

February 6, 2013

Ms. Maureen Lang, Clerk-Treasurer
Municipality of Powassan
466 Main Street
PO Box 250
Powassan, ON
POH 1Z0

Ms. Lang,

RE: Review of closed meetings

I am writing further to our conversations of December 18, 2012 and February 5, 2013, regarding the results of our review of a complaint that council held a number of improperly closed meetings to discuss a proposal for a local rental property and an Ontario Municipal Board (OMB) issue between November 2011 and September 2012.

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. In reviewing this complaint, our Office spoke with you and reviewed the meeting agenda and minutes, as well as the relevant sections of the Town's procedure by-law (2011-22) and the Act.

Council procedures

Regular meetings of Council are held the first and third Tuesday of every month. Notice of meetings is published in the local newspaper.

With respect to recording meetings, the by-law states that the municipality has the right to audio record all meetings of Council and Committee. However, no recording devices shall be used during the *in camera* sessions of any meeting (ss. 5.2 and 5.4). Minutes shall be kept of all closed meetings, identifying the members present and absent, and the senior staff present, in the same fashion as those kept for open sessions.

Section 6.3 of the by-law states that, before holding a meeting or part of a meeting that is to be closed to the public, Council shall state by resolution:

- a) the fact of holding the closed meeting
- b) the subsection of the *Municipal Act* which authorizes each item to be considered in closed session.

The by-law does not mention providing the general nature of the subject matter to be considered at the closed meeting, which is a requirement of the Act.

Motions can be added to the agenda “if not more than one member of Council present at the meeting objects to its consideration.” (s. 32.2)

As we discussed, in reviewing this complaint our Office found that the OMB issue in question was not in fact discussed at all meetings complained of. We have reviewed the meetings at which the issue was discussed, and identified any relevant closed meeting issues pertaining to the *in camera* discussions held at those meetings.

November 1, 2011 meeting

The agenda for this meeting stated that there would be nine items discussed *in camera*. The resolution to proceed into closed session included a tenth item (item 18.10) to be discussed under the personal matters about an identifiable individual exception.

The procedure by-law states that items can be added if not more than one member objects. There is no indication in the minutes regarding how this matter was added, or whether any debate or vote took place to determine that council agreed to add the item. During our conversation of December 18 you indicated that, usually, such a discussion would occur and would be captured in the minutes.

We discussed that, in general, last minute items should only be added to the agenda in urgent situations and after any necessary formalities have been observed. Any discussions regarding whether an item should be added at the last minute should be captured in the open session minutes.

Item 18.10 pertained to a request to the Chief Building Official to prepare a report regarding meetings held with an individual involved in developing a local rental property.

The *Municipal Act* does not define “personal matters.” However, the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* contains a similar phrase – “personal information” – that is defined. This definition has been considered by both the Information and Privacy Commissioner and the courts. While the definition of “personal information” in *MFIPPA* does not dictate how the phrase “personal matters” in the

Municipal Act should be interpreted, it does provide a useful reference point.

Section 2(1) of *MFIPPA* defines “personal information” as follows:

“personal information” means recorded information about an identifiable individual, including, in part:

- the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

It appears that the name of the individual involved in developing the rental property was revealed at the November 1, 2011 meeting. However, it also appears that this individual’s name and details of the rental property were included in local media reports as far back as August 2011. While it is possible that the actual report of the Chief Building Official would reveal “personal information” about this individual, it does not appear that council’s request to the Chief Building Official to prepare the report would reveal anything about this individual that was not already public knowledge. Accordingly, this item was not permitted for discussion in closed session under the any of the exceptions listed in the *Municipal Act*, and was discussed *in camera* in violation of the Act.

December 6, 2011 meeting

The agenda for this meeting stated that there would be ten items discussed *in camera*. Item 18.5 pertained to the OMB matter and was discussed under the “litigation or potential litigation” exception (s. 239(2)(e) of the Act). You confirmed that the OMB matter was in progress at the time of the meeting. As this was an ongoing legal proceeding, this matter could properly be discussed *in camera* under this exception.

July 3, 2012 meeting

According to the agenda, Council would be discussing four items in closed session. Item 18.4 pertained to the OMB matter and was closed to the public under the “personal matters” exception (s. 239(2)(b) of the Act).

During this *in camera* session, council discussed the upcoming Ontario Municipal Board hearing, and reviewed correspondence from the municipality’s solicitor.

Although this subject matter would have been appropriate for *in camera* consideration, we discussed that either the litigation or potential litigation (s. 239(2)(e)) or solicitor-client privilege (s. 239(2)(f)) exception would have been more appropriate to authorize the discussion, since council was discussing both an upcoming legal proceeding, and advice from the municipality’s legal counsel.

There are many cases in which council may discuss a matter involving identifiable individuals, however this does not necessarily make the subject matter of that discussion “personal matters about an identifiable individual.” Council should be careful to turn its mind to which is the most appropriate exception to authorize a particular closed session discussion. This will ensure that the most accurate information is provided to the public in advance of a closed meeting.

August 7, 2012 meeting

The agenda indicated that Council would be discussing three matters *in camera*. Item 18.3 pertained to a letter from an individual involved in a local rental development, which suggested that certain councillors were in a conflict of interest. This discussion was closed to the public under the “advice subject to solicitor-client privilege” exception. The municipality’s solicitor was not in attendance and there was no reference to legal advice in the *in camera* minutes.

When we spoke on December 18 you advised that you had, in fact, spoken with the municipality’s legal counsel and had relayed specific legal advice from legal counsel to council at the meeting. Accordingly, this portion of the discussion could properly be closed to the public under this exception.

In camera records

We also discussed, however, that the record of the closed meeting should accurately reflect what was discussed. In reviewing the record of the August 7 meeting, as well as other meetings, we noted that not all pertinent information was included in the official record of meetings. In fact, in order to complete our review, key information regarding what was discussed behind closed doors had to be obtained from discussions with staff and reference to personal notes.

In accordance with s. 239(7) of the Act, a municipality is required to record, without note or comment, all resolutions, decisions and other proceedings at its meetings.

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. Generally, the clerk has the responsibility to record the substantive and procedural items that were discussed at a closed meeting. As the Ombudsman noted in his report concerning a special meeting of the City of Oshawa’s Development Services Committee, entitled *The ABCs of Education and Training*:

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.

The Ombudsman also has recommended that municipalities follow a practice of audio recording both open and closed sessions. In the interests of transparency, a number of Ontario municipalities audio record or allow for the broadcast of their open meetings. We have seen some Ontario municipalities who are considering audio recording closed meetings, or have already begun doing so. Several jurisdictions in the United States also require that municipal closed meetings be electronically recorded or videotaped, and others have adopted this practice to enhance the accountability and transparency of their proceedings. This approach helps to ensure that there is a clear, comprehensive and accessible meeting record.

As the Ombudsman noted in our Office's Annual Report on Closed Municipal Meetings, the practice of audio recording both open and closed meetings is in the interest of all of Ontario's municipalities. It inspires community trust in the transparency and accountability of local government. Having a clear, accessible record for closed meeting investigators to review also means that many closed meeting investigations would take far less time, as the necessary information would be readily available on the recording.

The Municipality's Procedure By-Law

When we spoke, we discussed that the municipality's procedure by-law (s. 6.3) says that, before holding a meeting or part of a meeting that is closed to the public, council shall state: the fact of holding the closed meeting, and the subsection of the Act that authorizes the item. We noted that the wording of the Act (s. 239(4)(a)) is that council must pass a resolution stating the fact of holding a closed meeting and the general nature of the subject to be considered.

From the materials provided to our Office it appears that council usually does follow a practice of stating the general nature of the subject matter to be considered during *in camera* sessions. We suggested that the procedure by-law should be amended to reflect this practice.

We also discussed that the procedure by-law (ss. 5.2 and 5.4) says that no audio recording devices should be allowed *in camera*. As noted above, the Ombudsman recommends that municipalities follow a practice of audio recording both open and closed sessions. Council may wish to amend its by-law to allow for audio recording of meetings.

Reporting back

It appears that it is council's current practice to not provide any information to the public

about what occurred during an *in camera* session, unless motions need to be passed in open session as a result of the closed session discussions.

As a best practice, our Office encourages municipalities to report publicly in open session on what transpired in closed session, at least in a general way. In some cases, public reporting might simply consist of a general discussion in open session of subjects considered in closed session, similar to the information in the resolution authorizing the session together with information about staff directions, decisions and resolutions. In other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided publicly.

When we spoke you expressed general agreement with our Office's findings and recommendations and confirmed that this letter would be made available to the public at the next council meeting on February 19, 2013.

Thank you for your cooperation during our review.

Sincerely,

Michelle Bird
Legal Counsel
Open Meeting Law Enforcement Team