



ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

August 8, 2014

Mayor Jean-Paul St. Pierre
Clerk Joanne Camiré-Laflamme
Township of Russell
717 Notre-Dame Street
Embrun, ON K0A 1W1

Re: Closed Meeting Complaint – May 5, 2014

Dear Mayor St. Pierre and Ms. Camiré-Laflamme:

I am writing further to our discussion of August 5, 2014 regarding the outcome of our review of a complaint about a closed meeting held on May 5, 2014 by council for the Township of Russell. The complaint alleged that council went into closed session to discuss a number of infrastructure projects, and that these discussions did not fall within the permitted closed meeting exceptions under the *Municipal Act, 2001* (the Act).

As you know, the Act requires that meetings of council, local boards, and committees be open to the public, with limited exceptions and subject to certain procedural requirements.

In reviewing this matter, we spoke with Township staff and reviewed the relevant documentation, including the Township's procedural by-law, the meeting agenda, the open and closed meeting minutes, and the reports discussed in the closed meeting.

Procedure By-Law (By-law No. 2-2014)

The Township's procedural by-law states that regular meetings are to be held on the third Monday of every month at 5:00 p.m. and that a second regular meeting is held following each committee of the whole meeting. It further states that a schedule of regular meetings for each calendar year is to be prepared and distributed. The by-law also requires that public notice of special meetings be provided no less than 48 hours in advance of a meeting, and published on the Township website and in the Town Hall, as well as electronically to local media. The procedural by-law also addresses opening the closed session by introducing a resolution in the public session to go *in-camera* that sets out the general nature of the matters to be discussed.

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The meeting of May 5, 2014

The agenda for the regular council meeting on May 5, 2014 listed the following matters that would be considered at a closed session within the meeting, at item 14:

Closed session pursuant to Section 239(2) (a), (b) and (c) of the Municipal Act to consider matters relating to:

i) s. (a) the security of the property of the municipality:

- Embrun Lagoon Expansion & Design Modifications;
- Embrun Sewage Pumping Station # 8 & Sewage Forcemain;
- Embrun Sewage Pumping Station #3 and Sewage Forcemain;
- Embrun Watermain Oversizing;
- Brisson Subdivision and Future Growth; and
- Old Embrun Fire Hall.

ii) s. (b) personal matters about an identifiable individual, including municipal or local board employees:

- Embrun Sewage Pumping Station #3 and Sewage Forcemain; and
- Brisson Subdivision and Future Growth.

iii) s. (c) a proposed or pending acquisition or disposition of land by the municipality:

- Embrun Sewage Pumping Station #3 and Sewage Forcemain; and
- Brisson Subdivision and Future Growth.

The open meeting minutes indicate that a resolution was introduced that reiterated the items listed in the agenda. The closed meeting minutes noted the exceptions cited with respect to each item on the agenda, and provided a brief description of what was discussed. In all cases, the details relied upon to justify the closed session were contained in the reports and appendices presented to council. The minutes of the closed session did not make mention of the specifics of any of the matters discussed.

Upon the conclusion of the closed session, the meeting was reopened and various motions relating to the closed session items were introduced. Council gave instructions to staff in open session relating to upgrades for the Embrun Lagoon Expansion and Pumping Station #8, negotiation of the construction contract for Pumping Station #3, and proceeding with the water main construction project. It also referenced “verbal direction” given to staff with respect to the Brisson Subdivision and the Fire Hall.

Analysis

Security of Property

During the meeting on May 5, 2014, council considered six items under the exception in the Act that relates to “the security of the property of the municipality” (s 239(2)(a)). The phrase “security of the property” is not defined in the Act. However, decisions by the Information and Privacy Commissioner have considered the meaning of this phrase, and our Office has adopted a similar analysis. To qualify for closed session consideration under this exception, the discussion must relate to loss or damage prevention measures or protection of public safety relating to municipal property.¹

The six items discussed under this exception generally concerned financial interests, municipal growth, future planning and negotiation strategy. These subjects do not come within the “security of property” exception,² and should not have been considered in closed session under this exception.

Two of the six items – Embrun Sewage Pumping Station #3 and Sewage Forcemain, and Brisson Subdivision and Future Growth – were also listed for discussion under additional exceptions to the open meeting requirements.

Personal Matters

Council also considered the Embrun Sewage Pumping Station #3 and Sewage Forcemain item and the Brisson Subdivision and Future Growth item in closed session under the “personal matters about an identifiable individual” exception (s 239(2)(b)). The Act does not define “personal matters,” and this provision has not been judicially considered. However, the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* contains a similar phrase that is defined. This definition has been considered by both the Information and Privacy Commissioner and by the courts. While the definition of “personal information” in *MFIPPA* does not dictate how the phrase should be interpreted in the *Municipal Act*, it does provide a useful reference point.

The Information and Privacy Commission (the Commission) has issued orders that assess and define what types of information can be considered personal under *MFIPPA*. For instance, the Commission has found that “the information must be about the individual in a personal capacity.

¹ City of Greater Sudbury Audit Committee, Ontario Ombudsman letter of March 18, 2011.

² Corporation of the County of Brant, Amberley Gavel report of January 2013; IPC Interim Order MO-2683-I of December 30, 2011, discussing the findings of Order MO-2468-F.

As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be ‘about’ the individual.”³

The closed meeting discussions about the Embrun Sewage Pumping Station #3 and Sewage Forcemain item and the Brisson Subdivision and Future Growth item related to construction at these sites. There were references to contractors in their professional capacity, but the discussion did not address anything of an inherently personal nature.⁴ Accordingly, these two items did not fit within the exception cited to close the meeting.

Acquisition/Disposition of Land

Finally, the Embrun Sewage Pumping Station #3 and Sewage Forcemain item and the Brisson Subdivision and Future Growth item were discussed under the “acquisition or disposition of land” exception under section 239(2)(c). According to the information our Office received, these two subjects were discussed under this exception because there was a need for the Township to obtain an easement over property in the Brisson Subdivision in order to carry out the Embrun Sewage Pumping Station #3 project. In closed session, council considered what would be discussed with the property owner about the cost and pricing for the easement, as well as the potential for having to tender for some of the work relating to the pumping station.

An easement is a form of property right. Council was entitled to consider acquiring an easement in closed session under the acquisition or disposition of land exception.

In addition, council’s discussions about the Old Embrun Fire Hall related to a lease proposal. While council improperly cited the “security of property” exception to justify considering this item in a closed meeting, it could have done so under the “acquisition or disposition of land” exception.⁵

Improvements to Closed Meeting Practices and Procedures

Council is required to keep a record of its open and closed meetings under the Act. While the Township did prepare minutes of the closed meeting, they contained very little detail relating to the nature of the discussions.

In accordance with section 239(7) of the Act, a municipality is required to record, without note or comment, all resolutions, decisions and other proceedings at its meetings. Ideally, a written record of a closed meeting should include reference to:

³ IPC Order MO-2368 of November 26, 2008.

⁴ *Id.*

⁵ Township of Billings, Ontario Ombudsman letter of July 7, 2010.

- 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.

While the Act prohibits “notes or comments” from being included in the official record, this does not mean that the subjects discussed in a meeting should not be referred to. The various substantive and procedural items that were discussed at a meeting should be recorded. The requirement to keep a meeting record should be interpreted in a manner that is consistent with the intent of the municipal meeting provisions, which are directed at enhancing the openness, transparency and accountability of municipal government.

The Ombudsman recommends that all municipalities make audio or video recordings of all meetings – both open and closed – to ensure the most thorough record possible. This helps foster community trust and confidence in the transparency and accountability of local government.

Conclusion

At the meeting on May 5, 2014, council improperly applied the exceptions to the open meeting rules to consider six items in closed session. In the case of two items – the Embrun Sewage Pumping Station #3 and Sewage Forcemain, and the Brisson Subdivision and Future Growth – council cited three exceptions (security of property, personal matters, and acquisition or disposition of land) to justify considering them in closed session. However, the only exception that applies to these items is “acquisition or disposition of land.”

In the case of the Old Embrun Fire Hall, council discussed a lease under the “security of property” exception. This subject did not come within this exception, although it might have been properly considered under the “acquisition or disposition of land” exception, had that exception been cited.

The remaining three items – Embrun Lagoon Expansion and Design Modifications, Embrun Sewage Pumping Station #8 and Sewage Forcemain, and Embrun Watermain Oversizing – were



all discussed under the “security of property” exception. None of these topics properly came within this exception.

As we discussed, in future, staff and council members should carefully reviews all matters identified for closed meeting consideration to ensure that they fit within the exceptions under the Act.

Council should also consider adopting the Ombudsman’s general recommendation that audio or video recordings be made of all closed sessions.

On August 5, 2014 we shared our review and findings with you and provided you with an opportunity to provide feedback. You thanked us for our work, and reiterated that you look forward to receiving greater guidance on the interpretation of the closed meeting exceptions and related procedural requirements. You agreed to make this letter available to the public at the next possible opportunity.

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

Sincerely,

Jean-Frédéric (J-F) Hübsch
Open Meeting Law Enforcement Team
Office of the Ontario Ombudsman