

April 15, 2021

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

Sent by email to municipalclerk@townshipofthenorthshore.ca

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

Re: Complaints about the October 8 and October 29, 2020 council meetings

My Office received a complaint about meetings held by council for the Township of the North Shore (the "Township") on October 8 and October 29, 2020. During both meetings, council held a closed session under the "advice subject to solicitor-client privilege" exception in the *Municipal Act, 2001* (the "Act"). The complainant told my Office that closed sessions were improper because a lawyer was not present to provide legal advice.

I am writing to share the outcome of my Office's review. Based on the evidence, I do not find that the meetings contravened the Act's open meeting rules.

Ombudsman jurisdiction

As of January 1, 2008, the *Municipal Act* gives citizens the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public.¹ Municipalities may appoint their own investigator. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own. My Office is the closed meeting investigator for the Township of the North Shore.

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

In reviewing closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's governing procedures have been observed.

Our Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman's 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 certain matters can or should be discussed in closed session, as well as issues related to open meeting procedure. Summaries of previous Ombudsman decisions can be found in the digest at:

www.ombudsman.on.ca/digest.

Review

My Office reviewed the meeting agendas and the open and closed session minutes for the October 8 and October 29, 2020 meetings. Members of my Office spoke with the Township Clerk about the meetings.

On October 8, 2020, council held an electronic meeting. The open session minutes indicate that council resolved to proceed *in camera* under the "personal matters" and "advice subject to solicitor-client privilege" exceptions. The resolution does not include a description of the matters to be discussed *in camera*. However, the minutes record that council reported out after returning to open session that:

Council met in Closed Session to consider a personal matter about an identifiable individual and received information and advice from Legal Counsel. Council provided direction to Legal Counsel.

According to the closed session minutes for the October 8 meeting, council and the clerk were present during the closed session. The Township's solicitor was not present. However, the minutes record that council received and discussed written legal advice from the solicitor.

On October 29, 2020, council held an electronic meeting. According to the open session minutes, council passed a resolution to proceed *in camera* to discuss three items under the exceptions for personal matters, labour relations, litigation or potential litigation, and advice subject to solicitor-client privilege. The resolution stated that the subject matters of the *in camera* discussion were: a) personnel matter(s); b) municipal restructuring; and c) legal consultation.

The closed session minutes for the October 29 meeting record that the Township's solicitor participated electronically during the closed session. According to the minutes, the solicitor provided legal advice to council.

After returning to open session, council reported out the following:

The Acting Clerk reported that the Township of the North Shore Council met in Closed Session regarding a personnel matter about identifiable individuals, municipal restructuring and additionally received information from the Solicitor regarding a human resources legal matter. Council received information and direction from Legal Counsel and Council provided authority to Legal Counsel to proceed further with the matter.

Application of the "advice subject to solicitor-client privilege" exception

The exception for advice subject to solicitor-client privilege found in section 239(2)(f) of the Act covers discussions that include communications between a municipality and its solicitor in seeking or receiving legal advice intended to be confidential.² The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure. The Supreme Court of Canada has found that solicitor-client privilege extends when three pre-conditions are met:

1. there is a communication between a lawyer and a client;
2. which entails the seeking or giving of legal advice; and
3. which is considered to be confidential by the parties.³

My Office has consistently found that it is not necessary that the municipality's solicitor be present for the exception to apply. For example, a written legal opinion may be considered in closed session under the exception or staff may convey legal advice from a lawyer to council during a closed session.⁴

My review of the October 8 and October 29, 2020 council meetings indicate that council's discussion of legal advice *in camera* was permissible under this exception of the Act. On October 8, council received and discussed written legal advice from the Township solicitor *in*

² *Timmins (City of) (Re)*, 2017 ONOMBUD 4 at para 28, online: <<http://canlii.ca/t/h4rwt>>.

³ *Solosky v. The Queen*, [1980] 1 S.C.R. 821

⁴ See for example: *Greater Sudbury (City of) (Re)*, 2017 ONOMBUD 2, online: <<http://canlii.ca/t/h4rwp>>.

camera. On October 29, the Township solicitor participated in the closed session and provided council with legal advice.

Resolution to proceed in camera

Section 239(4) of the Act provides that before moving into a closed session, a municipality must state by resolution in open session that a closed meeting will be held, and state the general nature of the matter to be considered at the closed meeting. In *Farber v. Kingston (City)* (2007 ONCA 173), the Ontario Court of Appeal determined that the resolution to go into a closed meeting 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.

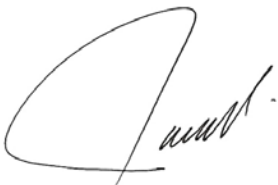
While the Township provided information about its closed session discussion in council's report out on October 8, 2020, the same information was not included in the resolution to move *in camera*. Instead, the resolution merely provided the section of the *Municipal Act* that council relied on to close its meeting to the public. When asked about this, the Clerk acknowledged that the resolution was missing a general description of the closed session matters to be discussed.

In future, the Township should ensure that its resolutions to proceed *in camera* 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.

Conclusion

I would like to thank the Township for its co-operation during my review. The Mayor confirmed that this letter would be included as correspondence at an upcoming council meeting.

Sincerely,



Paul Dubé
Ombudsman of Ontario

Cc: Barbara Major, Interim Clerk