



Ombudsman Report

Investigation into meetings held by the City of Richmond Hill on April 16, 2019; May 14, 2019; April 1, 2020; April 22, 2020; and May 14, 2020.

**Paul Dubé
Ombudsman of Ontario
March 2021**

Complaints

- 1 My Office received complaints about in-person closed meetings held by council for the City of Richmond Hill (the “City”) on April 16 and May 14, 2019. We also received complaints about electronic council meetings held on April 1, April 22, and May 14, 2020.
- 2 The complainants alleged that council discussed a land use planning matter *in camera* at each of these meetings and that the subject matter discussed did not fall within any of the prescribed exceptions in the *Municipal Act, 2001* (the “Act”).¹
- 3 The complainants also said that on April 22, 2020, council held two meetings back to back: A regular meeting to deal with open session matters followed by a special meeting to discuss matters *in camera*. The complainants alleged that much of the special meeting was not open to the public, and that after rising from closed session, council did not report back to provide a brief summary of the nature of its discussion *in camera*.
- 4 Finally, some complainants alleged that the entirety of the special meeting held electronically on May 14, 2020 was closed to the public, in violation of the open meeting rules, and that they only learned of the meeting shortly before it was held.

Ombudsman jurisdiction

- 5 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.
- 6 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.
- 7 The Ombudsman is the closed meeting investigator for the City of Richmond Hill.

¹ SO 2001, c 25.

- 8 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's governing procedures have been observed.
- 9 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.

Investigative process

- 10 On June 11, 2020, we advised the City of our intent to investigate these complaints.
- 11 My staff reviewed the City's procedure by-law and relevant portions of the Act. We reviewed the meeting records, including the agendas and minutes from the open and closed portions of each meeting, and the video recordings of the open portions of the meetings, where available. The City does not audio or video record closed meetings.
- 12 We spoke with the complainants, as well as the Mayor and the Clerk, to obtain additional information about each meeting and the City's modified procedure for holding meetings electronically as a result of the COVID-19 pandemic.
- 13 My Office received full co-operation in this matter.

Procedure by-law

- 14 Richmond Hill's procedure by-law (No. 74-2012) states that all meetings shall be open to the public except as provided in section 239 of the *Municipal Act, 2001*. The by-law states that prior to proceeding *in camera*, council shall pass a resolution advising of the closed session meeting and the general nature of the subject matter to be considered.

15 The by-law also states at s. 5.3.7 that:

Only matters discussed in a Closed Session Meeting and directed to be brought forward for voting in public by a Resolution of Council will be brought forward by the Clerk. Such matters will be voted on in public immediately following the Closed Session Meeting.

Legislative amendments permitting electronic meetings

16 A regulation came into force declaring a state of emergency throughout Ontario from March 18, 2020, until July 23, 2020, due to “the outbreak of a communicable disease namely COVID-19 coronavirus disease [which] constitutes a danger of major proportions that could result in serious harm to persons.”²

17 Bill 187, the *Municipal Emergency Act, 2020*, took effect on March 19, 2020.

18 The Bill amended the *Municipal Act, 2001*, to allow municipalities to make changes to their procedure by-laws, should they wish to do so, to permit:

- Members of a council or of a local board who are participating electronically in a meeting to be counted towards quorum; and
- Members participating electronically to participate in a closed session.

These changes applied only when an emergency had been declared under the *Emergency Management and Civil Protection Act*.

19 In accordance with Bill 187, council for the City of Richmond Hill amended its procedure by-law to provide for the holding of electronic meetings during an emergency.³ This version of the procedure by-law applied to the meetings held on April 1, April 22, and May 14, 2020.

20 The by-law stated that unless otherwise directed by an appropriate authority, members could choose to participate in an electronic meeting either in-person or electronically. However, council could pass a resolution providing for all or most members to participate electronically, having regard to health and safety considerations.

² O. Reg. 50/20 *Declaration of Emergency*, filed March 18, 2020 under *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9.

³ City of Richmond Hill, By-law 40-20.

- 21 The by-law provided that electronic meetings could be held using any audio-only, audiovisual, or other electronic means available to all members, as determined by the Clerk. It also stated that wherever possible, the technology used for an electronic meeting should permit the City to broadcast live, or create an audio or audiovisual record of, the open portion of a meeting.
- 22 However, the by-law also stated that where the only matter on an electronic meeting agenda is a closed session matter, live broadcasting or the creation of an audio or audiovisual record of the meeting was not required.⁴
- 23 The City's amended by-law permitted the Mayor or Chair, in consultation with the City Manager and Clerk, to limit or restrict any in-person attendance at a meeting, other than for a member of council. In making this determination, City officials were to consider the health and safety implications of permitting some or any in-person attendance, and in particular, consider any directive or advice of any appropriate authority (for example, a medical officer of health).
- 24 If in-person attendance by the public was restricted, the by-law stated that an electronic meeting would be made accessible to the public by permitting written delegations, posting records of the open session portion of the meeting (including any audio or audiovisual recording of the meeting, and minutes) to the City's website in a timely manner following the meeting, and making such records available for inspection by the public.
- 25 The by-law required that, wherever possible, public notice of an electronic meeting include sufficient information so that the public could electronically attend the open portion of the meeting.

