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Ombudsman
ONTARIO

J. Paul Dubé, Ombudsman

April 19, 2018

Via email

Mayor Dave Augustyn
Pelham Town Hall
20 Pelham Town Square
P.O. Box 400
Fonthill, ON L0S 1E0

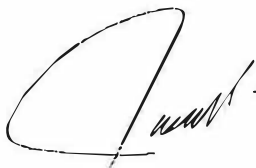
Dear Mayor Augustyn,

Re: Report – Office of the Ontario Ombudsman

I have completed my investigation into whether council for the Town of Pelham held an improper closed meeting and an illegal informal gathering on September 5, 2017. Please find my final report enclosed. We ask that you distribute the enclosed report to council.

In accordance with section 14.1 (8) of the *Ombudsman Act*, the town should make my report available to the public, and we ask that this be done no later than the next council meeting. Pursuant to section 14.1 (9) of the *Ombudsman Act*, I will also post a copy of the report on my website at www.ombudsman.on.ca.

Yours truly,



Paul Dubé
Ombudsman of Ontario

CC: Clerk, Nancy Bozzato

Bell Trinity Square
483 Bay Street, 10th Floor, South Tower, Toronto, ON M5G 2C9
483, rue Bay, 10^e étage, Tour sud, Toronto (Ontario) M5G 2C9
Tel / Tél 416-586-3347
Facsimile / Télécopieur 416-586-9659 TTY/ATS 1-866-411-4211

www.ombudsman.on.ca



Ombudsman Report

**Investigation into complaints about a meeting and an
informal gathering held by council for the Town of Pelham on
September 5, 2017**

**Paul Dubé
Ombudsman of Ontario
April 2018**

Complaints

- 1 In November 2017, my Office received complaints that a closed meeting held by council for the Town of Pelham did not comply with the open meeting rules in the *Municipal Act, 2001* (the "Act").
- 2 The complaints alleged that a closed session discussion on September 5, 2017, about town finances did not fit within any of the exceptions set out in the Act.
- 3 My Office also received a complaint alleging that following the September 5, 2017 council meeting, members of council held a gathering at a local establishment that did not comply with the open meeting provisions in the Act.

Ombudsman jurisdiction

- 4 Under the Act, all meetings of council, local boards and committees of each of them must be open to the public unless they fall within the prescribed exceptions.
- 5 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 6 The Ombudsman is the closed meeting investigator for the Town of Pelham.
- 7 In investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the municipality's procedure by-law have been observed.

Investigative process

- 8 On November 21, 2017, we advised the municipality of our intent to investigate these complaints.
- 9 My Office reviewed the city's procedure by-law and relevant portions of the Act. We reviewed the meeting records from the open and closed portions of the September 5, 2017 meeting, as well as supporting documentation. We interviewed the town's Clerk, all individuals who were members of council on

September 5, 2017, and spoke with lawyers retained by the town.

- 10 We also listened to an audio recording of the meeting provided by the town, which provided an accurate record of what transpired and greatly assisted us in completing our investigation.
- 11 The municipality was given the opportunity to review a preliminary version of this report and provide comments to our Office. Comments received were considered in the preparation of this final report.
- 12 My Office received full co-operation in this matter.

Council meeting on September 5, 2017

- 13 Council for the Town of Pelham met in council chambers at 4:00 p.m. on September 5, 2017, for a special meeting.
- 14 Council passed a resolution to move into closed session to discuss two items. The first discussion item was the subject of the complaints to my Office.
- 15 According to the audio recording of the meeting, council cited the exceptions for labour relations and for solicitor-client privilege in the resolution with respect to the first discussion item. The minutes, however, only record the exception for solicitor-client privilege.
- 16 In the closed session, the town's Chief Administrative Officer provided some background information and context for the matters to be discussed. He introduced the town's external lawyers, who were present in the room. One of the town's lawyers then introduced an external consultant retained by the lawyers on behalf of the town.
- 17 The external consultant presented a report that had been commissioned by the town's lawyers concerning financial information provided by the town, as well as the conduct and performance of an individual in the context of employment with the town. Councillors asked questions throughout the presentation, which the consultant answered.
- 18 Following the consultant's presentation, one of the town's lawyers provided legal advice to council regarding an employment matter. Council members asked questions, which the lawyer answered, with respect to the legal advice.

- 19 After the town's lawyer finished her presentation, the Mayor introduced the town's Treasurer. The Treasurer presented information to council and answered questions about that information.
- 20 Following the Treasurer's presentation, council members discussed and asked questions about the information presented at the beginning of the meeting with respect to legal advice and the consultant's report.
- 21 Council rose from the in camera session with no report. The special meeting adjourned at 6:21 p.m.

Analysis

Discussion of the external consultant's report

- 22 During the first portion of the closed meeting, the external consultant presented a report to council regarding financial information provided by the town, as well as the conduct and performance of an individual in the context of employment with the town.

Applicability of the exception for labour relations or employee negotiations

- 23 Council cited the exception for labour relations or employee negotiations in the resolution to go into closed session.
- 24 While decisions of the Ontario Information and Privacy Commissioner are not binding on my Office, they are often informative with respect to the applicability of the exceptions in the Act. The Information and Privacy Commissioner has found that the term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships.¹
- 25 My Office has found that this exception may also include discussions involving staff compensation or vacation; the hiring or firing of staff or disciplinary

¹ IPC Order MO-2352 (see also order PO-2613) Appeal MA07-409 (City of Elliot Lake)

proceedings; grievances under a collective agreement; a voluntary exit program; or a review of staff workload and working relationships.²

- 26 In the closed meeting on September 5, 2017, council for the town discussed an individual's conduct and performance with respect to employment. The discussion fit within the exception for labour relations and employee negotiations in section 239(2)(d) of the Act.

Applicability of the exception for advice subject to solicitor-client privilege

- 27 The town cited the exception for advice subject to solicitor-client privilege to receive and discuss the consultant's report in camera. The consultant was retained by the town's lawyers to review and interpret financial information provided by the town. The town's lawyers told us that the consultant's report formed the basis for the legal advice provided to the town.
- 28 The courts have found that the exception for advice subject to solicitor-client privilege is applicable "where legal advice of any kind is sought from a professional legal advisor in his capacity as such" and includes communications necessary for that purpose.³ As the Information and Privacy Commissioner set out in Order 49, in order for the privilege to apply:
- S There must be written or oral communication,
 - S The communication must be of a confidential nature,
 - S The communication must be between a client (or his agent) and a legal advisor, and
 - S The communication must be directly related to seeking, formulating or giving legal advice.⁴
- 29 The courts have examined the function of third party communications, like reports from a consultant, to determine if they are protected by solicitor-client privilege.
- 30 The courts have emphasized the distinction between solicitor-client privilege and litigation privilege. In *General Accident Assurance Co. v. Chrusz*, the Ontario Court of Appeal explained that not all material deemed useful to a lawyer to properly

² Ontario Ombudsman, "Investigation into a complaint about a meeting held by Council for the City of Sault Ste. Marie on October 13, 2015" (August 2016) online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2016/city-of-sault-ste-marie>>.

³ *Descôteaux et al. v. Mierzewski*, [1982] 1 SCR 860.

⁴ Order 49 [1989] O.I.P.C. No. 13.

advise a client is protected by solicitor-client privilege; it must be essential to the operation of the solicitor-client relationship.⁵

- 31 In that case, the court found that where a third party acts as a conduit for information between a client and solicitor, like a translator or messenger, privilege will apply. The court explained that communications with an expert like a doctor or psychiatrist retained by a lawyer will be privileged where the expert is acting as a translator to interpret the medical evidence, allowing the lawyer to “understand that information and assess its significance to the legal issues that the solicitor must address”.⁶
- 32 The court explained that this can also apply to an expert like an accountant, who interprets financial data provided by a client to allow the lawyer to understand the information relevant to formulating their advice.⁷
- 33 The consultant retained by the town’s lawyers acted as a translator, interpreting the financial information provided by the town and explaining it to the lawyers to allow them to formulate legal advice. The discussion in camera about the consultant’s report fit within the exception for solicitor-client privilege.

Discussion of legal advice provided by external counsel

- 34 During the second portion of the in camera discussion, the town’s lawyer provided council with legal advice and answered questions about that advice.

