



Ombudsman Report

**Investigation into a complaint about
a closed meeting held by the Municipality of
Brighton on March 10, 2017**

**Paul Dubé
Ombudsman of Ontario
August 2017**

Complaint

- 1 On March 27, 2017, my Office received a complaint about a series of phone calls between council members of the Municipality of Brighton on March 10, 2017.
- 2 The complainant alleged that Mayor Mark Walas spoke to four members of council by phone in advance of a special meeting of council on March 15, 2017. At this council meeting, which was closed to the public, council discussed an opportunity to sell land in the municipality's industrial park.

Ombudsman jurisdiction

- 3 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.
- 4 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.
- 5 The Ombudsman is the closed meeting investigator for the Municipality of Brighton.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's governing procedures have been observed.

Council procedures

- 7 The municipality's procedure by-law (by-law no. 097-2013) states that all meetings shall be open to the public except as provided by section 239 of the Act.

Investigative process

- 8 On May 12, 2017, we advised the municipality of our intent to investigate this complaint.
- 9 Members of my Office's staff reviewed relevant portions of the municipality's by-laws and policies, and the Act. We also reviewed an audio recording of the closed session of the council meeting on March 15, 2017.
- 10 We interviewed the mayor and the council members who participated in the phone calls.
- 11 My Office received full co-operation in this matter.

Background

Opportunity to sell land

- 12 On March 8, 2017, the Quinte Economic Development Commission (QEDC) informed the Mayor that a foreign company was interested in purchasing land in the municipality's industrial park to build a factory. The company's representatives were in the area for a short time and were also considering property in nearby municipalities.
- 13 Eager to secure the opportunity for the municipality, the Mayor arranged to meet with the company's representatives and the QEDC. After this meeting took place, the QEDC told the Mayor that the company had received sale of land proposals from the other municipalities under consideration and that Brighton should do the same if it wished to remain competitive.
- 14 To that end, on March 10, 2017, the municipality's Chief Administrative Officer (CAO) and a staff member prepared a proposal for the company. The Mayor was not present but phoned into the CAO's office periodically while the proposal was being drafted. The final proposal contained terms related to financing for the sale of land, a price per acre, and fees for planning, building permit and electrical servicing. It also noted that any terms were subject to council approval.
- 15 Later that evening, the CAO sent the municipality's proposal to the QEDC. The CAO told members of my Office that he received verbal direction from the Mayor to send the proposal to the company. The Mayor told the CAO

he had obtained the agreement of a quorum of council with respect to the proposal's terms.

- 16 A special meeting of council was called by the Mayor on March 15, 2017 to discuss the opportunity to sell land to the company. The municipality's procedure by-law permits the Mayor to call and arrange special council meetings.

The telephone calls

- 17 The Mayor told my Office that he spoke to four members of council over the phone on March 10, 2017.
- 18 According to the Mayor, he phoned those councillors because it was important that he advise them of the company's interest in purchasing municipal land and the time-sensitive nature of the opportunity. During the phone calls, he told the councillors about meeting with the company's representatives and the QEDC. He also advised them that staff members were preparing a proposal for the company that would outline certain terms for the sale of land, including a price per acre. The councillors provided comments on the proposal and expressed their support to send the proposal to the company, as long as it was subject to council approval.
- 19 Members of my Office spoke to the four council members who participated in the phone calls. Two councillors recalled speaking to the Mayor over the phone about the possibility of selling municipal land and supported sending the proposal to the QEDC. The other two councillors confirmed that they spoke to the Mayor over the phone but did not recall discussing the proposal. Rather, they told my Office that they briefly spoke to the Mayor over the phone to arrange the special meeting of council.

The special meeting of council on March 15, 2017

- 20 The Municipality of Brighton audio records its closed meetings of council. We obtained and reviewed a copy of the audio recording for the March 15, 2017 council meeting.
- 21 The recording captures the Mayor commenting that he spoke to four council members about the opportunity to sell municipal land to the company. The Mayor states that those councillors provided him with verbal comments on the proposal and supported sending the proposal to the company in order to remain competitive amongst the other municipalities under consideration.

- 22 None of the four council members disputed the Mayor's recollection during the special council meeting.

Analysis

Different versions of events

- 23 Two of the four council members who participated in the phone calls did not recall speaking to the Mayor about the terms of the proposal during their individual phone calls. According to these councillors, the Mayor phoned them to arrange a special council meeting on March 15, 2017. The phone calls were brief, lasting less than two minutes.
- 24 The evidence of the Mayor and the CAO does not support the recollection of these two councillors.
- 25 The Mayor told members of my Office that during the phone calls, he sought and received input from all four individual council members on the proposal's terms, as well as their support to send it to the company in advance of the special meeting on March 15, 2017. The Mayor emphasized that he needed to advise certain council members about the company's interest in the municipality before its representatives left the area, therefore he phoned individual councillors rather than wait for the special meeting.
- 26 The CAO told members of my Office that he would not have sent the proposal to the company without the assurances from the Mayor that a quorum of council agreed with its terms. A staff member who was also present in the room during the phone call between the Mayor and the CAO supports the CAO's recollection.
- 27 In addition, the recording of the March 15, 2017 closed meeting captures comments made by the Mayor that he received feedback and support on the proposal from the four councillors he spoke to over the phone. None of the council members who participated in the phone calls disputed the Mayor's statements during the closed meeting. This evidence is contemporaneous with the phone calls and corresponds with the Mayor's recollection of the phone calls.
- 28 On a balance of probabilities, I find that the phone calls between the Mayor and all four councillors included a discussion about the proposal and its terms, and all four councillors supported sending the proposal to the company.