Further amendments to electronic meeting procedures

- 26 Subsequently, Bill 197, the *COVID-19 Economic Recovery Act, 2020*, made further changes to the *Municipal Act* effective July 19, 2020. These amendments enable municipalities to permit electronic participation in meetings at any time, regardless of whether or not a state of emergency has been declared. Going forward, a municipality's procedure by-law may

⁴ By-law 74-12 (as amended by By-laws 62-15, 86-16, 120-18 35-19, 54-19, 151-19, 162-19 and 40-20) [the "former by-law"] at s. 12.2.4(c). This requirement is continued at s. 12.2.3(c) of the current by-law.

provide that a member of council, of a local board, or of a committee of either of them can participate electronically in a meeting to the extent and in the manner set out in the by-law.⁵

- 27 In accordance with Bill 197, council for the City of Richmond Hill amended its procedure by-law again to provide for the holding of electronic meetings generally, including in situations where no emergency has been declared under the *Emergency Management and Civil Protection Act*.
- 28 The City's current procedure by-law continues to permit limitations on the public's ability to attend meetings in-person during "any situation or an impending situation where there is a threat to public health, life, property or the environment," including but not limited to when a local or provincial state of emergency has been formally declared. Limitations on in-person attendance may also be imposed as a result of any health and safety implications of in-person attendance, as defined in the by-law.⁶
- 29 The by-law now provides that restrictions on in-person attendance may be imposed by resolution of council and/or by decision of the Mayor in consultation with the Clerk and City Manager. The updated by-law also establishes procedures for audio-visual delegations by members of the public during an electronic meeting under certain circumstances.
- 30 The by-law continues to require that:
 - the open portion of an electronic meeting be broadcast live wherever possible,⁷
 - public notice of an electronic meeting include sufficient information so that the public may electronically access the open portion of the meeting wherever possible,⁸ and
 - where the only matter on an electronic meeting agenda is a closed session matter, the live broadcast or the creation of an audio or audiovisual record of the meeting is not required.⁹

⁵ *Municipal Act, 2001*, S.O. 2001 c. 25 at s. 238(3.1)

⁶ By-Law No. 74-2012 (as amended by By-laws 62-15, 86-16, 120-18 35-19, 54-19, 151-19, 162-19, 40-20, and 102-20) [the current by-law] at s. 12.4.1

⁷ *Ibid* at s. 12.2.3(b)

⁸ *Ibid* at s. 12.2.4(b)

⁹ *Ibid* at s. 12.2.3(c)

Continued application of the open meeting rules

- 31 While the amendments set out in both Bill 187 and Bill 197 allow for some additional flexibility in conducting meetings through electronic participation, they did not create any new exceptions to the open meeting rules, or change any of the other applicable rules. Municipal meetings are still required to be open to the public, unless the topic of discussion fits within one of the exceptions set out in the Act. Notice of meetings must still be provided in accordance with the procedure by-law, meeting minutes must be recorded, and a resolution must be passed in open session before the meeting can be closed to the public.¹⁰

Background: The Yonge/Bernard Key Development Area

- 32 Under the *Planning Act*, a municipality may establish an official plan setting out objectives and policies for managing future growth.¹¹ Once an official plan is in effect, it guides all of the municipality's planning decisions. Council and municipal officials must follow the plan and all by-laws must conform with the official plan.¹²
- 33 The council of a municipality may amend an official plan from time to time, as long as the plan remains consistent with provincial land use planning policies. For example, council may decide to prepare a secondary plan that would apply only to a particular area of a municipality.
- 34 The official plan adopted by the City of Richmond Hill in 2010 identified the area around Yonge Street and Bernard Avenue as a "Key Development Area" and directed that a secondary plan be prepared to guide future development in the area by addressing issues such as the height and density of new buildings and the location of new parks, roads and transit facilities.¹³
- 35 On November 28, 2016, council passed an interim control by-law to halt new development in the Yonge/Bernard Key Development Area while a planning study was conducted and a secondary plan prepared.

¹⁰ *Russell (Town of) (Re)*, 2020 ONOMBUD 1 (CanLII), <<https://canlii.ca/t/j6n2t>>.

¹¹ *Planning Act*, R.S.O. 1990, c. P.13 at s. 16

¹² Ministry of Municipal Affairs and Housing. *Citizens' Guide to Land Use Planning*. <https://www.ontario.ca/document/citizens-guide-land-use-planning/official-plans>

¹³ Prior to March 26, 2019, the municipal corporation formerly known as the Town of Richmond Hill was continued as the City of Richmond Hill. This report will refer to Richmond Hill as the "City" throughout.

- 36 On November 27, 2017, council approved a secondary plan for the Yonge/Bernard Key Development Area as Official Plan Amendment No. 8. Council also passed a zoning by-law setting out specific rules to implement the broader policies contained within the plan.
- 37 Under certain circumstances, an official plan or amendments to an official plan may be appealed to the Local Planning Appeal Tribunal (“LPAT”).
- 38 Both the City’s official plan amendment and the zoning by-law amendments respecting the Yonge/Bernard Key Development Area were appealed to the Tribunal.¹⁴ A number of pre-hearing conferences and hearings have occurred since 2018 related to these appeals.¹⁵
- 39 The appeals respecting the Yonge/Bernard Key Development Area were initially scheduled to be heard in July 2019, but the Tribunal granted an adjournment until June 2020.¹⁶
- 40 A revised secondary plan for the Yonge/Bernard Key Development Area and related zoning by-law were subsequently released by the City on February 14, 2020, for public discussion.
- 41 At the time my Office notified the City of my intention to investigate these complaints, the Tribunal had yet to render a final decision regarding these appeals.

April 16, 2019 special council meeting

- 42 Council held a special meeting in council chambers on April 16, 2019 that was called to order at 1:20 p.m.
- 43 Council resolved to go into a closed meeting pursuant to the exception in s. 239(2)(e) for discussions about litigation or potential litigation, and s. 239(2)(f) for discussions subject to solicitor-client privilege. The resolution stated that the discussion would relate to “appeals before the Land Planning Appeal Tribunal pertaining to the Yonge/Bernard Key Development Area”.

¹⁴ *Askander v Richmond Hill (Town)*, 2018 CanLII 126932 (ON LPAT)

¹⁵ *Askander v Richmond Hill (Town)*, 2019 CanLII 67583 (ON LPAT)

¹⁶ *Yonge MCD Inc. v Richmond Hill (Town)*, 2019 CanLII 75364 (ON LPAT)

- 44 Council proceeded to enter closed session at 1:22 p.m. After arising from closed session at 3:06 p.m., council passed a motion directing staff to make a number of revisions to the secondary plan respecting the Key Development Area, including revisions related to matters such as density, building heights and parking standards. The motion also directed staff to “do all things necessary to give effect to the above in order to resolve the appeals before LPAT without a contested hearing.”
- 45 The meeting was adjourned at 3:30 p.m.
- 46 Our review of the open and closed session minutes, and interviews conducted with individuals present during the meeting, indicate that council received and considered a staff report prepared by the Commissioner of Planning and Regulatory Services regarding the Yonge/Bernard Key Development Area. The appeals to the Local Planning Appeal Tribunal about this matter had yet to be resolved.
- 47 The minutes also indicate that a lawyer retained as external legal counsel for the City was present and provided an overview of information contained in the staff report, including the implications of the options that were before council for the ongoing appeals.

May 14, 2019 council meeting

- 48 The May 14, 2019 regularly scheduled council meeting was held in council chambers and called to order at 1:00 p.m.
- 49 Prior to going *in camera*, council heard ten delegations regarding the Yonge/Bernard Key Development Area, which was on the agenda to be discussed in closed session later in the meeting.
- 50 Council passed a resolution to go *in camera* at 4:06 p.m., again citing the exceptions for litigation or potential litigation and advice subject to solicitor-client privilege. The resolution stated that council would be discussing “appeals before the Land Planning Appeals Tribunal pertaining to the Yonge/Bernard Key Development Area [...]”.
- 51 The resolution also indicated that, in addition to this topic, council would discuss a second item pertaining to litigation involving the City, which was not the subject of the complaints to my Office.

- 52 According to the closed session minutes and interviews conducted with individuals present during the meeting, while in closed session, council received and reviewed a staff report regarding the Yonge/Bernard Key Development Area secondary plan and related zoning by-law. This occurred in the context of the litigation that was before the Local Planning Appeal Tribunal, which remained ongoing.
- 53 The minutes further indicate that council provided direction to staff while in closed session. The City Solicitor and the City's external legal counsel were present during the closed session. Those interviewed told us that council received advice from legal counsel and asked questions during the closed session regarding the City's options and how various courses of action would affect the appeals that were before the Tribunal.
- 54 Council reconvened in open session at 4:57 p.m. and passed a motion to rescind the resolution that had been adopted at the April 16 meeting respecting the Yonge/Bernard Key Development Area. Council directed staff to advise the LPAT that the City supported an adjournment of the hearing scheduled to take place in July 2019, as this would permit the City to conduct further community engagement about the secondary plan.

April 1, 2020 meeting

- 55 Council held an electronic emergency special council meeting on April 1, 2020 at 10:00 a.m. via videoconference. One member of council and several staff members were present at the municipal offices, while the remainder of council members and additional staff participated remotely.
- 56 Members of the public were not permitted to attend the municipal offices in person to observe the meeting. However, the meeting was broadcast live via YouTube.¹⁷ Council proceeded to discuss a number of agenda items in open session, which members of the public could observe by tuning in to the live broadcast.
- 57 At 12:30 p.m., council passed a resolution to move into closed session to discuss several topics including:

To consider litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board; and personal matters about identifiable individuals, including municipal or

¹⁷ <https://www.youtube.com/watch?v=mUY0lfjf15k>

local board employees, with respect to an employee matter (Section 239(2)(e) and (b) of the *Municipal Act, 2001*).

- 58 At that point, council entered closed session and the live broadcast ended.
- 59 Those we interviewed told us that the Yonge/Bernard Key Development Area and related appeals were not discussed at this meeting. The closed session minutes also do not reflect any discussion about this matter. Council dealt with other matters during the closed session that were not the subject of any complaints to my Office.
- 60 The minutes indicate that council rose from closed session at 2:15 p.m. and passed a motion approving certain proposals discussed *in camera*.
- 61 Although the minutes indicate that council reconvened in open session, the live broadcast did not resume at 2:15 p.m. and was not available for the remainder of the meeting, which was adjourned at 2:18 p.m.

April 22, 2020 meeting

Regular meeting

- 62 On April 22, 2020, an electronic council meeting was called to order at 9:30 a.m. with council members and some municipal staff participating via videoconference and a small number of staff attending the municipal offices in person. A special council meeting was scheduled to begin immediately following the regular meeting to deal with a closed session agenda item.
- 63 Members of the public were not permitted to attend the municipal offices in person to observe the meeting. However, the meeting was broadcast live via YouTube.¹⁸ At the beginning of the meeting, the Mayor described the steps the City had taken to facilitate public participation in electronic meetings, such as the manner in which members of the public could provide written correspondence to council or apply in advance to delegate electronically.
- 64 The agenda for the 9:30 a.m. meeting included a motion to “Reschedule an LPAT hearing on the Yonge/Bernard KDA to permit live and in person public participation” under the heading of “Other Business”. The motion included a proposal that, if passed, would have resulted in a direction to staff to seek a further adjournment of the Yonge/Bernard Key Development

¹⁸ <https://www.youtube.com/watch?v=GxeqsnY79qg>

Area hearing at the LPAT until such time as the easing of public health measures could permit in-person public consultation to occur.

- 65 Council began by adopting the agenda for the meeting. A majority of members voted to amend the agenda by removing the motion pertaining to the Yonge/Bernard Key Development Area from the agenda of the 9:30 a.m. meeting and instead adding it to the agenda of the special meeting to be held immediately afterwards to consider *in camera* matters.
- 66 Council proceeded to address other items on the agenda before adjourning the meeting at 9:59 a.m. The Clerk then instructed members of council to exit the electronic meeting and reconvene afterwards using a separate invitation to the special meeting that would be held via videoconference to discuss the closed session agenda items.

Special meeting

- 67 Council commenced a special electronic meeting at 10:10 a.m. with members of council and staff participating via videoconference. As with the meeting held at 9:30 a.m., members of the public were not permitted to attend council chambers to observe any portion of the meeting in person.
- 68 However, unlike the 9:30 a.m. meeting, members of the public were not provided with the second videoconferencing invitation that had been sent to members of council, and the beginning of this meeting was not broadcast in any form to the public.
- 69 The minutes indicate that council passed a resolution to go *in camera* to discuss the councillor's motion regarding the Yonge/Bernard Key Development Area that had been removed from the earlier meeting's agenda. The resolution cited the exceptions in s. 239(2)(e) for litigation or potential litigation, and s. 239(2)(f) for advice subject to solicitor-client privilege.
- 70 The public minutes indicate that council "moved into closed session and then returned to open session (10:10 a.m. to 11:36 a.m.)."
- 71 According to the closed session minutes and interviews conducted with individuals present during the meeting, while in closed session, the City Solicitor provided information to council about the procedural history of the LPAT appeals regarding the Yonge/Bernard Key Development Area and responded to questions about the upcoming hearings.

- 72 My review found that council did not provide any direction to staff with respect to the Yonge/Bernard Key Development Area appeals.
- 73 Council also dealt with another matter in closed session that was not the subject of any complaints to my Office.
- 74 Council passed a motion to reconvene in open session at 11:36 a.m., at which point a live broadcast of the meeting began. A recording of the broadcast was archived on YouTube.¹⁹
- 75 The minutes indicate that there was nothing to report out in open session respecting the Yonge/Bernard Key Development Area matter.
- 76 Council then passed a by-law confirming the proceedings of the special meeting and adjourned the meeting at 12:40 p.m.

May 14, 2020 meeting

- 77 An “Electronic Emergency or Time Sensitive Special Council meeting” was held on Thursday, May 14, 2020 at 9:00 p.m. via videoconference. This meeting was not broadcast live. Members of the public were not permitted to attend council chambers to observe any portion of the meeting in person.
- 78 The Clerk explained that the meeting was called on the evening of May 14 to deal with an urgent matter that had arisen, and that notice of the meeting was posted to the City’s website at approximately 8:00 p.m.
- 79 The meeting minutes indicate that council passed a resolution confirming that the meeting was called in order to consider a time-sensitive matter, as defined in the City’s procedure bylaw, related to, “the Yonge Bernard Key Development Area (KDA) Local Planning Appeal Tribunal conference call scheduled for Friday, May 15, 2020”.
- 80 Council then passed motions adopting the agenda and to move into closed session to discuss a “time-sensitive matter” related to “the Yonge/Bernard Key Development Area (KDA) appeal to the Local Planning Appeal Tribunal (LPAT)”. Council cited the exceptions for litigation or potential litigation, and advice subject to solicitor-client privilege.
- 81 The minutes indicate that the *in camera* discussion began at 9:15 p.m.

¹⁹ <https://www.youtube.com/watch?v=XdlUy13Qq3E>

- 82 According to the closed session minutes and interviews conducted with individuals present during the meeting, while in closed session, the City's external legal counsel updated council regarding the Yonge/Bernard Key Development Area matter. Council was briefed on the implications of its prior decisions for the ongoing litigation. Council then provided further direction to staff about this matter.
- 83 The minutes indicate that council "returned to open session" at 10:10 p.m. and that there were no open session recommendations to report arising from the closed session discussion. However, as with the beginning of the meeting, this portion of the meeting was also not broadcast live and the public was not able to observe it.
- 84 The meeting was adjourned at 10:11 p.m. No recording of any portion of the meeting has been posted online.

Analysis

- 85 Council discussed a number of distinct topics *in camera* on the five meeting dates set out above. However, the complaints received by my Office were only about the appropriateness of council discussing the Yonge/Bernard Key Development Area and related appeals in closed session. Council cited both the "litigation" and "solicitor-client privilege" exceptions each time it discussed this matter *in camera*.

Applicability of the exception for advice subject to solicitor-client privilege

- 86 The exception for advice subject to solicitor-client privilege applies to discussions that include communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential. The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.
- 87 The Supreme Court of Canada has found that solicitor-client privilege extends when three pre-conditions are met:
1. There is a communication between a lawyer and a client;
 2. which entails the seeking or giving of legal advice; and
 3. which is considered to be confidential by the parties.²⁰

²⁰ *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821, <<https://canlii.ca/t/1mjtq>>.

88 Council discussed the Yonge/Bernard Key Development Area and related appeals *in camera* at meetings held on April 14 and May 16, 2019, and April 22 and May 14, 2020. At each of these meetings, both the City Solicitor and external counsel were present to provide legal advice to council about the litigation and answer questions from council about the potential legal implications of the particular courses of action available to the municipality. These discussions were held *in camera* to keep the advice confidential. Accordingly, this topic fit within the exception for advice subject to solicitor-client privilege on each of the four meeting dates.

Applicability of the exception for litigation and potential litigation

89 The “litigation” exception allows a municipality or local board to proceed *in camera* to discuss “litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board.” Although the Act does not define what constitutes “litigation or potential litigation,” courts have determined this exception is reserved for circumstances where the subject matter discussed is ongoing litigation or involves a reasonable prospect of litigation.²¹

90 My Office has previously found that this exception permits council to discuss and prepare for pending litigation before an administrative tribunal, such as an appeal before the Local Planning Appeal Tribunal, in a closed meeting, as well as to receive and consider new information affecting an ongoing appeal.²²

91 In each of the four meetings where the Yonge/Bernard Key Development Area appeals were discussed, council received information about developments in the ongoing litigation and provided direction to staff or legal counsel about next steps in the appeals.

92 While discussions about land use planning matters do not generally fit within any of the exceptions to the open meeting rules, the discussion in this case related to ongoing litigation before the LPAT. Accordingly, the topic fit within the exceptions for “litigation”.

²¹ *RSJ Holdings Inc. v. London (City)*, 2005 CanLII 43895 (ON CA), <<https://canlii.ca/t/1m32m>> at para 22.

²² *Norfolk (County of) (Re)*, 2016 ONOMBUD 18 (CanLII) <<https://canlii.ca/t/h2st5>>; Ombudsman Ontario, Letter to the City of Greater Sudbury (2013), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2013/city-of-greater-sudbury-en>>

Failure to broadcast portions of meetings

- 93 I recognize that municipalities faced, and continue to face, unprecedented challenges in adapting their regular operations to function during the COVID-19 pandemic, as applicable laws, best practices and public health guidelines continue to evolve.
- 94 As my Office has noted in previous closed meeting investigation reports, the requirement to hold meetings that are open to the public is not suspended in an emergency.²³ None of the amendments to the *Municipal Act* permitting municipalities to allow members to participate in open and closed meetings via electronic means have changed this basic requirement.
- 95 The right of citizens to attend public meetings and view council proceedings in action is the foundation of the municipal open meeting requirement. As the Supreme Court of Canada determined in *London (City) v. RSJ Holdings Inc.*, the open meeting requirements set out in the *Municipal Act* demonstrate that the public has “the right to observe municipal government in process.”²⁴
- 96 As the *Municipal Act* now permits municipalities to amend their procedure by-laws to permit a quorum of members to participate electronically in meetings even outside of a formal declaration of emergency, it is especially important that municipal councils give careful consideration to ensuring that the public’s right to observe municipal government in process is maintained when electronic meeting formats are adopted.
- 97 Whenever the public is excluded from in-person attendance, it is imperative that whatever alternative electronic format is selected enables the public to observe all portions of a meeting except a duly constituted closed session. I am aware of municipalities that have adopted practices that ensure all open portions of meetings are made available to the public.²⁵
- 98 The expedited publication of minutes or a post-facto recording of a meeting, while commendable, are not a substitute for enabling the public to observe

²³ *Russell, 2020, supra.*

²⁴ *London (City) v RSJ Holdings Inc*, 2007 SCC 29 at para 32.

²⁵ *Russell, 2020, supra*; Letter from Ombudsman of Ontario to Township of Lanark Highlights (2 February 2021), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2021/township-of-lanark-highlands>>; Letter from Ombudsman of Ontario to Township of Stone Mills (22 December 2020), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2020/township-of-stone-mills>>.

a meeting while it is happening. In my Office's 2015 report, *Access Denied*, we stated:

The fact that a video of the session was available for viewing some time later does not make up for the fact that the public was effectively barred from attending while council business was being transacted. If this were sufficient to allow council to meet its open meeting obligations, municipal meetings could take place at any time behind closed doors, as long as a recording was available for public viewing at a later date. This was clearly not the intention of the framers of the open meeting requirements.²⁶

This statement is equally applicable to electronic meetings, whether or not they are being held during a declaration of emergency.

Failure to broadcast the passage of resolutions to go *in camera*

- 99** Section 239(4) of the *Municipal Act* requires that municipalities pass a resolution in open session prior to going *in camera*:

Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution ...the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting[.]

- 100** This requirement is not a mere formality; rather, it enables both members of council and members of the public to assess whether the proposed topic appears to be suitable for discussion *in camera* and for members of council to speak to this issue on the record.
- 101** The Ontario Court of Appeal has explained that the resolution to go into closed session should provide a general description of the matters to be discussed in a way that maximizes information available to the public without undermining the reason for closing the meeting.²⁷ If the resolution to close a meeting is passed when council is already in closed session, it does not provide any information to the public, disclosing neither the fact of the closed meeting nor the general nature of the matter(s) to be considered.

²⁶ *Clarence-Rockland (City of) (Re)*, 2015 ONOMBUD 1 (CanLII), <<https://canlii.ca/t/gtp5p>>.

²⁷ *Farber v. Kingston (City)*, 2007 ONCA 173 (CanLII), <<https://canlii.ca/t/1qtzl>>.

- 102** The Clerk told my Office that while in-person attendance is not permitted, the City has adopted a practice where most *in camera* matters are dealt with during special meetings in which the only agenda items are topics to be discussed in closed session. The City's procedure by-law exempts such meetings from the requirement to live broadcast portions of the meetings which would otherwise be open to the public if the meeting were held in-person. The Clerk explained that this procedure was adopted for security reasons and to ensure that a closed session matter is not inadvertently disclosed to the public using electronic meeting technology, as there may be a brief delay before a live broadcast can no longer be viewed by the public after the recording function is turned off.
- 103** I recognize that different municipalities have adopted different electronic meeting practices and technologies, depending on factors such as the availability of high-speed internet access in the community and whether council members have suitable hardware to support different modes of participation. Depending on the technology used to facilitate electronic meetings, it may be necessary for municipalities to take additional steps in order to enable the public to observe all open portions of a meeting, while being excluded from portions of the meeting, which may be held *in camera*.
- 104** This might involve providing separate meeting invites or call-in instructions for different parts of a meeting, or taking steps to ensure that live-broadcasting capabilities are enabled or disabled at various points of the meeting as required to ensure the confidentiality of a closed session.
- 105** Nevertheless, the resolution to close a meeting must still be passed in open session, while members of the public still have the opportunity to observe. As my Office has found in a previous report, even if council plans to hold a meeting where a closed session is the only agenda item, the meeting must begin in open session and the public must be invited to attend that portion of the meeting.²⁸
- 106** At the April 22 and May 14, 2020 special meetings, council's resolutions to proceed *in camera* were passed in meetings that were already effectively closed to the public. The public was not permitted to attend these meetings in person. The beginning of each meeting was not broadcast live, nor did members of the public receive information that would permit them to access the videoconference directly. As such, council's resolution to proceed *in*

²⁸ *Burk's Falls / Armour (Village of / Township) (Re)*, 2015 ONOMBUD 26 (CanLII), <<https://canlii.ca/t/gtp6w>>.

camera was not passed in a portion of the meeting that was open to the public, contrary to s. 239(4) of the Act.

Failure to broadcast the report back following a closed session

- 107** At the conclusion of the April 1, 2020 electronic meeting, council purported to rise and report from closed session and pass a motion approving certain matters discussed *in camera*. However, the public live broadcast of the meeting did not resume following the closed session. Therefore, although the motion and brief report back were described in the meeting minutes, this business was not actually conducted in a part of the meeting that was open to the public.
- 108** The City did begin live-broadcasting the April 22, 2020 special meeting at the conclusion of the closed session, which permitted members of the public to observe council rise and report back from its discussion held *in camera*. However, the portion of the May 14, 2020 special meeting after the conclusion of the closed session discussion was not broadcast. As such, this portion of the May 14, 2020 special meeting was closed to the public, contrary to the Act.
- 109** Even where no further vote in open session is required to advance a matter discussed *in camera*, transparency is enhanced by adopting the best practice of reporting back in open session on what transpired in closed session, at least in a general way.²⁹ In some cases, public reporting might simply consist of a general discussion in open session of subjects considered in closed session, similar to the information in the resolution authorizing the session, together with information about staff directions, decisions and resolutions.
- 110** Any such report back must take place in a portion of the meeting that is actually open to the public, either in person or electronically. In a previous report, my Office noted that:

In the interest of transparency, council should ensure that members of the public understand their right to observe all portions of open meetings, including the resolution to proceed *in camera* and the portion of the meeting that follows a closed session.³⁰

²⁹ *Oshawa (City of) (Re)*, 2016 ONOMBUD 10 (CanLII), <<https://canlii.ca/t/h2ssm>>.

³⁰ *Sables-Spanish Rivers (Township of) (Re)*, 2020 ONOMBUD 5 (CanLII), <<https://canlii.ca/t/j9vbx>>.

Public notice

111 The complaints I received also expressed concern that notice of the May 14, 2020 special meeting was only provided immediately prior to the commencement of the meeting, and that this notice did not provide a link to any live broadcast of the meeting.

112 Section 6.1.7 of the City's procedure by-law in force at the time of the meeting provided that:

The Clerk shall provide notice to the public of a special Meeting called for:

- (a) any purpose other than an Emergency or Time Sensitive Matter by posting to the schedule of Meetings on the City's website not less than one (1) clear day in advance of the date of the Meeting; and
- (b) an Emergency or Time Sensitive Matter, by posting a notice on the door of Council Chambers.³¹

113 The procedure by-law also provided that:

- (a) A public notice of an Electronic Meeting will, wherever possible, include sufficient information as to provide the public with a means to electronically access the Open Session of such Electronic meeting.
- (b) Notwithstanding Section 6.1.7(b) of the By-law, notice of an Electronic Meeting called to address an Emergency or Time Sensitive Matter shall still be given by posting notice of the meeting on the City's website with the information referred to in paragraph (a).
- (c) The saving provisions in Section ... 6.1.8 of the By-law shall apply to any public notice of any Electronic Meeting, with all the necessary changes in points of detail understood.³²

114 Finally, section 6.1.8 of the by-law stated that:

If by oversight or otherwise notice of a special Meeting is not provided in the manner prescribed in subsection 6.1.7 (Public Notice of Special Meeting), the Meeting of Council shall not be void or voidable by reason of such failure to give notice or the insufficiency of any notice

³¹ By-law 74-12 [former] at s. 6.1.7

³² By-law 74-12 [former] at s. 12.2.5

and no proceeding at that Meeting shall be void or voidable by reason of such failure to give notice or the insufficiency of any notice.³³

- 115** As noted above, council passed a resolution confirming that the May 14, 2020 special meeting was to consider a time-sensitive matter.
- 116** The City's procedure by-law defines a time-sensitive matter as "a matter that relates to a significant financial, legal, or contractual deadline that may require a decision of or direction from Council before the next regular Meeting of Council."
- 117** My review found that during this meeting, council discussed a litigation matter that was scheduled to proceed the following day.
- 118** City staff confirmed that public notice was posted on the City's website approximately one hour prior to the commencement of the meeting. However, the posted notice did not include any instructions on how to electronically access open portions of the meeting. As noted above, my review found that no such live broadcast occurred.
- 119** Given the emergency nature of the meeting, the City did not contravene the Act or its by-law when it provided one hour's notice of the special meeting. However, by failing to provide information to the public about how to access the open portions of the electronic meeting, the notice provided for the May 14 meeting was not sufficient. The meeting notice must provide information that will permit the public to observe the meeting, which, for an electronic meeting, means the link and any relevant technical instructions.

Procedure by-law

- 120** Several provisions of the City's procedure by-law establish electronic meeting practices that do not comply with the Act.
- 121** The by-law states that the open portion of an electronic meeting be broadcast live "wherever possible."³⁴ I recognize that technical difficulties can and do occur. However, if a live broadcast of a meeting is the only means by which the public is able to observe it, the meeting should not proceed until any problem with the broadcast can be rectified. Otherwise, the meeting may be found to be in contravention of the Act.³⁵

³³ By-law 74-12 [both current and former] at 6.1.8

³⁴ By-law 74-12 [current] at 12.2.3(b).

³⁵ *Westport (Village of) (Re)*, 2021 ONOMBUD 5 (CanLII), <<https://canlii.ca/t/jdpvc>>.

- 122** The by-law also states that public notice of an electronic meeting should include sufficient information so that the public may electronically access the open portion of the meeting “wherever possible.”³⁶ Respectfully, if the public notice of the electronic meeting does not contain sufficient information to permit the public to actually access the open portion of the meeting, then the meeting is not truly open to the public.
- 123** Furthermore, the by-law states that where the only matter on a meeting agenda is a closed session matter, the live broadcast or the creation of an audio or audiovisual record of the meeting is not required. This provision purports to authorize a practice that does not comply with the open meeting rules set out in the *Municipal Act*. As set out above, council must pass a resolution in an open meeting before proceeding *in camera*. Where the public is not permitted to attend a meeting in person and can only observe the meeting by electronic means, the beginning of the meeting must be broadcast live, even when all of the substantive agenda items deal with matters to be discussed *in camera*.

Opinion

- 124** Council for the City of Richmond Hill did not contravene the Act when it discussed the Yonge/Bernard Key Development Area and related appeals *in camera* on April 16 and May 14, 2019, and April 22 and May 14, 2020.
- 125** Council for the City of Richmond Hill did not discuss the Yonge/Bernard Key Development Area and related appeals *in camera* on April 1, 2020.
- 126** However, the public was denied the ability to observe all or part of the electronic meetings held by council on April 1, April 22, and May 14, 2020, in contravention of the Act.
- 127** On April 1, 2020, the public live broadcast of the meeting ended after council passed a resolution to move *in camera* and did not resume when council rose and passed a resolution adopting proposals discussed in closed session. Accordingly, the public was excluded from the final portion of the meeting.
- 128** On April 22, 2020, council held two back-to-back meetings. The entirety of the first meeting was broadcast live; however, the beginning of the second meeting was not. As a result, council’s resolution to proceed *in camera*

³⁶ By-law 74-12 [current] at 12.2.4(b).

during the second meeting did not occur in a part of the meeting open to the public. The live broadcast only resumed when council rose from *in camera*.

- 129** On May 14, 2020, council held a special meeting, none of which was broadcast live. Accordingly, the portions of the meeting before and after council's *in camera* discussion, including the resolution to go *in camera*, were not open to the public, in contravention of the Act.
- 130** While public notice of the May 14, 2020 meeting was provided in accordance with the City's procedure by-law, the City should have included information on accessing the live broadcast in the meeting notice.
- 131** I recognize that the City has taken steps to facilitate the public's ability to observe electronic meetings during the COVID-19 pandemic, and it is to be commended for many of these practices, including live-broadcasting many open meetings, making video recordings of many meetings available on YouTube, and expediting the publication of draft meeting minutes.
- 132** Nevertheless, I urge the City of Richmond Hill to consider all available options to ensure that the public's right to observe municipal meetings is upheld in full. The City's current procedure by-law condones several practices that violate the *Municipal Act's* open meeting requirements, such as denying the public access to all portions of meetings where the only agenda items are *in camera* matters. While it may be true that such meetings are sometimes open to the public for only a few minutes, the City is still legally required to ensure that the public can observe the open portions of such meetings. Members of the public are entitled to observe council pass a resolution in open session stating the general nature of the topic to be discussed *in camera*. It is also a best practice to report back publicly after arising from closed session to provide a brief summary of what was discussed *in camera*.
- 133** The City should amend its procedure by-law to require that all open meetings be broadcast live whenever in-person attendance is not permitted, rather than merely making best efforts to do so, and to ensure that instructions for accessing a live broadcast are always included in public notice of a meeting that will be held electronically, even if the only substantive agenda items are *in camera* matters.

Recommendations

134 I make the following recommendations to assist the City of Richmond Hill in fulfilling its obligations under the Act and enhancing the transparency of its meetings:

Recommendation 1

All members of council and committees for the City of Richmond Hill 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 its procedure by-law.

Recommendation 2

Council for the City of Richmond Hill should ensure that the public is able to observe all open portions of electronic meetings held by council and its committees, including the resolution to go *in camera* and any business conducted after rising from closed session.

Recommendation 3

Council for the City of Richmond Hill should amend its procedure by-law to recognize the public's right to observe all open meetings, including meetings where the only item on the agenda is an *in camera* matter.

Recommendation 4

Council for the City of Richmond Hill should amend its procedure by-law to ensure that information on how to access the live broadcast of an electronic meeting is provided in its public notices, including meetings where the only item on the agenda is an *in camera* matter.

Report

135 Council for the City of Richmond Hill was given the opportunity to review a preliminary version of this report and provide comments to my Office. In light of the restrictions in place related to COVID-19, some adjustments were made to our normal preliminary review process and we thank council and staff for their co-operation and flexibility. We received comments from council, which were considered in the preparation of this final report.

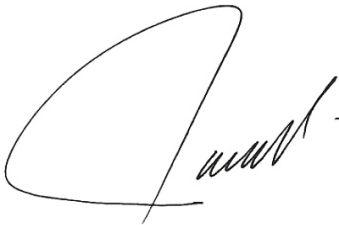
136 In its response, council expressed that it generally accepted the findings set out in the report, but maintains that any failure to comply with the Act was unintentional and resulted from the implementation of a fully electronic meeting process in an unprecedented and extraordinary situation.

137 Council's response also noted that the City has already implemented a number of changes to improve the transparency of its electronic meetings, including:

- Ensuring that meeting agendas inform the public that they can observe meetings of council and committees by viewing the livestream of the open session portion of these meetings on the City's website or YouTube page.
- Holding the closed session portion of meetings during regular electronic council meetings. Meeting participants will receive separate Zoom invites: The first for the portion of the meeting leading up to the passing of the resolution to go into closed session, and the second for the closed session portion of the meeting.
- Broadcasting the portion of the meeting following the closed session by activating the livestream function on the second Zoom meeting at the end of the closed session.

I commend council for taking these steps.

138 This report will be published on my Office's website, and should be made public by the City of Richmond Hill as well. In accordance with s. 239.2(12) of the *Municipal Act, 2001*, council should pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario