollections of events to differ and memories to fade over time, and we saw that in this case. It is my role to weigh that evidence and determine what information to accept, and when there is insufficient evidence to reach a conclusion.
- 230** As noted in several footnotes in this report, external counsel questioned several of my factual conclusions. I considered these comments, as well as those from the five individual council members, when finalizing my report, leading to one correction and some clarifications. But on the whole, the external counsel's representations were not particularly persuasive, given the evidence that I had collected independently.

- 231** External counsel also questioned my interview process, noting that the interviews my Office conducted were not under oath. Although I have the authority to examine witnesses under oath, it is rarely necessary to do so, and I determined that it was unwarranted in this case. Under the *Ombudsman Act*, it is an offence (punishable on conviction by a fine of up to \$500 or imprisonment up to three months, or both), to wilfully make any false statement to or mislead or attempt to mislead my Office, whether or not the information is provided under oath.
- 232** Another troubling argument by external counsel was that there was no “due process” during my investigation and that the region was not provided with any chance to rebut my conclusions until the preliminary report was provided for review. This ignores the fact that the preliminary reporting process **is** the chance for public sector bodies to address any concerns about my findings. It is a longstanding ombudsman practice, and its intent is to provide for procedural fairness. It is regrettable that the region did not take full advantage of this opportunity.
- 233** The *Ombudsman Act* provides me with the authority to disclose in any report those matters that, in my opinion, ought to be disclosed in order to establish the grounds for my “conclusions and recommendations” (s.12). I am obligated to provide a basis to support my opinions, conclusions and recommendations, and, in doing so, must consider the comments I receive during the preliminary reporting process. Representations on behalf of a public sector body may or may not result in changes to the final version of the report.
- 234** My objective is to make feasible and constructive recommendations, and the commentary of public sector bodies in response to preliminary reports is extremely helpful in this regard. All of my Office’s investigative reports include a reference to the response from the relevant organization; depending on the case, these responses are summarized in the final report or attached in full. Ultimately, I have the authority to decide what information is included in my reports and how it is presented.
- 235** Finally, the external counsel’s response indicated that the region would not provide its position on my recommendations. They maintained that the region was not asked to respond to the recommendations and that doing so would make no sense, as the report was preliminary. This is frankly baffling – it is a standard expectation that a public sector body provided with recommendations from an independent oversight body would address them. Not only was this explained to them in writing, but a review of any of my Office’s investigative reports would have made this expectation clear to the region and its external counsel. Most disturbing of all, as a result of this omission, I cannot report on whether or not the region intends to implement the improvements I am recommending.

- 236** Fortunately, regional council is legally obligated to respond to at least part of my report: Section 239.2(12) of the *Municipal Act* requires that council pass a resolution stating how it intends to address my report, with respect to the closed meetings held on December 7, 2017 (both the intentional closed session and the one resulting from the locked doors).
- 237** I strongly encourage regional council to consider, as soon as possible, all of my other recommendations as well, which are addressed at ensuring that fairness, accountability and proper consideration of the law guide its actions in future. It should also announce publicly, by way of resolution passed at a public meeting, how it intends to respond to each recommendation.



Paul Dubé
Ombudsman of Ontario



Ombudsman
ONTARIO

ONTARIO'S WATCHDOG

Office of the Ombudsman of Ontario
Bell Trinity Square
483 Bay Street, 10th Floor, South Tower
Toronto, Ontario
M5G 2C9

www.ombudsman.on.ca
1-800-263-1830

Facebook:
Ontario Ombudsman

Twitter:
@Ont_Ombudsman
@Ont_OmbudsmanFR

