



February 23, 2021

Council for the Township of Russell
717 Notre-Dame Street
Embrun, ON
K0A 1W1

Sent via email: pierreleroux@russell.ca

Dear Council for the Township of Russell:

Re: Closed meeting complaint

My Office received a complaint about a closed meeting held by council for the Township of Russell (the “Township”) on September 8, 2020. The complainant alleged that council’s *in camera* discussion did not fit within the closed meeting exceptions in the *Municipal Act, 2001* (the “Act”).

I am writing to share the outcome of my Office’s review.

Closed meeting investigator

Under the Act, all meetings of council, local boards, and committees of each must be open to the public, unless they fall within prescribed exceptions. 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 Act in closing a meeting to the public.

Municipalities and local boards 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. My Office is the closed meeting investigator for the Township of Russell.

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 procedures. Summaries of previous Ombudsman decisions can be found in the digest at www.ombudsman.on.ca/digest.

Review

The complaint we received alleged that council's *in camera* discussion about a zoning dispute did not fit within the closed meeting exceptions in the Act. Council cited two closed meeting exceptions from the Act in its resolution to proceed *in camera*. These were the exceptions for personal matters about an identifiable individual (s. 239(2)(b)) and litigation or potential litigation (s.239(2)(e)).

My Office reviewed the relevant meeting agenda, open and closed session minutes, and the municipality's procedure by-law. We also spoke with the Township's Clerk and Mayor.

The resolution to go into closed session stated that council would discuss a "zoning issue in the Village of Russell". The report out of closed session stated that "council was briefed on the subject and a direction was given to staff on how to proceed".

We were told by the Clerk and Mayor that staff provided council with an update about an ongoing zoning dispute between neighbouring property owners and sought council's direction on how to proceed. The Clerk and Mayor told us that the residents had threatened litigation against the municipality if they were dissatisfied with the resolution to the zoning issue. We were also told that prior to the meeting, staff sought legal advice about the zoning matter and that this advice was verbally relayed to council during the meeting. We were also told that council discussed personal information about identified individuals during the closed session.

Application of the "personal matters" exception

The complaint we received alleged that the discussion about a zoning issue did not involve personal information about identifiable individuals.

Section 239(2)(b) of the Act allows council to discuss personal information about identifiable individuals. In order to be considered personal information, it must be reasonable to expect

that an individual could be identified if the information were disclosed publicly.¹ Information about an individual may fit within the exception if the discussion reveals something personal or relates to the scrutiny of an individual's conduct in their personal capacity.² Information that would normally be considered personal in nature may not fit within the personal matters exception if the information has already been publicly disclosed, or if it is generally known to the public.³

Our review indicates that council was briefed about a zoning dispute and discussed staff members' interactions with identified property owners and shared their opinions regarding the owners' conduct. This discussion included personal information about identified property owners as well as scrutiny of their conduct. Accordingly, this discussion was permissible under section 239(2)(b) of the Act.

Application of the "litigation or potential litigation" exception

The complaint we received also alleged that there was no ongoing litigation relating to the zoning matter discussed by council.

Section 239(2)(e) of the Act allows council to discuss litigation or potential litigation affecting the municipality. The Act does not define what constitutes "litigation or potential litigation". In *RSJ Holdings Inc. v London (City)*, the Ontario Court of Appeal considered the litigation or potential litigation exception, noting that "[t]he fact that there might be, or even inevitably would be, litigation arising from the [matter discussed] does not make the 'subject matter under consideration' potential litigation."⁴ In considering the related law of litigation privilege, courts have found that, while it is not necessary that litigation have commenced for litigation privilege to apply, "there must be more than a mere suspicion that there will be litigation."⁵

My Office has found that this exception is reserved for circumstances where the subject matter discussed is related to ongoing litigation or involves a reasonable prospect of litigation.⁶ The exception will apply where there is more than a remote possibility that litigation may commence, although the litigation does not need to be a certainty. Council must believe that litigation is a reasonable prospect and must use the closed meeting to explore that prospect in some way.⁷ In a 2017 report to the Township of Georgian Bay, I found that it was not

¹ *Ontario (Ministry of Correctional Services) v Goodis* [2008], OJ No 289 at para 69.

² *Aylmer (Town) (Re)*, 2007 CanLII 30462 (ON IPC), <<http://canlii.ca/t/1scqh>>.

³ Letter from Ombudsman of Ontario to the Town of Midland (February 4, 2014), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2014/town-of-midland>>.

⁴ *RSJ Holdings Inc. v. London (City)*, 2005 CanLII 43895 (ON CA), at para 22.

⁵ *C. R., Re*, 2004 CanLII 34368 (ON SC), at para 21 citing *Carlucci v. Laurentian Casualty Co. of Canada*, [1991] O.J. No. 269.

⁶ *Norfolk (County of) (Re)*, 2016 ONOMBUD 18 (CanLII), <<http://canlii.ca/t/h2st5>>.

⁷ *West Lincoln (Township of) (Re)*, 2015 ONOMBUD 34 (CanLII), <<http://canlii.ca/t/gtp7g>>.

unreasonable for council to believe that there was a prospect of litigation based on verbal threats of litigation to municipal staff.⁸

The closed session minutes and our discussions with the Clerk and Mayor indicate that council referenced the potential for litigation relating to the zoning dispute during the *in camera* discussion on September 8, 2020. The closed session minutes state that the individual members of the public involved in the zoning dispute told staff that they would pursue legal action against the Township. We were told by the Mayor that both he and council took the threat of legal action very seriously due to a contentious relationship between the individual members of the public and the Township. The Mayor also told us that council discussed the possibility of going to court in relation to the zoning issue and discussed the Township's legal position on the issue.

My review indicates that the Township had received verbal threats of litigation relating to the zoning dispute and received legal advice related to the potential litigation during the closed session. Accordingly, council was permitted to rely on the open meeting exception for litigation or potential litigation pursuant to s.239(2)(e) of the Act in these circumstances.

Applicability of the “advice subject to solicitor-client privilege” exception

Based on information provided to my Office by the Clerk and Mayor, we also reviewed whether council's discussion fit within the “advice subject to solicitor-client privilege” exception found in section 239(2)(f) of the Act. This exception was not cited by council and allows municipal officials to discuss legal advice or related communications in closed session. My Office has found that it is not necessary that the municipality's lawyer be present for the exception to apply. For example, staff may convey legal advice from a lawyer to council verbally while *in camera*.⁹

According to the September 8, 2020 closed session minutes, council discussed legal advice that staff had received relating to the zoning issue and potential litigation. The Clerk and the Mayor both confirmed that staff verbally conveyed legal advice regarding the zoning issue while in closed session. The Mayor further indicated that staff members had previously received verbal advice from the Township's municipal lawyer about their communication with property owners.

My review indicates that Township staff verbally conveyed legal advice related to the zoning issue and potential litigation during the closed session. Accordingly, council's discussion also fit within the exception for advice subject to solicitor-client privilege, although council did not rely on this exception in its resolution to proceed *in camera*.

⁸ *Georgian Bay (Township of) (Re)*, 2017 ONOMBUD 1 (CanLII), <<http://canlii.ca/t/h4rwh>>.

⁹ *Greater Sudbury (City of) (Re)*, 2017 ONOMBUD 2 (CanLII), <<http://canlii.ca/t/h4rwp>>.

Conclusion

Council discussed personal matters of identifiable individuals and the potential for litigation in relation to a zoning issue, as well as related legal advice, when it went into closed session on September 8, 2020. I am satisfied that the subject matters discussed fell within the exceptions cited for closed meeting discussion. As noted above, the matters also fell within the additional exception for solicitor-client privilege. 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
Ontario Ombudsman

CC: Clerk Joanne Camiré Laflamme: joannecamirelaflamme@russell.ca