



J. Paul Dubé, Ombudsman

February 9, 2017

Ms. Elaine Gunnell, Clerk
The Municipality of Temagami
7 Lakeshore Drive
P.O. Box 220
Temagami, ON
P0H 2H0

Re: Closed meeting complaint

Dear Ms. Gunnell:

I am writing to provide the outcome of our review of a complaint made about closed meetings held by council for the Municipality of Temagami (the Municipality) on April 28 and August 11, 2016.

Authority of the Ombudsman

As of January 1, 2008, the *Municipal Act, 2001* (the Act) gives citizens the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. My Office is the closed meeting investigator for the Municipality of Temagami.

Closed meeting complaint

With respect to the April 28 meeting, the complaint stated that council went into closed session under the solicitor-client privilege exception found in s. 239(2)(f) of the Act, to discuss a letter from a member of the public. The complainant did not believe that the in camera discussions fit within this exception, or any exception to the open meeting requirements.

With respect to the August 11 meeting, the complaint stated that council went in camera under the “personal matters” exception to discuss a Code of Conduct complaint against the Mayor. Council then came out of closed session and declared, through the Mayor, that discussion of the Code of Conduct complaint would be deferred. The complaint to our Office alleged that deferral of the complaint should not have been discussed or decided on during the closed session.

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Our Review

In considering this complaint my staff spoke with you, and reviewed the open and closed session minutes for the meetings in question. We also considered relevant sections of the Act and the Municipality's procedure by-law.

The April 28, 2016 council meeting

The April 28 meeting was a regular council meeting that was scheduled to begin at 6:30 p.m. The agenda indicated that council would be proceeding in camera to discuss:

- (2)(f) The receiving of advice that is subject to solicitor/client privilege, including communications necessary for that purpose, with respect to correspondence received from Ron & Suzanne Prefasi dated April 9, 2016.

According to the open session minutes, council passed a resolution to proceed in camera for the reasons noted on the agenda.

The closed session began at 7:30 p.m. According to the closed session minutes, you advised council that staff had sought a legal opinion about issues raised in the April 9 letter. You told our Office that, although the final legal opinion was not ready, you provided council with an overview of your conversation with legal counsel, including some preliminary comments about what his advice was likely to be.

The closed session adjourned at 7:48 p.m.

When the open session resumed, council stated there was nothing to report back regarding discussion of the letter.

Analysis

As noted in several of my office's reports¹, the section 239(2)(f) exception can be used when council is considering specific advice, or a related communication,

¹ See, for example: Ombudsman of Ontario, *Investigation into whether Council for the City of Greater Sudbury held illegal closed meetings on March 2, March 23, and April 26, 2016* (January 2017), online: [https://www.ombudsman.on.ca/Resources/Reports/City-of-Greater-Sudbury-\(5\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-Greater-Sudbury-(5).aspx)

from a solicitor. Such communications can be privileged if they are: (a) between a client and his or her solicitor, where the solicitor is acting in a professional capacity; (b) made in relation to the seeking or receiving of legal advice; and (c) intended to be confidential².

You advised our Office that during the April 28, 2016 closed session you told council about your conversation with the municipality's legal counsel, and passed along the solicitor's comments about when his final advice would be available, and what that advice would likely be. This discussion fit with the solicitor-client privilege exception to the open meeting requirements.

The August 11, 2016 council meeting

The August 11 meeting was a regular council meeting that was scheduled to begin at 6:30 p.m. The Code of Conduct complaint against the Mayor was not originally on the agenda for the August 11 meeting, but was added as addendum #1 to the agenda for closed session discussion after the agenda was finalized.

According to the open session minutes, council passed a motion to proceed in camera at 7:15 p.m. to discuss personal matters about an identifiable individual under s. 239(2)(b) of the Act, regarding "an allegation" received by the municipality, and an unrelated labour relations matter.

According to the closed session minutes, council discussed whether enough information had been received to proceed with the Code of Conduct complaint against the Mayor. You advised our Office that there was some uncertainty about whether the Mayor had been acting in her personal or professional capacity during the event that gave rise to the Code of Conduct complaint. Accordingly, discussions of the complaint took place in closed session.

While in camera, Mayor Hunter moved a motion that discussion of the complaint be deferred "until all affidavits are received in accordance with our Code of Conduct". The motion was carried. This was a procedural vote, permitted to be taken in camera by section 239(6) of the Act.

The closed session concluded at 8:40 p.m.

When the open session resumed, the Mayor announced that council had deferred an item regarding an allegation received by the Municipality.

² *Solosky v. the Queen*, [1980] 1 S.C.R. 821

Analysis

The Act does not define “personal matters” for the purposes of section 239 of the *Municipal Act*. However, the related term “personal information” is defined in the *Municipal Freedom of Information and Protection of Privacy Act* as, in part “recorded information about an identifiable individual, including...(g) the views or opinions of another individual about the individual”. When reviewing the parameters of the open meeting exceptions, our Office has often considered the case law of the Office of the Information and Privacy Commissioner (the IPC). Although not binding on our Office, these cases can be informative.

The IPC has determined that, in order to qualify as “personal information”, the information must be about individuals in their personal capacity, rather than their professional, official or business capacity³. However, information in a professional capacity can take on a more personal nature if it relates to scrutiny of that individual’s conduct⁴.

Discussions of a council member's actions in the course of their duties are normally considered to be of a professional nature and do not fall within the personal matters exception. In this case, however, you advised our Office that it was not clear whether the Mayor was acting in her professional or personal capacity during the incident that gave rise to the Code of Conduct complaint. Furthermore, council was considering unproven allegations against the Mayor. In a September 8, 2014 letter regarding a closed meeting held by council for the City of Elliot Lake, our Office found that council’s in camera discussion of unproven allegations of a breach of confidentiality against a council member fit within the “personal matters” exception⁵.

In these circumstances, I am satisfied that the closed session discussions on August 11 fell within the personal matters exception.

Conclusion

My review found that the discussions that took place in camera at the April 28, 2016 council meeting were permitted to be closed to the public under the

³ Order MO-2204 (22 June 2007)

⁴ Order MO-2519 (29 May 2010)

⁵ Letter from Ombudsman of Ontario to City of Elliot Lake (September 8, 2014), online: <https://www.ombudsman.on.ca/Files/sitemedia/Documents/Elliot-Lake-Sept-8-2014.pdf>

solicitor-client privilege exception. The in camera discussions held at the August 11, 2016 council meeting were permitted to be closed to the public under the personal matters exception.

You indicated to us that this letter would be included as correspondence at the next available meeting of council.

We thank you for your co-operation during our review.

Yours truly,



Paul Dubé
Ombudsman of Ontario

cc: Patrick Cormier, Chief Administrative Officer