



Ombudsman Report

**Investigation into a closed meeting held by council
for the Town of Pelham on April 19, 2021**

**Paul Dubé
Ombudsman of Ontario
June 2022**

Complaint

- 1 My Office received a complaint about a closed session held by council for the Town of Pelham (the “Town”) on April 19, 2021.
- 2 The complaint alleged that council’s closed session discussion, which related to the Niagara Central Dorothy Rungeling Airport, did not fall within any of the prescribed exceptions in the *Municipal Act, 2001*.
- 3 My review has determined that council for the Town contravened the *Municipal Act, 2001* when it held a closed meeting on April 19, 2021. My review also found that the Town failed to describe the general nature of the discussion in the resolution to proceed *in camera*.

Ombudsman jurisdiction

- 4 Under the *Municipal Act, 2001*¹ (the “Act”), all meetings of council, local boards, and committees of either must be open to the public, unless they fall within prescribed exceptions.
- 5 As of January 1, 2008, the Act gives anyone the right to request an investigation into whether a municipality or local board has complied with the Act in closing a meeting to the public. 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 When investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the municipality’s governing procedures have been observed.
- 8 My 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

¹ SO 2001, c 25.

issues related to open meeting procedures. Summaries of the Ombudsman's previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Investigative process

- 9 On May 5, 2021, my Office advised the Town of our intent to investigate the complaint about the meeting on April 19, 2021.
- 10 We reviewed the Town's procedure by-law and relevant portions of the *Municipal Act, 2001*. Additionally, we reviewed the open and closed meeting agendas, open and closed meeting minutes, and an audio recording of the closed session.
- 11 We reviewed the *Welland-Port Colborne Airport Act, 1976* and a recent report about the Niagara Central Dorothy Rungeling Airport published by the Regional Municipality of Niagara.²
- 12 We interviewed all members of council, the Chief Administrative Officer (CAO), the former Clerk and current Clerk, as well as two members of council from the City of Welland who were present at the meeting in their roles as members of the Niagara Central Dorothy Rungeling Airport Commission.
- 13 My Office received full co-operation in this matter.

Background

- 14 Council's *in camera* discussion on April 19, 2021 was about the potential development of the Niagara Central Dorothy Rungeling Airport (the "Airport") land, and whether to upload management of the Airport to the Regional Municipality of Niagara ("Niagara Region").
- 15 The Airport is located in the Town and is owned and operated by the Niagara Central Dorothy Rungeling Airport Commission (the "Commission"). The Commission manages the Airport on behalf of the Town, the Cities of Welland and Port Colborne, and the Township of

² "Feasibility Study and Business Case Niagara District Airport & Niagara Central Dorothy Rungeling Airport", HM Aero Aviation Consulting, online: <<https://pub-niagararegion.escribemeetings.com/filestream.ashx?DocumentId=8101>>.

Wainfleet, each of which appoints members of council to be Commission members. The four municipalities also financially support the Airport.

- 16 Between 2015 and 2017, councils for all four municipalities voted to upload management of the Airport to Niagara Region. However, this upload had yet to occur at the time of the meeting on April 19, 2021.

April 19, 2021 council meeting

- 17 The meeting on April 19, 2021 began at 5:30 p.m. in council chambers. After some open session discussion, council passed a resolution to move into closed session under the exception for plans and instructions for negotiations, set out in section 239(2)(k) of the Act. The resolution did not provide a general description of what council would discuss *in camera*.
- 18 Members of council, the CAO, the Acting Clerk³, the Deputy Clerk and the Treasurer for the Town were present at the closed meeting on April 19, 2021. One member of council is also a member of the Commission. Two members of council from the City of Welland were also present at the meeting in their capacity as members of the Commission.
- 19 Once *in camera*, council for the Town heard a presentation from members of the Commission about potential development opportunities for the Airport land and the benefits this would generate for the Town.
- 20 Some councillors pointed out that there are constraints on the use and sale of the Airport land and asked how this would affect development proposals. The Commission members indicated that they were exploring lease options, such as long-term leases, and a legal opinion, but did not provide additional details. One Commission member mentioned that it was difficult to make plans due to the unknown future of the Airport's management.
- 21 At one point in the discussion, a councillor asked about the typical cost and length of a hangar lease at the Airport. A Commission member responded with the estimated cost of leasing a specific Airport hangar.
- 22 During the meeting, there was some discussion about whether council would vote to retain the Commission's management of the Airport. A Commission member clarified that to retain management of the Airport, a

³ The Acting Clerk is now the Town's Clerk; her first day as Acting Clerk was April 19, 2021 – the same day as the meeting that is the subject of this investigation.

consensus would have to be reached among all four councils, with each voting to rescind its decision to upload the management to Niagara Region.

