

THE CORPORATION OF THE MUNICIPALITY OF MISSISSIPPI MILLS

STAFF REPORT

DATE: August 10, 2021
TO: Committee of the Whole
FROM: Cynthia Moyle, Acting Clerk
SUBJECT: Closed Meeting Investigation 2021-01 – Municipal Emergency Control Group

RECOMMENDATION:

THAT the Committee of the Whole recommends to Council to receive the attached report as information;

AND THAT the attached report be published on the website as per Section 239.11 of the *Municipal Act, 2001*.

BACKGROUND:

The Corporation of the Municipality of Mississippi Mills appointed Local Authority Services Inc. ("LAS") as its Closed Meeting Investigator pursuant to Section 239.2 of the Municipal Act, 2001. LAS has delegated its authority to act as Closed Meeting Investigator to Aird & Berlis LLP.

A formal request for a closed meeting investigation was filed directly with LAS pertaining to the Municipal Emergency Control Group specific to composition of its membership, and meetings.

The attached Closed Meeting Investigation Report 2021-01 provides a detailed background and conclusion.

DISCUSSION:

N.A.

FINANCIAL IMPLICATIONS:

The invoice for this investigation amounted to \$6,838.03 including HST. It is important to note the municipality receive a \$1,500 discount and is an unbudgeted expense.

SUMMARY:

Section 239 (11) of the Municipal Act states that: *"The municipality or local board shall ensure that reports received under subsection (10) by the municipality or local board, as the case may be, are made available to the public."*

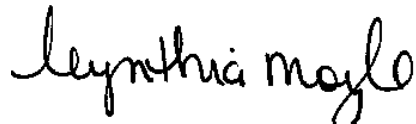
The Clerk's department will publish the report on the website under Council Complaints and Transparency/ Closed Meeting Investigation Reports.

ATTACHMENT:

1. Closed Meeting Investigation Report 2021-01.

Respectfully submitted by,

Reviewed by:



Cynthia Moyle,
Acting Clerk



Ken Kelly,
CAO



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May 21, 2021

Our File No.: 162668

Cynthia Moyle
Acting Clerk
Town of Mississippi Mills
3131 Old Perth Road, PO Box 400
Almonte, ON
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Dear Ms. Moyle:

**Re: Town of Mississippi Mills Closed Meeting Investigation 2021-01
Municipal Emergency Control Group**

The Corporation of the Town of Mississippi Mills (the “**Town**”) appointed Local Authority Services Inc. (“**LAS**”) as its Closed Meeting Investigator pursuant to section 239.2 of the *Municipal Act, 2001*.¹ LAS has delegated its authority to act as Closed Meeting Investigator to Aird & Berlis LLP.

We are providing this notice in our capacity as the Town’s Closed Meeting Investigator. For the reasons outlined below, we have determined that we do not have jurisdiction to continue our investigation in respect of the Town’s municipal emergency control group (the “**MECG**”).² We are hereby terminating our inquiry into this matter.

1. The Request

Our office received a formal request for a closed meeting investigation, dated March 8, 2021, filed pursuant to section 239.1 of the *Municipal Act, 2001* (the “**Request**”). The Request was filed directly with our office.

The Request pertains to the MECG, which is a municipal emergency control group established pursuant to subsection 12(1) of O. Reg. 380/04 (the “**Regulation**”) of the *Emergency Management and Civil Protection Act*.³ The relevant aspects of the MECG, including the composition of its membership and the manner in which it conducts its meetings, are set out below.

¹ S.O. 2001, c. 25.

² There is some discrepancy in terms of the names used by the Town to refer to the MECG. In the applicable municipal emergency plan, discussed below, the MECG is correctly referred to as the “Municipal Emergency Control Group”. In the MECG’s Terms of Reference (the “**Terms of Reference**”), the MECG is referred to as the “Emergency Management Community Control Group”. For the purposes of this Report, we have chosen to refer to this body exclusively as the MECG in accordance with the applicable legislative provisions, discussed below.

³ R.S.O. 1990, c. E.9 [“**EMCPA**”].

The Request alleges that the MCEG met approximately twenty (20) times during the calendar year 2020 (the “**Meetings**”) and that the Meetings were not listed on the Town’s public calendar nor was public notice given in respect of the Meetings.

By implication, the Request also alleges that the Meetings were held contrary to subsection 239(1) of the *Municipal Act, 2001*. This provision requires all “meetings”⁴ to be open to the public, unless an exception under subsections 239(2), (3) or (3.1) of the statute applies to either permit or require, as the case may be, the meeting to be held *in camera*. This requirement is generally referred to as the “open meeting rule”.

The Request is also predicated on the assumption that the MCEG is either a “municipality” or a “local board” (or a “committee” of either of them) as these terms are understood or defined under the *Municipal Act, 2001*. This is because, as set out below, our jurisdiction as Closed Meeting Investigator only extends to meetings of a municipality or local board that have been closed to the public.

2. Review of Materials

In order to properly assess the Request, we have reviewed the following materials:

- the Request;
- the Town’s By-law 20-120, being a by-law to adopt the Town’s current in-force municipal emergency management program and municipal emergency plan, and to meet other requirements under the *EMCPA*;⁵
- the Town’s now-repealed By-law 04-63, being a by-law to adopt the Town’s former emergency management program and emergency plan, and to establish the MCEG;
- the Town’s former emergency plan, dated February 2020 (the “**Plan**”), which was the in-force emergency plan at all applicable times;
- agendas and minutes from meetings of the Council of the Town (“**Council**”) in respect of the MCEG; and
- the Terms of Reference.

⁴ Subsection 238(1) of the *Municipal Act, 2001*, defines the term “meeting” as follows:

“meeting” means any regular, special or other meeting of a council, of a local board or of a committee of either of them, where,

- (a) a quorum of members is present, and
- (b) members discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the council, local board or committee”.

⁵ In accordance with section 2.1 of the *EMCPA*, every municipality in Ontario must have an emergency management program that includes, among other things, an emergency plan passed under section 3 of the statute.

In addition, we have obtained further information regarding the nature and function of the MECG and its conduct of the Meetings from the Clerk of the Town (the “**Clerk**”).

We have also had recourse to the applicable provisions of the *Municipal Act, 2001* and the *EMCPA* as well as regulations made thereunder and such secondary sources and applicable case law as we deemed necessary in order to make our determinations.

3. Municipal Emergency Control Group – Background and Establishment

In Ontario, all municipal emergency management activities are governed by the *EMCPA*.

Pursuant to subsections 11(1) and 12(1) of the Regulation, all municipalities must establish two emergency response bodies: an emergency management program committee and a municipal emergency control group. The former’s function is to advise and assist the municipal council on the development and maintenance of the municipality’s emergency management program, which includes the municipality’s emergency plan.⁶ The latter’s function is to direct the municipality’s response in an emergency, including the implementation of the municipality’s emergency plan.⁷

The MECG is a municipal emergency control group established pursuant to subsection 12(1) of the Regulation. The MECG was established on October 12, 2004 by By-law 04-63. The MECG was then continued under By-law 20-120, which was passed on December 15, 2020, and which repealed By-law 04-63.⁸

We understand the MECG’s membership at the applicable times was comprised of senior staff, officers and officials of the municipality as well as local emergency response personnel. This included the Clerk, the Town’s Mayor (the “**Mayor**”) and the Town’s Chief Administrative Officer (the “**CAO**”).⁹ The Mayor was the only member of Council on the MECG. Under the Plan, the CAO was designated as the “Operations Officer”. In this capacity the CAO was in charge of, among other things, chairing the MECG’s meetings.¹⁰

⁶ Subsections 11(5) and (6) of the Regulation.

⁷ Subsection 12(4) of the Regulation.

⁸ The Terms of Reference suggest that the MECG may have also acted at times as the Town’s emergency management program committee. This is evidenced by the fact that the Terms of Reference ascribe functions to the MECG that are generally ascribed to an emergency management program committee pursuant to section 11 of the Regulation. While an in-depth consideration of this matter was beyond the scope of this investigation, we have considered it to the extent necessary to determine whether we have jurisdiction in respect of the MECG and the Meetings. In this regard, for the reasons set out below, we have determined that we would not have jurisdiction in respect of meetings held by the MECG, even in circumstances where the MECG may have acted as, or performed any of the functions of, the Town’s emergency management program committee.

⁹ Pursuant to section 2.0 of the Plan, the membership also included the following persons: an OPP representative; the Fire Chief; an EMS/Ambulance worker; the Director of Roads & Public Works; the Medical Officer of Health; the Director of Social Services; a “CERV Team Leader”; an “ARES club member”; an Ottawa River Power Corporation Almonte Office Manager; and the Public Information officer.

¹⁰ See section 2.6 of the Plan for a complete list of the CAO’s functions as Operations Officer of the MECG.

As noted above, the Plan was the in-force emergency plan at all applicable times. In respect of the MCEG, the Plan provides as follows:

The Municipal Emergency Control Group is the group that is responsible for the direction and control of the overall emergency response within the community. The [MECG] ensures the provision of essential services necessary to minimize the effects of an emergency on the community.¹¹

This is reflective of the MCEG's statutory mandate which is, as noted above, to direct the Town's response in an emergency including the implementation of the Town's emergency plan.

The Plan also provides information on the municipality's "Emergency Operations Centre" (the "**EOC**"), which is to operate as the MCEG's headquarters in the event of an emergency:

It is essential that the [EOC] is functional, has good communications and is secure from unnecessary distractions. Only [MECG] members and EOC support staff shall have access to the EOC. No media are allowed into the EOC, nor is anyone who has not been authorized by the Operations Officer.¹²

The above reflects that, in the event of an emergency, the operations of the MCEG are to be undertaken in the most effective manner possible. To facilitate this, the EOC is to be free from any unnecessary distractions and only authorized persons are permitted to access the EOC.

In terms of the MCEG's conduct of meetings, the Plan provides, in part, as follows:

The [MECG] members will meet and in turn will report their agency's status to the Mayor and Operations Officer. The round table discussion should include problems, questions, resources requests and any other relevant information so that timely informed decisions can be made as a group. A status board and maps will be prominently displayed and kept up to date. Once the meeting is completed, the members should contact their agencies' and pass on any relevant information or directives that come out of the MCEG meeting. The frequency of the meetings is determined by the Operations Officer in conjunction with the Mayor, but should reflect the pace of the emergency and occur on a scheduled basis which may be adjusted accordingly.

The above further demonstrates that the MCEG's purpose is to direct the municipality's response in an emergency in the most effective manner possible. This includes conducting meetings in a less formal and more flexible fashion than meetings conducted by, for example, a municipal council or local board.

It is also worth noting that the MCEG is not subject to a procedure by-law passed pursuant to subsection 238(2) of the *Municipal Act, 2001*. This further illustrates the fact that meetings of the MCEG are intended to support the municipality's operations specifically within the context of an emergency rather than in general or on a day-to-day basis.

¹¹ Section 2.0 of the Plan.

¹² Section 2.2 of the Plan.

4. Jurisdiction of the Closed Meeting Investigator

The Closed Meeting Investigator derives its authority from the following provisions of the *Municipal Act, 2001*:

Investigation

239.1 A person may request that an investigation of whether a municipality or local board has complied with section 239 or a procedure by-law under subsection 238 (2) in respect of a meeting or part of a meeting that was closed to the public be undertaken,

(a) by an investigator referred to in subsection 239.2 (1);...

...

Investigator

239.2 (1) Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an investigator who has the function to investigate in an independent manner, on a complaint made to him or her by any person, whether the municipality or a local board has complied with section 239 or a procedure by-law under subsection 238 (2) in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation. [emphasis added]

In accordance with the above, our jurisdiction is limited to investigating the conduct of meetings of a “municipality” or a “local board”. It follows that our jurisdiction does not extend to an entity that is not a “municipality” or a “local board”.¹³

The term “municipality” within the context of section 239.1 and subsection 239(1) of the *Municipal Act 2001* is generally understood to mean the municipal corporation in question.

The general definition of “local board” in subsection 1(1) of the *Municipal Act, 2001* provides as follows:

...a municipal service board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities, excluding a school board and a conservation authority.

If not expressly listed in the above definition, an entity may still be considered a “local board” where it exercises powers under legislation with respect to the affairs or purposes of the municipality.

¹³ On this point, see *City of Hamilton v. Ombudsman of Ontario* (2017), 68 M.P.L.R. (5th) 97, at para. 10 (Ont. Div. Ct.), aff'd (2018), 77 M.P.L.R. (5th) 230 (Ont. C.A.), holding that the Ontario Ombudsman did not have jurisdiction to conduct a closed meeting investigation in respect of a municipal Election Compliance Audit Committee or a Property Standards Committee as those entities were not “local boards”. The Ontario Ombudsman acts as a municipal closed meeting investigator where a municipality has not appointed its own closed meeting investigator (such as LAS). Both the Ontario Ombudsman and a municipally-appointed closed meeting investigator derive their jurisdiction from the same source, being subsection 239.2(1) of the *Municipal Act, 2001*.

This general definition is varied in different provisions of the *Municipal Act, 2001*. As such, it is important to interpret the phrase “local board” within the context and specific part of the *Municipal Act, 2001* in which it appears.

For the purposes of Part VI of the *Municipal Act, 2001* and the aforementioned open meeting rule, the definition of a “local board” expressly excludes a police services board and public library board,¹⁴ but says nothing more.

5. Analysis

As noted above, the Request is based on the assumption that the MCEG is either a municipality or a local board (or a committee of either of them).

(a) MCEG is not a Municipality

The MCEG, by virtue of being a municipal emergency control group established pursuant to subsection 12(1) of the Regulation, is not a municipal corporation. Therefore, the MCEG is not a “municipality” within the meaning of section 239.1 and subsection 239.2(1) of the *Municipal Act, 2001*.

(b) MCEG is not a Local Board

In terms of whether the MCEG is a local board, for the reasons that follow, it is our determination that the MCEG is *not* a “local board” as defined under subsections 1(1) and 238(1) of the *Municipal Act, 2001*. In determining whether the MCEG is a local board, we have had recourse to applicable principles of statutory interpretation and case law.

The proper approach to the interpretation of statutory provisions is well-accepted. The words of the legislation are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of legislation, the object of the legislation, and the intention of the Legislature.¹⁵

In this case, the *ejusdem generis* principle of statutory interpretation is particularly instructive. The Ontario Divisional Court described this principle as follows in *Hamilton (City) v. Ontario Ombudsman*:

One of the principles relied upon in some of the cases is *ejusdem generis*, under which the general language in the definition ought to be interpreted to include only entities “of the same kind or nature” as those that are specifically listed.¹⁶

In *Hamilton (City) v. Ontario Ombudsman*, the main issue was whether the City’s closed meeting investigator had jurisdiction to investigate closed meetings of the City’s Property Standards Committee and Election Compliance Audit Committee. The Divisional Court and, on further appeal, the Court of Appeal, considered the application of the *ejusdem generis* principle to the definition of “local board” under the *Municipal Act, 2001*.

¹⁴ *Municipal Act, 2001*, s. 238(1).

¹⁵ *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 at para. 21, citing and relying upon Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at 87.

¹⁶ *Supra* note 13 at para. 44.

The City of Hamilton successfully argued that the *ejusdem generis* principle should be applied to the definition of “local board” such that the general wording of “any other board” at the end of the definition should be restricted to entities similar in kind or nature to those specifically outlined in the provision. The City submitted that all the entities outlined acted for a municipal purpose on behalf of the City and provided day-to-day municipal service operations, while the applicable committees did not provide similar services.

In its decision, the Ontario Court of Appeal reasoned that the general language in the statutory definition of “local board” in the *Municipal Act, 2001* outlined a list of named entities that provide services integral to the daily business operations of municipalities. Therefore, the Legislature must not have intended to capture the aforementioned committees, which do not provide the same kind of municipal services, within the definition. In this regard, the principle of *ejusdem generis* was relied upon to interpret “local board” in harmony with the intent of the Legislature.

In this case, the facts and applicable legislative provisions demonstrate that the MCEG is not a “local board” as defined under the *Municipal Act, 2001*.

The MCEG is not one of the kinds of local boards that is explicitly listed under the definition of “local board”. The MCEG also cannot be said to fall under the broader category of “any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities...” This is because, in accordance with the respective rulings of the Divisional Court and Court of Appeal in *Hamilton (City) v. Ontario Ombudsman*, the MCEG does not provide municipal services that are integral to the daily business operations of the municipality. Rather, the MCEG provides direction and implementation in respect the municipality’s response to an emergency situation.

Not only is the MCEG’s function *not* service-oriented, it is completely unique in nature and is only required in very specific circumstances (i.e. within the context of an emergency). This is evidenced by the fact that the Legislature chose to name this body a “group” under section 12 of the Regulation rather than a “board”, “commission”, “committee” or otherwise, all of which are terms that are more typically found in the names of local boards. This is also reflected in the applicable sections of the Plan, set out above, which support the contention that the MCEG’s purpose is strictly operational in nature and is not service-oriented.

The “implied exclusion” rule of statutory interpretation is also instructive in this context. This principle provides that the Legislature’s failure to mention one thing provides strong grounds to infer it was deliberately excluded.¹⁷ Applied to this case, if the Legislature had intended the aforementioned open meeting rule to apply to meetings of a municipal emergency control group, the Legislature would have explicitly referred to this body, together with a municipality and local board, in sections 239.1 and 239.2 of the *Municipal Act, 2001*.

Lastly, as noted above, it is possible that the MCEG may have performed some of the functions that are generally performed by an emergency management program committee pursuant to section 11 of the Regulation. Even if the MCEG was, at any time, acting as or performing the functions of an emergency management program committee, it is our determination that the MCEG, in this capacity, still could not be properly characterized as a “local board” for the following reasons.

¹⁷ See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis Canada Inc., 2014) (online) at §8.90.

As noted above, the primary function of an emergency management program committee pursuant to section 11 of the Regulation is to advise the municipal council in respect of the development and maintenance of the municipality's emergency management program. This function is advisory in nature and pertains to a very specific mandate. This function, like that of a municipal emergency control group, does not entail the provision of services in respect of the day-to-day operations of the municipality.

Therefore, for the same reasons set out above regarding the application of the *ejusdem generis* principle and the respective rulings of the Divisional Court and Court of Appeal in *Hamilton (City) v. Ontario Ombudsman Hamilton (City) v. Ontario Ombudsman* to the question of whether the MEGC is a local board, we would find that the MEGC, acting as an emergency management program committee, could not be properly characterized as a local board.

(c) MEGC is not a Committee

Finally, the MEGC is also not a "committee" for the purposes of the open meeting rule. A committee, for the purposes of sections 238, 239 and 239.2 is defined as follows:

"committee" means any advisory or other committee, subcommittee or similar entity of which at least 50 per cent of the members are also members of one of more councils or local boards...

As noted above, while the Mayor was a member of the MEGC, there were no other council members appointed to or otherwise members of the MEGC. The MEGC is, therefore, not a "committee" as defined in section 238 of the *Municipal Act, 2001*.

5. Conclusion

For the reasons set out above, it is our determination that the MEGC is not subject to the open meeting rule under subsection 239(1) of the *Municipal Act, 2001*. The MEGC is not: (i) a municipality; (ii) a local board; or (iii) a committee of council or of a local board.

As a result of this conclusion, it is our determination that we do not have jurisdiction as Closed Meeting Investigator under sections 239.1 and 239.2 to continue our investigation into the Request and to make a determination whether the MEGC contravened section 239 of the *Municipal Act, 2001* or a procedure by-law in its conduct of the Meetings. The simple answer is that those statutory provisions do not apply.

We are hereby terminating our inquiry into the matter for lack of jurisdiction, and exercise our discretion to dismiss the Request in its entirety.

Should there be any questions, please do not hesitate to contact the undersigned.

Yours truly,

AIRD & BERLIS LLP



Rebecca Hines

RH/JM/cg