



J. Paul Dubé, Ombudsman

BY MAIL

October 11, 2022

Board of Trustees
Grand Erie District School Board
349 Erie Avenue
Brantford, ON N3T 5V3

Dear Board of Trustees,

Re: Closed Meeting Complaint - Grand Erie District School Board

I am writing further to our discussion on October 4, 2022 regarding the outcome of our Office's review of a complaint regarding a closed meeting held by the Board of Trustees for the Grand Erie District School Board (the "Board") on May 30, 2022. The complainant alleged that the Board discussed new governance by-laws and policies during this *in camera* meeting, and in doing so, did not comply with the open meeting requirements set out in section 207(1) of the *Education Act*.¹

As we discussed, and for the reasons set out below, our Office has concluded its review of this complaint.

The Ombudsman's role and authority

The Ombudsman is an independent and impartial Officer of the Ontario Legislature. Our Office has the authority to address complaints about public sector bodies, including provincial governmental organizations, municipalities, school boards, and universities, as well as services provided by children's aid societies and residential licensees, and the provision of French language services under the *French Language Services Act*. Under the *Ombudsman Act*, our Office has broad discretion to decide whether or not to investigate a complaint.

The Ombudsman's role with respect to school boards is to review and investigate complaints about school board administration. When problems are identified, we may share best practices or make recommendations to a school board to improve its processes, as well as to strengthen board governance and accountability. Elected school board officials are generally responsible for setting broad public policy. We do not have the authority to direct trustee decision-making or to require boards to decide matters in a certain fashion.

¹ R.S.O. 1990, c. E.2

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Our Office receives more than 25,000 cases (complaints and inquiries) every year. Since Ombudsman oversight of Ontario school boards began on September 1, 2015, we have received over 5,000 cases about general school board issues. We strive to resolve cases at the earliest opportunity and informally whenever possible. The vast majority are resolved efficiently and effectively without the need for a formal investigation. Our Office has conducted two formal investigations regarding school board issues since September 1, 2015. This number reflects the overwhelming co-operation that we have received from school boards.

In addition to our role in reviewing complaints about administrative conduct, since 2008 our Office has acted as the closed meeting investigator for more than half of Ontario municipalities. As the province's default closed meeting investigator, our Office is responsible for determining whether a municipality has complied with the *Municipal Act's* open meeting requirements. Since 2008, our Office has investigated hundreds of municipal closed meetings and documented our findings in a publicly available online digest of open meeting cases. This searchable repository, available at www.ombudsman.on.ca/digest, was created to provide easy access to the Ombudsman's decisions on, and interpretations of, the open meeting rules. While the open meeting requirements in the *Municipal Act* differ from those in the *Education Act*, the digest contains valuable information that may be in of assistance to the board when assessing its obligations to hold open meetings under the *Education Act*.

Review

In response to the complaint we received, we spoke with the complainant, the Board's legal counsel, and the Director of Education. In addition, we reviewed the May 30, 2022 open meeting agenda and minutes, the Board's current general working by-law and governance policies, and the Board's former by-law pertaining to the process for developing by-laws, policies, procedures, and protocols.

May 30, 2022 Meeting

The May 30, 2022 Board meeting began at 5:30 PM and was held on Microsoft Teams. Shortly thereafter, the Board moved into closed session to discuss personnel, legal, and property matters. Once *in camera*, we were told that the Board sought legal advice from two lawyers with respect to its existing by-laws and policies, and that the Board and its solicitors discussed enacting new governance by-laws and policies. We understand that legal counsel attended the entire closed session and provided legal advice throughout.

The Chair called the public meeting to order at 8:26 PM, and the meeting adjourned at 10:06 PM.

Analysis

Under the *Education Act*, all meetings of a board of trustees must be open to the public, subject to the exceptions in the *Education Act*.² Section 207(2) of the Act states that a meeting of a board may be closed to the public where the subject matter under consideration involves:

² s. 207.

- a) the security of the property of the board;
- b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;
- c) the acquisition or disposal of a school site;
- d) decisions in respect of negotiations with employees of the board; or
- e) litigation affecting the board.

Although the Board did not cite a specific closed meeting exception from the *Education Act*, it told our office that its discussions in closed session were covered by solicitor-client privilege. Solicitor-client privilege covers discussions that include communications between client and solicitor in seeking or receiving legal advice intended to be confidential. The Supreme Court of Canada has found that solicitor-client privilege extends when the following three conditions are met:

- there is a communication between a lawyer and a client;
- which entails the seeking or giving of legal advice; and
- which is considered to be confidential by the parties.³

The Supreme Court of Canada has recognized the importance of solicitor-client privilege on many occasions, noting that “[c]lients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent.”⁴

As noted in previous Ombudsman reports, our Office cannot compel the organizations we oversee to produce information subject to solicitor-client privilege. This is one of the limited and narrow exceptions to our general authority under the *Ombudsman Act* to require disclosure of information. However, we must exercise due diligence and inquire into the circumstances surrounding meetings closed to consider legal advice. This can include determining whether legal counsel attended a meeting to provide advice verbally and/or whether elected officials considered written legal advice during the meeting.

In this case, we were told that the Board met *in camera* on May 30, 2022 to receive advice from its solicitors that was intended to be confidential. Legal counsel was in attendance for the entire closed session. We were told that the Board and its solicitors discussed the Board’s existing by-laws and policies, as well as the enactment of new governance by-laws and policies. This involved communication between the Board and its lawyers, which entailed both the seeking and giving of legal advice, and was considered to be confidential. Based on the three-part test established by the Supreme Court of Canada, these discussions were covered by solicitor-client privilege.

In light of the above information, we will be concluding our review of this complaint at this time.

³ *Solosky v The Queen*, [1980] 1 SCR 821, online: <<https://canlii.ca/t/1mjtq>>

⁴ *Smith v Jones*, 1999 CanLII 674 (SCC), [1999] 1 S.C.R. 455, at par. 46.

I would like to thank the Board for meeting with us to discuss our Office's review of this complaint. The Director of Education has confirmed that this letter will be included as correspondence at an upcoming board meeting.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Dubé". The signature is fluid and cursive, with a large initial "P" and "D".

Paul Dubé
Ombudsman of Ontario

Cette lettre est aussi disponible en français