Did a meeting occur?

- 29 The *Municipal Act, 2001* defines a “meeting” as “any regular, special or other meeting of a council, of a local board or of a committee of either of them.”¹ In a 2008 report, my Office developed a working definition of “meeting” to assist in the interpretation of the definition contained in the Act²:

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.³

- 30 This definition supports the principles underlying the open meeting rules.
- 31 A meeting of council is not limited to a physical gathering of its members. Instead, a meeting may occur whenever council exercises its authority, including by electronic means.
- 32 In a February 2009 investigation, my Office considered whether sequential phone calls between the Mayor and individual councillors for the Township of Nipissing could be considered a “meeting” for the purpose of the open meeting requirements.⁴ In that case, a quorum of council was never present in the same room or on the phone during any of the conversations. However, as a result of the calls, council collectively came to a consensus to approve additional costs related to the purchase of a fire vehicle. Our report notes:

It is not necessarily the form that a meeting takes that should be determinative, but its substance. In my view, a meeting of council is not limited to a physical gathering of its members. Sequential telephone conversations of council members, “*for the purpose of exercising the power or authority of the council or for the purpose of doing the groundwork necessary to exercise that power or authority,*” may constitute a meeting.⁵

¹ *Municipal Act, 2001*, S.O. 2001, Ch. 25, s. 238(1).

² Ombudsman of Ontario, *Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 25, 2008), online: <https://www.ombudsman.on.ca/Files/sitemedia/Documents/Newsroom/Press%20Releases/dont_let_the_sun_sudbury_04252008.pdf>.

³ *Ibid* at paras 54-60.

⁴ Ombudsman Ontario, *Investigation into Council of the Township of Nipissing Special Meeting of April 25, 2008*, (February 6, 2009), [online](#).

⁵ *Ibid* at para 29.

33 Serial telephone calls are, by their nature, closed to the public.

Did a quorum of council participate in the serial phone calls?

34 When determining if a meeting has occurred, the concept of a legal quorum is an important consideration. In an October 2015 report regarding the City of Elliott Lake, our Office noted that having a quorum of members present is not conclusive, but that quorum is a factor as it means a sufficient number of members is present to legally transact business.⁶ Once a gathering constitutes a quorum of council, committee, or local board, the risk of those individuals collectively exercising their authority increases.

35 The phone calls in this case occurred between the Mayor and four council members. As council is composed on seven members, a quorum of councillors participated in the phone calls.

Did the phone calls materially advance council business or decision-making?

36 I have already found that, on a balance of probabilities, the Mayor's serial phone calls went beyond informing the councillors of the company's interest in the municipality and arranging a special meeting. Rather, during the phone calls, the Mayor took the pulse of four councillors with respect to the proposal, discussed a price per acre for the land, and obtained support to send the proposal prior to the special council meeting.

37 Council did not vote during the phone calls, but it is apparent that staff sent the proposal to the company on the basis of the phone calls and the agreement that resulted amongst a quorum of council. In this manner, the phone calls furthered the municipality's activity with the company and council's interest in securing a land deal with the company.

38 In making the phone calls, the Mayor may have only intended to inform certain council members of the economic opportunity for the municipality and to keep them apprised of his actions. However, by seeking the input of individual council members on specific terms of a disposition of municipal land, the serial phone calls crossed the line.

39 Accordingly, the serial phone calls advanced the business of council.

⁶ Ombudsman of Ontario, *Investigation into whether Council for the City of Elliot Lake held illegal closed meetings in April 2015*, (October 2015) [online](#).

- 40 During interviews with our Office, some council members noted that since the proposal was labelled 'subject to council approval', the business of council was not advanced because council had yet to make a final decision on the matter. This is not an accurate understanding of the open meeting rules. I have already found that as a result of the phone calls, a quorum of council came together for the purpose of advancing council business. The proposal was only sent to the company after a quorum of council members supported its terms. In this case, labelling the proposal "subject to council approval" did not insulate council's actions from the open meeting rules.

Opinion

- 41 My investigation found that council for the Municipality of Brighton contravened the *Municipal Act, 2001* and its procedure by-law by discussing and approving a proposal for a company interested in purchasing municipal land through a series of phone calls ahead of the March 15, 2017 council meeting. The serial phone calls between a quorum of councillors constituted a meeting for the purposes of the *Municipal Act*, and this meeting was closed to the public. I make this finding on a balance of probabilities taking into account all evidence provided to my Office.
- 42 Although council may have been motivated by a desire to act quickly and secure an economic advantage for the municipality, local government must remain vigilant to ensure it acts in a transparent and accountable manner. While it may be more cumbersome, that is what democracy requires.

Recommendations

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

Recommendation 1

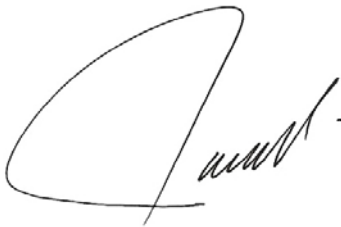
Council members for the Municipality of Brighton should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

The Municipality of Brighton should avoid exercising the power or authority of council or laying the groundwork to do so through serial phone calls or by any other electronic means.

Report

- 44 The Municipality of Brighton was given the opportunity to review a preliminary version of this report and provide comments. No comments were received.
- 45 My report should be shared with council for the Municipality of Brighton and should be made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario