



Ombudsman Report

**Investigation into complaints about meetings of the
Investigation Committee in the Township of Nairn and Hyman
on June 4, August 5, and October 19, 2020**

**Paul Dubé
Ontario Ombudsman
December 2021**

Complaint

- 1 My Office received three complaints regarding the openness of meetings held by the Investigation Committee (the “committee”) in the Township of Nairn and Hyman (the “Township”) on June 4, August 5, and October 19, 2020. The complainants alleged that these meetings were contrary to the *Municipal Act, 2001* (the “Act”)¹ because notice of the meetings was not provided and the minutes were not made available to the public. Some complainants also questioned whether or not the committee passed resolutions to proceed *in camera*. The complainants did not allege that the subject matter of the meetings was inappropriate for *in camera* consideration.

Ombudsman jurisdiction

- 2 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.
- 3 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.
- 4 The Ombudsman is the closed meeting investigator for the Township of Nairn and Hyman.
- 5 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.
- 6 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 SO 2001, c 25.

Investigative process

- 7 In February 2021, my Office advised the Township that we would investigate these complaints.
- 8 Members of my Office's open meeting team reviewed relevant portions of the Township's procedure by-law and the Act. We reviewed the meeting agendas, relevant documents, and the minutes from the open and closed sessions of each meeting. We also reviewed materials related to the creation of the committee, including its terms of reference and a subsequent amendment.
- 9 We interviewed all five members of council, the external Clerk of the committee, the Township solicitor, and a workplace investigator who participated in committee meetings. We also spoke with the Chief Administrative Officer (CAO)/Clerk/Treasurer.
- 10 My Office received full co-operation in this matter.

Creation of the Investigation Committee

- 11 According to those we spoke with, the series of events leading to the creation of the Investigation Committee began with an integrity commissioner investigation into alleged violations of the code of conduct by two councillors. In the course of this code of conduct investigation, evidence emerged suggesting that the two councillors' conduct could have contravened another piece of legislation. Under the Township's code of conduct, this required that the integrity commissioner stop her work so she could seek direction from council.
- 12 As a result of this request for direction, at a council meeting on May 20, 2020, council resolved to create an Investigation Committee that would allow those councillors who were not subjects of the investigation to provide direction and receive reports regarding confidential employment matters. The resolution named three councillors to the committee and established the following terms of reference:

The Committee will receive advice from the Municipal Solicitor and/or other Agents directly involved in the proceedings and will provide to the Municipal Solicitor and/or other Agents all necessary instructions;

The Committee will receive the report(s) when they are completed and will make recommendations to Council with respect to any decisions that arise from the reports.

- 13 The Investigation Committee's first meeting occurred on June 4, 2020, and will be discussed further below. Following this meeting, council amended the committee's terms of reference during a council meeting on June 8, 2020. The resolution set out the following amendment to the committee's meeting practices:

Pursuant to section 239(2)(b) of the *Municipal Act, 2001*, **all meetings of the Committee will not be open to the public and will be conducted in accordance with the closed meeting and other procedures** of the Township of Nairn and Hyman Bylaw 2018-39 "Being a by-law to govern the proceedings of Council, the conduct of its members and the calling of meetings", **however, Part 5, Section 35.1 regarding the format of the meeting agenda and Part 3, Sections 21.1 to 21.3 regarding the giving of public notice do not apply.** [emphasis added]

- 14 This meant that the committee would not be required to hold open meetings or provide public notice of its meetings under the Township's procedure by-law.
- 15 Everyone we spoke with agreed that the committee's structure, terms of reference, and the subsequent amendments were implemented based on legal advice the Township received. We were told that the Township has strict confidentiality obligations imposed on it by the relevant workplace legislation and that these obligations guided the Township's actions.

Procedure by-law 2018-39

- 16 Section 5.1 of the procedure by-law² provides that, subject to exceptions set out in the by-law, all council and committee meetings must be open to the public. The committee's terms of reference state that this does not apply to the committee's meetings after June 8, 2020.
- 17 Section 6.1 provides a list of closed meeting exceptions, and section 6.2 requires that council pass a resolution to proceed *in camera*. Section 6.7 provides that closed meeting minutes will be kept. The by-law also contains a few provisions regarding the conduct of closed sessions, such as the distribution of reports and the adding of agenda items. These by-law provisions applied to the Investigation Committee.

