



Ombudsman Report

**Investigation into complaints
about a closed meeting held by
the Town of Grimsby, the Town of Lincoln,
and the Township of West Lincoln**

**Paul Dubé
Ombudsman of Ontario**

September 2024

Complaint

- 1 My Office received complaints that council members from the Town of Grimsby, the Town of Lincoln, and the Township of West Lincoln held a joint meeting on August 9, 2023 that did not fit within the closed meeting exceptions in the *Municipal Act, 2001*¹ (the “Act”). During the meeting, the councils held a closed session under the exception for education or training to discuss a provincial review of regional municipal governance.
- 2 My investigation has determined that the first part of the *in camera* meeting on August 9, 2023 fit within the exception for education or training. However, small-group discussions that occurred during the second part of the *in camera* meeting did not fit within the closed session exceptions.

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001* all meetings of a council, local board, and committee of either must be open to the public, unless they fall within prescribed exceptions.
- 4 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.
- 5 The Ombudsman is the closed meeting investigator for the Town of Grimsby, the Town of Lincoln, and the Township of West Lincoln.
- 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.
- 7 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

¹ SO 2001, c 25.

Ombudsman’s previous decisions can be found in the digest:
www.ombudsman.on.ca/digest.

- 8 The Ontario Ombudsman also has the authority to conduct impartial reviews and investigations of hundreds of public sector bodies. This includes municipalities, local boards, and municipally-controlled corporations, as well as provincial government organizations, publicly funded universities, and school boards. In addition, the Ombudsman’s mandate includes reviewing complaints about the services provided by children’s aid societies and residential licensees, and the provision of French language services under the *French Language Services Act*. Read more about the bodies within our jurisdiction here:
www.ombudsman.on.ca/have-a-complaint/who-we-oversee.

Investigative process

- 9 On September 19, 2023 we advised each municipality of our intent to investigate these complaints.
- 10 We obtained and reviewed the records from the August 9, 2023 meeting, relevant portions of each municipality’s procedure by-laws, and the Act. Members of my Office interviewed the Mayor, the Clerk, and the Chief Administrative Officer (the “CAO”) from each municipality. We also spoke to the Member of Provincial Parliament for the provincial electoral district of Niagara West, in which the three municipalities are located.
- 11 My Office received full co-operation in this matter.

Background

Provincial review of regional municipal governance

- 12 In November 2022, the Ministry of Municipal Affairs and Housing announced that provincially appointed facilitators would conduct a review of several municipal regional governments in Ontario, including in the Niagara region.²
- 13 After this announcement was made, the CAOs from the Town of Grimsby, the Town of Lincoln and the Township of West Lincoln began to meet to discuss the potential impact of the review on their respective municipalities.

² <<https://news.ontario.ca/en/backgrounder/1002482/better-municipal-governance-act-2022>>.

The mayors from each municipality were also involved in these discussions. The three municipalities were collectively described as “Niagara West” by the people we interviewed.

- 14 The Town of Lincoln’s CAO told my Office that the CAOs and mayors met with the Member of Provincial Parliament (MPP) for Niagara West to discuss the regional governance review. After the meeting, the MPP provided the Lincoln CAO with a statement to share with the three municipal councils. The statement encouraged local municipalities in Niagara West to agree on a preferred model of governance and provide that position to the regional governance review facilitators. The MPP indicated via email that the statement was his personal view and did not represent a government position. The Lincoln CAO told our Office that the MPP asked that the statement be attributed to him confidentially.

The August 9, 2023 meeting

- 15 The Clerks of each municipality worked together to arrange the joint council meeting. A single agenda and public notice were prepared. We were told that the Grimsby Clerk took the lead to organize the meeting because she had the most experience of the three Clerks.
- 16 The meeting agenda was posted by each municipality on August 2, 2023. The agenda stated that a joint special meeting would occur and provided the date, time and location of the meeting. The agenda contained one item of closed session business: “Governance Matters in Niagara West.”
- 17 Council members from each municipality, the three CAOs, and the three Clerks gathered on August 9, 2023 at the West Niagara Agricultural Centre and Fairgrounds. The meeting was called to order at 5:30 p.m. We were told that the Grimsby Clerk acted as meeting clerk and took minutes.
- 18 All members of council who were present voted together on procedural items and on the resolution to move *in camera*. The resolution stated that a closed session would be held under the exception for education or training to discuss “governance matters in Niagara West.”
- 19 The closed session minutes record that a municipal consultant led a closed session workshop and that council members participated in small-group discussions about governance matters in Niagara West.

- 20 According to those we interviewed, the meeting began with the MPP's statement being read aloud. The municipal consultant then gave a presentation about the history of municipal amalgamations in Ontario and the current regional governance review. Council members had an opportunity to ask questions.
- 21 Following the presentation, we were told that the attendees broke out into three groups for a discussion period. Each group was made up of councillors, a Clerk and a CAO from each municipality. The groups were tasked with discussing and sharing ideas related to changes to the current governance model in Niagara West, including the potential amalgamation of the three municipalities.
- 22 We were told that the small groups discussed a variety of matters regarding potential changes to local governance as a result of the regional governance review. For example, council members shared their ideas and opinions about the role of regional government in the future, downloading regional services to the local municipalities, and the possible amalgamation of the three municipalities. Following the discussions, each Mayor provided a summary of their table's conversation to the larger group.
- 23 The open session minutes record that after the closed session ended, a resolution was passed reporting that "the information provided in the training session be received."

Analysis

Applicability of the exception for education or training

- 24 The three councils cited section 239(3.1), the exception for education or training, in the resolution to move into closed session on August 9, 2023.
- 25 Under section 239(3.1) of the Act, a meeting may be closed to the public if it is both (1) held for the purpose of educating or training members of council, and (2) members do not discuss a matter in a way that materially advances the business or decision-making of council. This exception has been narrowly construed by my Office to apply to gatherings where the sole purpose is to provide education or training and no transactional business or decision-making occurs.

- 26** The first part of the exception refers to council members acquiring skills or information that may assist them in better understanding municipal business – for example, council members attending training on how to read and interpret municipal financial and budget documents.³
- 27** Under the second part of the exception, no member may materially advance the business or decision-making of council. In a recent report to the Village of Casselman, I stated that “materially advances” means considering the extent to which the discussions at issue move forward the business of the municipality, based on factual indicators.⁴ 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. Similarly, council is likely to materially advance business or decision-making when it votes, reaches an agreement, provides direction or input to staff, or discusses or debates a proposal, course of action, or strategy.⁵
- 28** On the other hand, the 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 council.⁶ I have previously found that this includes sessions where councillors are taught skills but do not discuss or attempt to apply the information to specific municipal business.⁷
- 29** The closed session on August 9, 2023 took place in two parts: First, the presentation by the municipal consultant, and second, the small-group discussions.

Municipal consultant’s presentation

- 30** The council members received general information about municipal amalgamations and the municipal regional governance review from the municipal consultant’s presentation. The purpose of the presentation was to educate council members so that they could better understand the governance review and the impact it might have on their municipalities. This exchange of information did not materially advance the business or decision-making of the councils.

³ *Emo (Township of) (Re)*, 2023 ONOMBUD 5, online: <<https://canlii.ca/t/jvj4d>>.

⁴ *Casselman (Municipality of) (Re)*, 2022 ONOMBUD 13, online: <<https://canlii.ca/t/jrnx5>>.

⁵ *Pelee (Township of) (Re)*, 2022 ONOMBUD 2, online: <<https://canlii.ca/t/jm1f5>>.

⁶ *Ibid.*

⁷ *Russell (Township of) (Re)*, 2016 ONOMBUD 1, online: <<https://canlii.ca/t/gt6qg>>.

- 31 The exception for education or training therefore applied to this part of the closed session.

Small-group discussions

- 32 Unlike the first part of the closed session, the small-group discussions involved a free flow of ideas and exchange of opinions from individual council members about changes to local government in Niagara West. There was no receipt of information for the purpose of educating or training councillors. Accordingly, the first part of the exception for education or training is not met.
- 33 Moreover, the small-group discussions materially advanced the business or decision-making of the three councils. The topic and purpose of the discussions – forming a joint position on future governance and potential amalgamation – is a matter of significance to the local community and relates closely to the business of each municipality.
- 34 The three councils did not come to a collective consensus during the August 9, 2023 meeting, such as a resolution or direction to staff. However, a substantive decision or consensus is not required to materially advance the business or decision-making of council, which may include discussing or debating a proposal, course of action or strategy.⁸ In *Southam Inc. v. Ottawa*, the Ontario Divisional Court described council decisions as progressing along a “spectrum” and that the public should not be “deprived of the opportunity to observe a material part of the decision-making process”.⁹ In other words, the open meeting rules are not limited to instances where a formal decision is made. The underlying purpose of the rules is to safeguard the public’s right to observe important steps along the way in the spectrum of a council decision. That may include an exchange of information that informs an impending or potential matter coming before council.
- 35 The exchange of council members’ opinions and ideas about future governance was intended to form the basis of imminent decisions the municipalities would make in going forward with a joint position to submit to the regional governance review facilitators. These discussions were a key step along the way to a specific decision of the three councils that materially advanced the business or decision-making process.

⁸ *Casselman (Village of) (Re)*, 2018 ONOMBUD 11, online: <<https://canlii.ca/t/hvmtk>>.

⁹ *Southam Inc. v. Ottawa (City) Council (Div. Ct.)*, 1991 CanLII 7044 (ON SC).

Parsing the discussion

- 36 Closed session topics that on their own do not fit within a closed meeting exception may be discussed *in camera* where it is not realistic to expect council to parse its meeting between open and closed sessions.¹⁰ The Divisional Court has found that parsing a discussion in this way may “detract from free, open and uninterrupted discussion.”¹¹ My Office has applied this principle narrowly and determined that it does not apply to discussions that could have been separated into open and closed sessions.
- 37 As I have previously stated, the closed session on August 9, 2023 took place in two distinct parts: The municipal consultant’s presentation and the small-group discussion. These two parts were not entwined in such a way that separating the parts into an open and closed session would have prevented council members from holding a free, open and uninterrupted discussion. Council members could have parsed the discussion by receiving the presentation *in camera* under the exception for education or training and then moved into open session to conduct a discussion about changes to local governance in Niagara West.

Applicability of the exception for information provided in confidence by another level of government

- 38 Although the exception in section 239(2)(h) was not cited in the resolution to move into closed session, I have considered whether it would have applied to the statement from the MPP for Niagara West that was read out loud during the closed session.
- 39 The exception applies to “information explicitly supplied in confidence to the municipality or local board by Canada, a province or territory or a Crown agency of either of them.”
- 40 The Lincoln CAO told my Office that he believed the statement was confidential. My Office obtained and reviewed the statement; it was not explicitly marked as confidential when it was sent to the Lincoln CAO. The MPP’s correspondence with the Lincoln CAO indicated that the statement was the MPP’s personal opinion regarding the municipal governance review and did not represent an official position of the provincial government.

¹⁰ *Elliot Lake (City of) (Re)*, 2024 ONOMBUD 3, online: <<https://canlii.ca/t/k2wqr>>.

¹¹ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346, online: <<https://canlii.ca/t/fkqfr>>.

- 41 Accordingly, the exception for information provided in confidence by another level of government did not apply to the August 9, 2023 meeting.

Applicability of the exception for labour relations or employee negotiations

- 42 One individual we interviewed suggested that the exception for labour relations or employee negotiations applied to the closed session because the amalgamation of the three municipalities could involve the termination of municipal staff. We were told, for example, that theoretically an amalgamated municipality would require only one chief administrative officer, clerk, or treasurer rather than three.
- 43 The purpose of the exception for labour relations or employee negotiations is to protect discussions relating to the relationship between a municipality and its employees. My Office has found that the exception applies to discussions about elimination of staff positions.
- 44 In this case, only one individual we interviewed told us that there was reference to the possibility of eliminating staff positions in the event of an amalgamation, and that this was mentioned during one of the small-group discussions. If this topic was indeed discussed, it was not the focus of the discussion. A brief or passing reference to information that would fit into one of the exceptions is not sufficient to bring an entire discussion into an exception.¹²
- 45 Accordingly, the exception for labour relations or employee negotiations does not apply.

Procedural matters

Meeting separately or together?

- 46 Section 236(2) of the Act permits two or more municipalities to hold a joint meeting to consider “matters of common interest.” While two or more municipal councils may come together to hold a meeting at the same time and in the same place, I have found that procedurally, the meeting may be separate and subject to each municipality’s procedure by-law.

¹² *Lanark Highlands (Township of) (Re)*, 2021 ONOMBUD 15, online: <<https://canlii.ca/t/jhx9n>>.

- 47 For example, my Office investigated a meeting held by the councils for the Village of Burks Falls and Armour Township. Although all the attendees met in one room and held a discussion as a group, I determined that technically each council held a separate meeting and was obligated to comply with its respective procedure by-law and with the Act. Each clerk prepared their own agenda for the meeting and took separate minutes. The two councils passed individual resolutions to close the meeting and relied on different exceptions to hold an *in camera* discussion. The clerks did not discuss or agree on a process for the meeting ahead of time.
- 48 In this case, the procedures followed by the three municipalities leading up to and during the August 9, 2023 meeting indicate that a joint meeting occurred.
- 49 Prior to the meeting, the three municipal Clerks together established procedures related to providing notice, preparation of an agenda, and minute-taking. A single agenda was created for the meeting. The notices posted by the three municipalities all contained the same language.
- 50 During the meeting, all of the council members in attendance acted as a single body when passing resolutions and motions. A single resolution to close the meeting was moved and seconded by council members from different municipalities and voted on by all of the council members present. Only the Grimsby Clerk acted as clerk during the meeting. Finally, a single set of minutes was recorded which was adopted by each municipal council.

Delegation of clerk's duties

- 51 Section 228(1) of the Act requires a clerk to record, without note or comment, all resolutions, decisions, and other proceedings of council. Section 228(4) permits a clerk to delegate in writing to any person (other than a member of council) the clerk's powers and duties, including to record minutes.
- 52 The Grimsby Clerk assumed clerking duties for the August 9, 2023 meeting but did so without written delegation from the other Clerks. Written delegation of the Lincoln and West Lincoln Clerks' duties should have been provided to the Grimsby Clerk to comply with the requirements of section 228(4).
- 53 In response to a preliminary version of this report, the Town of Lincoln commented that the Grimsby Clerk took the lead to organize and clerk the August 9, 2023 meeting and, therefore, it was the Grimsby Clerk's

responsibility to ensure the proper delegations had been obtained. Under the Act, the ability to delegate a clerk’s statutory duties belongs to the clerk. Regardless of which of the three municipal Clerks took minutes during the meeting, each one had an individual responsibility to ensure that the proper delegations had been made prior to the meeting.

Opinion

- 54 The councils for the Town of Grimsby, the Town of Lincoln and the Township of West Lincoln held a joint meeting on August 9, 2023. The first part of the closed session - the presentation by a municipal consultant - fit within the exception for education or training. However, the second part of the closed session - the small-group discussions between council members – did not educate or train members of council and materially advanced business or decision-making. Accordingly, this part of the closed session did not fit within the exception for education or training or any other exception to the open meeting rules.
- 55 The Grimsby Clerk assumed clerking duties for the Town of Lincoln and the Township of West Lincoln during the August 9, 2023 meeting despite not having received written delegation from the Clerk for either municipality.

Recommendations

- 56 I make the following recommendations to assist the Town of Grimsby, the Town of Lincoln and the Township of West Lincoln in fulfilling their obligations under the Act and enhancing the transparency of their meetings:

Recommendation 1

All members of council for the Town of Grimsby should be vigilant in adhering to their individual and collective obligation to ensure that the Town complies with its responsibilities under the *Municipal Act, 2001*.

Recommendation 2

All members of council for the Town of Lincoln should be vigilant in adhering to their individual and collective obligation to ensure that the Town complies with its responsibilities under the *Municipal Act, 2001*.

Recommendation 3

All members of council for the Township of West Lincoln should be vigilant in adhering to their individual and collective obligation to

ensure that the Township complies with its responsibilities under the *Municipal Act, 2001*.

Recommendation 4

The Clerk for the Town of Grimsby should ensure that they obtain a written delegation from municipal clerks if they act as clerk for any future joint meetings between two or more municipal councils.

Recommendation 5

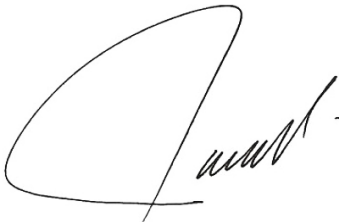
The Clerk for the Town of Lincoln should ensure that their duties are delegated, in writing, to the individual who will act as clerk for any future joint meetings between two or more municipal councils.

Recommendation 6

The Clerk for the Township of West Lincoln should ensure that their duties are delegated, in writing, to the individual who will act as clerk for any future joint meetings between two or more municipal councils.

Report

- 57 The Town of Grimsby, the Town of Lincoln and the Township of West Lincoln were given the opportunity to review a preliminary version of this report and provide comments to my Office. All comments we received were considered in the preparation of this final report.
- 58 This report will be published on my Office's website and should also be made public by the Town of Grimsby, the Town of Lincoln and the Township of West Lincoln. In accordance with subsection 239.2(12) of the *Municipal Act, 2001*, council for each municipality is required to pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario