



J. Paul Dubé, Ombudsman

BY E-MAIL

January 16, 2023

Members of council for the City of London
c/o Josh Morgan, Mayor
300 Dufferin Avenue
London ON N6B 1Z2

Members of council for the City of London:

Re: Final Report

I have completed my investigation into a complaint about a gathering held by members of the Community and Protective Services Committee of the City of London on March 21, 2023. Please find my final report enclosed.

In accordance with subsection 14.1(8) of the *Ombudsman Act*, the City should make my report available to the public, and we ask that this be done no later than the next council meeting. In accordance with subsection 239.2(12) of the *Municipal Act, 2001*, council should pass a resolution stating how it intends to address this report.

Pursuant to subsection 14.1(9) of the *Ombudsman Act*, I will also post a copy of the report on my website at www.ombudsman.on.ca.

Sincerely,

A handwritten signature in black ink, appearing to read 'Paul Dubé', written over a large, light blue, stylized 'O' that matches the Ombudsman Ontario logo.

Paul Dubé
Ombudsman of Ontario

Cc: Michael Schulthess, City Clerk, City of London

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Ombudsman Report

**Investigation into a complaint about a gathering
held by members of the Community and
Protective Services Committee
of the City of London
on March 21, 2023**

**Paul Dubé
Ombudsman of Ontario**

January 2024

Overview

- 1 My Office received a complaint about a gathering held by members of the Community and Protective Services Committee (“the committee”) of the City of London (“the City”) on March 21, 2023.
- 2 The complaint alleged that a quorum of the committee held a gathering with the Executive Director of a local non-profit organization. A few hours later, the committee held a formal meeting, during which it voted to recommend approving conditional funding for the non-profit.
- 3 My investigation found that the gathering on March 21, 2023 constituted a “meeting” of the committee under the *Municipal Act, 2001* and contravened the open meeting rules.

Ombudsman jurisdiction

- 4 Under the *Municipal Act, 2001*¹ (the “Act”), all meetings of a council, local board, and committee 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 has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ombudsman. 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 London.
- 7 In investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the municipality’s governing procedures have been observed.
- 8 Since 2008, my Office has investigated hundreds of closed meetings in municipalities throughout Ontario. 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. 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

- 9 On May 1, 2023, my Office advised the City of our intent to investigate the complaint regarding the March 21, 2023 gathering of a quorum of the committee.
- 10 Members of my Office's open meeting team reviewed relevant portions of the City's procedure by-law, as well as the Act. We reviewed the records for the March 21, 2023 formal meeting of the committee, including the agenda, minutes, and video recording of the meeting.
- 11 Finally, a member of my Office's open meeting team interviewed the three members of the committee alleged to have been present at the gathering, as well as the Executive Director of the non-profit.
- 12 My Office received full co-operation in this matter.

The Committee

- 13 The Community and Protective Services Committee is a standing committee of the City. Pursuant to sections 24.1 and 24.2 of the City's procedure by-law, it is composed of five members of council appointed by council. As such, this body is also a "committee" under subsection 238(1) of the Act, which defines a "committee" as "any advisory or other committee, subcommittee or similar entity of which at least 50 per cent of the members are also members of one or more councils or local boards."
- 14 The Mayor is an *ex officio* member of the committee (who holds the role of committee member by virtue of being mayor), and is counted for the purpose of the committee's quorum when present. However, according to section 24.4 of the City's procedure by-law, the Mayor is not counted for the purpose of the committee's quorum when not in attendance at a committee meeting.
- 15 Section 25.2 of the procedure by-law provides that the role of the Community and Protective Services Committee is to make recommendations and reports to council on matters outlined in a schedule to the by-law. This includes community services, housing and homelessness, public safety, and any other matter that the City Clerk identifies as relevant to the jurisdiction of the committee.

Background

- 16 My Office was told that, at the time of the gathering in March 2023, a local non-profit organization with an aim of helping homeless individuals was seeking one-time funding of \$760,000 from the City to support its ongoing operations and short-term capital needs, and to undertake a retrofit project at its shelter facility. The non-profit's request was set to be considered at the formal committee meeting on March 21, 2023.
- 17 We were told that on March 20, 2023, after learning about this proposal, a member of council who sits on the committee contacted the Executive Director of the non-profit to request a tour of its facility. The Executive Director agreed and a tour was organized for the next day, on March 21, 2023, at 2 p.m.
- 18 We were told that the member of the committee who organized the tour subsequently spoke about it with another member of the committee and invited them to join the tour.
- 19 We were also told that, on the day of the gathering, a third member of the committee happened to bump into the two other members as they were about to leave for the facility tour. We were told the invitation to join the tour was extended to that member as well and was accepted. We were told that the member who requested the tour intended to notify the Executive Director of the non-profit shortly before the tour that two other members would join them, but ultimately did not reach her.

The March 21, 2023 gathering

- 20 The three members of council arrived at the site of the non-profit on March 21, 2023, at 2 p.m. and were greeted by the Executive Director. We were told that everyone sat down around a table and stayed at this location for most of the gathering. After some discussion, the Executive Director briefly brought the members of council to an outdoor portion of the site, explained where structures would be built, and provided some details about plans for the proposed retrofit.
- 21 When we asked about the content of the discussions that took place during the site visit, we were told that there was a broad conversation about many topics, not solely a presentation of a funding proposal. Interviewees recalled discussions about the non-profit itself, the issue of people experiencing homelessness, and the Executive Director's experience with the issue. We were also told that they discussed matters related to the retrofit proposal, such as the number of beds at the shelter, community needs, the non-profit's programs, triaging, use of space, and planning for the proposal.

- 22 We were told that members of the committee were engaged throughout and asked some detailed questions about the proposal, and that the Executive Director explained the reasons for certain choices in the proposal. Interviewees generally agreed that there was little to no back-and-forth, no feedback provided, and that discussions about the proposal were stated as facts, with some justification from the Executive Director for certain choices.
- 23 Everyone interviewed agreed that members of council did not expressly voice their support or opposition to the project, although we were told by an interviewee that they expressed the idea that the proposed design was good. Everyone agreed that no decisions were made during the gathering.
- 24 We were told that the site visit ended at around 2:45 p.m., with the three members of council leaving at the same time.
- 25 We were told by members of the committee that no records were taken of discussions that occurred during the site visit, and City staff were never made aware of it.
- 26 The member of council who organized the site visit told us that their intent was to view the facility and proposed renovations first-hand, in order to deliver the best results for the community, and did not intend to hold an illegally closed meeting. The Executive Director of the non-profit told our Office that she was surprised by the presence of the two additional members of council during the site visit.

March 21, 2023 official committee meeting

- 27 The same day, at 4:15 p.m., the committee held a meeting in council chambers.² All members of the committee, as well as the Mayor, were present.
- 28 As set out in the agenda of that meeting, the committee discussed funding for the non-profit organization in open session. The Executive Director of the non-profit made a delegation to explain the proposal. In the opening statements, the Executive Director thanked the three members of the committee for visiting the site earlier that day to get a better understanding of the proposal.
- 29 One member of the committee who was present at the gathering asked questions and acknowledged being on site that day. The member of council indicated their satisfaction with the proposal and said that they had been looking to get “the numbers, the answers, [and] the confidence”.

² The Committee also held a special meeting at 4 p.m. that day to consider an unrelated matter.

30 The committee then unanimously passed a motion recommending that council approve conditional funding for the proposal.