² By-law 2018-39, "Being a by-law to govern the proceedings of council, the conduct of its members and the calling of meetings", online: <https://nairncentre.ca/wp-content/uploads/2018/10/2018-39.-By-law-Council-Proceedings.pdf>

- 18 Sections 21.1 to 21.3 set out the rules for providing notice of council and committee meetings. They require that agendas be posted for a minimum of 48 hours on the Township's website and at the municipal office. The committee's terms of reference state that these rules do not apply to the committee after June 8, 2020.
- 19 The terms of reference also specify that section 35.1, which provides a prescriptive format for meeting agendas, does not apply after June 8, 2020.

June 4, 2020 Investigation Committee meeting

- 20 The Investigation Committee met on June 4, 2020, at 6:00 p.m. The CAO/Clerk/Treasurer delegated her clerk authority for this meeting and subsequent meetings of the committee to the Township's integrity commissioner (the "external Clerk"), who was responsible for taking the meeting minutes.

Notice and public attendance

- 21 The agenda for this meeting is currently posted on the Township's website, and the external Clerk told us the CAO/Clerk/Treasurer provided public notice for this meeting in accordance with the Township's procedure by-law.³ However, when speaking with our Office, the CAO/Clerk/Treasurer could not recall the steps she took to provide notice for this meeting. Two committee members told our Office that notice was not provided for any of the committee's meetings, while the third was unsure.
- 22 Those we spoke with indicated that members of the public were not present for any portion of this meeting or other meetings of the Investigation Committee. The committee members disagreed about whether the public could have attended any portion of the committee's three meetings. The Township solicitor and external investigator indicated that they did not pay attention to the meeting's procedure and could not provide relevant information.

Investigation Committee's discussion

- 23 The meeting was held in council chambers, with virtual attendance by the Township solicitor and workplace investigator. According to the open meeting minutes, at 6:16 p.m. the committee resolved to move *in camera* to discuss advice subject to solicitor-client privilege and personal matters regarding an identifiable individual. The resolution did not provide further information about the matter to be discussed.

³ <https://nairncentre.ca/our-government/agenda/>

- 24** We did not receive a complaint that the content of the committee's discussion at any of its meetings did not fit within the open meeting exceptions. However, those we spoke with and our review of the closed meeting minutes indicate that the Township solicitor provided legal advice to the committee about a confidential workplace matter and the external investigator provided details regarding personal matters about identifiable individuals. Both spoke about necessary next steps and responded to related questions. According to the closed meeting minutes, the committee provided direction to the Township solicitor. Our Office was provided with formal, signed documents for each resolution passed during this meeting, including the resolution to proceed *in camera*.
- 25** The committee returned to open session at 7:13 p.m. and reported back that it received information from and gave direction to the Township solicitor regarding a confidential workplace matter.

Analysis

Notice

- 26** Under the *Municipal Act*, every municipality and local board must pass a procedure by-law that governs the calling, place and proceedings of meetings. The Act also requires municipalities to include a public notice requirement in their procedure by-law. The Act does not specify what the content of the public notice requirement should be.
- 27** The agenda for the June 4, 2020 Investigation Committee meeting is posted to the Township's website. It is unclear when it was posted online and whether it was also posted in the municipal office, as required by the procedure by-law. Unfortunately, the CAO/Clerk/Treasurer did not recall taking any steps to post the agenda and could not provide further details. The external Clerk told us that notice of this meeting was provided by the CAO/Clerk/Treasurer in accordance with the procedure by-law. Two committee members believed that notice was not provided for any meetings, while the third was unsure.
- 28** While the evidence is imperfect, it suggests that the agenda was posted on the Township's website at some point, and there was some public notice of the committee's meeting, although it is unclear if the notice fully complied with the procedure by-law's requirement that it also be posted in the municipal office.

Resolution

- 29** Before moving into a closed session, a municipality must state by resolution in open session that a closed meeting will be held, and state the general nature of the matter to be considered at the closed meeting.⁴ The resolution to go into a closed meeting 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.⁵
- 30** In this case, the Investigation Committee passed a resolution to proceed *in camera* that cited the two closed meeting exceptions it relied on to exclude the public. However, the resolution failed to provide any further detail regarding the committee's intended discussion as required by section 239(4) of the *Municipal Act*. While I acknowledge the Township's concerns about confidentiality given the nature of the committee's discussion, the Investigation Committee reported back in open session that its discussion related to a confidential workplace matter, which suggests that similar information could have been provided in the closed session resolution. Further, the Investigation Committee provided information about the nature of its discussion at its subsequent meetings, with each resolution referencing a "confidential workplace proceeding." In future, the Township should ensure that its resolutions to proceed *in camera* 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.

