

April 10, 2014

Clerk Mark Becker  
Township of Ashfield-Colborne-Wawanosh  
82133 Council Line  
R.R. #5  
Goderich, ON N7A 3Y2

Dear Mr. Becker,

**Re: Closed Meeting Complaint: February 18, 2014 Council Meeting**

I am writing further to our discussion on April 9, 2014 about the outcome of our review of a complaint that Council for the Township of Ashfield-Colborne-Wawanosh violated the *Municipal Act, 2001* when it went into closed session on February 18, 2014 to discuss an issue involving a wind energy company (K2 Wind Ontario).

The complaint to our Office stated that Council went in camera to discuss the K2 Wind company's discharge of water from a power project site to a municipal road allowance. In the complainant's view, because the matter was of public interest, it should have been discussed in an open meeting. The complainant also alleged that Council did not pass a resolution to proceed in camera and did not provide sufficient information to the public about the subject matter to be considered at the February 18, 2014 closed meeting.

As you know, the *Municipal Act, 2001* (the Act) requires that council, local board, and committee meetings are open to the public, with limited exceptions and subject to certain procedural requirements. For instance, Council is required to pass a resolution prior to proceeding into a closed session, confirming the general nature of the subject matter to be considered.

In reviewing this complaint, we obtained and reviewed the meeting documents, including the meeting agenda, minutes of the open and closed meetings, and a report prepared by the Public Works Superintendent that was considered in the closed session. In addition, we spoke with the Clerk and considered the relevant sections of the Township's Procedure By-Law and the *Municipal Act*.

### **Procedure By-Law (No. 04-2013)**

According to the *Municipal Act, 2001*, a municipality's Procedure By-Law must provide for public notice of meetings. The Township's Procedure By-Law states that council meetings are scheduled on the first and third Tuesdays of the month (unless this falls on a statutory or municipal holiday).

The Township's practice is to post meeting agendas on the Township website the Friday prior to the meeting.

### **February 18, 2014 Council Meeting**

The Agenda for the February 18, 2014 regular Council meeting was posted on the Township's website on Friday, February 14, 2014 at 10:32 a.m.

The Agenda stated that a K2 Switching Station Drainage issue (Item 6.6.1 of the Agenda) would be discussed in camera and that the meeting would be closed to consider : 1) matters of litigation 2) matters of potential litigation.

In addition, a separate "confidential" agenda for the closed meeting showed that both a court matter and the K2 Switching Station Drainage matter would be discussed in camera.

Although the complaint to our Office stated that Council did not pass a resolution to proceed in camera in the public session, the public minutes show that Council did pass a resolution in open session prior to moving in camera at 8:05 p.m. "for the purpose of discussing (1) matters of litigation (2) matters of potential litigation." The minutes show that the motion to proceed in camera was introduced by Councillor Barry Millian and seconded by Councillor Roger Watt.

The Clerk stated that the minutes accurately reflect what transpired at the meeting. Also, the Clerk said that, when the Agenda item concerning the K2 Switching Station Drainage issue came up prior to the closed meeting, it was publicly stated that the matter would be referred to the closed session. This information is consistent with the meeting agenda and public minutes.

## **Closed Meeting**

The record of the closed meeting shows that all Council members initially were present at the closed session, but Reeve VanDiepenbeek and Councillors Connie Black and Murray Curran recused themselves from the discussion on the K2 Switching Station drainage issue.

The record states that the remaining Council members reviewed a report from the Township's Public Works Superintendent on the water drainage matter as it impacted the municipal road allowance. The report outlined what efforts, if any, were being taken by the parties to address the water drainage problem and/or to prevent water damage to the road allowance. The report showed that staff were seeking instruction from Council on how to proceed and litigation against one or more parties was an option for consideration.

Council provided direction to staff during the closed session.

According to the public minutes, Council returned to open session at 8:50 p.m. and, on the topic of the K2 Switching Station Drainage issue, reported that "discussions are ongoing towards a resolution to this issue."

## **Analysis**

Council relied on the "litigation or potential litigation" exception to the open meeting requirements to move in camera to discuss the K2 drainage issue. The *Municipal Act* does not specifically define the litigation exception. Instead, the case law on litigation privilege informs the definition under the *Municipal Act*.

The jurisprudence in Ontario on litigation privilege in the context of *anticipated* litigation holds that:

It is not necessary that litigation have been commenced, nor is it "necessary that it be created at a time when there is a certainty of litigation but merely that litigation is in reasonable prospect. On the other hand, there must be more than a suspicion that there will be litigation."<sup>1</sup>

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<sup>1</sup> *R. (C.) v. CAS of Hamilton* (2004), 50 RFL (5<sup>th</sup>) 394 (Ont. S.C.J.) at para. 21, citing *Carlucci v. Laurentian Casualty Co. of Canada* (1991), 50 CPC (2d) 62 (Ont. Ct. (Gen Div.)).

The Ontario courts have held that litigation privilege may cover situations where litigation was contemplated by making the decision *not* to litigate (see *CIT Financial Ltd. v. JDS Uniphase Corp.* (2003), 124 ACWS (3d) 455 (Ont. S.C.J. Case Mgt Master).

In this case, there was more than a suspicion or mere speculation that litigation would occur. As noted above, a third party company had discharged water onto a municipal road allowance, resulting in damage or potential damage if not addressed, and litigation was an option that staff and Council were realistically contemplating. Therefore, it appears that the subject matter qualified for closed meeting consideration under the “litigation or potential litigation” exception.

Based on the meeting agenda and minutes, it appears that a resolution was passed by Council prior to proceeding in camera, as required under the Act.

On April 9, 2014, I shared the details of our review and findings with you and provided you with an opportunity to provide feedback. You stated that you did not have any concerns with our findings.

You agreed to include a copy of this letter on the agenda for Council’s next public meeting, and to make a copy of the letter available to the public on your website.

Thank you for your cooperation with our review.

Sincerely,

Yvonne Heggie  
Early Resolution Officer  
Open Meeting Law Enforcement Team