Applicability of the exception for advice subject to solicitor-client privilege

- 35 As set out above, the courts have found that the exception for advice subject to solicitor-client privilege is applicable “where legal advice of any kind is sought from a professional legal advisor in his [sic] capacity as such” and includes communications necessary for that purpose.⁸
- 36 During the closed meeting, the town’s external counsel communicated confidential information to council for the purpose of providing legal guidance.
- 37 This portion of the meeting fit within the exception for solicitor-client privilege.

⁵ *General Accident Assurance Co. v. Chrusz* (1999), 1999 CanLII 7320 (ON CA), 45 O.R. (3d) 321 (C.A.)

⁶ *General Accident Assurance*, *supra*, explaining *Smith v Jones* [1999] 1 SCR 455.

⁷ *Susan Hosiery Ltd. v. M.N.R.*, [1969] 2 Ex. C.R. 27, as cited in *General Accident Assurance*, *supra*.

⁸ *Descôteaux et al. v. Mierzewski*, [1982] 1 SCR 860.

Discussion of town finances moving forward

- 38 Following the discussion about legal advice, the town's Treasurer presented information to council about the town's financial status.

Applicability of the exception for advice subject to solicitor-client privilege

- 39 The town cited the exception for advice subject to solicitor-client privilege to discuss how the town should proceed with respect to its finances.
- 40 As discussed above, this exception is applicable "where legal advice of any kind is sought from a professional legal advisor in his capacity as such" and includes communications necessary for that purpose.⁹
- 41 In most cases, information provided to council by staff about a municipality's finances would not fit within any of the exceptions to the open meeting rules and should be discussed in open session. Governments are entrusted with the management of public funds, and information about the state of those funds should be public to ensure financial accountability at the local level.
- 42 However, in this case, the town's solicitor submitted that the information presented by the Treasurer was necessary to fully explore the issues covered by the legal advice provided to council. As with the third party expert's report discussed above, the information provided by the Treasurer was provided to allow the lawyers to understand the financial information, in order to provide legal advice to the town.
- 43 Having considered the solicitor's comments, including in response to our preliminary report, and a thorough review of the audio recording of the closed meeting, I have determined that the discussions on September 5 were properly held in camera, as the information provided by the Treasurer was sufficiently necessary to fully explore the issues covered by the legal advice to fall within the exception for solicitor-client privilege. I commend the town once again for audio recording its meetings, as the record was particularly helpful in this case.

⁹ *Descôteaux et al. v. Mierzewski*, [1982] 1 SCR 860.

Procedural matters

Procedure by-law

- 44 The township's procedure by-law states that all council and committee meetings shall be open to the public, except in accordance with the exceptions in the *Municipal Act, 2001*.
- 45 The by-law closely mirrors the exceptions set out in the Act, except for the exception set out in section 239(3)(b) for discussions about an ongoing investigation by the Ontario Ombudsman, an appointed ombudsman, or an appointed closed meeting investigator.
- 46 In response to my preliminary report, town staff have recommended that council update the town's procedure by-law to reflect all of the exceptions to the open meeting rule set out in the Act.

Minutes

- 47 The Act requires that council record, without note or comment, all resolutions, decisions, and other proceedings at its meetings.
- 48 In the meeting minutes from the closed session on September 5, 2017, the only exception listed for discussing the first matter in closed session is the solicitor-client privilege exception. However, on the audio recording, the Mayor can be heard passing a resolution to discuss that matter in closed session under both the solicitor-client privilege exception and the labour relations or employee negotiations exception.
- 49 In this case, the minutes did not capture the full proceedings of council. After receiving my preliminary report, council directed staff to correct the meeting minutes for September 5 to reflect both exceptions cited to close the meeting, noting that one exception was omitted in error.

Informal gathering on September 5, 2017

- 50 In addition to the complaints reviewed above about the town's September 5, 2017 closed council meeting, my Office received a complaint that members of council gathered at a local establishment called the Mouse Trap following the meeting on September 5, 2017, in violation of the open meeting provisions of the *Municipal Act*.

