

BY EMAIL

July 6, 2022

Council for the Township of Leeds and the Thousand Islands
c/o Megan Shannon, Clerk
1233 Prince Street
Lansdowne, ON K0E 1L0

Dear Council for the Township of Leeds and the Thousand Islands:

Re: Closed meeting complaint

My Office received a complaint alleging that the Committee of the Whole (the “Committee”) for the Township of Leeds and the Thousand Islands (the “Township”) contravened the *Municipal Act, 2001*¹ (the “Act”) on September 8, 2020 by discussing a verbal update concerning negotiations with a commercial partner *in camera*. The complaint alleged that the topic did not fit within any of the exceptions to the open meeting rules. My Office was also told that the Committee failed to provide the general nature of the subject matter to be discussed before proceeding into closed session.

Ombudsman’s role and authority

As of January 1, 2008, the *Municipal Act, 2001* (the “Act”) gives anyone the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator, but 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 Leeds and the Thousand Islands.

¹ SO 2001, c 25.



My 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 the Ombudsman's previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Investigative process

My Office received this complaint on November 25, 2021, and notified the Township of our intent to investigate this complaint in December 2021. We spoke with the former Clerk and interviewed all members of council and the Chief Administrative Officer (the "CAO"). My Office also reviewed e-mail correspondence relating to the meeting as well as the open and closed minutes, and the audio recording of the September 8, 2020 Committee meeting. Finally, my Office reviewed a staff report and a memorandum of understanding relating to the negotiations discussed during the meeting.

Meeting on September 8, 2020

The Committee of the Whole met in council chambers at 6:30 p.m. on September 8, 2020. The meeting was livestreamed online. At approximately 7:30 p.m., the Committee resolved to move into closed session to discuss "personal matters about an identifiable individual, including municipal employees."

During the closed session, the Committee discussed a matter related to municipal employees. However, my Office was told that an unrelated verbal update was also provided to council by the CAO during the *in camera* meeting. This update related to negotiations with a commercial partner of the Township and was recorded in the closed meeting minutes.

Following these discussions, the Committee moved back into open session and provided a report back that was captured by the audio recording as an "update in regard to personal matters".

Analysis

a) *The resolution to move in camera*

The resolution stated that the Committee would meet *in camera* to consider personal matters about an identifiable individual. The motion to move *in camera* did not reference the discussion about negotiations with a commercial partner.

Subsection 239(4) of the Act requires that the resolution to proceed into closed session include the general nature of the subject matter to be considered. As noted by the Court of Appeal of Ontario in *Farber v. Kingston*, “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”.²

In this case, the resolution to move into closed session made no reference to the verbal update. The resolution also failed to include a description of the general nature of the employment matter to be discussed, instead referencing only the exception in the *Municipal Act* – the exception for personal matters about an identifiable individual, including municipal employees. The Committee did not meet its obligation to provide the general nature of the matter to be discussed in the resolution to move *in camera*.

In a recent report to the Township, I indicated that it must pass a resolution that clearly sets out the fact of the closed meeting and the general nature of the matters to be discussed.³ In response to this report, I note that council has adopted a resolution to ensure that meeting agendas and draft resolutions include the general nature of matters to be discussed *in camera*. I am encouraged by the Township’s willingness to address this issue and I again remind council of its legal obligation to provide information to the public before moving *in camera*.

b) *The in camera discussions*

The complaint also alleged that the verbal update provided to the Committee in relation to negotiations with a commercial partner should have occurred in open session.

During the course of our investigation, I considered the applicability of paragraph 239(2)(k) of the Act, the exception for plans and instructions for negotiations. This exception is intended to protect information that could undermine a municipality’s

² *Farber v. Kingston (City)*, 2007 ONCA 173 (CanLII) at para 21, online: <<https://canlii.ca/t/1qtz/>>.

³ *Leeds and the Thousand Islands (Township of) (Re)*, 2022 ONOMBUD 5 at paras 57-59, online: <<https://canlii.ca/t/jnkk9>>.

bargaining position or give another party an unfair advantage during an ongoing negotiation.⁴ In order for the exception to apply:

- The *in camera* discussion must be about positions, plans, procedures, criteria, or instructions;
- The positions, plans, procedures, criteria, or instructions must be intended to be applied to negotiations;
- The negotiations must have been in progress at the time or to be carried out in future; and
- The negotiations must be conducted by or on behalf of the council.⁵

According to the information we gathered, the verbal update in closed session on September 8, 2020 was about the Township's position with respect to negotiations with a commercial partner. Although these negotiations, which were being conducted by staff on behalf of council, may have reached a stalemate at the time of the meeting, I am satisfied based on the evidence I have reviewed that such negotiations were ongoing when council moved *in camera*. Finally, the negotiation was being conducted by staff, on behalf of the Township. For these reasons, I am satisfied that this discussion was permitted to occur in closed session under paragraph 239(2)(k) of the Act.

Concerns of council members

During interviews conducted by my Office, several members of council voiced frustration with my Office's decision to launch an investigation into this complaint, which they characterized as "frivolous and vexatious". One member of council suggested that my Office had been "weaponized" by the complainant. Two members of council suggested that this investigation was a waste of time and resources.

I would like to remind council that open meeting requirements are rooted in the public's right to accountable municipal governance and the principle that open meetings are essential to what the Supreme Court of Canada called the "robust democratic legitimacy" of municipal decision-makers.⁶ Closed meeting investigations play a crucial role in increasing "public confidence in the integrity of local government by ensuring the open and transparent exercise of municipal power".⁷

⁴ *Letter from the Ombudsman to the City of Pickering* (23 September 2020), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2020/city-of-pickering>>.

⁵ *St. Catharines (City of) (Re)*, 2019 ONOMBUD 1 at paras 30-31, online: <<https://canlii.ca/t/hxrk5>>.

⁶ *London (City) v. RSJ Holdings Inc.*, 2007 SCC 29 (CanLII) at paras 18, 38, online: <<https://canlii.ca/t/1rtq1>>.

⁷ *Ibid* at para 19.

As an independent and impartial investigator, my Office does not advocate for complainants nor enter into investigations lightly. An in-depth preliminary assessment of every complaint is conducted to ensure that complaints are not frivolous or vexatious, and that there are evidentiary grounds for launching a formal investigation. My Office has the discretion not to proceed with an investigation if we believe a complaint to be frivolous, vexatious, or not made in good faith.

Conclusion

The Committee of the Whole for the Township of Leeds and the Thousand Islands did not contravene the *Municipal Act, 2001* on September 8, 2020 when it received a verbal update in closed session concerning negotiations with a commercial partner. However, as I reminded council in my April 2022 report to the Township, the Committee must provide a general description of the issue to be discussed in its resolution to move *in camera*.

I thank the Township for its co-operation during my review. The Clerk has confirmed that this letter will be included as correspondence at an upcoming council meeting.

Sincerely,



Paul Dubé
Ombudsman of Ontario

Cc: Megan Shannon, Clerk, Township of Leeds and the Thousand Islands