



ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

December 19, 2013

Mayor Sonja Flynn and
CAO/Clerk Denis Turcot
Municipality of Markstay-Warren
21 Main Street South
Markstay, Ontario
P0M 2G0

Dear Mayor Flynn and Mr. Turcot,

Re: Review of July 15 and August 15, 2013 Closed Meetings

I am writing further to our discussion on December 16, 2013 regarding our review of complaints that Council for the Municipality of Markstay-Warren held improper closed meetings on July 15 and August 15, 2013 to discuss a merger of the public works garages and potential acquisition of land for a new garage. The complainants expressed concern that Council made decisions on this matter behind closed doors.

As you know, the *Municipal Act, 2001* (the Act) requires that all meetings of Council 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 obtained and reviewed the meeting agendas and minutes, and considered the relevant sections of the Municipality's Procedure By-Law and the Act.

Municipality's Procedure By-Law (No. 2011-11)

Regular meetings of Council are held on the third Wednesday of each month at 6:00 p.m. A majority of Council members may alter the date, time or place of a regular meeting, provided that adequate notice is posted.

Council and Committee meeting agendas are to be available at the municipal office four working days prior to the meeting.

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In addition to referencing the open meeting requirements as outlined in the *Municipal Act*, the Procedure By-Law states that the presentation of the Auditor's annual report "shall be presented to Council and debated in closed session." You stated that the purpose of this provision was to protect any personal information contained in the Auditor General's report about municipal staff. I acknowledged that certain subjects in the Auditor General report may qualify for closed meeting consideration if they fall within the permitted exceptions to the open meeting requirements (ie. personal matters), however general discussion of the Auditor General's report does not fall within any of the permitted exceptions and, as such, the Procedure By-Law should be amended to remove this provision.

July 15, 2013 Closed Meeting

The Agenda for the July 15, 2013 regular Council meeting stated that a closed meeting would be held to discuss an "employee negotiation" and a "land purchase".

The public minutes show that Council passed a resolution to proceed in camera prior to the closed session, "to discuss matters pertaining to a proposed or pending acquisition or disposition of land for municipal or local board purposes; and labour relations or employee negotiations."

The closed session commenced at 10:30 p.m and lasted for approximately forty minutes.

The closed meeting minutes were limited in that they did not detail the substantive discussions that took place in the closed session but they do reflect that Council discussed a proposed acquisition of land and provided direction to staff with respect to negotiating a land transaction. The Clerk provided details about the land matter that was being discussed and indicated that the focus of the meeting was on identifying an acceptable purchase price.

Council then discussed an employee/labour relations matter.

Council returned to the open session at 11:09 p.m. and adjourned the meeting.

Analysis

The *Municipal Act* permits Council to consider the potential acquisition or disposition of land in a closed session under s. 239 (2) (c). The purpose of this exception to the open

meeting requirements is to protect a municipality's bargaining position in property negotiations. Markstay-Warren Council's discussion of an acceptable purchase price for a proposed land purchase falls within this exception.

Although the Act does not permit Council to vote on substantive matters in a closed meeting, the Act does allow votes for procedural matters or for providing direction to staff, as Council did at the July 23, 2013 closed session.

We noted that the July 23, 2013 closed meeting record was limited and did not detail the substance of discussions held. The record is mainly a listing of any resolutions passed by Council. 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 concerning an investigation into a special meeting of the City's Development Services Committee entitled *The ABCs of Education and Training*¹:

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.

¹ The full report is available on our website at:
www.ombudsman.on.ca/media/44626/oshawamay08final.pdf

As a best practice, and to ensure a complete and accurate meeting record, the Ombudsman recommends that Council audio or video record closed meetings.

August 15, 2013 Closed Meeting

The Agenda for the August 15, 2013 Regular Meeting of Council stated that a closed meeting would be held to discuss a land purchase update, labour negotiations and an identifiable individual.

According to the meeting minutes, Council passed a resolution in open session to proceed in camera at 9:46 p.m. to discuss a:

1. Personal matter about an identifiable individual...
2. A proposed or pending acquisition or disposition of land for municipal or local board purposes
3. Labour relations or employee negotiations.

The closed meeting record shows that, in regard to “a proposed or pending acquisition or disposition of land”, Council received an update on a land purchase, including information on the status of negotiations.

Council also discussed another matter under the “acquisition or disposition of land” exception involving negotiating a lease of municipally owned property.

After discussing an employee contract issue, Council returned to open session at 10:30 p.m. without any report on what transpired in the closed session.

Analysis

Council’s consideration of the status of ongoing property negotiations, including a negotiation of a lease, is permitted in a closed meeting under the “proposed or pending acquisition or disposition of land” exception to the open meeting requirements.

Resolution and Reporting Back

We noted in our review that Council’s resolution to proceed in camera only referenced the wording of the exceptions of the Act in closing the meeting to the public. In addition,

there was no indication that Council would be considering two matters under the “acquisition or disposition of land” exception.

The *Municipal Act* requires that, prior to moving to a closed meeting, Council state “the fact of the holding of the closed meeting and the general nature of the matter to be considered...” On this subject, the Ontario Court of Appeal has stated that “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.”²

In the interest of transparency, Council is also encouraged to report back publicly after each closed session, to the extent possible, on what transpired in the closed meeting. Reporting back may simply be confirmation of the items considered in the closed session (similar to the resolution to proceed in camera) and any directions to staff, or, in other cases, a more detailed report of what took place may be possible.

On December 16, 2013 we shared our review and findings with you and provided you with an opportunity to provide feedback. You stated that you appreciated the review and an opportunity to improve on meeting practices.

You agreed to share this letter with Council at the next public meeting to be held on January 20, 2014 and to make a copy available to the public on your website.

We would like to thank you for your cooperation with our review.

Sincerely,

Yvonne Heggie
Early Resolution Officer
Open Meeting Law Enforcement Team

² *Farber v. Kingston* [2007] O.J. No. 919, p. 151