



Council for the Township of the North Shore
P.O. Box 108, 1385 Hwy 17
Algoma Mills, ON
P0R 1A0

July 9, 2020

Sent by email

Dear Members of Council for the Township of the North Shore:

Re: Closed meeting complaint

My Office received a complaint about a closed meeting held by council for the Township of the North Shore on April 15, 2020, by videoconference. During that meeting, council discussed a vacancy in the position of mayor. The complaint alleged that council's discussion did not fit within the open meetings exception for advice subject to solicitor-client privilege because the meeting was attended by an external governance consultant who also acts as the township's Integrity Commissioner.

I am writing to advise that my review has determined that council's discussion on April 15, 2020, fit within the exception for advice subject to solicitor-client privilege and that my Office will not be further assessing this complaint.

Closed meeting investigator

As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality or its local boards have complied with the *Municipal Act, 2001* in closing a meeting to the public.¹ Municipalities and local boards may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the

¹ *Municipal Act*, SO 2001, c 25, s 239.1.

default investigator for municipalities that have not appointed their own. I am the closed meeting investigator for the Township of the North Shore.

To assist municipal councils, staff, and citizens, we have developed an online digest of open meeting decisions that contains summaries of the Ombudsman's open meeting cases. This searchable repository was created to provide interested parties with easy access to the Ombudsman's past decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether a matter should or may be discussed in closed session, as well as issues related to open meeting procedure. Summaries of previous Ombudsman decisions may be consulted in the digest at www.ombudsman.on.ca/digest.

Review

On May 21, 2020, my Office advised the township that we would be investigating this complaint. As part of the investigation, my Office reviewed the relevant agenda, open and closed session minutes, a draft by-law reviewed at the meeting, and documentation related to the township's contract with its Integrity Commissioner. We conducted interviews with three members of council, as well as the township Clerk, external solicitor, and Integrity Commissioner. We received full co-operation with our investigation.

Meeting on April 15, 2020

The meeting minutes indicate that council entered closed session at 7:15 p.m. on April 15, 2020, under the exception for "advice subject to solicitor-client privilege," citing s. 239(3.1) of the Act. I note that the exception for solicitor-client privilege is found at s. 239(2)(f) of the Act, while subsection 3.1 pertains to discussions about education or training. All those interviewed by my Office agreed that the exception for "solicitor-client privilege" was the intended exception and this is confirmed by the text of the resolution.

The resolution to enter closed session indicated that council went in camera to receive advice from the township's solicitor on the issue of the "Mayor's vacancy." Attendees at the closed session included four members of council, the township's Clerk and external solicitor, and a consultant from the municipal governance consultancy E4M, listed in meeting documents as the Integrity Commissioner. The Township of the North Shore relies on E4M for both Integrity Commissioner services and other general advice to council.

According to our discussions with those in attendance at the closed session, council discussed a draft by-law prepared by the township's solicitor, which laid out a procedure for filling the

vacant position of mayor. Council also received advice related to the draft by-law from the consultant. After approximately four hours in closed session, council briefly returned to open session in order to pass a confirmation by-law and to adjourn the meeting.

Analysis

Section 239(2)(f) of the Act allows a municipality to proceed in camera to discuss “advice subject to solicitor-client privilege, including communications necessary for that purpose.” The closed meeting exception for solicitor-client privilege applies to discussions between the municipality and its solicitor while seeking or receiving legal advice intended to be confidential.² The solicitor-client relationship exists exclusively between the municipality and its solicitor. Consequently, the presence of a third party may constitute a waiver of solicitor-client privilege, in which case the exception in s.239(2)(f) of the Act might not apply.³

As an officer of the municipality, an Integrity Commissioner will not generally be considered a third party. However, in this case, the representative of E4M currently serving as the township’s Integrity Commissioner participated in the closed session to provide operational advice to council about the draft by-law. This type of advice falls outside the statutory role of an Integrity Commissioner as defined in the Act, suggesting that the representative of E4M attended in her capacity as a third-party governance consultant.

Nevertheless, the presence of a third party does not automatically constitute a waiver of solicitor-client privilege. Privilege can be maintained, for instance, if the third party is part of a continuum of communications between advisors working hand-in-hand within their respective areas of expertise to advance the client’s interests.⁴ In this case, the E4M representative attended the closed session in her capacity as a consultant to present operational advice that supplemented the confidential legal advice given by the solicitor. These communications were intended to be confidential and there is no indication that privilege was waived.

² *Descôteaux et al. v. Mierzwinski*, [1982] 1 SCR 860. See more recently *Timmins (City of) (Re)*, 2017 ONOMBUD 4 at paragraph 28, online : <<http://canlii.ca/t/h4rwt>>

³ See my Office’s findings with respect to the Township of Ryerson, November 8, 2013, online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2013/township-of-ryerson-en>>; and the Township of Adelaide Metcalfe, May 23, 2012, online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2012/township-of-adelaide-metcalfe>>

⁴ *Trillium Motor World Ltd. v. General Motors of Canada Ltd.* 2014 ONSC 1338 at paragraphs 153-155; appeal dismissed, 2014 ONSC 4894. See also *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paragraph 63.

On this basis, my review indicates that council's in camera discussion of the draft-by law prepared by the township's solicitor was permissible under s. 239(2)(f) of the Act.

Best practices

A municipal Integrity Commissioner occupies a statutory office whose role and function is defined at s.223.3 of the Act. When, as in this case, the person appointed to act as Integrity Commissioner also fills other roles in municipal governance, it is a best practice to clearly identify in meeting documents and other records the capacity in which that person attends a given meeting. In this case, a lack of clarity as to the consultant's role at the meeting appears to have contributed to concerns that the meeting was improperly closed.

Finally, council and staff should be mindful in drafting future closed meeting resolutions to ensure that the exception cited in the resolution aligns with the appropriate exception in the Act.

I would like to thank the township for its co-operation in this investigation. I ask that this letter be made available to the public no later than the next meeting of council for the Township of the North Shore.

Sincerely,



Paul Dubé
Ontario Ombudsman