



ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

July 14, 2011

Yvonne Aubichon
Clerk Administrator
Town of Kearney
P.O. Box 38, 8 Main Street
Kearney, Ontario
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Dear Ms. Aubichon:

Re: Our File No. 234652

I am writing further to our telephone conversation of July 13, 2011, regarding the results of our Office's review of two closed meeting complaints. The first complaint alleged that the Town's Ad Hoc Personnel Committee met in closed session without notice on April 29, 2011. The second complaint alleged that some issues discussed *in camera* at the April 1, 2011 Council meeting should have been discussed in open session.

When we spoke on July 13, we summarized the results of our preliminary review. We also provided suggestions regarding some "best practices" for closed meetings, which we asked that you share with Council.

April 29 Ad Hoc Personnel Committee Meeting

The complaint to our Office alleged that on April 29, 2011 the Town's Ad Hoc Personnel Committee (the Personnel Committee) met to interview a prospective candidate for the position of Chief Building Official (CBO). In reviewing this complaint, we obtained information from you and the Assistant Manager to the Clerk Administrator about the role and function of the Personnel Committee, including Council's February 18, 2011 resolution establishing various Committees of Council, Advisory Committees and Boards ("Schedule "A""). We also considered relevant provisions of the *Municipal Act, 2001* (the Act) and the Town's Procedure By-Law.

As outlined in Schedule "A," the Personnel Committee is a three-member committee comprised of Mayor Tomlinson, Councillor Dingwall and the Clerk Administrator, which meets on an ad

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hoc basis to "review, provide input to Kearney's human resource policy, remuneration, benefit packages and collective agreement". According to Schedule "A," the Personnel Committee also is "directly involved in all management disciplinary, hiring and dismissal matters."

You confirmed that the Personnel Committee currently is constituted as set out in Schedule "A," and that the Committee has not yet held a scheduled meeting. You also confirmed your understanding that the Personnel Committee, as a Committee of Council, would be required to comply with the open meeting provisions of the Act and the Town's Procedure By-Law, including providing public notice of meetings, holding open meetings and keeping a record of meeting proceedings.

Based on the information we received, the April 29, 2011 gathering was an interview of one prospective CBO candidate by a three-member interview panel, held at an off-site location in a neighbouring municipality. You explained that interview panels for Town staff positions are typically comprised of staff only; in the case of the CBO hiring process, however, it was determined that one Council member would sit on the interview panel. You explained that the panel originally was assembled to comprise the Clerk Administrator, the Assistant Manager to the Clerk Administrator, and one member of Council. We understand that the Assistant Manager to the Clerk Administrator was unable to attend the April 29 interview of a CBO candidate, and accordingly the panel was revised to include the Clerk Administrator, Mayor Tomlinson and Councillor Dingwall.

The Act provides that all meetings of council, local boards and committees shall be open to the public. For the purpose of the open meeting requirements, the Act defines a committee as "any advisory or other committee, subcommittee or similar entity of which at least 50 per cent of the members are also members of one or more councils or local boards." (s. 238(1)) Therefore, the personnel committee is a committee of Council for the purpose of the Act, and is subject to the open meeting requirements. Furthermore, the April 29 assembly of the interview panel, of which 2/3 were members of council, can be considered to be a meeting of the Personnel Committee within the meaning of the Act.

You explained that as the interview was not considered by the panel to be a meeting of the Personnel Committee, none of the Act's open meeting provisions was complied with. We also understand that the Personnel Committee did not make any decisions regarding the eventual hire of a CBO candidate, either at the April 29 interview or at any other time. When we spoke on July 14 we discussed that the Ombudsman has provided the following definition of what constitutes a "meeting" for the purpose of the open meeting requirements:

Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.

As discussed on July 14, it appears that on April 29 the members of the committee gathered for the purpose of laying the groundwork for future decision-making. Therefore, this gathering was technically a meeting of the Personnel Committee, conducted in violation of the Act's open meeting requirements.

During our conversation you expressed general agreement with these observations. We encouraged that in future all members be vigilant in ensuring that any assembly of the Personnel Committee comply with the Act's open meeting requirements, including providing notice of meetings to the public. Personnel Committee meetings should also be open to the public, unless the subject matter of the meeting falls within one of the statutory exceptions to the open meeting requirements outlined in s. 239 of the Act.

Under these circumstances, we will not be pursuing further review of this complaint.

April 1 Council Meeting

The complaint to our Office alleged that some items discussed *in camera* at the April 1 meeting should have been discussed in open session. In reviewing this complaint, we obtained information from you and reviewed the meeting materials from the April 1 meeting.

The open session minutes indicate that four items were discussed in closed session, and two statutory exceptions were cited in the resolution to proceed into closed session:

1. Personal matters about an identifiable individual, including municipal or local board employees
 - Council relations
 - Contract service
2. Advice that is subject to solicitor-client privilege including communications necessary for that purpose
 - Blog
 - Original Shore Road Allowance (OSRA)

Regarding the item “Original Shore Road Allowance”, you advised our Office that this item was closed under the “solicitor-client privilege” exception because Council was provided with information regarding an upcoming court case. During this conversation we noted that it appeared that the litigation exception outlined in s. 239(2)(e) of the Act may have been more appropriate. You advised our Office that it was your understanding that the litigation exception should be narrowly construed; as such, you did not want to misuse the exception, and solicitor-client privilege was cited instead as the reason for proceeding *in camera*.

When we spoke on July 13 we noted that, given the principles of openness; transparency; and accountability that the open meeting provisions promote, it is the Ombudsman’s view that all of the exceptions to the open meeting requirements should be narrowly construed. Regarding the litigation exception specifically, it is our Office’s view that this exception should be prudently applied, and generally should be limited to circumstances in which Council is discussing actual future or ongoing litigation, rather than speculating about litigation that may occur. In this case, it appears that Council was discussing an ongoing litigation matter, and the litigation exception would therefore have been appropriate for the *in camera* discussion.



Regarding the item “Contract Service”, you advised our Office that information about an individual staff member was discussed during the closed portion of the meeting. When we spoke on July 13, we noted that not all information pertaining to municipal employees would be considered “personal matters” for the purpose of s. 239(2)(b). Information that pertains to an individual in his or her personal, rather than professional, capacity or information that involves an examination of the employee’s performance may qualify as “personal information”, which properly could be discussed *in camera*. We also noted, however, that the exceptions outlined in s. 239(2) of the Act are discretionary, and that even if a portion of a discussion falls within the permissible exception, Council should ensure that any information that properly could be discussed in open session is in fact discussed during the public portion of the meeting.

During our conversation we also noted that the Ombudsman encourages Council to report back to the public on what was discussed during the *in camera* session, at least in a general way. You advised that the Mayor had reported back to the public on the items discussed during the closed session; however this was not captured in the open session minutes. You advised that this was omitted because the minutes are to be kept “without note or comment.”

We discussed that the Ombudsman is of the view that all procedural and substantive issues discussed during an open or closed session should be recorded. In the Ombudsman’s report concerning his investigation into a meeting of the City of Oshawa’s Developmental Services Committee, he noted:

The admonition not to include notes or comments does not mean that no information regarding the subjects 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 open meeting provisions, which are directed at enhancing the openness, transparency and accountability of municipal government. While extraneous notes and comments not germane to the actual proceedings of a committee should be excluded, the minutes should reflect what actually transpired, including the general nature of the subjects discussed.

You indicated general agreement with the observations and suggestions made by our Office and committed to share our Office’s suggestions with Council. We encourage you to discuss our review and suggestions with Council publicly, and request that you notify our Office when this occurs.

I would also like to take this opportunity to thank you for the cooperation our Office received during this review.

Yours truly,

Michelle Bird
Ombudsman Ontario