- 23 Council returned to open session with no public report back from closed session. My Office's review found that no decisions were made, nor was any direction provided to staff, as a result of the *in camera* discussion.

Analysis

Applicability of the exception for plans and instructions for negotiations

- 24 Council relied on the exception for plans and instructions for negotiations to proceed *in camera* on April 19, 2021.
- 25 The purpose of this exception is to allow "a municipality to protect information that could undermine its bargaining position or give another party an unfair advantage over the municipality during an ongoing negotiation."⁴
- 26 In order for the exception to apply, the municipality must show that:
- a. The *in camera* discussion was about positions, plans, procedures, criteria, or instructions;
 - b. The positions, plans, procedures, criteria, or instructions are intended to be applied to negotiations;
 - c. The negotiations are being carried on currently, or will be carried on in future; and
 - d. The negotiations are being conducted by or on behalf of the municipality.⁵
- 27 The second and third branches of the test require that the discussion relate to ongoing or potential negotiations.
- 28 In this case, no one we interviewed could clearly identify the subject or parties of any ongoing or future negotiations related to the *in camera* discussion. There is no evidence that negotiations were ongoing at the time

⁴ *Grey Highlands (Municipality of) (Re)*, 2021 ONOMBUD 11 at para 17, online: <<https://canlii.ca/t/jfzr8>>.

⁵ *Ibid.*

of the meeting or that they would be carried out in the future. The Town did not have a bargaining position to protect.

- 29 Accordingly, the *in camera* discussion held on April 19, 2021 did not fit within the exception for plans or instructions for negotiations.

Applicability of the exception for acquisition or disposition of land

- 30 While not cited by council, it was suggested to my Office that the exception for acquisition or disposition of land, under section 239(2)(c) of the Act, could have applied to the meeting on April 19, 2021.
- 31 Generally speaking, a municipality must be either the seller or purchaser of the land in order for the exception to apply.⁶ The purpose of the exception is to protect council's bargaining position during negotiations to purchase or sell (or lease) land.⁷ Our Office has found that the exception does not apply to discussions that involve speculation about a land transaction or discussions about land transactions that may or may not happen in the future, since there is no bargaining position to protect in these instances.⁸ The discussion must involve a land transaction that is currently pending or that has been proposed.⁹
- 32 In a 2018 report, my Office reviewed a meeting held by council for the Town of Fort Erie that was closed under the exception for acquisition or disposition of land. Council heard a presentation about a proposed partnership with a post-secondary institution that included timelines, potential benefits to the municipality and identified specific properties that could be appropriate if the partnership proceeded.¹⁰ However, my Office found that the exception did not apply since council had not identified a specific property that it wished to purchase or lease, and the municipality had taken no practical steps to acquire a property at the time of the meeting.¹¹

⁶ *Port Colborne (City of)*, 2015 ONOMBUD 32 at para 77, online: <<https://canlii.ca/t/gtp7c>>.

⁷ *Fort Erie (Town of) (Re)*, 2015 ONOMBUD 12 at para 23, online: <<https://canlii.ca/t/gtp5w>>.

⁸ *Ibid.*

⁹ *Norfolk (County of) (Re)*, 2021 ONOMBUD 6 at para 33, online: <<https://canlii.ca/t/jdr8d>>.

¹⁰ *Fort Erie (Town of) (Re)*, 2018 ONOMBUD 2 at para 33, 38, online: <<https://canlii.ca/t/hvmtm>>.

¹¹ *Ibid* at para 38.

- 33 In a 2021 report about the County of Norfolk, my Office reviewed a closed committee meeting where staff discussed a proposal to sell land to raise capital. My Office found that while there was no pending land transaction, the committee discussed setting a target price per acre for a specific parcel of land and thus the County of Norfolk had a bargaining position to protect.¹² This discussion fit within the exception for acquisition or disposition of land.
- 34 In this case, council for the Town discussed the Commission's suggestion to develop the Airport land. The Town is not the owner of the Airport land and would not be a party to a land transaction involving Airport land.
- 35 While the Commission identified specific areas of the Airport land for development and raised the possibility of long-term leases, it did not propose prices for these leases or otherwise discuss a plan to sell or lease the land. One Commission member explicitly acknowledged the difficulty of formulating a plan given the unknown future of the Airport's management. Multiple council members also raised the limitations on the Commission's ability to re-sell or develop the Airport land. There is no evidence that the Commission had pursued or obtained an exception to the limitations at the time of the meeting. The discussion about potential development of Airport land was high-level and speculative, and the Town did not have a bargaining position to protect.
- 36 Accordingly, the exception for acquisition or disposition of land does not apply to council's *in camera* discussion on April 19, 2021.

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

- 37 It was further suggested to my Office that the exception for information supplied in confidence by a third party, under section 239(2)(j) of the Act, could have applied to the closed session on April 19, 2021. My Office was told that the information provided by the Commission about the lease for a specific hangar is not available to the public and would cause harm if disclosed.

¹² *Ibid* at para 34.

- 38** This exception is intended to protect confidential information about a third party, rather than to protect information about a municipality supplied by a third party.¹³ In order for the exception to apply, the discussion must be about information that:
- a. Falls into one of the listed types: trade secret, scientific, technical, commercial, financial, or labour relations information;
 - b. Was supplied confidentially, whether explicitly or implicitly, to the municipality by a third party; and
 - c. If disclosed, could reasonably be expected to cause harm, either by prejudicing significantly the competitive position or interfering significantly with the contractual or other negotiations of a person, group of persons or organization.¹⁴
- 39** In a 2021 report about the City of Greater Sudbury, my Office reviewed a closed session where staff provided an update to council about information received from third parties regarding a development proposal, which those third parties had specifically requested remain confidential.¹⁵ The third parties were concerned that if details of the proposal were made public, they could be pressured to provide funding to other municipalities for similar projects on similar terms. My Office found that if the information in question were made public, it could reasonably have been expected to interfere with the competitive position and negotiations of the third parties and thus the discussion fit within the exception.
- 40** The Ontario Superior Court has found that the onus is on the party seeking to withhold information to supply “detailed and convincing” evidence to establish a reasonable expectation of harm.¹⁶
- 41** In this case, no one we spoke to could identify a clear harm to the Commission if information about the specific hangar lease were disclosed to the public. One councillor suggested that disclosing the terms of an existing lease agreement could dissuade others from leasing hangars at the Airport, which would affect the Commission’s contractual negotiations. This speculation does not establish a reasonable expectation of harm. There is

¹³ *St.-Charles (Municipality of) (Re)*, 2019 ONOMBUD 6 at para 29, online: <<https://canlii.ca/t/j2p1h>>.

¹⁴ Letter from the Ontario Ombudsman to Town of South Bruce Peninsula (14 October 2021), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2021/town-of-south-bruce-peninsula>>.

¹⁵ *Greater Sudbury (City of) (Re)*, 2021 ONOMBUD 10 at para 24, online: <<https://canlii.ca/t/jftv3>>.

¹⁶ *Corporation of the Town of Arnprior v Information and Privacy Commissioner of Ontario*, 2016 ONSC 2904 (CanLII) at paras 22 – 24, online: <<http://canlii.ca/t/gpqlx>>.

no evidence that the information disclosed during the meeting could have been expected to cause significant harm to the Commission.

- 42 Accordingly, the exception for information supplied in confidence by a third party does not apply to council's April 19, 2021 closed meeting.

Applicability of the exception for information belonging to the municipality

- 43 It was also suggested to my Office that the exception for information belonging to the municipality under section 239(2)(j) of the Act could have applied to the closed meeting on April 19, 2021. The individual who suggested it said that the idea of rescinding the decision to upload management of the Airport to Niagara Region was financial information because it would have financial implications for the Town.
- 44 Based on decisions of the courts and the Information and Privacy Commissioner, my Office has adopted the following three-part test for the exception, which sets out that the exception will apply where the *in camera* discussion is about:
- a. A trade secret, or financial, commercial, scientific or technical information;
 - b. that belongs to the municipality or local board; and
 - c. has monetary value or potential monetary value.¹⁷
- 45 Financial information is information relating to the use or distribution of money and must refer to specific data.¹⁸ In order to satisfy the second part of the test, the information will belong to the institution if it is owned by the institution. My Office has found that information prepared by municipal staff indicates that it belongs to the municipality.¹⁹ The third part of the test requires that the information itself have monetary value. This means that the information must have intrinsic value, such that disclosure would deprive the institution of that monetary value.²⁰ The potential for harm if the information were to be disclosed is not relevant for this exception.²¹

¹⁷ *Hamilton (City of) (Re)*, 2019 ONOMBUD 3 at para 48, online: <<https://canlii.ca/t/j2b49>>.

¹⁸ *Ibid* at para 45.

¹⁹ *Ibid* at para 52.

²⁰ *Ibid* at para 47.

²¹ *Ibid* at para 54.

- 46 In this case, there was very little discussion of financial information at the meeting on April 19, 2021. Rather, the discussion was focused on receiving a presentation about the Commission's suggestions for development of the Airport land, and considering the future management of the Airport. This presentation was not prepared by municipal staff and cannot be considered information belonging specifically to the Town. Further, the idea of rescinding the decision to upload management of the Airport has no monetary value, as there is no evidence that anyone would purchase this information from the Town.
- 47 There is no evidence that any other information discussed *in camera* could have met the test for this exception.
- 48 Accordingly, council's *in camera* discussion on April 19, 2021 does not fit under the exception for information belonging to the municipality.

Resolution to proceed *in camera*

- 49 Before moving into a closed session, section 239(4)(a) of the Act requires a municipality to state by resolution in open session that a closed meeting will be held, and the general nature of the matter to be considered at the closed meeting.
- 50 The Ontario Court of Appeal has determined that the resolution to close a meeting should provide a general description of the issue to be discussed in a way that maximizes the information available to the public without undermining the reason for excluding the public.²² My Office has also recommended that councils provide more substantive detail in resolutions authorizing closed sessions.²³
- 51 In this case, the resolution to proceed into closed session did not include any information about council's intended discussion other than referencing the exception for plans and instructions for negotiations.
- 52 Accordingly, council for the Town did not fulfil the requirements of the Act when it failed to provide a general description of the issue to be discussed in its resolution to proceed *in camera*.

²² *Farber v Kingston (City)*, 2007 ONCA 173 (CanLII), online: <<https://canlii.ca/t/1qtzl>>.

²³ *Niagara (District Airport Commission) (Re)*, 2016 ONOMBUD 22, online: <<https://canlii.ca/t/h2stf>>.

Opinion

- 53 Council for the Town of Pelham contravened the *Municipal Act, 2001* on April 19, 2021 when it held a closed session to discuss future management and potential development of the Niagara Central Dorothy Rungeling Airport with the Airport Commission. The discussion did not fit within the cited exception for plans and instructions for negotiations, or any other exception to the open meeting rules.
- 54 Council for the Town of Pelham contravened the requirements of section 239(4)(a) of the *Municipal Act, 2001* on April 19, 2021 by failing to state by resolution the general nature of the matters to be considered *in camera*.

Recommendations

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

Recommendation 1

All members of council for the Town of Pelham 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 Town of Pelham should ensure that no subject is discussed in closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 3

The Town of Pelham should ensure that its resolution to proceed *in camera* provides 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.

Report

- 56 Council for the Town of Pelham was given the opportunity to review a preliminary version of this report and provide comments to my Office. Due to restrictions in place related to COVID-19, some adjustments were made to the normal preliminary review process and I thank council and staff for their co-operation and flexibility. No comments were received.
- 57 This report will be published on my Office's website, and should also be made public by the Town of Pelham. In accordance with section 239.2(12) of the *Municipal Act, 2001*, council is required to pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario