



EWART

O'DWYER

Barristers and Solicitors

THE CORPORATION OF THE TOWN OF COBOURG

TO: Brent Larmer
AND TO: Municipal Council
DATE: November 21, 2018
SUBJECT: Parks and Recreation Advisory Committee

PURPOSE:

This is a report to the Municipal Council for the Corporation of the Town of Cobourg on the Ombudsman's finding with respect to allegations/complaints received with respect to the closed meeting of the Parks and Recreation Advisory Steering Committee of May 4, 2018.

PROCESS:

In preparation of this report, I have interviewed the Complainants and Municipal Staff and reviewed with the parties the written complaints received in this matter.

In addition, I have reviewed the chronology of events as provided by the Complainant pertaining to the complaints in order to determine the accuracy of the dates referred to in this report.

I have received full cooperation from the Complainant and Municipal staff.

BACKGROUND:

I was appointed by the Municipal Council for the Town of Cobourg to serve as Ombudsman related to the complaint dated May 3, 2018, with respect to allegations that the Parks and Recreation Advisory Committee acting as a Steering Committee failed to follow the Town of Cobourg's Policies of Transparency and Accountability Policy (LEG ADM8), Public Comment and Complaint Policy (LEG ADM19), and Advisory Committees of Council Policy and Procedure (COUN-ADM1).

LEGISLATIVE PROVISIONS:

A Municipal Ombudsman is appointed by Council under Section 223.13(1) of the *Municipal Act*, 2001, as amended with the following responsibilities:

Without limiting Section 9, 10, and 11, those Sections authorize the Municipality to appoint an Ombudsman who reports to Council and whose function is to investigate in an independent manner any decision of recommendation made or act done or admitted in the course of the administration of the Municipality, its local Boards and such municipally controlled corporations as the Municipality may specify and affecting any person or body of person in his/her or its personal capacity.

MUNICIPAL OMBUDSMAN INVESTIGATION PROTOCOL:

The Town of Cobourg does have a defined Ombudsman investigation protocol. The municipal ombudsman protocol would serve to outline the protocol to be adopted by the Ombudsman for the Municipality dealing with complaints within the jurisdiction of the Municipality. Individuals who identify or witness behaviour and activity by members of municipally controlled departments may address their concerns through a formal complaint process.

Accordingly, I received my jurisdiction to investigate the issues in this report by virtue of Section 223.13(1) of the *Municipal Act*, 2001.

THE ROLE OF THE OMBUDSMAN IN ASSESSING A COMPLAINT:

The role of the Ombudsman is to determine whether or not there is sufficient information or evidence to support and substantiate the allegations made in the complaint. That determination is made on an evidentiary standard of the “balance of probabilities”, that is whether it is more likely than not that the complaint in each scenario is contrary to the provisions of the *Municipal Act*, 2001, and/or other applicable legislation. In order to ensure fair and credible process, the municipal ombudsman must also:

1. Act as an impartial, unbiased third party;
2. Maintain the integrity and confidentiality of the process, to the extent possible;
3. Interview the complainant, the respondents, and the primary witnesses;
4. Collect and review the evidence;
5. Assess the issue of credibility;
6. Determine whether further witnesses should be interviewed;

7. Determine whether additional evidence or interviews are required;
8. Transmit the final report to the municipality setting out the findings and conclusions with respect to the allegations.
9. Provide recommendations where applicable.

SUBJECT OF INQUIRY:

CONFIDENTIALITY

As any investigation pursuant to the provisions of the *Municipal Act*, 2001, is carried out in conjunction with the *Public Inquiry Act*, the issue of confidentiality is always of paramount concern. Specifically, Section 223.15(1) imposes a duty of confidentiality when carrying out investigations in the role of Ombudsman. Those individuals interviewed did not express any desire to have the information contained therein treated as confidential. Accordingly, there can be no basis that there was an expectation that any information provided in each of the complaints was to be treated in a confidential manner.

In speaking with the parties, the issue of confidentiality was addressed with each. Each of the parties did not request that the information contained in their statements be in any way treated as confidential.

INVESTIGATION:

CONCERN 1:

The Parks and Recreation Advisory Steering Committee failed to provide agendas, minutes, and times, dates or locations of the meetings to the public. Meetings of the Parks and Recreation Advisory Steering Committee were not open to the public.

With respect to Concern 1, it is the position of the Complainant that the Parks and Recreation Advisory Committee while acting in its capacity as a Steering Committee for planning purposes did not follow the Advisory Committees of Council Policy and Procedure (COUN-ADM1) when it failed to provide agendas, minutes and times, dates or locations of meetings.

The Parks and Recreation Advisory Committee was appointed to act as a Steering Committee pursuant to a Motion of Municipal Council for the Town of Cobourg on September 19, 2016, pursuant to Motion 343-16.

Motion 343-16 provides inter alia that “the Parks and Recreation Advisory Committee be asked to act as a Steering Committee for (Planning Process) by providing input and advice to the Director of Recreation and Culture, who will procure expert services with considerable

experience and expertise in the design of water front communities and stakeholder management; engage the public (emphasis) and all local stakeholders with an active interest in the design and use of the waterfront to develop a comprehensive user needs assessment and create comprehensive waterfront design to be presented to Council for its consideration by the Spring of 2017”.

It is the position of the Complainant that the Parks and Recreation Advisory Committee acting as Steering Committee failed to comply with the procedures of the Advisory Committees of Council Policy and Procedure (COUN-ADM1) in that it failed to: a) publish agendas and times, dates and locations of the Parks and Recreation Advisory Steering Committee meetings; b) provide a written record of meetings, including all resolutions, decisions and other proceedings; c) being open to the public to ensure accountability and transparency.

It is the evidence of the Complainant that between the period of April 30, 2018, and May 9, 2018, six e-mails were sent to the Municipality asking for the Parks and Recreation Advisory Steering Committee’s agendas, minutes, dates, times, or locations of meetings to which no reply was received from the Director of Recreation and Culture. As a result of no response having been received from the Director of Recreation and Culture, the Complainant filed a formal complaint with the Municipality on May 3, 2018, alleging that the Parks and Recreation Advisory Steering Committee had failed to follow the procedures of an Advisory Committee as outlined in Advisory Committees of Council Policy and Procedure (COUN-ADM1) as set out above.

It is the position of the Complainant that the Parks and Recreation Advisory Committee acting as a Steering Committee pursuant to a Motion of Municipal Council, is required to follow the Advisory Committees of Council Policy and Procedure.

CONCERN 2:

Meetings of the Parks and Recreation Advisory Steering Committee were not open to the public.

With respect to the above issue, it is the position of the Complainant that on May 4, 2018, a Parks and Recreation Advisory Steering Committee was conducted regarding the waterfront at a local community centre. At that time, several individuals including one of the principles of the Complainant attempted to attend the meeting. The Director of Recreation and Culture for the Municipality refused entry to this meeting by those several individuals and further failed to provide the authority by which these several individuals were being asked to leave the meeting.

It is the position of the Complainant that one of the members asked to leave was advised by both the Municipal Clerk and Mayor that “the meeting was not open to the public”.

It is the position of the Complainant that in response to a formal complaint of May 10, 2018, in accordance with the Town's Public Comment and Complaint Policy (LAG-ADM19), the Municipality failed to comply with acknowledging receipt of the complaint within two regular business days.

Between the period of May 10, 2018, and May 16, 2018, two follow up e-mails were provided to the Municipality to which the Municipality has yet to reply as to reasons why several members of the public were asked to leave the May 4, 2018, Parks and Recreation Advisory Steering Committee meeting as referenced in Concern 2.

CONCERN 3:

The Town of Cobourg did not respond to complaints about the Parks and Recreation Advisory Steering Committee Meetings not being open to the public.

On May 4, 2018, the Clerk of the Municipality responded to the Complainant which response included a letter from the Director and Corporate Services.

ANALYSIS/RECOMMENDATIONS

Relevant Legislative and Municipal Act Requirements

The term "Committee" is defined in Section 238 of the *Municipal Act*, 2001, as any advisory or other committee, subcommittee, or similar entity of which at least 50% of the members are also members of one or more council or local boards.

The Parks and Recreation Advisory Steering Committee does not meet the composition requirement for a "Committee of Council" as outlined in Section 238 of the Act, as only one of the five members are also members of Council.

Furthermore, it does not serve to define in the terms of reference an entity known as a "Steering Committee" but rather speaks to that of advisory committees whose function it is to report to Council through the Council Coordinators and through recommendations made at meetings.

Despite the fact that the Parks and Recreation Advisory Steering Committee is not a committee as defined in Section 238 of the *Municipal Act*, 2001, nor in the Advisory Committee of Council Policy and Procedure for the Town of Cobourg for reasons set out above, there is authority continue with a review of this matter.

Section 239(2) of the *Municipal Act*, 2001, states that a municipal investigator has the function to investigate whether the municipality has complied with Section 239 of the Act or a procedure by-law in respect of a meeting that was closed to the public. As been noted by other closed meeting investigators, a body that does not meet the composition requirement for a committee of

council as described in Section 238 of the Act, may still be a committee of council if it meets the definition contained in the municipality's own procedural by-law.

In the case at hand, while the Advisory Committees of Council Policy and Procedure – Administration, Policy No. COUN-ADM1, does not identify a Steering Committee as a committee of Council, reference is made to Motion No. 343-16 for the Corporation of the Town of Cobourg which served to establish the Parks and Recreation Advisory Steering Committee.

Motion 343-16 specifically provides the basis on which the Steering Committee was to be created and serves to set out the parameters by which the Steering Committee is to operate. In doing so, specific reference is to the fact that the Steering Committee, amongst other things, is to “engage the public”.

CONCERN 1:

The Parks and Recreation Advisory Steering Committee failed to provide agendas, minutes, times, dates or locations of meetings to the public when requested.

The Parks and Recreation Advisory Steering Committee is not a committee as defined in Section 238 of the Municipal Act, 2001. However, Motion 343-16 which served to create the Parks and Recreation Advisory Steering Committee specifically directs the Committee to engage the public. Accordingly, it is my finding that the agendas, minutes and times, dates or locations of Parks and Recreation Advisory Steering Committee meetings are to be available to any member of the public when requested.

CONCERN 2:

Meetings of the Parks and Recreation Advisory Steering Committee were not open to the public.

The Parks and Recreation Advisory Steering Committee is not a committee as defined in Section 238 of the Municipal Act, 2001. However, Motion 343-16 which served to create the Parks and Recreation Advisory Steering Committee specifically directs the Committee to engage the public. Accordingly, it is my finding that the meetings of the Parks and Recreation Advisory Steering Committee are public meetings open to any member of the public.

CONCERN 3:

The Town of Cobourg did not respond to complaints about the Parks and Recreation Advisory Steering Committee meetings not being open to the public.

In response to the receipt of a formal complaint provided to the Town of Cobourg on behalf of the Cobourg Taxpayers Association dated May 3, 2018, a letter was provided to the President of the Association on May 4, 2018. Subsequent to this letter a second formal complaint was

provided to the Municipality on May 10, 2018, in accordance with the Town of Cobourg's Public Comment Complaint Policy (LEG-ADM19).

It is the position of the Municipality that the response provided to the Complainant on May 4, 2018 served to address the concerns raised in the May 10, 2018 correspondence and therefore no further reply was required.

In this regard I accept the position of the Municipality that it believed an adequate response had been provided to the Complainant particularly when the Complainant was advised of its ability to make a formal complaint to the Ombudsman's office. Accordingly, I find that the alleged failure of the Municipality to respond to the May 10, 2018 correspondence not a breach of the Town of Cobourg's Public Comment Complaint Policy (LEG-ADM19). However, for purposes of clarity it would have been of assistance to advise the Complainant of the Municipality's intention to rely upon the position articulated in the May 10, 2018 correspondence.

RECOMMENDATIONS

Given my finding that the Parks and Recreation Advisory Steering Committee is a committee whose proceedings were intended to engage the public, the following recommendations are made to assist enhancing the transparency of the Steering Committee. In making the recommendations as set out below, I acknowledge that municipal staff have recognized the issues outlined in this report.

I also wish to thank those individuals who were asked to participate in this investigation and who did so without reluctance.

Accordingly, it is recommended that:

- (a) the Parks and Recreation Advisory Steering Committee make available to the public its agendas, minutes, dates, times and location of its meetings when requested by a member of the public;
- (b) that the meetings of the Parks and Recreation Advisory Steering Committee be open to the public and in accordance with the Advisory Committee Council Policy and Procedure (COUN-ADM1);
- (c) having found that there is no breach of the Town of Cobourg's Public Comment and Complaint Policy (LEG-ADM19), it is recommended that the Town of Cobourg reaffirm its commitment to its Public Comment and Complaint Policy (LEG-ADM19).

This report should be shared with Council and made available to the public as soon as possible and no later than the next Council meeting. I would be pleased to be in attendance when this report is considered to answer any questions Council may have relating to its contents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY M. JOHN EWART ON
NOVEMBER 21, 2018.



M. JOHN EWART, B.A., M.A. L.L.B., C.S.