Regular informal gatherings of council members

- 51 In interviews, council members told my Office that it is a regular practice for members of council to meet for a social gathering after council meetings. They told us that the purpose of the gatherings is to allow council members to get to know one another more personally.
- 52 Councillors told my Office that after every council meeting, they go to the Mouse Trap for some food and drinks. We were told that councillors generally go straight to the Mouse Trap following the meeting, while the Mayor arrives about 30 minutes later because he stays to help staff clear up council chambers and to shut down his computer. Council members told us they usually sit at one of two spots in the restaurant.
- 53 Council members recalled being cautioned by town staff to take care not to discuss or advance council business during an informal gathering. Some councillors specifically mentioned that they know not to advance the business of council and, in the past, members have reminded one another not to discuss something if a matter related to council business comes up during a gathering.

Gathering on September 5, 2017

- 54 On September 5, 2017 council members told my Office they gathered in the middle section in the Mouse Trap at standing tables. We were told that no one other than council members was at their table for the gathering, but that other individuals in the restaurant might have stopped by to say hello and briefly chat.
- 55 Some members of council recalled council members expressing their reactions to the discussion at that night's council meeting during the gathering that evening. They told us the discussion did not include anything specific about the content of the meeting and was not a continuation of the meeting's discussions.
- 56 Three council members did not recall the council meeting being discussed at all while at the Mouse Trap.
- 57 Council members told us the remainder of the conversation at the Mouse Trap on September 5, 2017 was about matters unrelated to council business. They suggested it was about their lives, including vacation plans, real estate, or sports games, though no members of council could recall specifically what was discussed that night. All council members agreed the purpose of the gathering was social in nature.

Analysis

58 At the time of the September 5, 2017 gathering, the term “meeting” was defined in section 238 of the Act as “any regular, special or other meeting of a council, of a local board or of a committee of either of them.”

59 My Office has developed a working definition of “meeting”:

Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.¹⁰

60 The *Municipal Act, 2001* does not prevent council members from meeting informally or socially outside of council chambers. My Office found that a social gathering of council members in Owen Sound did not contravene the Act, as members did not discuss council business during the gathering.¹¹ However, in my Office’s report regarding a private breakfast meeting in the City of Hamilton, we noted that it can be challenging to assure the public that no improper discussions have taken place when councillors or committee members meet informally.¹²

61 In the present case, members of council from the Town of Pelham gathered socially at a local restaurant surrounded by other tables. No council business was discussed and council members did not lay the groundwork for any future council decisions.

62 This type of social gathering is not a “meeting” for the purposes of the Act’s open meeting requirements. However, such gatherings run the risk of undermining public confidence and engendering suspicion, particularly if concern or opinions about council business are expressed during the gathering. Council should keep in

¹⁰ Amendments to the *Municipal Act, 2001* came into force on January 1, 2018, which included a new definition of “meeting” for purposes of section 239 of the Act. These amendments were not in force at the time of the September 5, 2017 meeting.

¹¹ Ombudsman of Ontario, *Investigation into the City of Owen Sound’s alleged violations of the Municipal Act, 2001 on April 27, May 25 and June 15, 2015* (November 2015) online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2015/city-of-owen-sound>>.

¹² Ombudsman of Ontario, *Investigation into whether the City of Hamilton’s NHL Proposal Sub-Committee held an improperly closed meeting* (February 2012) at para 24, online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2012/city-of-hamilton-en>>.

mind the perception by the public that decisions might be made during these gatherings, even if the gathering is intended to be social in nature.¹³

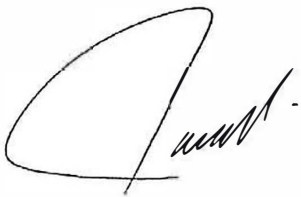
- 63 We recognize, as council members noted in their interviews, that such gatherings, when limited to purely social events, can help council establish stronger working relationships. However, we encourage all members of council to be vigilant in ensuring that their actions fulfil not only the requirements of the Act, but also its spirit.

Opinion

- 64 Council for the Town of Pelham did not contravene the *Municipal Act, 2001* on September 5, 2017, when it discussed a consultant's report, received legal advice, and received a presentation from staff in camera.
- 65 Council for the Town of Pelham also did not contravene the *Municipal Act, 2001* when its members met informally following the September 5, 2017, council meeting.

Report

- 66 My report should be shared with council and made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario

¹³ Local Authority Services, *A Report to the corporation of the Township of Carling* (March 2015) at 7, online: <<http://www.agavel.com/wp-content/uploads/2013/09/Carling-Investigation-Report-Final-March-2015.docx>>.