

May 9, 2013

Clerk Carolyn Kett
Town of Fort Erie
1 Municipal Centre Drive
Fort Erie, ON L2A 2S6

Dear Ms. Kett,

Re: Complaint about February 4, 2013 Closed Meeting of Council

I am writing further to our conversations with you, Councillor Hill, and Mayor Martin on April 22, 2013 regarding the results of our review of complaints that Fort Erie Council held a closed meeting on February 4, 2013 to discuss alleged code of conduct violations by the Mayor. The complaints alleged that the subject matter did not fall within the “personal matters” exception to the open meeting requirements, which Council relied on for holding the discussion behind closed doors.

As you know, the *Municipal Act, 2001* (the Act) requires that all meetings of Council, Local Boards, and their Committees be open to the public with limited exceptions. The Ombudsman is the closed meeting investigator for the Town of Fort Erie. In reviewing this complaint our Office spoke with you and Councillor John Hill (who chaired the closed meeting) , obtained and reviewed the meeting documentation, and considered the relevant provisions of the Act and the Town’s Procedure By-Law.

For the reasons set out below, we have determined that this closed meeting was not authorized under the exceptions in the *Municipal Act*.

February 4, 2013 Meeting

The Town’s Procedure By-Law states that the Clerk “shall provide public notice of all meetings of Council and Committee by posting a notice on the website of the Town...”

The Agenda for the February 4, 2013 Council-in-Committee meeting was posted on the Town’s website and advised that a closed session would be held to discuss:

a) Personal Matters about an Identifiable Individual pursuant to Section 239 (2)(b) of the Municipal Act, 2001.

*Re: Potential Code of Conduct Violations by Member of Council (I.C.E.
CONFIDENTIAL MEMORANDUM)*

The public minutes show that Council passed a resolution to proceed in camera under the “personal matters” exception to discuss a code of conduct violation by a member of Council, as stated in the agenda.

All members of Council, except for the Mayor, attended the closed meeting, along with you and the then Acting CAO, Ron Tripp.

The meeting lasted approximately one hour. The minutes reflect that Council reviewed a confidential memorandum prepared by the Clerk.

According to the information provided by you and Councillor Hill, the closed session was arranged to discuss the Mayor’s alleged breach of the Town’s Code of Conduct with respect to a provision that prohibits Council members from releasing or disclosing information received or reviewed in a closed session. The alleged breach relates to a press release issued by the Mayor and posted in Bullet News on December 19, 2012 outlining the Mayor’s frustration with the CAO hiring process and decisions made by Council and the CAO Hiring Panel with respect to the selection of a candidate.

At the February 4, 2013 closed session, Council discussed concerns that specific comments made by the Mayor about the hiring competition and candidates, as well as other statements, violated the confidentiality clause in the Code of Conduct and may have potential repercussions, including possible legal implications, for the Town. Councillors reportedly expressed views on the Mayor’s conduct and discussed possible options for addressing the alleged breaches.

We were told that, because Council members were assessing and expressing views about the Mayor’s conduct, the discussion was believed to fall within the “personal matters” exception of the Act. Councillor Hill also said that, because the discussions included information that was the subject of closed meetings generally, Council members wanted to avoid breaching confidentiality themselves.

One of the options considered within the closed meeting was to appoint an Integrity Commissioner and Council directed the Clerk to obtain more detail about that option. This was reported on in the public session following the closed meeting as follows:

The Clerk be directed to submit a report to Council addressing all of the elements associated with appointing an Integrity Commissioner including but not limited to, a review of the Code of Conduct, cost, timing, potential partnerships with area municipalities and the Region, duties and responsibilities and sanctions.

Analysis

The *Municipal Act* does not define “personal matters”. However, the Information and Privacy Commission (the Commission) has issued a number of orders that assess and define what types of information can be considered personal.

For instance, the Commission has found¹ that “to qualify as personal information under the Act, the information must be about the individual in a personal capacity. 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...However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.”

In Order PO-2225, the Information and Privacy Commissioner adopted a two-step approach to interpreting the distinction between personal information and business/professional information:

... the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?...

The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently

¹ IPC Order MO-2368/November 26, 2008

personal in nature?

Closed Meeting Investigator Douglas R. Wallace considered a similar situation in a 2009 investigation of closed meetings held by Ottawa Council between December 2008 and January 2009. In that case, Council proceeded in camera under the “personal matters” exception in order to address a concern that a Councillor made unauthorized statements to the media about the status of labour negotiations. Council wanted to censure the Councillor for the conduct.

Investigator Wallace concluded that, as the statements were made by the Councillor in the course of his professional duties as a member of Council, the subject matter did not fall within the “personal matters” exception to the open meeting requirements.

In regard to Fort Erie Council’s discussion of a potential breach of the Town’s Code of Conduct, the conduct at issue and discussed in the closed meeting involved actions taken by the Mayor within the course of his official duties and in relation to municipal business. The specific conduct that inspired the calling of the February 4, 2013 closed meeting was the Mayor’s public statement to the media regarding dissatisfaction with the CAO hiring panel’s decisions. The grievances reportedly expressed in the closed meeting about the Mayor’s conduct were also publicly aired in a December 21, 2012 ‘Niagara This Week’ news article, titled, “Councillors Call Out Fort Erie Mayor”. The Article quotes Council members raising concerns about “intimidation” and “breach of confidentiality” by the Mayor in relation to the CAO hiring process and the December 19, 2012 press release.

Based on the information provided, the subject matter discussed at the February 4, 2013 closed meeting pertains to matters involving the Mayor in his “professional” versus “personal capacity”. We were not advised of any statements made in the closed session that revealed anything inherently personal about the Mayor.

In light of the above, the February 4, 2013 closed session was not authorized under the exceptions of the *Municipal Act*.

When we spoke on February 14, 2013, Councillor Hill raised the point that the alleged Code of Conduct breach was discussed in closed session because it was a sensitive topic and there was a risk that Council members may make comments of a personal nature that could then not be retracted. While we appreciate that Council was trying to be discrete in

regard to a sensitive topic, this does not bring the subject matter within the “personal matters” exception.

You advised that this letter would be shared with Council at a public meeting on May 13, 2013 and a copy posted on your website.

Thank you for your cooperation with our review.

Sincerely,

Yvonne Heggie
Early Resolution Officer
Open Meeting Law Enforcement Team