

March 28, 2014

Mayor Steve Parish and
Clerk Marty De Rond
Town of Ajax
65 Harwood Ave. S.
Ajax, ON L1S 2H9

Dear Mayor Parish and Mr. De Rond,

Re: Closed meeting complaint – May 23, 2013 General Government Committee Meeting

I am writing further to our conversation on March 17, 2014, regarding the outcome of our review of a complaint that the General Government Committee violated the open meeting provisions of the *Municipal Act, 2001* when it met behind closed doors on May 23, 2013 to discuss a municipal property encroachment issue.

The complaint alleged that the General Government Committee (the Committee) discussed the same issue at the public portion of the May 23, 2013 meeting and questioned whether the subject matter qualified for closed meeting consideration.

As you know, under the *Municipal Act, 2001* (the Act), all meetings of council, local boards, and their committees must be open to the public with limited exceptions, and subject to certain procedural requirements. In reviewing this complaint, our Office spoke with the Clerk and the Mayor, and obtained and reviewed the relevant meeting documents, as well as the Town's Procedure By-Law and relevant sections of the Act.

The General Government Committee is a Standing Committee of Council. Meetings are normally held on the first and third Monday of the month at 2:00 p.m. and any in-camera sessions are convened prior to the meeting. Council and Committee meeting agendas are posted on the Town's website.

May 23, 2013 General Government Committee – In Camera Session (1:30 p.m. followed by open session at 2:10 p.m.)

The Agenda that was posted on the Town's website for the May 23, 2013 meeting stated that the Committee would hold a closed session to discuss:

A matter pertaining to the proposed or pending acquisition or disposition of land by the municipality or local board [Sec. 239 (2) (c), *Municipal Act, 2001*, as amended]

A matter of advice subject to solicitor-client privilege, including communications necessary for that purpose [Sec. 239 (2) (f), *Municipal Act, 2001*, as amended]

- Legal Property Matter – Encroachment onto Town Property – Ontoro Blvd.

The public minutes state that the Committee passed a resolution in open session prior to proceeding in camera to discuss the above noted matters, as required by the Act.

The closed meeting minutes reflect that the Director of Legislative and Information Services Department (the Clerk) presented an overview of a staff report on the property encroachment issue.

Our Office obtained and reviewed a copy of the report, which was made public after the May 23, 2013 closed session. The report was prepared by Clerk Martin de Rond, and we were told that input was provided by the Chief Building Official and the Town's Solicitor. The Mayor and the Clerk advised us that the meeting was closed under the "advice that is subject to solicitor-client privilege" exception because the Solicitor contributed to the report and because it was also anticipated that he would provide advice on the encroachment issue at the meeting.

The report sets out information on the disposition of the road allowance (municipal property that was allegedly encroached) and the potential risks or impact of selling or leasing the land. It puts forward options and recommendations for the Committee to consider, including whether or not to sell or lease all or part of the land to a third party.

The Clerk and Mayor stated that staff was seeking direction from the Committee on how to proceed with respect to the property in question. During the closed session, the Committee discussed and debated how to proceed with the land.

The closed meeting minutes also reflect that the Mayor expressed the view that the "confidential" staff report and discussion of the acquisition of land/encroachment issue

should be made public. The Mayor told our Office that he did not disagree that the subject matter qualified for closed meeting consideration, but once the Committee discussed its position on the encroachment, he wanted the matter to be made public, as there was an impact to municipally owned land.

After approximately 40 minutes in closed session, the Committee voted to return to open session and continued discussion of “item 4.1 – Encroachments onto Town Property East of 14 Ontoro Blvd.”

After debating the terms of the draft resolution, the General Government Committee passed a recommendation to be presented to Council on how to address the encroachment, including that the lands not be made available for purchase, and that the Town enter into an encroachment agreement with the affected third party. Council considered the matter at its meeting of June 9, 2014.

Analysis

The meeting was closed under the “acquisition or disposition of land” exception as well as the exception for “advice that is subject to solicitor client privilege.”

The acquisition or disposition of land exception allows council and/or committees of council to discuss the sale, lease, or purchase of land within a closed session, with the primary purpose to protect the municipality’s bargaining position in property negotiations.

In this case, the issue before the General Government Committee was how to respond to a property owner’s encroachment on municipal property, including whether or not to sell or lease a portion or all of the road allowance to the property owner or to enter into an agreement to allow certain encroachments.

The fact that the General Government Committee discussed the same matter in open session after the closed meeting does not mean that the closed session was not permitted under the *Municipal Act* exceptions. The purpose of the closed meeting was for the Committee to consider and establish its position on how to dispose of the property in question. This was permitted under the “acquisition or disposition of land” exception. The Ombudsman encourages municipalities to make public as much information as possible about closed meeting discussions after they are concluded, as happened here.

The second cited exception, however – for “advice that is subject to solicitor-client privilege” – did not apply in this case.

The criteria required for solicitor-client privilege to apply, as set out in the Supreme Court of Canada decision, *Solosky v. The Queen*, [1980] 1 S.C.R. is:

- i) a communication between solicitor and client;
- ii) which entails the seeking or giving of legal advice; and
- iii) which is intended to be confidential by the parties.

The “confidential report” reviewed in the closed session was prepared, signed, and submitted by the Clerk and is not communication from the solicitor that would be considered “privileged.”

On March 17, 2014, we discussed our review and findings with you. You explained that the “advice that is subject to solicitor client privilege” exception was claimed because town staff consulted with the town's Solicitor when preparing the report that was considered at the meeting. The report itself, however, does not indicate that it contains communications with the Solicitor, nor that it reflects legal advice; moreover, the Solicitor did not provide advice at the meeting. Thus, the “solicitor-client privilege” exception did not apply – although, as noted, the closed session discussion of the report was justified under the exception for acquisition or disposition of land.

You confirmed that this letter would be included on the agenda for the public Council meeting of April 14, 2014, and that a copy would be posted on the Town’s website.

Thank you for your cooperation with our review.

Sincerely,

Yvonne Heggie
Early Resolution Officer
Open Meeting Law Enforcement Team