

January 24, 2014

Mayor Rob Adams and
Clerk Cheryl Johns
Town of Orangeville
87 Broadway
Orangeville, ON L9W 1K1

Dear Mayor Adams and Ms. Johns,

Re: Closed Meeting Complaint – September 9, 2013 Closed Session

I am writing further to our conversation on January 20, 2014, regarding the outcome of our review of a complaint that Council provided insufficient information to the public about the nature of a closed meeting on September 9, 2013, and that the meeting may have been improperly closed to the public.

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, our Office obtained and reviewed the meeting minutes and spoke with you both, in addition to considering the relevant sections of the Procedure By-Law and the *Municipal Act*.

The Town's Procedure By-Law requires that all council and committee meeting agendas be posted in a notice case located outside the municipal office and on the Town website at least 24 hours in advance of the meeting.

Copies of agendas are also made available to the local newspaper, radio and cable station representatives.

The Agenda for the September 9, 2013 Council meeting stated that a closed meeting would be held under s. 239 (2) (e): "Litigation or potential litigation, including matters

before administrative tribunals, affecting the municipality or local board (Hogey's Sports Bar Limited).”

The public minutes show that Council passed a resolution in open session confirming that Council would move to a closed session to discuss the above matter.

Five of the seven Council members were in attendance (Councillors Bradley and Rose were absent). In addition, the Deputy Clerk, Director of Parks and Recreation, Facilities Manager, and Treasurer attended.

The closed meeting minutes reflect that Council discussed options for continuing a lease agreement for the operation of Hogey's Sports Bar. Council discussed potential litigation with respect to the terms of the lease and the merits of the case, should the matter proceed to court.

Council then invited the owner of the Sports Bar to join the closed meeting and discussed with him the terms of the lease in an attempt to negotiate agreement. The owner relayed to Council advice he received from his lawyer about the lease agreement.

The meeting lasted approximately an hour and adjourned.

Analysis

Council's resolution to proceed in camera confirmed the general nature of the matter to be discussed in closed session – that Council intended to discuss potential litigation relating to Hogey's Sports Bar.

Our Office assessed whether the subject matter qualified for closed meeting consideration under the “litigation or potential litigation” exception or any other exception to the open meeting requirements.

Council's consideration of pursuing legal action against the restaurant owner as a result of unsuccessful attempts to negotiate agreement, as well as discussion about the merits of their case was permitted within the “litigation or potential litigation” exception, as there was a very real likelihood that litigation would result if negotiations about the lease failed. The focus of discussions was on litigation steps and the merits of the case.

However, the portion of the meeting attended by the restaurant owner, where Council discussed the issues related to lease with him, was not permitted under the exceptions of the *Municipal Act*.

In a 2006 Supreme Court of Canada decision, *Blank v. Canada* (Minister of Justice), the Court stated, in reference to litigation privilege:

Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation,

represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

In our March 2013 investigation into closed meetings by Council for the Township of Adelaide Metcalfe in July and August 2012¹, we found that Council improperly met with a local developer in a closed meeting to discuss a site plan and cost-sharing proposal under the “solicitor-client privilege” exception to the open meeting requirements. As explained in the Ombudsman’s report on that case, disclosure of legal advice that the municipality received from its lawyer to a third party waived any solicitor-client privilege that applied. He also pointed out that there is no exception under the Act that allows council to meet behind closed doors to negotiate agreements with third parties.

The discussion between Council and the restaurant owner also does not qualify for closed meeting consideration under the “acquisition or disposition of land” exception. A review of the history and case law concerning this exception confirms that its primary purpose is to protect the municipality’s bargaining position in property negotiations. Discussing the Town’s position on the proposed terms of the lease with the other party defeats this purpose; therefore, this exception does not apply.

In a report by closed meeting investigator Amberley Gavel² on closed meetings held by Council for the City of Kingston between May 5, 2009 and November 3, 2009, it was noted that this exception should only be used where “there would be potential financial harm if financial negotiations were continuing or in a situation where adjacent lands might attract speculative interest.”

A 2006 Massachusetts Court of Appeal decision³ also illustrates the intent of such exceptions. In this case, the Court considered the “real property exception” under the state’s open meeting legislation. The court considered residents’ request to have a land agreement between the Board of Selectmen (a local board) and a local hospital invalidated because the deal was reached in a closed session between the parties. The court noted that the purpose of the real property exception reflects “the need for confidentiality in considering the value of property to be purchased, exchanged, or leased in order to avoid impairment to the negotiating position of a governmental body.” The court determined that the presence of representatives from the hospital and their attorney at the closed session meant that “there was no basis to argue that the selectmen needed to go into closed executive session to establish a confidential negotiating position...”

¹ Report available at - http://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/AdMet-Final_1.pdf

² Amberley Gavel Ltd. -Kingston 2010 report - http://www.agavel.com/?page_id=45

³ Kathleen Allen & others vs. Board of Selectmen of Belmont. 58 Mass. App. Ct. 715, 2006



ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

During our discussion on January 20, 2014, I explained our review and findings and provided you with an opportunity to provide feedback. You acknowledged our findings and did not raise any objections to our conclusions.

You agreed to include this letter on the agenda for the next public Council meeting, to be held on February 24, 2014 – and to post a copy of the letter on your website.

Thank you for your cooperation with our review.

Sincerely,

Yvonne Heggie
Early Resolution Officer
Open Meeting Law Enforcement Team