31 The meeting was adjourned at 5:59 p.m.

Analysis

The definition of “meeting”

32 Section 238(1) of the *Municipal Act, 2001* (the Act) sets out a two-part test for a gathering to come within the definition of a “meeting”:

“meeting” means any regular, special or other meeting of a council, of a local board or of a committee of either of them, where,

(a) a quorum of members is present, and

(b) members discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

33 My Office has discussed on numerous occasions what situations “materially advance” business or decision-making of a council, local board or committee. In a report to the Village of Casselman, my Office provided the following commentary for what “materially advances” the business or decision-making of council, stating:³

[...] “materially advances” involves considering the extent to which the discussions at issue moved forward the business of the municipality, based on factual indicators.

34 Discussions, debates or decisions that are intended to lead to specific outcomes or to persuade decision-makers one way or another are likely to “materially advance” the business or decision-making of a council, committee or local board. Mere receipt or exchange of information is unlikely to “materially advance” business or decision-making, **as long as there is no attempt to discuss or debate that information as it relates to a specific matter that is or will be before a council, committee or local board.**⁴ [My emphasis]

³ *Casselman (Village of) (Re)*, 2018 ONOMBUD 11 at para 27 [*Casselman 2018*], online: <<https://canlii.ca/t/hvmtk>>.

⁴ *Ibid.*

- 35** I have noted that mere updates on recent activities or communication of information are unlikely to materially advance business or decision-making.⁵ However, votes, agreements, direction or input to staff, and discussion or debates of a proposal, course of action, or strategy are likely to materially advance business or decision-making.⁶
- 36** I have likewise concluded that discussions about procedural options do not generally materially advance business,⁷ nor do discussions of a social nature.⁸ On the other hand, a contravention to the Act could occur where members organize a voting bloc to strategically agree ahead of time about how to proceed with a specific matter.⁹ Likewise, discussions about governance issues,¹⁰ approval of minutes, direction to staff on recruitment, and candidate interviews¹¹ have been found to materially advance business or decision-making.
- 37** Although information sessions are unlikely to materially advance business or decision-making, we must have regard for factual indicators that suggest a movement in the overall spectrum of a decision (such as debates or discussions aimed at moving a matter forward).¹²
- 38** My analysis generally focuses on the term “materially advances”. However, to meet the criteria in the definition, the matters discussed must first be “business or decision-making”. To this effect, we have previously looked at whether the information received by members of council could inform the future business and decision-making of council.¹³ Generally, discussions which relate to business or decision-making that is set to come back to committee can be characterized as discussions about committee business.¹⁴

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Saugeen Shores (Town of) (Re)*, 2020 ONOMBUD 3, online: <<https://canlii.ca/t/j93c3>>.

⁸ *Pelham (Town of) (Re)*, 2020 ONOMBUD 2, online: <<https://canlii.ca/t/j8c83>>; *Greater Napanee (Town of) (Re)*, 2021 ONOMBUD 2, online: <<https://canlii.ca/t/jctvh>>.

⁹ *Hawkesbury (Town of) (Re)*, 2021 ONOMBUD 7, online: <<https://canlii.ca/t/jdzm9>>.

¹⁰ *Southgate (Township of) (Re)*, 2020 ONOMBUD 7, online: <<https://canlii.ca/t/jc42r>>.

¹¹ *Hamilton (City of) (Re)*, 2019 ONOMBUD 7, online: <<https://canlii.ca/t/j2pwf>>.

¹² *Casselman 2018*, *supra* note 3.

¹³ *Letter from the Ontario Ombudsman to the City of Elliot Lake* (August 10, 2012), online: <<https://www.ombudsman.on.ca/resources/reports,-cases-and-submissions/municipal-meetings/2012/city-of-elliott-lake>>.

¹⁴ *Brockton (Municipality of) (Re)*, 2017 ONOMBUD 6, <<https://canlii.ca/t/h4rwz>>; *Casselman (Municipality of) (Re)*, 2022 ONOMBUD 13 [*Casselman 2022*], online: <<https://canlii.ca/t/jrkx5>>.

Quorum was present

- 39 The Committee is composed of five members (or six, if the Mayor is present), such that three members constitute quorum (or four members if the Mayor and all Committee members are present). In this case, three members of the Committee were present during the site visit at the non-profit facility and a quorum of the Committee was therefore present.
- 40 During our interviews, two members of council questioned whether a quorum of the Committee was present, given that the Mayor was present at the formal Committee meeting later that day when the proposal was formally discussed. However, for the purpose of the on-site visit at the non-profit, the presence of the Mayor is not relevant as the City's procedure by-law only requires three members of the Committee to constitute quorum. The question of quorum cannot be assessed retrospectively, in light of a different quorum requirement at the meeting that occurred later on March 21, 2023.

Committee business was materially advanced

- 41 At a formal meeting shortly after the on-site visit at the non-profit, the Committee discussed the non-profit's proposal for funding, heard a related delegation from the non-profit's Executive Director, and ultimately recommended approving conditional funding for the proposal.
- 42 During our interviews, we confirmed that the proposal was also addressed during the site visit. Committee members discussed the non-profit's capacity, programs, triaging, community impact, rationale for the proposal, and choices for certain courses of action. In doing so, they asked questions and invited the Executive Director to articulate the reasons for certain choices in the proposal.
- 43 The information received by members of the committee was directly related to the future business and decision-making of the committee. As the discussions during the gathering squarely related to business or decision-making that was set to come back to committee, it was a discussion about committee business.
- 44 Everyone we spoke with maintained that no decisions were made during the site visit and that the discussion was informational in nature. However, immediately following the gathering, the committee held a meeting to consider the funding proposal. The facts of this case suggest that the information members of the committee received from the Executive Director during the gathering could reasonably be construed as having informed their decision-making.

- 45 Despite members of the committee insisting to my Office that they had already made up their minds on the proposal or that the visit to the site had no effect on their decision, the discussion that took place was geared at persuading decision-makers one way or the other. Members of the committee asking questions and viewing the location of the proposal suggest that they were actively assessing the proposal’s merit. I further find indications that decision-making was being actively informed during the gathering by the remark that the proposal was “a good design” and the later statement by a member of the committee that they had been “looking for the numbers, answers, [and] the confidence [...]”.
- 46 As my Office has recently stated,¹⁵ a culture of silence among council members outside of council chambers is neither realistic nor respectful of democratic governance in municipalities. However, council members’ desire to proactively engage outside of council chambers with important municipal projects does not negate the public’s expectation of open governance. Tours of this sort should be organized and co-ordinated through city staff, with proper ground rules in place to ensure the open meeting rules are respected.

Opinion

- 47 The gathering on March 21, 2023 constituted a “meeting” under the *Municipal Act, 2001*, and was therefore subject to open meeting rules.
- 48 The Community and Protective Services Committee of the City of London contravened the *Municipal Act, 2001* on March 21, 2023 when a quorum of the committee gathered to discuss a funding proposal for a non-profit organization. Public notice was not provided, the public was not able to attend, and an official record in the form of meeting minutes was not kept.

Recommendations

- 49 I make the following recommendations to assist the City of London and its Community and Protective Services Committee in fulfilling its obligations under the Act and enhancing the transparency of its meetings:

Recommendation 1

All members of council for the City of London should be vigilant in adhering to their individual and collective obligation to ensure compliance with their responsibilities under the *Municipal Act, 2001*.

¹⁵ *Casselman 2022, supra note 14.*

Recommendation 2

All members of council and committees of the City of London should ensure that no council or committee business or decision-making is materially advanced outside of formal meetings.

Recommendation 3

Members of council for the City of London who organize tours that may be subject to the open meeting rules should consult with City staff.

Report

- 50 Council for the City of London was given the opportunity to review a preliminary version of this report and provide comments to my Office. All comments received were considered in the preparation of this final report.

- 51 This report will be published on my Office's website, and should also be made public by the City. In accordance with subsection 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