



City of
Peterborough

To: Members of the General Committee

From: David J. Potts, Commissioner, Legislative Services

Meeting Date: April 2, 2024

Report: Jurisdiction of Ontario's Ombudsman, Report LSOCS24-005

Subject

This report recommends amendments to the Ombudsman Act that would facilitate the provision of particulars respecting municipal “cases” referred to in the Ombudsman’s Annual Reports.

Recommendations

That Council approve the recommendations outlined in Report LSOCS24-005, dated April 2, 2024 of the Commissioner, Legislative Services, as follows:

- a) That the Honourable Paul Calandra, Minister of Municipal Affairs and Housing, be requested to introduce a Bill to amend the Ombudsman Act to require the Ontario Ombudsman to provide to each municipality, if requested by the municipality, sufficient particulars of each investigation, matter or case respecting the municipality that is referred to in each of the Ombudsman’s Annual Reports to permit the municipality to fully understand and address the subject matter of each such investigation, matter or case including:
 - i) a copy of each complaint, as applicable, redacted only to the extent of individuals’ personal information contained therein;
 - ii) the identities of the municipality’s employees, officers and members of Council with whom the Ombudsman was consulting in respect of the investigation, matter or case; and
 - iii) particulars of the outcome of the investigation, matter or case including the Ombudsman’s findings, conclusions and recommendations, if any.

- b) That the City Clerk forward Council's resolutions resulting from Council's approval of these recommendations to Minister Calandra, MPP David Smith, the Association of Municipalities of Ontario and to the municipal Clerks of Ontario's municipalities.

Executive Summary

- Notwithstanding Ontario's Ombudsman's broad jurisdiction to undertake investigations respecting municipalities, the Ombudsman publicly reports only 6 municipal investigations since 2016 but almost 25,000 "cases" involving municipalities including several respecting the City of Peterborough.
- Following Council's approval of the recommendation in closed session report LSOCS24-001, the City's Chief Administrative Officer (CAO) repeated an earlier staff request to the Ombudsman for particulars of Peterborough "cases" referenced in the Ombudsman's 2023 Annual Report. The Ombudsman again refused to provide the requested particulars.

Background

Ombudsman's Jurisdiction: to "Investigate"

Ontario's Ombudsman has been the default municipal closed meeting investigator since January 1, 2008. On January 1, 2016, Bill 8, the Public Sector and MPP Accountability and Transparency Act, amended the Ombudsman Act and the Municipal Act, 2001, expanding the Ombudsman's broad investigative powers beyond governmental organizations to include municipalities. Municipal administrations have since been adjusting to the Ombudsman's expanded oversight role. Often, staff in the Ombudsman's Office will call front line municipal staff directly. Following are key issues to consider respecting the Ombudsman's jurisdiction.

First, the Ombudsman's jurisdiction to investigate is defined very broadly:

"The function of the Ombudsman is to investigate any decision or recommendation made or any act done or omitted in the course of the administration of a [municipality] and affecting any person or body of persons in his, her or its personal capacity."¹

¹ *Ombudsman Act*, R.S.O. 1990, c. O.6 (Ombudsman Act), s. 14(1) (underscoring added).

The “Ombudsman may make any such investigation on a complaint made to him or her by any person affected or by any member of the Assembly to whom a complaint is made by any person affected, or of the Ombudsman’s own motion.”²

The courts have interpreted the Ombudsman’s jurisdiction very broadly including the jurisdiction to investigate the merits of decisions made in an adjudicative capacity.³ If the Ombudsman determines to investigate alleged municipal maladministration, the Ombudsman has broad jurisdiction to do so.

However, the Ombudsman is a creature of statute and the Ombudsman’s jurisdiction is scoped accordingly. For example, the Ombudsman lacks jurisdiction “to investigate any decision, recommendation, act or omission [...] of any person acting as legal adviser to the [municipality]”.⁴

Perhaps the most important point is that the Ombudsman’s jurisdiction is to “investigate”. It is, therefore, important to determine whether and when the Ombudsman is “investigating”.

The Ombudsman is not investigating unless the Ombudsman has given notice of the intention to investigate:

“Before investigating any matter, the Ombudsman shall inform the head of the [municipality] of his or her intention to make the investigation.”⁵

For all local municipalities, the “head” is its Council. One communicates with a municipal Council via the municipal Clerk who places the correspondence on the agenda of a properly constituted meeting of the Council. Accordingly, unless the Ombudsman has given an investigation notice to the Council via the municipality’s Clerk, the Ombudsman has not commenced an “investigation” for the purposes of the Ombudsman’s otherwise broad jurisdiction.

The Ombudsman’s investigation notice is important for at least two reasons.

First, municipalities are already the level of government considered closest to the citizens they serve.⁶ Municipal citizens’ engagement includes attending and addressing their Council at open Council meetings, direct access to individual Councillors, access to municipal records and standing to lodge complaints respecting alleged members’ pecuniary interests and contraventions of municipal Codes of Conduct. This proximity distinguishes municipal governments from other “public sector bodies” to which the Ombudsman’s jurisdiction applies. Accordingly, if additional municipal and provincial

² Ombudsman Act, s. 14(2) (underscoring added).

³ See, for example, *Re Ombudsman of Ontario and Ontario Labour Relations Board* (1986), [1987] O.J. No. 7 (C.A.); *aff’d* (1987), [1987] S.C.C.A. 174.

⁴ Ombudsman Act, s. 14(4)(b).

⁵ Ombudsman Act, s. 18(1) (underscoring added).

⁶ *Toronto (City) v. Ontario (Attorney General)* (2021), [2021] S.C.J. No. 34 at ¶118.

resources are to be consumed by the Ombudsman's oversight, it is in taxpayers' interests that those resources are deployed efficiently.⁷

Second, the Ombudsman's practice of making inquiries directly of individual municipal staff and councillors in advance of an investigation notice is a potential legal risk to the individual and to the municipality to the extent that the protections respecting disclosures of personal information afforded by the Ombudsman Act are scoped to disclosures of personal information relating to a "matter that is being investigated".⁸ That is, unless an investigation has been properly commenced by an investigation notice given to the Clerk, municipal staff and individual members of Council are at risk to the extent of personal information they may disclose in response to a call from someone identifying as being from the Ombudsman's office. Accordingly, unless the City Clerk has advised staff and Council of receipt of an investigation notice, it is best practice for staff and members of Council to refer Ombudsman inquiries to the City Clerk who, in turn, can receive an investigation notice or assist the Ombudsman with any municipal information to confirm a complaint within the scope of the Ombudsman's General Rules.

Ombudsman's Annual Reports: "Cases" v. "Investigations"

Interestingly, the Ombudsman's public Annual Reports describe significant involvement by the Ombudsman in matters described by the Ombudsman as "cases" rather than investigations.

Following is an excerpt from the Ombudsman's Annual Report for the period ending March 31, 2022 (2022 Annual Report):⁹

"This past year, we dealt with **2,877** cases about general municipal issues – up from 2,281 in 2020-2021. None of these resulted in a formal investigation, as we resolve the vast majority of cases by working closely with municipalities to facilitate resolutions and share best practices to help them improve their processes. Since the Ombudsman's mandate was first expanded to this area in 2016, we have received more than 20,000 complaints and inquiries, and conducted **6** formal investigations."

Page 82 of the 2022 Annual Report identified 17 "cases" involving the City of Peterborough.

⁷ The operating and capital spending requirements for Ombudsman Ontario (2023-24) are estimated at \$29,465,000: <https://www.ontario.ca/page/expenditure-estimates-ombudsman-ontario-2023-24>

⁸ Ombudsman Act, s. 19(1) and (3.1).

⁹

https://www.ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Annual%20Reports/Ombudsman_AR_2022-Web-EN_FINAL-s.pdf at p24. Bolded text in original.

On October 5, 2023, the Ombudsman released his Annual Report for the period ending March 31, 2023 (2023 Annual Report). Following is an excerpt:¹⁰

*“In 2022-2023, we received **2,814** cases about general municipal issues. Since the Ombudsman was first given full oversight of municipalities in 2016, we have handled closed to 25,000 cases – and resolved almost all of them by making referrals and dealing with local officials, without the need for formal investigation.*

The Ombudsman has only deemed formal investigations necessary six times since 2016.”

Page 87 of the 2023 Annual Report identified 9 “cases” involving the City of Peterborough.

Requests for Particulars of Peterborough “Cases”

Appendix A is a letter dated October 6, 2023 from the City's Deputy Clerk to the Ombudsman requesting particulars of the 9 Peterborough “cases” referenced in the 2023 Annual Report. The letter advised that the particulars were requested so that staff may update Council. The requested particulars for each “case” were:

- a copy of the complaint as it was submitted (redacted, if necessary, to the extent of personal information contained therein);
- the identities of the “local officials” with whom the Ombudsman was consulting in respect of the complaint; and
- particulars of the outcome of the complaint.

Appendix B is a letter dated November 3, 2023 from the Ombudsman's Manager, Early Resolutions, to the City Clerk. The Ombudsman declined to provide the requested particulars citing “complainant confidentiality” notwithstanding that the Deputy Clerk's request suggested redactions to the extent of any personal information.

On January 15, 2024, Council approved the recommendation in closed session Report LSOCS24-001, “Jurisdiction of Ontario's Ombudsman”. This open session report responds to Council's approval of the aforementioned recommendation.

Appendix C is a letter dated January 23, 2024 from the City's CAO to the Ombudsman repeating staff's earlier request for particulars of the 9 Peterborough “cases” referenced

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<https://www.ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Annual%20Reports/2022-2023/Ombudsman-Ontario-2022-2023-Annual-Report-accessible.pdf> at p31. Bolded text in original.

in the 2023 Annual Report. Respecting the Ombudsman's response to staff's earlier request, the City's CAO noted:

“Respectfully, the response does not provide the requested or any particulars that are sufficient for Council to understand the municipal issues that the report advises were handled by your office including how they may have been resolved. Accordingly, Council is hindered in its own role including to ensure the accountability and transparency of the operations of the City.”

Appendix D is a letter dated February 13, 2024 from Senior Counsel for the Ombudsman to the City's CAO. The Ombudsman again declined to provide the requested particulars citing “confidentiality” and “secrecy”.

Staff remain unable to advise Council respecting the 9 “City of Peterborough” cases referred to in the Ombudsman's 2023 Annual Report except that the majority of them apparently related to “Council/Committees”. This report's recommendations seek amendments to the Ombudsman Act to require Ontario's Ombudsman to provide particulars of each municipal investigation, matter or case that is referenced in the Ombudsman's Annual Reports.

Strategic Plan

Strategic Pillar: Governance and fiscal sustainability

Strategic Priority: Pursue service excellence in governance to support long-term fiscal sustainability of the city while respecting the impact of decisions on taxpayers.

Securing particulars of the Ombudsman's “cases” respecting Peterborough is consistent with the pursuit of service excellence in governance.

Budget and Financial Implications

There are no budget or financial implications directly related to this report.

Attachments

Appendix A: 2023 10 06 Letter: Garnett to Dubé

Appendix B: 2023 11 03 Letter: Fulford to Garnett

Appendix C: 2024 01 23 Letter: Raina to Dubé (exclusive of its attachments)

Appendix D: 2024 02 13 Letter: Bull to Raina

Submitted by,

David J. Potts, B.A., LL.B., C.S.
Commissioner, Legislative Services and City Solicitor

Contact Name:

David J. Potts, B.A., LL.B., C.S.
Commissioner, Legislative Services and City Solicitor
Phone: 705-742-7777 Ext. 1603
Toll Free: 1-855-738-3755
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Appendix A: 2023 10 06 Letter: Garnett to Dubé

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500 George Street North
Peterborough, ON, K9H 3R9
peterborough.ca | 1-855-738-3755

City Clerk's Office
Phone - 705-742-7777 Ext. 1799
Toll Free -1-855-738-3755
Fax - 705-742-4138
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October 6, 2023

Paul Dubé, Ombudsman
Office of the Ombudsman of Ontario
483 Bay Street
10th Floor, South Tower
Toronto, Ontario
M5G 2C9

Dear Sir:

Re: 2022-2023 Annual Report

The table at page 87 of the Annual Report references nine (9) "cases" involving the City of Peterborough. So that staff may update Council, we would appreciate if your staff were to forward to the writer, for each such case:

- a copy of the complaint as it was submitted (redacted, if necessary, to the extent of personal information contained therein);
- the identities of the local officials with whom the Ombudsman was consulting in respect of the complaint; and
- particulars of the outcome of the complaint

Sincere thanks for your anticipated timely response.

Sincerely,

Natalie Garnett
Deputy City Clerk



Appendix B: 2023 11 03 Letter: Fulford to Garnett**BY EMAIL**

November 3, 2023

Natalie Garnett
Deputy Clerk | Clerks Office
500 George Street North
Peterborough, ON
K9H 3R9

Dear Natalie Garnett:

Re: Cases about the City of Peterborough reported in the Ombudsman's 2022-2023 Annual Report

Further to your request, I am pleased to provide you with an overview of the nine cases the Ontario Ombudsman received about the City of Peterborough between April 1, 2022 and March 31, 2023, as reported in the Ombudsman's 2022-2023 Annual Report.

The Ombudsman's role and function

The Ontario Ombudsman is appointed under the *Ombudsman Act* as an Officer of the Ontario Legislature, independent of political parties and government administrators. Our Office has the authority to conduct impartial reviews and investigations of complaints regarding the administrative conduct of provincial government organizations. We also have the authority to review the administrative conduct of municipal sector entities, publicly funded universities, and school boards, as well as complaints about the provision of French language services, and services to children and youth in care.

The Ombudsman is intended to be an office of last resort. This means that people contacting our Office are first expected to raise their concerns using existing complaint processes and appeal mechanisms before our Office will intervene. Many cases we receive are resolved quickly and efficiently by providing information and referrals, or by reaching out to the public sector body to obtain more information or clarification. In many cases, we are able to assist a complainant without contacting the organization involved.

Depending on the circumstances, Ombudsman staff may share best practices with the organization to address the concerns raised or to improve local administrative processes going forward. If the Ombudsman determines that a formal investigation is necessary, a written notice of investigation is always provided to the organization.

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483 Bay Street / 483, rue Bay
Toronto ON, M5G 2C9
Tel./Tél. : 416-586-3300 / 1-800-263-1830 - Complaints Line | Ligne des plaintes
Facsimile/Télécopieur : 416-586-3485 TTY/ATS: 1-866-411-4211
Email/Courriel : info@ombudsman.on.ca
www.ombudsman.on.ca

Cases about the City of Peterborough

Our Office received nine cases about the City of Peterborough between April 1, 2022 and March 31, 2023. While I am not able to provide specific details about these cases for reasons of complainant confidentiality, I am happy to share some general information about the nature of the cases. The number and general subject areas of cases we received are as follows:

General subject area	Number of cases
Council/Committees	5
Employment/Labour relations	1
Finance	1
Housing	1
Planning/Zoning/Land use	1

The cases reflected in our Office's 2022-2023 annual report have all been closed.

As we are an office of last resort, complainants who had not already raised their concerns with the municipality are referred to do so. In cases where an issue should be raised with another body outside of the municipality, complainants are provided with information about where to turn next.

You can read more about how we work collaboratively to resolve administrative issues at www.ombudsman.on.ca. If you are interested in receiving our e-newsletter, you can [subscribe to it by clicking here](#).

I trust that this information will be of assistance. If you have any questions about the contents of this letter, please do not hesitate to contact me at 416-586-3431 or by email at fulford@ombudsman.on.ca.

Sincerely,



Alison Fulford
Manager, Early Resolutions
Office of the Ontario Ombudsman

Appendix C: 2024 01 23 Letter: Raina to Dubé (exclusive of its attachments)

Chief Administrative Officer
Jasbir Raina
City of Peterborough
500 George Street North
Peterborough, ON, K9H 3R9
705-742-7777 ext. 1810 | 1-855-738-3755 ext. 1810
jraina@peterborough.ca

January 23, 2024

Paul Dubé, Ombudsman
Office of the Ombudsman of Ontario
483 Bay Street
10th Floor, South Tower
Toronto, Ontario
M5G 2C9
info@ombudsman.on.ca

Dear Sir:

Re: 2022-2023 Annual Report

This is further to a letter dated October 6, 2023 from the City's Deputy Clerk to you (Appendix A) respecting the table at page 87 of the Annual Report referencing nine (9) "cases" involving the City of Peterborough and requesting particulars of such cases so that City staff may update Council. Appendix B is a response to that letter dated November 3 from the Manager, Early Resolutions, to the Deputy Clerk.

Respectfully, the response does not provide the requested or any particulars that are sufficient for Council to understand the municipal issues that the report advises were handled by your office including how they may have been resolved. Accordingly, Council is hindered in its own role including to ensure the accountability and transparency of the operations of the City.

In the circumstances, for each of the nine (9) cases, we again respectfully request that you forward to the writer:

- a copy of the complaint as it was submitted (redacted, if necessary, to the extent of personal information contained therein);
- the identities of the local officials with whom the Ombudsman was dealing in respect of the complaint; and
- particulars of the outcome of the complaint.





We will be reporting to Council. Accordingly, we will greatly appreciate the requested particulars by February 16, 2024.

Sincere thanks for your anticipated timely response.

Yours sincerely,

Jasbir Raina

Jasbir Raina (Jan 23, 2024 16:30 EST)

Jasbir Raina
Chief Administrative Officer

CC: Mayor Jeff Leal

Attachments:

Appendix A – Letter dated October 6th, 2023 from the City's Deputy Clerk
Appendix B – Letter dated November 3rd, 2023 from the Manager, Early Resolutions



Appendix D: 2024 02 13 Letter: Bull to Raina**BY EMAIL**

February 13, 2024

Jasbir Raina
Chief Administrative Officer
City of Peterborough
500 George St. N.
Peterborough, ON K9H 3R9

Dear Mr. Raina:

Re: Cases about the City of Peterborough reported in the Ombudsman's 2022-2023 Annual Report

Thank you for your letter of January 23, 2024, in which you requested additional details regarding the 9 cases about the City of Peterborough received by the Ontario Ombudsman between April 1, 2022 and March 31, 2023.

As you note, the Deputy Clerk for the City of Peterborough contacted our Office on October 6, 2023 to ask for information about the 9 cases (complaints and inquiries) regarding the City that were listed in the Ombudsman's 2022-2023 Annual Report. We provided a letter dated November 3, 2023 listing the subject areas of these cases, which included council/committees (5 cases), employment/labour relations (1 case), finance (1 case), housing (1 case), and planning/zoning/land use (1 case).

Our normal process is to provide referral information or contact City staff to resolve a complaint. If there is an issue that cannot be resolved or which we feel requires council's attention, we would send a notice of investigation to the municipality or escalate the matter to senior municipal staff, and send a letter to council setting out the issues raised and any relevant best practices. All 9 cases cited in the Annual Report were resolved and closed; none were the subject of an investigation.

In our letter of November 3, we explained that we are not able to provide the additional information requested due to the confidentiality of our work, which is conducted in private under the *Ombudsman Act*. With the consent of a complainant, we may disclose only the information required to review a complaint when making inquiries with a public sector body, like a municipality. In the case of a formal investigation where notice has been provided to the public sector body under our Act, the Ombudsman decides what information is necessary to disclose in a report or letter to support his findings and recommendations. The Ombudsman's confidentiality obligations are not limited to personal information.

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The confidentiality protections in our Act apply to all information received by the Ombudsman and his delegates during the course of our work. These protections are not limited to cases where the Ombudsman conducts a formal investigation, and apply to the 9 cases received about the City of Peterborough during the last fiscal year.

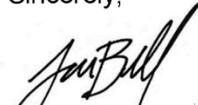
The Ombudsman has broad powers of investigation. Public sector bodies are compelled to co-operate with the Ombudsman's investigations, and our Office has extraordinary access to confidential and sensitive information. Given the unique nature of our mandate, our Office is not subject to provincial access to information legislation and the *Ombudsman Act* contains strong confidentiality provisions.

The Ombudsman takes an oath of secrecy upon taking office (s. 7.3(1)). His staff are required not to disclose information obtained in the course of their duties (O. Reg. 865, s.2). The Ombudsman and his staff cannot be called to give evidence in court in respect of anything coming to their knowledge in the exercise of their functions under the Act (s. 24(2)).

In light of these provisions, we will not be providing the City with additional details regarding the cases reported in our Annual Report.

Thank you for reaching out to the Office of the Ontario Ombudsman. If you have any questions about the contents of this letter, please do not hesitate to contact me at jbull@ombudsman.on.ca.

Sincerely,



Joanna Bull
Senior Counsel