



Ombudsman Report

**Investigation into a meeting held by
the City of Greater Sudbury on January 12, 2021**

**Paul Dubé
Ombudsman of Ontario
May 2021**

Complaints

- 1 My Office received a complaint about a meeting held by council for the City of Greater Sudbury (the “City”) on January 12, 2021.
- 2 The complaint alleged that council discussed the Kingsway Entertainment District *in camera* and that this topic did not fit within the exceptions in the *Municipal Act, 2001* (the “Act”) that were cited in council’s resolution to go into closed session.
- 3 The complaint also alleged that council’s resolution to go *in camera* was not passed during a part of the meeting that was open to the public.

Ombudsman jurisdiction

- 4 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.¹
- 5 As of January 1, 2008, the Act gives anyone the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 6 The Ombudsman is the closed meeting investigator for the City of Greater Sudbury.
- 7 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.
- 8 Our Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman’s decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of the Ombudsman’s previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

¹ S.O. 2001 C. 25.

Investigative process

- 9 On January 22, 2021, we advised the City of our intent to investigate this complaint.
- 10 My staff reviewed the City's procedure by-law and relevant portions of the Act. We reviewed the meeting records, including the agenda, open and closed session minutes, and the archived broadcast of the meeting.
- 11 We spoke with the complainant, as well as the Mayor and the City Clerk/Solicitor, to obtain additional information about the meeting and the City's modified procedure for holding meetings electronically as a result of the COVID-19 pandemic.
- 12 My Office received full co-operation in this matter.

Procedural by-law

- 13 The City's procedure by-law (By-law 2019-50) states that meetings may be closed to the public in accordance with section 239 of the *Municipal Act, 2001* provided that council pass a resolution stating the reason for closing the meeting and the general nature of the subject matter to be considered.
- 14 Section 11 of the by-law provides that closed meetings shall be scheduled immediately prior to a regular or special meeting of council and shall recess at least ten minutes prior to the time scheduled for the commencement of the regular or special meeting, unless otherwise determined by the Clerk.
- 15 The by-law also provides that closed meetings of council shall be chaired by the Deputy Mayor, and that the Chair shall report back to the public after council reconvenes in open session.

Electronic meetings

- 16 Following amendments to the *Municipal Act* made by the *Municipal Emergency Act, 2020* and the *COVID-19 Economic Recovery Act, 2020*, a municipality's procedure by-law may now allow members to participate electronically in a meeting "to the extent and in the manner set out in the by-law."² Members participating electronically can also be counted towards quorum.

² *Municipal Act, 2001*, S.O. 2001 C. 25 at s. 238(3.3).

- 17 While these amendments allow for some additional flexibility in conducting meetings through electronic participation, they did not create any new exceptions to the open meeting rules, or change any of the applicable procedural rules. Municipal meetings are still required to be open to the public, unless the topic of discussion fits within one of the exceptions set out in the Act. Notice of meetings must still be provided in accordance with the procedure bylaw, meeting minutes must be recorded, and a resolution must be passed in open session before the meeting can be closed to the public.³
- 18 Council amended the City's procedure by-law to provide for members to participate electronically in both open and closed meetings and be counted towards quorum. Members are to advise the Clerk and Chair of their intention to participate electronically in a meeting.⁴
- 19 The procedure by-law as amended indicates that the Chair, in consultation with the Clerk, shall determine any procedures required to ensure that meetings conducted with electronic participation are in compliance with the requirements of the *Municipal Act*.

January 12, 2021 meeting

- 20 The agenda for the January 12 council meeting indicated that it would be broadcast online and on television in real time and would also be saved for public viewing on the City's website. Members of the public were not permitted to observe the meeting in-person due to restrictions related to COVID-19.
- 21 The agenda indicated that council would hold a closed meeting at 4:00 p.m. in a committee room and by electronic participation to discuss two topics:

one (1) Information Supplied in Confidence item regarding the City of Greater Sudbury Community Development Corporation and one addendum to deal with one (1) Personal Matter (Identifiable Individual(s)) item regarding an employment matter in accordance with the *Municipal Act, 2001*, s. 239(2)(b) and (i).
- 22 The agenda also indicated that council would hold an open session at 6:00 p.m. in council chambers and by electronic participation to address the rest of the items on the agenda.

³ *Russell (Town of) (Re)*, 2020 ONOMBUD 1 (CanLII), <<https://canlii.ca/t/j6n2t>>.

⁴ By-law 2020-137.

- 23 The closed session minutes indicate that the meeting began at 4:00 p.m. and that council passed a resolution to go *in camera* at 4:02 p.m. This portion of the meeting was not broadcast to the public.
- 24 According to the closed session minutes and interviews conducted with individuals present during the meeting, staff provided an update to council about confidential information received from third parties regarding a development proposal. We were told that the third parties had specifically requested that the information remain confidential.
- 25 Council then proceeded to discuss a matter involving an individual employed by the City. Council also had the opportunity to consult with the City's external legal counsel about this matter, who participated electronically for part of the meeting.
- 26 Council then recessed from closed session at 8:20 p.m.
- 27 We were told that discussion about the second closed session agenda item took much longer than anticipated, and that the City's closed meetings typically conclude prior to the scheduled start time of the open session at 6:00 p.m. Between 6:00 p.m. and 8:50 p.m. a message was displayed on the live broadcast indicating that the meeting would begin later than originally scheduled.⁵
- 28 According to the closed session minutes and interviews conducted with individuals present during the meeting, council did not discuss the Kingsway Entertainment District at any point during the closed session.
- 29 Council convened in council chambers in open session at 8:50 p.m. and a live broadcast commenced at that time. A roll call was conducted to confirm that members of council had logged in to the electronic meeting.
- 30 The Mayor then made brief introductory remarks and noted that because the closed session had gone longer than anticipated, council might not be able to discuss all the outstanding agenda items. The Mayor commented upon newly announced public health restrictions related to COVID-19, and stated that he would be directing staff to prepare an updated report on the Kingsway Entertainment District project. The Mayor asked that further discussion on this topic wait until updated information was available to council.
- 31 The Deputy Mayor then reported back on the two topics discussed in closed session and stated that no direction or resolution arose from the meeting.

⁵ <https://livestream.com/greatersudbury/events/9464845/videos/215956606>

- 32 Council then proceeded to deal with other business. The meeting was adjourned at 9:05 p.m.

Analysis

- 33 The complainant who requested that my Office investigate this matter inferred from the Mayor's remarks in open session that the Kingsway Entertainment District had been discussed *in camera*, even though it had not been listed in the agenda or report back provided by the Deputy Mayor.
- 34 This topic was not discussed during the closed session held on January 12. We found that both topics discussed *in camera* fit the exceptions cited.

Applicability of the exception for personal matters about identifiable individuals

- 35 The "personal matters" exception applies to discussions that reveal personal information about an identifiable individual, where an individual could reasonably be expected to be identified if the information were disclosed publicly.⁶
- 36 While information that pertains to an individual in their professional capacity will not generally fit within the "personal matters" exception, it may still fit within the exception if it reveals something personal – for example, where it relates to the conduct or performance of an individual employee.⁷
- 37 Council's discussion *in camera* on January 12, 2021 involved consideration of an individual employee's conduct. Accordingly, this topic fit within this exception.

Applicability of the exception for information supplied in confidence by a third party

- 38 The exception under section 239(2)(i) of the Act applies to "a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence to the municipality or local board, which, if disclosed, could reasonably be expected to prejudice significantly the competitive

⁶ *Ontario (Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC), <<https://canlii.ca/t/1vkb1>>, at para 69.

⁷ *Aylmer (Town) (Re)*, 2007 CanLII 30462 (ON IPC), <<https://canlii.ca/t/1scqh>>; *Madawaska Valley (Township) (Re)*, 2010 CanLII 24619 (ON IPC), <<https://canlii.ca/t/29p2h>>.

position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization[.]”

- 39 As my Office has found in a previous investigation, a party’s assertion that they would like a particular discussion to remain private does not, on its own, mean that the topic can be discussed *in camera* under this exception.⁸
- 40 My Office has found that this exception is intended protect confidential information about third parties. In a report about the Municipality of St.-Charles, the Ombudsman found that discussion of a financial consultant’s report on municipal accounting practices did not fit within this exception.⁹ Although the consultant’s report was marked “supplied in confidence”, it summarized and analyzed information about the municipality, not information belonging to a third party.¹⁰
- 41 In this case, council for the City of Greater Sudbury received commercial and financial information from third parties that had been supplied in confidence to the municipality. Unlike in the St.-Charles case, this information belonged to the third parties rather than to the City.
- 42 Those we interviewed explained that discussions related to the project remained ongoing and that if disclosed, this information could prejudice the negotiating position of the parties involved in the proposal. We were told that if details of the proposal were made public, the third party proponents might be pressured to provide funding to other municipalities for similar projects and on similar terms.
- 43 Disclosure of the commercial and financial information supplied to the City by third parties could reasonably have been expected to interfere with the competitive position and negotiations of those third parties. Accordingly, this topic fit within the exception.

Failure to broadcast the passage of a resolution to go *in camera*

- 44 The Mayor and Clerk/Solicitor explained to my Office that prior to the imposition of restrictions on in-person attendance at meetings due to COVID-19, council met in a committee room before its regular meetings to conduct closed sessions. The door to this room was kept open and members of the public were welcome to attend and observe council pass a resolution to go *in camera*, at which point they would leave. After council rose from closed session, the rest of the meeting would be broadcast

⁸ *Brockville (City of)*, 2016 ONOMBUD 12 (CanLII), <<https://canlii.ca/t/h2ssr>>.

⁹ *St.-Charles (Municipality of) (Re)*, 2019 ONOMBUD 6 (CanLII), <<https://canlii.ca/t/j2p1h>>.

¹⁰ *Ibid.*

beginning at the time specified in the agenda and the public could also observe the meeting in person in council chambers.

- 45 However, on January 12, 2021, the public was not permitted to attend council chambers or the committee room to observe the meetings. The live broadcast of the open meeting began at 6:00 p.m. and did not capture council's resolution to go *in camera*, which was passed at approximately 4:00 p.m.
- 46 I recognize that municipalities have faced unprecedented challenges in adapting their operations during the COVID-19 pandemic, as applicable laws, best practices, and public health guidelines continue to evolve. Nevertheless, as my Office has noted in previous closed meeting investigation reports, the amendments to the *Municipal Act* permitting electronic participation in meetings did not change the fundamental requirement that meetings must be open to the public, which enables citizens to observe council proceedings in action.¹¹ The Supreme Court of Canada has determined that the open meeting requirements in the Act demonstrate that the public has "the right to observe municipal government in process".¹²
- 47 Whenever the public is excluded from in-person attendance, it is imperative that the alternative electronic format selected enables the public to observe all portions of a meeting except a duly constituted closed session.
- 48 Pursuant to section 239(4) of the Act, members of the public are entitled to observe council passing a resolution stating the general nature of the topics to be discussed prior to holding a closed session.
- 49 This requirement is not a mere formality. As the Ontario Court of Appeal has explained, it allows the municipality to provide a general description of the matters to be discussed in a way that maximizes information available to the public without undermining the reason for closing the meeting.¹³
- 50 In previous reports issued by my Office, I have noted that the resolution to close a meeting cannot be passed when the meeting is already effectively closed to the public.¹⁴ Meetings must begin in open session and the public must be able to attend or otherwise observe that portion of the meeting, even if council plans to go *in camera* shortly thereafter.¹⁵ The inclusion of

¹¹ *Westport (Village of) (Re)*, 2021 ONOMBUD 5 (CanLII), <<https://canlii.ca/t/jdpvc>>.

¹² *London (City) v RSJ Holdings Inc.*, 2007 SCC 29, at para 32, <<https://canlii.ca/t/1rtq1>>.

¹³ *Farber v. Kingston (City)*, 2007 ONCA 173 (CanLII), <<https://canlii.ca/t/1qtzl>>.

¹⁴ *Burk's Falls / Armour (Village of / Township)*, 2015 ONOMBUD 26 (CanLII), <<https://canlii.ca/t/gtp6w>>.

¹⁵ *Richmond Hill (City of) (Re)*, 2021 ONOMBUD 8 (CanLII), <<https://canlii.ca/t/jf6b3>>.

the proposed resolution to go *in camera* on an agenda circulated prior to the meeting cannot substitute for inviting the public to observe the passage of the resolution in an open meeting.

Opinion

- 51 Council for the City of Greater Sudbury did not discuss the Kingsway Entertainment District *in camera* on January 12, 2021.
- 52 The topics discussed by council under the exceptions for personal matters about an identifiable individual and information supplied in confidence from a third party fit within those exceptions.
- 53 However, council contravened the Act when it passed a resolution to go in camera in a portion of the meeting that was effectively closed to the public, as the public was unable to attend in-person or observe a live broadcast.
- 54 I urge the City of Greater Sudbury to consider all available options to ensure that the public's right to observe municipal meetings is upheld in full and that all portions of such meetings are broadcast live when there are restrictions on in-person attendance.

Recommendations

- 55 I make the following recommendations to assist the City of Greater Sudbury in fulfilling its obligations under the Act and enhancing the transparency of its meetings:

Recommendation 1

All members of council and committees for the City of Greater Sudbury should be vigilant in adhering to their individual and collective obligation to ensure that the municipality complies with its responsibilities under the *Municipal Act, 2001* and its procedure by-law.

Recommendation 2

Council for the City of Greater Sudbury should ensure that the public is able to observe all open portions of meetings held by council and its committees, including resolutions to go *in camera*.

Report

- 56 Council for the City of Greater Sudbury was given the opportunity to review a preliminary version of this report and provide comments to my Office. In light of the restrictions in place related to COVID-19, some adjustments were made to our normal preliminary review process and we thank council and staff for their co-operation and flexibility. The comments we received were considered in the preparation of this final report.
- 57 This report will be published on my Office's website, and should be made public by the City of Greater Sudbury as well. In accordance with s. 239.2(12) of the *Municipal Act, 2001*, council should pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario