



“Into the Light”

**Investigation into
Council of the Township of Baldwin
Closed Meeting of July 14, 2008**

**André Marin
Ombudsman of Ontario
March 23, 2009**

Complaint

- 1 On July 21, 2008, we received a complaint alleging that a portion of the Township of Baldwin's regularly scheduled meeting of July 14, 2008 had been improperly closed in contravention of the *Municipal Act, 2001*.

Ombudsman Jurisdiction

- 2 Under the *Municipal Act, 2001*, municipalities are required to pass by-laws setting out the rules of procedure for meetings. The law requires public notice of meetings, and that all meetings be open to the public, unless they fall within prescribed exceptions.
- 3 As of January 1, 2008, changes to the *Municipal Act, 2001* gave citizens the right to request an investigation into whether a municipality has properly closed a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 4 The Township of Baldwin has not appointed its own investigator and accordingly, the Ombudsman is the township's closed meeting investigator under s.239.1 of the *Municipal Act, 2001*.
- 5 In investigating closed meeting complaints, the Ombudsman considers whether the meeting was closed in accordance with the provisions of the Act, and the relevant municipal procedure by-law.

Council Meeting Procedures

- 6 The Township of Baldwin's Procedure By-law 651 was issued March 14, 2005, and sets out the procedures relating to council meetings. While the by-law requires that council members be provided with notice of council meetings, it does not include a public notice requirement.
- 7 The by-law also addresses the procedure for "in-camera meetings" of council. The by-law does not specify that prior public notice must be given before a closed meeting is held. It simply provides that a separate meeting of the "Committee of the Whole" may be called during a meeting of council or on prior notice.
- 8 The Clerk is required to prepare a meeting agenda for regular meetings and provide it to council members at least two days before the meeting. Any additions to the agenda after

the meeting has commenced must be introduced by way of motion, unless they are of an emergency nature.

- 9** The *Municipal Act, 2001* sets out eight permissive and one mandatory exemptions to the open meeting requirements for subjects that can be considered in closed session. Municipalities may choose to consider the following topics in the absence of the public:
- security of the property of the municipality or local board;
 - personal matters about an identifiable individual, including municipal or local board employees;
 - proposed or pending acquisition or disposition of land by the municipality or local board;
 - labour relations or employee negotiations;
 - litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
 - advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
 - matters in respect of which a council, board, committee or other body may hold a closed meeting under another Act, and
 - meeting for the purpose of education or training of the members, where no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee.
- 10** Municipalities are also required to close meetings to the public if the subject matter relates to the consideration of a request under the *Municipal Freedom of Information and Protection of Privacy Act* and the body is acting as an institution for the purposes of that Act.
- 11** Rather than use the language of the *Municipal Act, 2001*, the township's by-law contains its own definition of "In Closed Session" (in camera). It provides that this means "sitting in closed session to discuss finance, personnel, litigation, property or any matter where premature disclosure may prejudice the municipality's position, or where the lack of parliamentary immunity may leave Council or any of its Members open to suit." The by-law provides that council can, on motion, resolve to meet as the "Committee of the Whole" in the absence of the public whenever it considers that "any matter may be more conveniently considered" in "Committee of the Whole."

12 The township’s by-law also generally provides that in-camera meetings shall be called “as the public interests require,” and then sets out the following subjects, which council may consider in closed session:

- matters “as the public interest requires”;
- matters related to litigation or communications respecting solicitor- client relationships;
- matters related to wages, salaries, benefits, discipline of personnel and arbitration proceedings;
- collective bargaining matters;
- matters related to specific properties to be acquired or disposed of by the municipality and related negotiations;
- at the decision of council, matters related to preliminary discussions on Official Plan amendments, zoning by-law amendments, or discussions concerning the location, relocation or expansion of businesses when requested by the owners;
- matters prohibited from being made public by federal or provincial legislation;
- appointments to boards and committees;
- consideration of awards of merit, and
- matters where premature public disclosure could cost the public money or be prejudicial to the interests of a property owner, or the municipality, when the acquisition or sale of property is being investigated or negotiated.

13 While some of these topics may loosely come within the exceptions provided for in the *Municipal Act, 2001*, others clearly do not. The township’s by-law improperly expands on the situations that may be considered in closed session. Instead of promoting the principles of openness, transparency and accountability underlying the open meeting requirements, the by-law grants the township broad authority to close a meeting whenever, based on its own subjective reasons, it thinks it is advisable to do so.

14 From the outset of this investigation, it was apparent that the township’s procedure by-law was inherently flawed. It contravenes the *Municipal Act, 2001* in a number of critical respects. It fails to provide for prior public notice of meetings, and authorizes council to hold closed sessions for reasons beyond those permitted by the Act. In light of this, it is not surprising that a complaint was received concerning an in-camera meeting held on July 14, 2008.

Investigative Process

- 15 On August 14, 2008, following preliminary inquiries, the Township of Baldwin was notified that our office would investigate the complaint concerning the closed meeting of council held on July 14, 2008.
- 16 During the course of our investigation, in addition to the complainants, we interviewed all five members of council, including the reeve, the township's clerk/treasurer, and the roads superintendent.
- 17 In addition, documents were obtained from the municipality and reviewed, including minutes, agendas, tender documents and a council member's meeting notes. We also reviewed a number of municipal by-laws and applicable legislation.
- 18 The Township of Baldwin co-operated fully during the investigation.

Investigative Findings

- 19 Despite the fact that its procedure by-law does not specify that notice must be given to the public prior to a meeting, the Township of Baldwin does post notice of all scheduled council meetings, including the date and time, on the bulletin board in the town hall the week before the meeting. Regular meetings are held the second Monday of each month. The agenda is available to council members the Thursday before the meeting, and to the public on the night of the meeting.
- 20 We were advised that typically, councillors will wait until the evening of the regularly scheduled meeting to raise any issues they would like considered in camera, and the Reeve will then decide whether any issues should be considered in closed session. Normally, if the Reeve considers an in-camera session to be necessary, he will inform those in attendance at the open portion of the meeting that the council will be going in camera after a short recess break towards the end of the meeting. Customarily, the public will leave during the recess, and when the meeting resumes in the absence of the public, council will pass the following resolution to go in camera:

NOW THEREFORE BE IT RESOLVED THAT: we now retire to committee of the whole as the public interest requires.

- 21 On July 14, 2008, council met for its regularly scheduled monthly session at 7 p.m. Four of the five members of council were in attendance. The fifth councillor was away on vacation. During the open portion of the meeting, a staff issue arose, which council felt should be discussed in closed session. The Reeve told us that once this happened, he asked council members if there were other issues that they wished to discuss in camera. He

explained that one member responded saying he wished to discuss a gravel issue in the closed session. As the open portion of the meeting was drawing to a close, the Reeve announced that after a recess, the council would be moving in camera to discuss the “personnel issue” that had arisen. No further information about the issues to be considered in closed session was provided in open session.

- 22** After a short recess during which members of the public left the meeting, at 8:28 p.m., the council passed the standard resolution to go in camera.
- 23** The minutes for the July 14, 2008 in-camera session indicate that in addition to the members of council in attendance that day, the clerk and roads superintendent were also present at the closed meeting. The minutes note that council discussed the need for crushed gravel, as well as access issues relating to a specific gravel pit owned by a named individual. The minutes also record that “it was agreed to put out a tender to all crushers within the area.” We were told that after the councillors had decided to issue a tender they instructed the Clerk to carry out this task. However, there is no reference in the minutes to the direction to the Clerk regarding the tender.
- 24** During our investigation, two councillors indicated that a vote had been taken by a “show of hands” as to whether to issue a request to tender. One councillor said that the Reeve had asked each councillor for their view on the matter, and another could not recall that a vote had taken place. However, the minutes do indicate that an agreement was reached regarding the tender, and in fact, two days later, the clerk issued an invitation to tender to four local gravel crushers.
- 25** There was also a discussion at the meeting concerning the propriety of one of the councillors mentioning a personnel matter in public, which had been considered by the road’s committee. The in-camera session continued until 8:57 p.m., when open session briefly resumed. The council did not report back publicly regarding the closed session.

Analysis of Investigative Findings

Notice of the July 14, 2008 Regular Meeting

- 26** As noted above, the township’s procedure by-law is deficient in that it fails to provide for public notice of meetings, in contravention of the *Municipal Act, 2001* (s.238(2.1)). While the township did provide public notice of its regular meeting of July 14, 2008, it did not provide prior notice of the issues to be considered. In accordance with the township’s general practice, the meeting agenda is only available to the public at the time of the meeting, and issues to be considered in closed session are raised for the first time during the open portion of the meeting.

- 27** The *Municipal Act, 2001* does not specify the content of the notice to be given to the public. However, many municipalities require that an agenda listing the matters to be discussed be publicly posted in advance of a meeting. Some municipalities also provide that items arising after an agenda has been posted are to be included in an addendum, which must also be publicly posted. Additions to the agenda are generally reserved for matters of an urgent nature. In the case of items that arise without advance public notice, many procedures require approval of all members in attendance, or a resolution suspending the normal meeting rules, before they can be considered.
- 28** These practices are consistent with the intent of the open meeting requirements. They allow citizens to make an informed choice as to whether to attend a particular meeting. They also limit the potential for surprise last-minute items to surface.
- 29** The township's procedure by-law does provide that additions to the agenda must be introduced through a formal motion. However, council does not appear to abide by this requirement. Items for closed session appear to be saved up and introduced without any particular formalities during open session. This practice contravenes the procedure by-law and runs counter to the principles of openness, transparency, and accountability underlying the open meeting requirements.
- 30** Advance public notice of a meeting should include all items to be considered, including a general description of subjects to be considered in closed session. Items that have not been the subject of advance notice should only be considered in rare circumstances where urgency doesn't permit the normal notice requirements to be met, and after additional procedural requirements have been satisfied.

Resolution to go into closed session

- 31** The *Municipal Act, 2001* requires that before holding a meeting or part of a meeting that is to be closed to the public, a municipality must state by resolution the fact that a closed meeting will be held as well as the general nature of the subject matter to be considered. (s.239(4)). The resolution must occur in public before the closed meeting takes place. The township's practice of resolving to go into closed session after a recess in which members of the public leave is inconsistent with the intent of the open meeting requirements. Council should ensure that resolutions allowing for consideration of matters in camera are made in open session while the public is still in attendance. It should also ensure that members of the public are aware that they are entitled to be present at all portions of the open meeting, including after any in-camera session has been held.
- 32** The wording of council's resolution to go in-camera is also inconsistent with the *Municipal Act, 2001* requirements. The resolution should provide meaningful information about the issue to be discussed in closed session. As noted by the Ontario Court of Appeal in *Farber*

v. *Kingston City*¹, “the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.” Referring generally to the “public interest” to justify meeting behind closed doors does not satisfy the Act. The *Municipal Act, 2001* does not permit council to discuss issues in camera on this basis. Under the circumstances, the resolution was unauthorized and the subsequent closed meeting did not comply with the Act.

- 33** In terms of the “personnel issue” considered by council, had a proper resolution identifying the nature of the issue been made, discussion would likely have been permitted under s. 239(2)(b) of the *Municipal Act, 2001*, which allows councils to consider “personal matters about an identifiable individual, including municipal or local board employees.” However, a council must strictly follow the legislative requirements and issue a public resolution permitting discussion of an issue coming within this exception.
- 34** While the township’s procedure by-law is so broadly and subjectively written that it appears to permit council to consider virtually any issue it wishes to in camera, the *Municipal Act, 2001* requires that all meetings be open to the public unless they come within limited exceptions. In accordance with the remedial nature of the legislation any exception must be narrowly construed. The discussion at the closed meeting of the gravel issue clearly does not come within any of the statutory exceptions to the open meeting requirements. It is even hard to see how discussion of this issue could be justified by reference to the procedure by-law’s “public interest” criteria. There is no apparent reason why this topic should have been considered in closed session. While the owner of a gravel pit was identified by name in the discussion, this would not justify council going in camera in the first place to discuss “gravel” matters or excuse the ensuing general discussion of the township’s gravel needs. The exception for discussion of personal matters was not intended to allow council to circumvent open meeting requirements by allowing subjects to be generally discussed as long as there is reference at some point to a named individual. Even the Reeve acknowledged during our investigation that the gravel issue was not a proper topic for discussion in camera. Under the circumstances, council’s consideration of the gravel issue would have contravened the *Municipal Act, 2001* in any event.
- 35** Publicly identifying what issues will be discussed in a closed session is not a mere procedural technicality. It is of fundamental importance to the transparency of local democracy. It is a significant accountability measure to ensure that council only engages in discussions of permitted subjects in closed session. Failure to comply with the requirements for council resolutions and for closed meeting discussions can result in a loss of public confidence in municipal government, as evidenced by the complaint to my Office.

¹ [2007] O.J. No. 919, at page 151.

Decision to Issue Tenders

- 36** During the in-camera discussion of the township’s gravel supply, council voted to issue a tender to gravel crushers. Even if the discussion had been authorized, which it clearly was not, this vote would have been illegal. Under its procedure by-law council cannot pass motions in the committee of the whole. While it did not pass a “formal” motion, council improperly carried on business during the closed session, which should have been done in public view. Under s.239(6) of the *Municipal Act, 2001* voting in closed session can only be done in limited circumstances for procedural matters or for giving directions or instructions to officers, employees or agents of the municipality. Council cannot vote on a substantive matter, such as whether to issue tenders in this forum. Accordingly, this vote contravened both the township’s procedure by-law and the Act. While this vote was clearly of no force and effect, all votes should be properly conducted, and should be prefaced and accompanied by properly worded motions and resolutions.

Closed Meeting Minutes

- 37** Baldwin’s procedure by-law requires that meeting minutes record the place, date and time of meetings, the name of the presiding officer, the attendance and absence of members, as well as all other proceedings without note or comments. The *Municipal Act, 2001* specifies additional information that must be included in a record of a meeting. Under that Act, municipal councils are required to record all resolutions, decisions and other proceedings without note or comment (s.239(7)). In the case of the minutes for the July 14, 2008 closed meeting, there were serious omissions from the official record. The minutes failed to clearly identify that a vote had been taken and that instructions had been given to the clerk regarding the tender.
- 38** The existence of an accurate record of all closed sessions is an important safeguard to ensure that the open meeting requirements have been observed. In this case, it is clear that council acted inappropriately in voting on a substantive matter during the meeting. This would have been readily apparent had the minutes been properly prepared. As they stand, the July 14, 2008 closed meeting minutes contravene both the township’s procedure by-law and the Act.

Reporting in Public

- 39** In addition to not issuing minutes that accurately reflected what had occurred at the July 14, 2008, closed session, the council did not report back in a public session regarding the in-camera meeting. Council should always follow a practice of reporting publicly, in at least a general way, about matters discussed in closed session, including reference to resolutions, decisions, directions to staff and other proceedings, as appropriate. This would go a long way to instilling public confidence in the transparency of Baldwin’s governance.

Opinion

- 40** My investigation has highlighted critical deficiencies in the township's antiquated procedure by-law, which in its current state contravenes the *Municipal Act, 2001* in a number of respects. As a starting point, it is fundamentally important for the township's by-law to be consistent with the legislative requirements. It must set out procedures for public notice and strictly limit the circumstances when closed meetings are allowed to those sanctioned by the Act. It should also clearly set out the requirements for recording minutes of its meetings to ensure that they are complete and accurate.
- 41** During the meeting of July 14, 2008, the council failed to follow its own procedure by-law when it considered issues not listed on its agenda without a formal motion. More significantly, the township repeatedly violated the *Municipal Act, 2001* during the course of the meeting. It resolved to go in camera without the public in attendance, and without proper justification. The wording of council's resolution failed to meet the requirements of the Act, and it improperly considered an issue in closed session that should have been discussed in public view.
- 42** The council also breached its procedure by-law and the *Municipal Act, 2001* restrictions when it voted on issuing a tender during the closed session and then did not record the vote or directions to the clerk in the minutes for the meeting.
- 43** Accordingly, I am making a number of recommendations, which I believe if implemented will assist Baldwin council to operate in accordance with the open meetings law for the benefit of its citizens.

Recommendations

Recommendation 1

The Township of Baldwin should immediately cease its practice of discussing subjects that have not been identified in an authorizing resolution in closed session, and should ensure that in future no subject is discussed in closed session unless:

- (a) it clearly comes within one of the statutory exceptions to the open meeting requirements;
- (b) there is a resolution made in advance in open session before members of the public leave the meeting, authorizing that the subject be discussed in closed session; and
- (c) the subject has been generally described with as much specificity as possible so as to maximize the information available to the public without undermining the reason why the matter is being dealt with in camera.

Recommendation 2

The Township of Baldwin should immediately amend its procedure by-law to ensure provision for:

- (a) advance public notice of meetings;
- (b) an agenda of issues to be considered at meetings to be publicly posted in advance;
- (c) allowing items to be added to a meeting agenda only in urgent situations, and provided that additional procedural requirements, such as consent of all council members in attendance at a meeting, are met;
- (d) preventing matters from being considered in camera unless they clearly come within the exceptions to the open meeting requirements set out in the *Municipal Act, 2001*; and
- (e) accurate and complete records of meetings to be kept, including reference to all votes taken, directions to staff and subjects discussed during meetings.

Recommendation 3

The Township of Baldwin should ensure that its meeting agenda include reference to the general description of subjects to be disclosed in closed session with as much specificity as possible so as to maximize the information available to the public without undermining the reason why the matter is being dealt with in camera, and to the fact that council will resume open session, if that is the case, after closed session has ended.

Recommendation 4:

The council for the Township of Baldwin should ensure that no vote is taken at a closed meeting except in accordance with the township's procedure by-law and the *Municipal Act, 2001*. A vote should not be taken unless the formalities are observed, including authorizing motions, and resolutions.

Recommendation 5

The council for the Township of Baldwin should report back in open public session regarding closed meetings, to the extent that this is appropriate.

Recommendation 6:

All members of Baldwin township council should be vigilant in adhering to their individual obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own by-law.

Response of the Township of Baldwin

- 44** I provided the Township of Baldwin with a preliminary report setting out my initial findings, opinions and recommendations. Within days of receiving my report, council met and resolved to agree to all my recommendations and to make the suggested changes to its procedure by-law. The clerk of the Township of Baldwin promptly notified my Office of this decision. She advised us that she took full responsibility with respect to council's use of the improperly worded resolution, and noted that as the only full-time employee, she had been unable to attend information workshops concerning the open meeting requirements.
- 45** The Township of Baldwin is not alone in demonstrating difficulty implementing the open meeting provisions. Throughout this first year of investigating complaints about closed meetings, it has become clear to me that many municipalities, particularly municipalities with limited resources, require increased education in this area. To this end, my Office has prepared and distributed *The Sunshine Law Handbook*, which sets out the basic legal requirements for open meetings. I encourage the township's staff as well as its council members to use this guide to gain a greater understanding of their obligations under the open meetings law.
- 46** On February 10, 2009, the township provided my Office with a new procedure by-law, which had been revised to address the items in my **Recommendation 2**.

Advance Public Notice of Meetings and Posting of Agendas

- 47** Baldwin's by-law now provides for advance notice of regular meetings to be posted on its website and meeting agendas to be posted on its bulletin board no later than 48 hours in advance. The regular meeting procedure is also to be followed for special meetings.
- 48** Unfortunately, sections 22 and 40(a) of the by-law, which have been carried over from the by-law's previous incarnation, still contemplate that council may move into committee of the whole without advance notice to conduct in-camera discussions. In order to comply with the open meeting provisions and fully implement my recommendation, these provisions should be amended to ensure that no in-camera session occurs without the appropriate prior public notice and resolution, or for reasons other than as specifically permitted by the *Municipal Act, 2001*.

Limiting Additions to the Agenda

- 49** The new by-law now provides that no additions to a meeting agenda will be permitted unless the clerk deems them to be of an emergency nature and all councillors present at a meeting must also consent to the addition.

Limiting In-Camera Sessions to Exempted Issues

- 50** The new by-law sets out the discretionary exceptions allowing Baldwin council to hold an in-camera session. Council may also wish to consider adding reference to the mandatory exception in s.239(3) of the *Municipal Act, 2001* relating to requests under the *Municipal Freedom of Information and Protection of Privacy Act*. In addition, section 22 of the by-law continues to contemplate council moving into committee of the whole if a “matter may be more conveniently considered” in that forum. This section is inconsistent with the open meeting requirements and should be removed.

Accurate and Complete Meeting Records

- 51** While the new by-law does provide for meeting records to be kept, in order to be fully consistent with s. 239(7) of the *Municipal Act, 2001*, it should also state that resolutions and decisions should be recorded. I would also urge the township to expressly include reference to recording directions to staff and the subjects actually discussed in a meeting.
- 52** While there are a few additional amendments to the township’s procedure by-law that I believe should be made to ensure consistency with the open meeting requirements, I believe that the township has been diligent in attempting to implement my recommendations.
- 53** I was very encouraged by the township’s swift decision to embrace my recommendations and its willingness to bring its meeting procedures into the light.

Report

- 54** Baldwin council will be required to make my final report on this matter public in accordance with s.14 (2.6) of the *Ombudsman Act*.



André Marin
Ombudsman of Ontario