



ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

August 21, 2014

Mayor Mario Campese
Township of Joly
P.O. Box 519
Sundridge, Ontario POA 1Z0

Dear Mayor Campese,

Re: Closed Meeting Complaints

I am writing further to our conversation of August 14, 2014, regarding the outcome of our investigation into a complaint that the Township of Joly held closed meetings in December 2013 and in March and April 2014, and that it failed to keep minutes of closed meetings prior to June 2012, in violation of the *Municipal Act*, S.O. 2001, c.25 (the "Act").

As you know, the Act requires that all meetings of council, local boards and their committees be open to the public, with limited exceptions. The Ombudsman is the closed meeting investigator for the Township of Joly.

Shortly after receiving this complaint, the Ombudsman issued a notice of investigation pursuant to s.18(1) of the *Ombudsman Act*, RSO 1990, c. O.6. Subsequently, our Office spoke with all members of council and township staff, and reviewed the meeting materials for the open meeting of April 7, 2014, and the closed meetings of April 7, 14, 23 and 28, 2014. We also reviewed relevant correspondence, resolutions and relevant sections of the Act and the township's Procedure By-Law (2013-02).

Closed Meeting in December 2013

In the first week of December 2013, the Mayor and Councilor Marion Duke met with a third party to discuss a township employment matter. As a result, the Mayor sent a memo to the township clerk on December 2, 2013, asking her to provide certain employment-related information to council. The Mayor sent a subsequent email to the clerk on December 9, 2013, asking her to provide council with copies of a by-law, policy and an up-to-date budget. This correspondence was appended to the agenda and discussed at the regular open meeting of council on December 10, 2013.

No other councillors were copied on the memos or emails, or recalled being advised that these issues were discussed or that information was sought from the clerk in advance of the meeting when this correspondence was discussed.

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Analysis

In order for the Act to apply, council must be found to have held a meeting for the purposes of the Act. Section 238 (1) of the Act defines a “meeting” as “any regular, special or other meeting of a council, of a local board or of a committee of either of them.”

When determining whether a meeting of members of council is governed by the Act, a number of factors are considered, including whether a legal quorum of council was present. Although quorum is not determinative, it is an important consideration, as the presence of quorum means that there are sufficient numbers of council members present to make binding decisions and transact city business.

In this case, the Mayor and another councillor met with a third party to informally discuss an employment-related matter. There was no evidence that a quorum of council was present, that any formal or binding decisions were made, or that the groundwork was laid for such. This informal meeting and discussion did not violate the *Municipal Act*.

Closed Meeting of March 26, 2014

On March 25, 2014, the Mayor instructed the township clerk to contact all members of council and request that they attend at the township office and sign a resolution. The resolution was to authorize the Mayor to sign a letter of intent to bring a hockey team to a neighboring arena that Joly shared with two other municipalities. On March 26, 2014, the councillors did as requested, and attended at the office at various times to sign the resolution.

Analysis

As found in our investigation into an illegal closed meeting in Nipissing which occurred through sequential telephone conversations,¹ a meeting of council is not limited to a physical gathering of its members, but may occur whenever council exercises its authority.

In this case, on March 26, 2014, council exercised its authority through the serial attendance of councillors at the township office to approve a resolution authorizing the Mayor to sign the letter of intent. This therefore constituted a closed meeting.

While it was explained to us that this process was followed due to time pressures (to deliver the letter of intent to the team manager by May 1, 2014), no public notice or resolution to proceed in camera was provided, contravening sections 239(2.1) and 239(4) of the Act.

¹ Investigation into Council of the Township of Nipissing Special Meeting of April 25, 2008, published February 6, 2009.

Even if council had followed proper procedures, this meeting would have been illegal, as the subject matter of the letter of intent – a hockey team – did not fall within any of the exceptions under which the *Municipal Act* permits closed meetings.

Closed Meeting of April 7, 2014

The complaint to the Ombudsman alleged that council met in closed session on April 7, 2014, prior to the regular council meeting on April 8, 2014, to discuss certain township employment matters. There was no agenda or minutes for this alleged meeting, and all councillors stated to us that no such meeting occurred.

Analysis

Based on the information gathered, there was no illegal closed meeting of council on April 7, 2014.

Closed Meeting of April 8, 2014

A regular meeting of council was scheduled for Tuesday, April 8, 2014. Notice was provided in accordance with the Act, by posting the agenda on the township website, in the local newspaper and on the reception counter of the Township office, the Friday before the meeting. The agenda indicated that an *in camera* portion of the meeting would discuss a proposed or pending acquisition or disposition of land and employee vacation entitlement.

In the course of the discussion in open session about the draft budget prepared by the clerk, personal matters were raised. A motion was brought to go into closed session, with a resolution that stated that council would go in to closed session to discuss “personal matters about an identifiable individual” – one of the permitted exceptions in the Act.

Council returned to open session and passed resolutions to eliminate the clerk’s on-call hours and to cancel the Hours of Work Policy discussed in closed session.

Analysis

The Act does not define “personal information” for the purpose of the open meeting requirements. However, under Section 21(3) of the *Freedom of Information and Protection of Privacy Act*, both an individual’s employment history and “personal recommendations or evaluations” and character references are considered “personal” and it is a presumed invasion of personal privacy to disclose such information.

The Ombudsman, in his report on a closed meeting of the City of Greater Sudbury Audit Committee in January 2011, concluded that information that involves an examination of an employee’s performance or an investigation into an employee’s conduct constitutes appropriate “personal matters” discussion. In this case, the closed meeting of council

pertained to staff performance issues, thereby coming within the “personal matters” exception under s. 239(2)(b).

The township’s procedure by-law permits emergency meetings without written notice and additions to the agenda, with approval of council expressed by resolution. Council’s motion to proceed *in camera* to discuss was therefore permissible under the township’s procedure by-law.

Closed Meeting of April 14, 2014

Certain items with respect to the employment matters remained outstanding after the meeting on April 8, 2014. As a result, the Mayor decided to call a special closed meeting of council on April 14, and called all councillors and asked them to attend. No public notice was given of the special meeting. An agenda was prepared by the Mayor, but he was not able to recover it on his computer for our investigators.

On April 14, 2014, a resolution was moved, prior to proceeding *in camera*, that cited s.239(2) of the Act and the “personal matters” and “litigation or potential litigation” exceptions, with the general nature of matters to be discussed cited as an “employee matter.”

According to our interviews, at the closed meeting council discussed employee matters that identified a named individual and their performance issues. Council also instructed the Mayor to contact a solicitor for advice on how to deal with the issues raised. Council did not report back to the public after it returned from closed session.

Analysis

The matters pertaining to an identifiable individual’s performance issues fit within the personal matters exception, as discussed above. Therefore, the meeting was properly closed under s. 239(2)(b) of the Act. Additionally, under section 239(6)(b) of the Act, council is permitted to give direction to an officer of a municipality in closed session, and accordingly, council was permitted to instruct the Mayor to contact a solicitor.

Closed Meeting of April 23, 2014

At the meeting on April 14, 2014, it was determined that council would meet again to discuss the same employment matters on April 22, 2014. However, the roads were flooded that day, so council determined it would move its meeting to April 23, 2014.

No public notice was provided of the special meeting. The agenda prepared noted that items to be discussed would include “personal issues regarding an identifiable individual, solicitor-client privilege [and] potential litigation.” Before proceeding *in camera*, council passed a resolution to close the meeting under s. 239(2) of the Act, citing these three exceptions.

During the closed session, the city's solicitor participated in the meeting via telephone to provide advice with respect to the ongoing employment matters. A resolution by council was passed in open session that instructed the solicitor to draw up related documentation.

Analysis

Matters pertaining to an identifiable individual's performance fit within the "personal matters" exception, based on the same principles discussed above. In addition, the solicitor-client privilege exception also applied, as the solicitor was on the telephone and providing legal advice. Therefore, the closed meeting was permitted under s. 239(2)(b) and (f) of the Act.

Closed Meeting of April 28, 2014

Due to unanticipated events, the Mayor determined it was necessary to call a special meeting on April 28, 2014 to seek instruction from council and the township's solicitor on how to proceed with the ongoing employment matter.

No public notice was provided of the meeting. The agenda noted that the meeting would be closed to discuss personal matters pertaining to an identifiable individual, solicitor-client privilege and potential litigation. Before proceeding *in camera*, council passed a resolution to close the meeting under s. 239(2) of the *Act*, citing these three exceptions.

At the meeting, the Mayor addressed developments related to the personal employment matter and the township's solicitor provided relevant legal advice.

Council came out of closed session and passed resolutions in open session to hire a bookkeeper to prepare the township's 2014 budget and review its books, to direct the Mayor to make inquiries about the whereabouts of township's emails on their computer system, to hire a company to investigate their system for deleted emails, to appoint a temporary acting clerk and to agree to continue with the termination of a staff member, on certain terms, and continue with the advice of the solicitor on termination.

Analysis

The continued discussion of the employment-related matter and the solicitor's provision of legal advice fell within the exceptions contained in s.239(2)(b) and (f) of the Act. This meeting was permitted to be held in closed session under the exceptions contained in the *Municipal Act*.

Closed Meeting Minutes Prior to June 2012

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Section 239(7) of the Act requires that municipalities record all open and closed sessions of council, as follows:

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A municipality or local board or a committee of either of them shall record without note or comment all resolutions, decisions and other proceedings at a meeting of the body, whether it is closed to the public or not.

Based on the recollection of certain councillors and the township's failure to produce any copies of closed meeting minutes prior to June 2012, it appears that the township did not keep minutes of closed sessions of council prior to that date.

Therefore, prior to June 2012, the township was in breach of s. 239(7) of the *Municipal Act*. Council has since changed its practice and closed meeting minutes are taken at all closed sessions, which it must continue to do.

Other Procedural Recommendations

Procedure By-Law

According to the Ombudsman's investigation, the March 26, April 14, April 23 and April 28, 2014 meetings occurred without notice to the public. Joly's Procedure By-Law (2013-02) does not speak to public notice of special meetings, and the township should consider amending this by-law to so provide.

Agenda/Resolutions

As noted in our previous reports,² council should provide additional specificity in its agendas and resolutions to proceed *in camera*. Council should cite the appropriate subsections of the Act that relate to the exceptions cited (eg. personal matters – s.239(2)(b)), and at a minimum state the general nature of the subject matter to be considered *in camera* in the agenda.

Closed Meeting Record

The minutes of closed meetings taken by township staff record only direction, instruction or resolutions discussed in closed session. The closed meeting minutes, particularly on April 14, 23 and 28, often did not record the discussions that demonstrated that the exceptions under which the meetings were closed were applicable.

Section 239 (7) of the Act requires that municipalities "record, without note or comment, all resolutions, decisions, and other proceedings" at a meeting. As the Ombudsman noted in his report to the City of Oshawa on a special meeting of that city's Development Services Committee (*The ABCs of Education and Training*):³

² See, for example, the Ombudsman's Report into the Closed Meeting of Council of the Township of Enniskillen of September 2, 2009, published April 2009, available online at: <http://www.ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Enniskillenfinal.pdf>

³ The full report is available at: www.ombudsman.on.ca/media/44626/OshawaDevelopmentServicesCommittee.pdf

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Ombudsman

While extraneous notes and comments not germane to the actual proceedings of [council] should be excluded, the minutes should reflect what actually transpired, including the general nature of subject matters discussed:

Ideally, the closed meeting record should capture the following information:

- where the meeting took place;
- when the meeting started and adjourned;
- who chaired the meeting;
- who was in attendance; with specific reference to the clerk or other designated official responsible for recording the meeting;
- whether any participants left or arrived while the meeting was in progress, and if so, at what time this occurred;
- a detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered;
- any motions, including who introduced the motion and seconders; and
- all votes taken and all directions given.

As a best practice, and to ensure a complete and accurate meeting record, the Ombudsman recommends that council audio or video record closed meetings. We are aware of several municipalities that follow this practice, including the Townships of Tiny and Madawaska Valley, the Town of Midland, the Municipality of Lambton Shores and the City of Oshawa.

Conclusion

When we spoke on August 14, 2014, we reviewed our findings and conclusions and provided you with an opportunity to comment.

As per our discussion, you agreed to share this letter with council at its next public meeting on September 11, 2014, and to make a copy available to the public on the township's website.

Thank you for your assistance with our review.

Sincerely,



Sara Gottlieb
Legal Advisor
Open Meeting Law Enforcement Team

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