August 5, 2020 Investigation Committee meeting

- 31** The Investigation Committee met for the second time on August 5, 2020 at 7:00 p.m. in council chambers. Three committee members, the external Clerk, the Township solicitor, and the workplace investigator attended the meeting either in person or virtually. We were provided with an open and closed meeting agenda prepared by the external Clerk, although she indicated that these were not circulated to committee members or other participants. Those we spoke with did not recall receiving agendas.

Notice and public attendance

- 32** The external Clerk indicated that public notice was not provided for this meeting, as the committee's amended terms of reference specifically indicated that notice was not required. The external Clerk also noted that she had no way of posting notice, as she does not have access to the Township's website. The CAO/Clerk/Treasurer, who

⁴ *Municipal Act*, s.239(4).

⁵ *Farber v. Kingston (City)*, 2007 ONCA 173.

does have access to the website, said she did not post the notice online. There is no evidence on the municipality's website that notice was provided. We were told that no members of the public attended.

Resolution

- 33** The open meeting minutes indicate that the Investigation Committee passed a resolution to proceed *in camera* "to receive the findings of a confidential workplace proceeding." The resolution did not cite any closed meeting exceptions, although the closed session agenda indicates that the discussion was planned to be closed under the exceptions for personal matters and for advice subject to solicitor-client privilege.
- 34** Unlike with the previous meeting held on June 4, 2020, there are no signed resolutions to support the information recorded in the meeting minutes for August 5, 2020. Signed resolutions are not required in the Township's procedure by-law, although we were told this is the Township's typical practice. However, the Clerk's handwritten notes, in addition to the formal meeting minutes, indicate that the meeting was called to order in open session, with a subsequent resolution to proceed *in camera*.

Investigation Committee's discussion

- 35** Once in closed session, the external investigator presented two very detailed PowerPoint presentations containing personal information about identified individuals. Our Office reviewed a copy of these presentations and everyone we spoke with agreed that the external investigator went through the presentations in detail and answered some questions from committee members.
- 36** Following the presentation, the Township solicitor provided the committee with information about how to meet the Township's legal requirements in response to these findings. Ultimately, the committee directed that the external Clerk review the investigation reports and bring recommendations back to the Investigation Committee for consideration. As with the previous meeting, we did not receive a complaint that the substance of this *in camera* discussion was inappropriate for closed session.
- 37** According to the open meeting minutes, the committee returned to open session at 8:55 p.m. and reported that it met in closed session "to receive the findings of a confidential workplace proceeding from, and give direction to, the solicitor regarding a confidential workplace matter." The meeting adjourned a few minutes later.

Analysis

Notice

- 38** There is no evidence that public notice was provided for the meeting on August 5, 2020. While the Investigation Committee's terms of reference purport to suspend the procedure by-law's open meeting and notice requirement, section 239(1) of the *Municipal Act* states that all meetings must be open to the public, subject to limited exceptions. This requirement cannot be overridden by a committee's terms of reference or a municipality's procedure by-law. The Ombudsman has previously found that public notice for meetings is pivotal to their openness, as the public must be aware that a meeting is set to occur in order to exercise its right to attend and see decision-making in process.⁶
- 39** Accordingly, the Township's failure to provide notice of the committee's meeting on August 5, 2020 was contrary to the Act's open meeting requirement.

Resolution

- 40** The formal and handwritten meeting minutes from the Investigation Committee's August 5, 2020 meeting each indicate that it passed a resolution to proceed *in camera*. The resolution provided a general description of the matter to be discussed ("to receive the findings of a confidential workplace proceeding"), but did not identify the specific closed meeting exceptions upon which it relied. Although not required under the Act, the Township may wish to adopt this as a best practice, as it helps the public understand why a discussion is being held in closed session and ensures a municipality has considered its legal basis for proceeding *in camera*.

October 19, 2020 Investigation Committee meeting

- 41** The Investigation Committee's third meeting occurred in council chambers at 6:00 p.m. on October 19, 2020. Three committee members and the external Clerk attended. We were provided with open and closed meeting agendas prepared by the external Clerk, although she indicated that these were not circulated to committee members.

⁶ *Greater Napanee (Town of) (Re)*, 2021 ONOMBUD 2, online: <<https://canlii.ca/t/jctvh>>.

Notice and public attendance

- 42** As with the previous meeting, the external Clerk indicated that public notice was not provided for the October 19, 2020 meeting. The CAO/Clerk/Treasurer said that she did not provide notice of the meeting and there is no evidence on the municipality's website that notice was provided. We were told that no members of the public attended.

Resolution

- 43** The open meeting minutes indicate that the Investigation Committee passed a resolution to proceed *in camera* "to receive recommendations from Expertise for Municipalities (E4M) related to a confidential workplace proceeding." The resolution did not cite any closed meeting exceptions, although the closed session agenda indicates that the discussion was to be closed under the exceptions for personal matters and for advice subject to solicitor-client privilege.
- 44** As with the previous meeting, there are no signed resolutions to support the information recorded in the external Clerk's minutes. However, the external Clerk's handwritten notes and the formal meeting minutes indicate that the meeting was called to order in open session, with a subsequent resolution to proceed *in camera*.

Investigation Committee's discussion

- 45** According to the closed meeting minutes and those we spoke with, the external Clerk provided recommendations on behalf of E4M regarding the matters under consideration by the Investigation Committee. The committee discussed these recommendations and ultimately directed that the external Clerk take certain actions. As with the previous meetings, we did not receive a complaint regarding the appropriateness of this discussion for *in camera* consideration. The closed meeting adjourned at 6:32 p.m., and the Investigation Committee reported that it met in closed session to receive recommendations from E4M related to a confidential workplace proceeding. The open session adjourned immediately thereafter.
- 46** At the time of our interviews, we were told that after this meeting, the Investigation Committee had fulfilled its mandate and has not met further.

Analysis

Notice

- 47** There is no evidence that any public notice was provided for the Investigation Committee meeting on October 19, 2020. As described above, the *Municipal Act* requires that all meetings be open to the public, subject to limited exceptions, and the Ombudsman has found that public notice for meetings is pivotal to their openness.⁷
- 48** Accordingly, the Township's failure to provide notice of the committee's October 19, 2020 meeting was contrary to the Act's open meeting requirements.

Resolution

- 49** The formal and handwritten meeting minutes each indicate that the committee passed a resolution to proceed *in camera*. The resolution provided a general description of the matter to be discussed ("to receive recommendations from Expertise for Municipalities (E4M) related to a confidential workplace proceeding"), but did not identify the specific closed meeting exceptions upon which it relied. As discussed earlier, the municipality may wish to adopt the best practice of specifically identifying the closed meeting exception it is relying on in its resolution to proceed *in camera*.

Public access to meeting minutes

- 50** Each complainant that contacted our Office noted that the Investigation Committee's open meeting minutes had not been posted online. For them, this was further evidence that the committee was improperly meeting in private, and undermined the perceived legitimacy of the committee's decision-making.
- 51** When we spoke with the CAO/Clerk/Treasurer, she told us she did not have access to the open meeting minutes and could not post them online, as the external Clerk had not sent them to her. We also experienced some delay in receiving the minutes from the external Clerk. When we interviewed the external Clerk, we were told the minutes had not been formally approved by the Investigation Committee, and it is unclear when or if this will occur because the committee is no longer meeting.
- 52** Section 239(7) of the *Municipal Act* requires that all resolutions, decisions and other proceedings that take place during a meeting be recorded without comment. This requirement applies whether the meeting is open or closed. The Act does not speak

⁷ *Ibid.*

to the public's access to meeting minutes, and this is not specifically addressed in the Township's procedure by-law.

- 53 However, as my Office noted in a report regarding the Greater Napanee Business Improvement Area,⁸ meeting minutes are one of the best ways for the public to understand what a municipal council or local board has decided. Public access to the Investigation Committee's open meeting minutes may have alleviated some of the concerns regarding its meeting practices and decision-making. As a best practice, the Township should ensure that all of its meeting minutes are finalized and approved by the relevant body following a meeting, and that these finalized minutes are made available to the public for review.

Opinion

- 54 The Investigation Committee for the Township of Nairn and Hyman contravened the *Municipal Act, 2001* on August 5 and October 19, 2020, when it failed to provide public notice for its meetings. It also contravened the requirements of section 239(4)(a) of the *Municipal Act, 2001* on June 4, 2020, for 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 Township of Nairn and Hyman in fulfilling its obligations under the *Municipal Act, 2001* and enhancing the transparency of its meetings.

Recommendation 1

All members of council for the Township of Nairn and Hyman 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 the Township's procedure by-law.

Recommendation 2

The Township of Nairn and Hyman should ensure that it provides public notice for all committee meetings in accordance with the *Municipal Act, 2001* and the Township's procedure by-law.

⁸ *Ibid.*

Recommendation 3

The Township of Nairn and Hyman should ensure that its resolutions to proceed *in camera* provide a general description of the issues 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 Township of Nairn and Hyman 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 we thank council and staff for their co-operation and flexibility. All 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 Township of Nairn and Hyman as well. 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