

April 23, 2012

Mr. Dean Iorfida
City Clerk
City of Niagara Falls
4310 Queen Street
Niagara Falls, ON L2E 6X5

Dear Mr. Iorfida,

Re: Our File No. 250459

I am writing further to our telephone conversation on April 23, 2012 regarding the results of the Ombudsman's review of a complaint made to our Office about an October 3, 2011 closed meeting of Council. The complaint alleged that the meeting was improperly closed to the public and a decision was reached in the meeting to ban a member of the public from future council meetings.

As you know, the *Municipal Act* requires that all meetings of Council, local boards, and committees of council are open to the public, with limited exceptions. Our Office is the closed meeting investigator for the City of Niagara.

In reviewing the complaint, our Office spoke with you and reviewed the agenda and minutes for the October 3 closed meeting as well as the December 12, 2011, and January 24, 2012 closed meetings in which the same matter was discussed. In addition, our Office reviewed the relevant By-Laws, procedures, and sections of the *Municipal Act*, 2001 (the Act).

October 3, 2011 meeting

According to the City's Procedure By-Law (No. 89-155) Council meetings are held at 6:00 p.m. on the dates confirmed in the Schedule available on the City's website.

Based on the information provided, Council held a closed meeting at 5:00 p.m. on Monday October 3, 2011 prior to the regular meeting of council.

In regard to notice of the closed meetings, you said that the meeting Agenda is usually posted on the City's website on the Wednesday or Thursday prior to the Council meetings (generally held on Mondays in 2011 and held on Tuesdays in 2012).

The Agenda for the October 3, 2011 meeting did not indicate that a closed meeting was scheduled for 5:00 p.m. You explained that Council's practice is to pass a resolution to hold a closed meeting and announce it at the Committee of the Whole meetings, which are public meetings that typically take place approximately one hour prior to the closed meeting and the following regular meeting of Council.

When the resolution is passed to hold a closed meeting it is added to the Agenda package, which can be over 100 pages in length. The Agenda package is distributed to Council, staff, and some members of the media.

The exception cited in the written resolution for holding the in-camera meeting on October 3 was to seek advice that is subject to solicitor-client privilege pursuant to s. 239 (2) (f) of the *Municipal Act*.

While the public meeting minutes for October 3, 2011 mention that a closed meeting was held at 5:00 p.m., the minutes do not provide any information about the nature of the topic(s) discussed in closed session or the exception under the *Act* authorizing the in-camera meeting.

According to the Minutes of the *in-camera* meeting, the matter considered involved security concerns about a member of the public. You advised that the Solicitor was present at the meeting and Council sought his advice about what action to take to address the issue. The *in-camera* minutes do not specifically mention that the Solicitor was present but indicates, "All present".

The minutes show that Council voted on whether or not to direct the Solicitor to take certain legal action to address security concerns, which was defeated. According to the Minutes, the vote was taken under s. 239 (6) (b) which states,

...a meeting may closed to the public during a vote if, ...

(b) the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality,

December 12, 2011 and January 24, 2012

The information provided indicates that Council also met on December 12, 2011 and January 24, 2012 to discuss the security matter mentioned above.

Notice of the closed meeting was provided in the same manner as the October 3, 2011 meeting – a resolution was passed and announced at the Committee of the Whole meeting held just prior to the closed session and the regular meeting of Council. The written resolution was then included in the Agenda package.

For both the December 12 and January 24 closed meetings, the exception cited for holding the discussion in camera was, “security of the property of the municipality” pursuant to s. 239 (2) (a) of the Act.

You said that the meeting was also closed in order to seek advice subject to solicitor-client privilege and that the City Solicitor was present at these meetings.

The publicly available minutes for the December 12, 2011 meeting do not mention that a closed meeting took place. While the January 24, 2012 minutes confirm that Council held a closed meeting at 4:00 p.m. prior to the regular Council meeting, they do not provide any information about the nature of the in-camera session or the exception authorizing the closed meeting,

Councillors voted again at the December 12 and January 24 meetings about whether to direct the Solicitor to take certain action. A confidential report outlining recommended actions was considered at the January 24 meeting and Council voted to approve certain security measures but did not report back on that particular issue in the public meeting that followed.

Findings and Procedural Recommendations

As discussed, although the security issue described appears to be a topic appropriate for *in-camera* discussion, we identified a number of procedural issues and provided some suggestions regarding best practices for future meetings.

Under the *Municipal Act*, the Municipality’s Procedure By-Law “shall provide for public notice of meetings.” Although you advised that the City’s practice is to provide notice of Council meetings by posting an agenda on the website on the Wednesday or Thursday prior the Council meeting, the agenda document that is posted does not include notice of the closed meeting. The first public notice of the closed meeting occurs during the Committee of the Whole meeting approximately one hour prior to the closed session.

Given the City's practices, the public would have to be present at the Committee of the Whole meeting in order to be aware that a closed meeting is to be held later that day.

While the *Municipal Act* does not specify the content of public notice, our Office suggested that the agenda that is posted on the City's website include advance notice of closed meetings, the exception under which the meeting is being closed, and the general nature of the matter to be discussed.

The Ombudsman has suggested that, in order to provide for public notice, items only be added to an agenda after it is posted to the public in limited and urgent circumstances and then, only after procedural formalities have been observed.

Since the City's Procedural By-Law did not include the City's closed meeting procedures, including a public notice provision, Council should consider amending the Procedure By-Law to include this information.

Further, in the interest of transparency, we suggested that the open meeting minutes confirm not only that the closed meeting was held but the nature of the closed meeting and the exception cited for closing the meeting to the public. Council should generally also rise and report publicly after the completion of each closed meeting and indicate that in the public minutes. With respect to the December 12, 2011 closed meeting, the public minutes do not make any reference to the closed meeting.

Under the *Municipal Act*, meetings may be closed to the public if matters to be discussed involve security of the property of the municipality. Although the Act does not define 'security of the property', the Information and Privacy Commissioner has considered the meaning of the term and in a 2009 decision¹ which stated in part,

In my view, 'security of the property of the municipality' should be interpreted in accordance with its plain meaning, which is the protection of property from physical loss or damage (such as vandalism or theft) and the protection of public safety in relation to the property.

During our discussion you agreed that the subject matter discussed in the closed meetings did not involve security of the property and that the more appropriate exception would have been "personal matter about an identifiable individual" (s. 239 (2) (b)) and/or "to seek advice that is subject to solicitor client privilege" (s. 239 (2) (f)).

¹ Information and Privacy Commission Order MO-2468-F; re: City of Toronto (October 27, 2009)



As noted, voting is prohibited in closed meetings unless the meeting is appropriately closed under an exception under the Act and “the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality...”

In regard to the votes taken in the October 3, 2011, December 12, 2011, and the January 24, 2012 closed meetings, they are described as votes to direct the City Solicitor to take certain legal action and/or direction to staff. However, the January 24, 2012 in-camera minutes indicate that Council considered a number of security measures and voted to implement a number of those options. Although staff would be involved in the implementation, the underlying decision to adopt those measures may be viewed as substantive in nature and, therefore, more appropriate for the public meeting.

When we spoke, you expressed general agreement with our observations and agreed to discuss our review with Council and to add the letter to the Agenda at the next possible meeting of Council.

Under the circumstances, we will not be pursuing further review of this complaint. I would like to take this opportunity to thank you for your cooperation during this review.

Sincerely,

Yvonne Heggie
Early Resolution Officer
Open Meeting Law Enforcement Team