



Final Report

“Being More Open About Closed Sessions”

**Investigation into the September 2, 2008
Closed Meeting of the
Council of the Township of Enniskillen**

**André Marin
Ombudsman of Ontario
April 2009**

Complaint

- 1 On September 10, 2008, we received a complaint concerning a closed session held by the Council of the Township of Enniskillen on September 2, 2008. The meeting took place at the end of a regular meeting of council to consider a “property matter.” The complainant alleged that the discussion should not have taken place in closed session, as it did not relate to the acquisition or disposal of land by the township, but to a private residential development proposal.

Ombudsman jurisdiction

- 2 Under the *Municipal Act, 2001*, municipalities are required to pass by-laws setting out the rules of procedure for meetings. The law requires public notice of meetings, and that all meetings be open to the public, unless they fall within prescribed exceptions.
- 3 As of January 1, 2008, changes to the *Municipal Act, 2001* gave citizens the right to request an investigation into whether a municipality has properly closed a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 4 The Township of Enniskillen has not appointed its own investigator and accordingly, the Ombudsman is the township’s closed meeting investigator under s.239 (1) of the *Municipal Act, 2001*.
- 5 In investigating closed meeting complaints, our Office considers whether the meeting was closed in accordance with the provisions of the Act, and the relevant municipal by-laws.

Closed sessions of Enniskillen council

- 6 The Township’s *Procedure By-law 83* of 2007 provides that notice of council meetings is to be posted in the Township Office. It also refers to the circumstances, as provided for in the *Municipal Act, 2001*, in which a meeting or part of a meeting may be closed.

Investigative process

- 7 On December 1, 2008, following preliminary inquiries, the township was notified that our Office would be pursuing an investigation into the complaint concerning the closed session of council held on September 2, 2008.

- 8 During the course of our investigation, we interviewed all five members of council, the clerk and the complainant.
- 9 In addition, documents were obtained from the municipality and reviewed, including minutes, agendas, memoranda, and other municipal records. We also reviewed the township's procedure by-law and applicable legislation.
- 10 The township generally co-operated during the investigation.

Investigation facts

- 11 During the investigation we learned that in April 2007, the township had been asked to consider a proposal from property owners who wished to subdivide farmland on Centre Street into residential lots. The proposal was discussed in an open council meeting on June 24, 2008. The minutes from that meeting reflect that a number of residents who attended raised objections about the proposed development. Another public meeting was held on August 19, 2008, in which the development application was considered. The minutes again reflect that some residents expressed concern about the proposal.
- 12 Notice of the September 2, 2008 regular meeting of council was posted at the township office, as required by the procedure by-law. In accordance with the township's standard practice, an agenda for the meeting was posted along with the notice. One of the items on the agenda under "Other Business" was referenced as "Memo to Council re: Centre St." Neither the notice nor agenda indicated that any issues would be considered in closed session. The clerk advised us that his recollection was that there had been reference at the August 19, 2008 meeting to the fact that the issue of the development proposal would be discussed in closed session on September 2, 2008. However, this is not recorded in the minutes. Both the clerk and the Mayor acknowledged that normally the public is not notified prior to a meeting that a portion will be held *in camera*.
- 13 During the open portion of the meeting on September 2, 2008, council resolved to go into closed session, noting, "that the council moves *in camera* to discuss a property matter."
- 14 When a member of the public questioned why council was proceeding in this manner, the Mayor responded that it was to discuss the Centre Street project, which included a property issue involving the municipality.
- 15 During the closed session, council considered an August 21, 2008 memorandum prepared by the clerk regarding the development proposal. The memorandum did refer briefly to an option relating to the township potentially purchasing and disposing of some land. It also summarized some advice obtained from legal counsel for the township regarding the development proposal. However, most of the document refers to conditions that might be applied with respect to the development application.

- 16** The minutes prepared for the *in camera* meeting indicate that a discussion took place regarding the conditions to be applied to the development of the Centre Street lots, the expansion of the abutting residential lots south of the proposed development, the servicing of the properties and the method to be used to insure compliance with municipal conditions. The minutes also indicate that municipal staff were directed to enter into discussions regarding the conditions to be applied to the development of the property.
- 17** While it is not specifically reflected in the minutes, the clerk indicated that the “heart of the discussion” was a consideration of whether the township might purchase a portion of the development land. However, it is clear that other issues were also considered, including the conditions to be applied with respect to the development proposal.

Public notice of the September 2, 2008 meeting

- 18** The township did post notice of the September 2, 2008 meeting in accordance with its procedure by-law. It also posted the meeting agenda, a practice that is consistent with the intent of the open meeting requirements, as it allows citizens to make an informed choice as to whether to attend a particular meeting. However, the township did not identify that one of the agenda items would be considered in closed session. Consistent with the principle of transparency underscoring the open meeting requirements, agenda items to be considered in closed session should normally be publicly identified in advance with as much detail as possible.

Resolution to go in camera

- 19** The *Municipal Act, 2001* and the township’s procedure by-law both require that, prior to going *in camera*, council must state, by resolution, the fact of the holding of the meeting and the general nature of the matter to be considered at the closed meeting.
- 20** Under s. 239(2)(c) of the *Municipal Act, 2001*, a closed meeting may be held for the purpose of discussing “a proposed or pending acquisition or disposition of land by the municipality or local board.” However, the language of the township’s resolution preceding its *in camera* session on September 2, 2008 was very vague, referring only to pending discussion of “a property matter.” The information provided in a resolution should be as specific as possible. The more information provided in the resolution, the less room there will be for suspicion and conjecture regarding the *in camera* session. As noted by the Ontario Court of Appeal in *Farber v. Kingston City*¹, “the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.” In this case, council could have provided more detail,

¹ [2007] O.J. No. 919, at page 151.

and in fact did do so after questioning by a resident. While the *in camera* discussion of a potential land purchase appears to have been generally authorized by the *Municipal Act, 2001*, the record indicates that council did not restrict its discussion to this subject.

- 21** In addition to lacking detail, council's resolution neglected to reference the other matters that were to be considered outside of public view, including the solicitor's advice and conditions relating to the development proposal.
- 22** While "advice that is subject to solicitor-client privilege" may be considered in closed session in accordance with s.239 (2)(f) of the *Municipal Act, 2001*, council is prohibited from discussing any matter in closed session unless it has been specifically identified in the resolution authorizing *in camera* discussion. As for the conditions to be applied with respect to the development proposal, this topic does not come within any of the exceptions to the requirement that meetings be held open to the public. Accordingly, the discussion of this subject and direction to staff regarding it, in closed session, contravened the open meeting requirements.
- 23** It is critical for the resolution authorizing a closed session to identify all the issues to be discussed in closed session with as much particularity as possible. It not only assists council to limit its *in camera* discussions to permissible subjects, but serves as notice to the public of what will be considered in their absence.

Reporting in public

- 24** The council did not report back in open session regarding the *in camera* session. Council should always follow a practice of reporting publicly, in at least a general way, about matters discussed in closed session, including reference to resolutions, decisions, directions to staff and other proceedings, as appropriate.

Opinion

- 25** The township's conduct in relation to the September 2, 2008, fell short of the procedural requirements set out in the *Municipal Act, 2001*. The resolution it issued to authorize its *in camera* discussion was vague and incomplete. The council considered topics in the closed session that were not identified in the resolution, including the subject of conditions to be applied with respect to the development proposal, which could not be legally considered in this forum.
- 26** Given the apparent concern on the part of some residents relating to the development proposal, it is not surprising that the *in camera* discussion of this topic, which clearly involved consideration of matters that should have been dealt with openly, resulted in a complaint to my Office.

Recommendations

- 27** I am making the following recommendations, which I believe will assist the council of the Township of Enniskillen in meeting its obligations under the open meeting provisions of the *Municipal Act, 2001* in future.

Recommendation 1

The Township of Enniskillen should ensure that in future no subject is discussed in closed session unless:

- (a) It clearly comes within one of the statutory exceptions to the open meeting requirements;
- (b) There is a resolution made in advance in open session authorizing that the subject be discussed in closed session; and
- (c) The subject has been generally described with as much specificity as possible so as to maximize the information available to the public without undermining the reason why the matter is being dealt with *in camera*.

Recommendation 2

The Township of Enniskillen should ensure that its meeting agendas include reference to the general description of subjects to be discussed in closed session with as much specificity as possible so as to maximize the information available to the public without undermining the reason why the matter is being dealt with *in camera*.

Recommendation 3

The council for the Township of Enniskillen should report back in open public session regarding closed meetings, to the extent that this is appropriate.

Recommendation 4

All members of council for the Township of Enniskillen should be vigilant in adhering to their individual obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own by-law.

Response of the Township of Enniskillen

- 28** The Township of Enniskillen responded to my preliminary findings, analysis, opinion and recommendations by letter dated April 2, 2009. The Township's comments were taken into consideration in preparing this final report.
- 29** Prior to sending its response, the township's Clerk sought clarification concerning my Recommendation 3, calling on council to report back publicly after conducting a closed session. At that time, my staff explained that reporting back in open session in this manner is viewed as a best practice, and that the extent of information released in open session would depend on the context of and subjects discussed within the closed session. As a general rule, similar to resolutions to enter closed sessions, public discussion of matters considered in closed session should seek to maximize the information available to the public while not undermining the reason for excluding the public from the closed session in the first place.
- 30** I would encourage the Township to implement my recommendations fully so that its practices may more properly reflect the principles of openness, transparency and accountability for the benefit of its citizens.

Report

- 31** The council of the Township of Enniskillen is required to make this report public in accordance with s.14 (2.6) of the *Ombudsman Act*.



André Marin
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